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,

vs.

KIMBERLEY K. 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–Appellees.

Appeal from the United States District Court
for the Southern District of Iowa
4:21-cv-00231-SMR-HCA
(The Honorable Stephanie M. Rose)

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July 28, 2025

SUMMARY OF CASE AND STATEMENT ON ORAL ARGUMENT

In 2021, Iowa enacted a Trespass-Surveillance statute to protect Iowans' property rights and right to privacy. The statute prohibits a person, while committing a trespass, from knowingly placing or using a camera or electronic surveillance device to record data or images. Iowa Citizens for Community Improvement ("ICCI") challenges the statute on First Amendment grounds as-applied to its activities. ICCI pleads that its members record videos and sound while trespassing at various sites. But ICCI lacks standing, and its claims are unripe. Beyond that, the statute survives as it regulates conduct not speech. If prohibiting trespass-surveillance regulates speech, it satisfies intermediate scrutiny. The district court held that the statute was a constitutional content-neutral, narrowly tailored speech restriction, dismissing ICCI's claims.

This appeal raises significant issues regarding property rights, the right to privacy, and the First Amendment. Appellees respectfully request 15 minutes per side for oral argument as the criteria in Fed. R. App. P. 34 (a)(2)(A)–(C) are not present. But if this Court grants Appellant's request for 20 minutes per side, Appellees respectfully request equal time to that granted to Appellant.

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STATEMENT OF JURISDICTION

ICCI filed its federal constitutional claims under 42 U.S.C. § 1983 and § 1988 and the Declaratory Judgment Act, 28 U.S.C. § 2201. App.012, R.Doc.1 ¶¶ 28–29. Jurisdiction thus arises under 28 U.S.C. § 1331.

ICCI filed its Complaint on August 10, 2021. App.006–031, R.Doc. 1. On March 19, 2025, the Honorable Judge Stephanie M. Rose granted Defendants' Motion to Dismiss and denied Plaintiff's parallel Motion for Summary Judgment. App.130, R.Doc.75 at 22. ICCI filed a timely Notice of Appeal on April 16, 2025. App.132–134, R.Doc.77. This case concerns an appeal from a final order, giving this Court jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the district court erred in concluding that Plaintiff had standing to challenge the Trespass-Surveillance statute and that its claims were ripe based on a speculative and amorphous as-applied challenge that asserts a right to violate pre-existing Iowa law.

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

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

Iowa Right to Life Committee, Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013)

Elend v. Basham, 471 F.3d 1199 (11th Cir. 2006)

Statutes: Iowa Code § 617.7

2. Whether the district court erred in finding that the First Amendment protects committing criminal trespass simply because the trespasser is recording audio or video without exercising any editorial discretion over those recordings.

Cases: *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021)

Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 786 (8th Cir. 2021)

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

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

3. Whether the district court correctly applied intermediate scrutiny to its analysis of the Trespass-Surveillance statute because the statute is a content-neutral time, place, and manner restriction that applies to any trespasser who records while trespassing regardless of the content of the trespassers' alleged speech or even the reason for the trespass.

Cases: *Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1071 (8th Cir. 2024)

Peterson v. City of Florence, Minn., 727 F.3d 839 (8th Cir. 2013)

Doe v. City of Minneapolis, 898 F.2d 612 (8th Cir. 1990)

Ward v. Rock Against Racism, 491 U.S. 781 (1989)

4. Whether the district court properly held that the Trespass-Surveillance statute survives intermediate scrutiny as a statute that is narrowly tailored to address the government's substantial interest in protecting property rights and property owner privacy because it applies only to people who are first committing a criminal trespass and leaves

open ample alternatives for communication, including public forums and forums where the property owner grants permission to be present.

Cases: *Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1071 (8th Cir. 2024)

Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks, 864 F.3d 905 (8th Cir. 2017)

Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo., 775 F.3d 969 (8th Cir. 2014)

Frisby v. Schultz, 487 U.S. 474 (1988)

STATEMENT OF THE CASE

Protecting private property has long been recognized in Iowa—so much so that Iowa's founders enshrined those protections in Iowa's Constitution. *See* Iowa Const. art. I, § 1 (identifying the inalienable right to acquire, possess, and protect property). Fundamental to protecting that "inalienable right," trespass is "an ancient cause of action that is long recognized in this country." *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2021) ("*ALDF I*") (citing *United States v. Jones*, 565 U.S. 400, 404–05 (2012) and 3 Willam Blackstone, Commentaries *209).

To further protect private property against trespassers, Iowa enacted its Trespass-Surveillance statute, penalizing anyone who, while trespassing, "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 ("Trespass-Surveillance statute"). Shortly after its enactment, Plaintiffs sued. In that facial First Amendment challenge, this Court recognized that Iowa's Trespass-Surveillance law, "protect[s] property rights by penalizing 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) ("*ALDF III*").

On remand from this Court's vacatur of the earlier entered injunction, ICCI pleads that its members and staff record videos and sound while trespassing at various corporate and political sites. App.018–019, R.Doc.1 ¶¶54–55. Based on this Court's prior decision, ICCI thus "harms the privacy and property interests of property owners and other lawfully-present persons." *ALDF III*, 89 F.4th at 1082. ICCI members then "exacerbate that harm when they use a camera while committing their crime." *Id.* Thus, "[b]ecause the Act's restrictions on the use of a camera only apply" to ICCI "when there has first been an unlawful trespass [the Trespass-Surveillance statute] does not burden substantially more speech than is necessary to further the Sate's legitimate interests." *Id.* at 1082 (citing *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)). The district court agreed that the Trespass-Surveillance law thus survives ICCI's as-applied challenge. *See id.*

II. Factual and Procedural Background.

In 2021, "Iowa enacted a trespass-surveillance law penalizing anyone who, while trespassing, '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[.]'" *ALDF III*, 89 F.4th at 1074 (quoting Iowa Code § 727.8A). "The [law] applies only when there has first been a 'trespass' as defined in Iowa Code § 716.7(2)." *Id.* at 1075. A general trespass under section 716 is punished as a simple misdemeanor unless the trespass involves injury to a person or property damage over $300. *Id.* (citing Iowa Code §§ 716.8(1)–(2). A first offense under Iowa's Trespass-Surveillance statute is an aggravated misdemeanor. *Id.* (citing Iowa Code § 903.1(2)).

The Trespass-Surveillance statute targets two types of trespasser activity. *See* Iowa Code § 727.8A. First, the "Place Provision" penalizes a person who "places . . . a camera or electronic device" on another person's property during a trespass. *Id.* Meanwhile, the "Use Provision" penalizes a person who "uses a camera or electronic surveillance device" while trespassing. *Id.*

Originally, five non-profit organizations "dedicated to animal welfare, environmental protection, and other grassroots advocacy issues" challenged the law in its entirety. *ALDF III*, 89 F.4th at 1075. "Because the Act has a plainly legitimate sweep and it is narrowly tailored to

achieve the State's significant government interests," this Court held that "it survives intermediate scrutiny against Plaintiffs' facial challenge." *Id.* at 1080, 1082. "And because the Act does not prohibit a substantial amount of protected speech relative to its plainly legitimate sweep," this Court also held that the law was not overbroad. *Id.* at 1082 (citation omitted). This Court then reversed a district court summary judgment order, vacated that court's preliminary injunction, and remanded the case "for further proceedings not inconsistent with this opinion." *Id.*

The following factual and legal conclusions were essential to this Court's analysis:

- "An essential element of the Act is that it only applies to a person who has committed 'a trespass as defined in [Iowa Code] section 716.7[.]'" *Id.* at 1076 (alteration in original);
- "Without a doubt, trespassing . . . harms the privacy and property interests of property owners and other lawfully-present persons." *Id.* at 1082;
- "Trespassers exacerbate that harm when they use a camera while committing their crime." *Id.*;

- Iowa's trespass-surveillance law "is tailored to target that harm and redress that evil." *Id.*;
- "[T]he Act represents a content-neutral time, place, and manner restriction." *Id.* at 1080 (citing *Peterson v. City of Florence, Minn.*, 727 F.3d 839, 843 (8th Cir. 2013));
- Content-neutral time, place, and manner restrictions are reviewed under intermediate scrutiny. *Id.*;
- The law is "narrowly tailored to achieve the State's significant government interests." *Id.*; and
- "Because the Act's restrictions on the use of cameras only apply to situations when there has first been an unlawful trespass, the Act does not burden substantially more speech than is necessary to further the State's legitimate interests." *Id.* at 1082 (citing *McCullen*, 573 U.S. at 486).

Following remand, two of the five original Plaintiffs—PETA and ICCI—pursued their claims on an as-applied basis. App.112, R.Doc.75 at 4. Defendants moved to dismiss Plaintiffs' as-applied claims based on lack of standing and ripeness as well as on failure to state a claim upon which relief can be granted. App.113, R.Doc.75 at 5 (citing R.Doc.62); *see*

R.Doc.62. Plaintiffs resisted the motion and moved for summary judgment. App.113, R.Doc.75 at 5 (citing R.Doc.65).

The district court granted Defendants' motion to dismiss and denied Plaintiffs' motion for summary judgment. App.130, R.Doc.75 at 22. The court explained that "[g]uided by the Eighth Circuit's analysis and applying intermediate scrutiny, the Court concludes that the Use Provision withstands these as applied challenges." App.130, R.Doc. 75 at 22. Plaintiffs did not challenge the Place Provision. App.111, R.Doc. 75 at 3.

Only ICCI appealed the district court decision. App.132–134, R.Doc.77. "Unlike the other plaintiff's, ICCI pleads its members *intentionally* commit general trespass, and they record themselves while doing so." *ALDF III*, 89 F.4th at 1075. "As pled, ICCI members travel to spaces generally open to the public or where the public is typically allowed." *Id.* at 1078. Then, "as ICCI members disruptively protest in these spaces, they are inevitably asked to leave and their refusal to leave makes them trespassers." *Id.* "ICCI members have been arrested for trespassing in a number of settings: blocking a construction site, protesting in a bank lobby, and protesting in the offices of elected

officials." *Id.* "During these encounters, ICCI members intentionally record themselves trespassing." *Id.*

ICCI challenges only the law's Use Provision as it has not alleged that its members place cameras on properties. Instead, they plead that they bring cameras with them. *Id.* at 1078–79.

SUMMARY OF THE ARGUMENT

The district court properly granted Defendants' Motion to Dismiss and properly denied Plaintiff's Motion for Summary Judgment.

I. The district court erred in concluding that ICCI has standing to challenge the Trespass-Surveillance statute and that its claims were ripe.

ICCI lacks standing to assert its as-applied claims because its claims are too remote and speculative. The hypothetical nature of ICCI's claims also make them unripe. "ICCI seeks to prevent Defendants from imposing § 727.8A's penalties when ICCI's staff and members engage in demonstrations where protestors "'stay[] at the location of the action after a person with actual or apparent authority asks ICCI and its members to leave,'" resulting in the commission of a trespass. Appellant's Br. at 4 (citing App.88, R.Doc.69-1 ¶ 4). That request is far too broad for

this Court to properly analyze. The amorphous details about Plaintiffs' planned conduct, combined with the number of locations where Plaintiffs intend to engage in said conduct, counsel against a broad as-applied challenge based both on standing and ripeness

ICCI also lacks an injury-in-fact because its alleged injury is not legally or judicially cognizable. That is because Iowa trespass law prevents ICCI from pursing its preferred course of action independent of this litigation. ICCI asserts a legal right to commit trespass. But trespass is illegal in Iowa, and an interest in violating a separate law cannot create standing because no one has such a right.

II. The district court erred in finding that the First Amendment protects the act of committing criminal trespass simply because the trespasser is recording audio and video. This Court previously assumed without deciding that the use of a camera while trespassing implicates the First Amendment as protected activity and proceeded to the next steps of the analysis. But the First Amendment generally only protects conduct when it is inherently expressive—criminal trespass is not. Video recordings also are not inherently expressive when a person merely makes a recording of events without exercising any editorial discretion.

Further, recording while trespassing cannot be protected speech because the First Amendment does not protect a person's speech on property where that person has no right to be present.

III. The district court properly held that the Trespass-Surveillance statute survives First Amendment scrutiny.

Content-neutral regulations of the time, place, or manner of speech are subject to intermediate scrutiny. The district court correctly applied intermediate scrutiny to its analysis of the Trespass-Surveillance statute because the statute is a content-neutral time, place, and manner restriction. That is because the statute applies to any trespasser who records while trespassing regardless of the content of the trespassers alleged speech or even the reason for the trespass.

Protecting property rights and privacy are substantial governmental interests firmly established in constitutional jurisprudence and recognized by the Eighth Circuit. Trespassing violates those property rights, and when trespassers document their unauthorized presence through recording devices, they transform a discrete time-limited intrusion into something far more invasive.

The Trespass-Surveillance statute is narrowly tailored to protect the government's substantial interests because it only applies to people who are first committing a trespass. Trespass is an element of the statute. If the property owner does not object to the person's presence, that person is not a trespasser under Iowa law, and the Trespass-Surveillance statute does not apply.

The Trespass-Surveillance statute also leaves open ample alternative channels for communication. The statute does not restrict speech in public forums or in locations where a person has permission to be present. The statute also does not restrict collecting contemporaneous written accounts nor does it restrict other forms of speech including mailings, canvassing, or non-harassing telephone contact.

This Court should affirm the district court's dismissal of Plaintiff's claims.

ARGUMENT

I. Standard of Review.

This Court reviews a district court's decision granting a motion to dismiss de novo, accepting as true all factual allegations and viewing them in the light most favorable to the non-moving party. *Yang v. Robert*

Half Int'l, Inc., 79 F.4th 949, 961–962 (8th Cir. 2023) (citing *Thompson v. Harrie*, 59 F.4th 923, 926 (8th Cir. 2023)).

This Court likewise also reviews summary judgment rulings de novo, "viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Id.* at 964 (quoting *Richardson v. Omaha Sch. Dist.*, 957 F.3d 869, 876 (8th Cir. 2020)). "Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law." *Leonard v. St. Charles Cnty. Police Dep't*, 59 F.4th 355, 359 (8th Cir. 2023) (citation modified).

II. Plaintiff Lacks Standing to Challenge the Trespass-Surveillance Statute and Its Claims Are Not Ripe.

"[S]tanding is a jurisdictional prerequisite." *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007) (citation omitted). Plaintiffs must establish that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *see also Pratt v. Helms*, 73 F.4th 592, 594 (8th Cir. 2023). Like other claims, when bringing an as-applied challenge, the injury-in-fact element requires a plaintiff to establish the injury is

"concrete, particularized, and actual or imminent." *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 584 (8th Cir. 2013). The injury cannot be "'conjectural or hypothetical.'" *Jackson v. Abendroth & Russell, P.C.*, 207 F. Supp. 3d 945, 951 (S.D. Iowa 2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

When a plaintiff asserts First Amendment claims, the injury-in-fact element can be satisfied as long as the plaintiff "is objectively reasonably chilled from exercising his First Amendment right to free expression in order to avoid enforcement consequences." *Republican Party of Minn., Third Cong. Dist. v. Klobouchar*, 381 F.3d 785, 792 (8th Cir. 2004). A plaintiff establishes an injury in fact "where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

Despite slightly broader grounds for standing in First Amendment cases, a threatened injury must still be "qualitative[ly] and temporal[ly]" concrete, as well as "'distinct and palpable, as opposed to merely

abstract.'" *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

Beyond standing, a plaintiff's claims must also be ripe. "The ripeness doctrine prevents courts 'through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also [protects] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 796 (8th Cir. 2016) (quoting *Nat'l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 692 (8th Cir. 2003)).

Ripeness requires courts to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). To decide ripeness, courts consider: "(1) the hardship to the plaintiff caused by delayed review; (2) the extent to which judicial intervention would interfere with administrative action; and (3) whether the court would benefit from further factual development." *Missourians for Fiscal Accountability*, 830 F.3d at 796–97.

A. Plaintiff's alleged injuries are too speculative, hypothetical, broad, and unspecified to establish standing.

This Court previously found that ICCI had standing to facially challenge the "use" section 727.8A—but not the "place" provision—and that Plaintiff's facial challenge claims were ripe. But that appeal involved a facial challenge, not this as-applied one. *ALDF III*, 89 F.4th at 1078–79.

Plaintiff's as-applied claims are too remote and speculative to meet the imminence requirement for standing and are unripe because they have not matured enough to warrant judicial intervention. *See Tooker*, 717 F.3d at 583–87 (holding that plaintiffs lacked standing to challenge certain campaign finance laws under the First Amendment because it was not clear the definitions applied to plaintiffs, and their purported injuries were "conjectural or hypothetical"); *see also Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 841–44 (1st Cir. 2020) (holding plaintiff's as-applied First Amendment claims and plaintiff's requested relief were not ripe because they were so broad and ill-defined, it rendered them merely "conjectural" and "hypothetical"); *Elend v. Basham*, 471 F.3d 1199, 1206–07 (11th Cir. 2006) (holding plaintiffs' as-applied First Amendment

claims and requested relief were not ripe because they were too speculative and did not provide any details on prospective future conduct).

Plaintiff's request for relief is stunningly broad—all but facial relief as applied to the organizational Plaintiff. "ICCI seeks to prevent Defendants from imposing § 727.8A's penalties when ICCI's staff and members engage in demonstrations where protestors 'stay[] at the location of the action after a person with actual or apparent authority asks ICCI and its members to leave,'" resulting in the commission of a trespass. Appellant's Br. at 4 (citing App.88, R.Doc.69-1 ¶ 4).

Plaintiff's other allegations do not provide much—if any—further guidance. ICCI alleges that it "trespass[es] at political and corporate sites where the politicians or executives have refused to listen to those impacted by their actions." App.018, R.Doc.1 at ¶ 54. Those locations include, "a construction site that ICCI believed would be environmentally damaging to their community," "the lobby of a Wells Fargo," "areas of Senator [Charles] Grassley's office open to other constituents," and "open business offices of factory farms." App.018–019, R.Doc. 1 at ¶ 54; App.020, R.Doc.1 at ¶ 62. A declaration from ICCI Executive Director, Lisa Whelan, included in ICCI's summary judgment appendix, states that

other examples include: protests "on the grounds of the Iowa State Capitol," "an open parking area used by a farm show," and the home of then-State Senator Mary Kramer. App.052–053, R.Doc.65-3 ¶¶ 19–20.

As ICCI itself acknowledges, "as-applied relief turns on 'how the Act applies to a plaintiff's particular circumstances.'" Appellant's Br. at 27 (citing *ALDF III*, 89 F.4th at 1080). As such, "the law needs to pass review considering the 'particular' activities at issue." *Id.* (citing *Kaden v. Slykhuis*, 651 F.3d 966, 969 (8th Cir. 2011) and *Ness v. City of Bloomington*, 11 F.4th 914, 924 (8th Cir. 2021)). But ICCI's allegations are so broad that it is impossible for this Court to know what those particular activities are for purposes of as-applied review.

To bring a ripe as-applied challenge to the Trespass-Surveillance statute, a plaintiff should allege that he intends to violate the law in some specific, judicially cognizable way—and that the violation is unconstitutional. Plaintiff does not come close here and thus its claim is not ripe.

Plaintiff's amorphous details about hypothetical planned conduct, combined with the scope of locations where the Plaintiffs intend to

engage in said conduct, counsel against a broad as-applied challenge based both on standing and ripeness

B. Plaintiff lacks standing to challenge its ability to commit a crime.

"To support standing, an injury must be legally and judicially cognizable." *Pratt*, 73 F.4th at 594 (quoting *Va. House of Delegates v. Bethune-Hill*¸ 587 U.S. 658, 666 (2019)). That requires "that the dispute is traditionally thought to be capable of resolution through the judicial process." *Id.* (quoting *United States v. Texas*, 599 U.S. 670, 676 (2023)).

But to determine whether plaintiff has a "legally and judicially cognizable" interest, a court must "consider whether the plaintiffs have a legal right to do what is allegedly being impeded." *See, e.g.*, *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014); *Aurora Loan Servs. v. Craddieth*, 442 F.3d 1018, 1024 (7th Cir. 2006); *cf. ALDF III*, 89 F.4th at 1082. That makes sense because a dispute is not "capable of resolution through the judicial process" if the law prevents plaintiffs from pursuing their desired course of action apart from the litigation. *Pratt*, 73 F.4th at 594.

Plaintiff asserts a legal right to commit trespass. But trespass is illegal in Iowa. It was illegal before the enactment of the Trespass-

Surveillance statute and will remain so even if the Trespass-Surveillance statute were no longer in effect. *See* Iowa Code § 716.7. So Plaintiffs lack standing to make their complaint because, as multiple federal appeals courts have recognized, no one has a right to violate the law. *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 764 (9th Cir. 2018); *Gessler*, 770 F.3d at 910; *Bell v. Am. Traffic Sols. Inc.*, 371 F. App'x 488, 490 (5th Cir. 2010); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) (en banc). A court simply does not have the power to "provide a remedy for actions that are unequivocally illegal." *Shulman v. Kaplan*, 2020 WL 7094063, at *2 (C.D. Cal. Oct. 29, 2020).

Plaintiff objects that "[b]oth staff and members are now unwilling to engage in and record ICCI's civil disobedience because of § 727.8A penalties." Appellant's Br. at 15 (citing App.55–56, R.Doc.65-3 ¶¶ 33–39). But an "interest in evading the law cannot create standing—a plaintiff's complaint that defendant's actions will make his criminal activity more difficult lacks standing." *Bell*, 371 F. App'x at 490 (citation and quotation marks omitted). In effect, Plaintiffs complain that the penalty for their criminal trespass is now harsher. And it logically follows that an interest in receiving a preferred penalty for that activity also cannot create

standing. This Court should therefore affirm the district court's dismissal based on lack of standing. *See Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951, 958 (8th Cir. 2019) (this Court "may affirm a judgment on any ground supported by the record").

III. The First Amendment Does Not Protect Committing a Crime then Recording the Commission of that Crime.

First Amendment challenges involve a three-step analysis, requiring Courts to determine: 1) whether the speech is protected by the First Amendment; 2) if the speech is protected, the court must determine what standard of review applies; and 3) apply the standard of review to the facts of the case. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). Plaintiff must satisfy each factor to succeed on its claim. *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

This Court earlier "assume[d] without deciding that the use of a camera while trespassing implicates the First Amendment as protected activity" and proceeded to the next steps of the analysis. *ALDF III*, 89 F.4th at 1080. But this Court need not go so far here because section 727.8A does not involve protected speech. That conclusion ends the inquiry at step one.

"[T]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses." *Cohen v. California*, 403 U.S. 15, 19 (1971). For example, the First Amendment does not require access to all parts of even public property "in which some form of communicative activity occurs." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) ("Nowhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs . . . for unlimited expressive purposes." *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 117–118 (1972))). And using a camera or other electronic surveillance device while committing trespass does not transform the prohibited trespass and accompanying conduct into protected speech.

The First Amendment only protects "conduct that is inherently expressive." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66 (2006). Conduct does not generate First Amendment protection "merely because the conduct was in part initiated, evidenced, or carried

out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949))

The Trespass-Surveillance statute prohibits the act of using or placing a camera or electronic surveillance device to make recordings while trespassing. Iowa Code § 727.8A. A "common law trespass 'symbolizes nothing.'" *Animal Legal Def. Fund. v. Wasden*, 878 F.3d 1184, 1207–08 (9th Cir. 2018) (Bea, J., dissenting); *see also Pickup v. Brown*, 740 F.3d 1208, 1230 (9th Cir. 2014) ("[a]n act that 'symbolizes nothing,' even if employing language, is not 'an act of communication' that transforms conduct into First Amendment speech.") (quoting *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126–27 (2011), *abrogated on other grounds by Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 585 U.S. 755 (2018)).

While the Eighth Circuit has held video recording can be protected speech, it has not held that recording while committing a criminal trespass is protected speech. *See ALDF III*, 89 F.4th at 1080 (assuming without deciding that the use of a camera while trespassing was protected by the First Amendment). The First Amendment does not protect a person's speech on property where the person has no right to be

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

In concluding otherwise, the district court relied on admittedly distinguishable cases regarding "agriculture-specific statutes." App.120, R.Doc.75 at 12 (citing *Wasden*, 878 F.3d 1184 (majority opinion) and *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017)). Contrary to the district court's assertion, those cases are inapplicable to the First Amendment analysis here.

The court's reliance on *Wasden* fails for the same reason as reliance on *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751 (8th Cir. 2019). *See*

infra. As the Ninth Circuit later recognized in *Project Veritas v. Schmidt*, "*Wasden* did not conclude that every act of recording requires expressive decisions, nor that every act of recording implicates the First Amendment." 125 F.4th 929, 946 (9th Cir. 2025). Rather, the Ninth Circuit in *Wasden*, like this Court in *Telescope Media*, based its ruling on the idea that "[t]he act of recording" is "inherently expressive" because "decisions about content, composition, lighting, volume, and angles, among others, are expressive." 878 F.3d at 1203. In other words, the recording in *Wasden* was deemed expressive because of editorial discretion not present here.

Herbert gives even less support for the district court's conclusion. There, the court invalidated a law that prohibited recording "of an agricultural operation" while committing a trespass. 263 F. Supp. 3d at 1211. But *Herbert*'s reasoning relies on an analysis that would find ICCI's speech here categorically "immune from First Amendment scrutiny." *Id.* at 1203. Unlike the law at issue in *Herbert*, lying to obtain admission to a facility is not a part of the statute here. *Id.* at 1202.

The court explained that uncertainty as to whether a person charged under the Utah law (prohibiting misrepresentations rather than

trespass) must have committed a trespass was integral to its analysis—and the lack of certainty that a violator committed trespass the reason for First Amendment scrutiny. *Id.* at 1202–03. That opinion, harmonizing holdings from the Fourth and Seventh Circuits, explained that a law "is immune from First Amendment scrutiny under the State's trespass theory only if those who gain access to an agricultural operation under false pretenses subsequently cause trespass-type harm." *Id.* at 1203 (citing *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1352 (7th Cir. 1995) and *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517 (4th Cir. 1999)). Herbert found that if it were guaranteed that a violator would have committed a "trespass-related harm" the Utah law would not be subject to First Amendment scrutiny. *Id.* at 1205. Such a guarantee can be found in Iowa's law, which codified trespass as an element of the Trespass-Surveillance crime.

Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton is less support yet for the district court's conclusion. App.119, R.Doc.75 at 11 (citing 536 U.S. 150 (2002)). That case addressed whether a municipality could allow property owners to preemptively restrict door-to-door canvassers. *Watchtower*, 536 U.S. at 154–156 (ordinance

requiring "Solicitation Permits" and "Solicitor's Registration Forms" and allowing homeowners to file "No Solicitation Registration Forms"). In other words, the law applied regardless of whether any trespass had in fact occurred.

These cases simply do not establish that the Trespass-Surveillance statute implicates protected expression.

Yet even if there is some speech element to the conduct that section 727.8A proscribes, any speech burden is incidental. The statute does not regulate specific words or the editing, publication, or distribution of recordings as speech. The statute only prohibits recording while committing a trespass. And this Court has held that whether recording receives First Amendment protections turns on the existence of editorial discretion.

The district court ignored this distinction, causing it to incorrectly conclude that this Court has held broadly that "'videos are a form of speech' entitled to constitutional protection." App.117, R.Doc.75 at 9 (quoting *Telescope Media*, 936 F.3d 740).

But the question before this Court in *Telescope Media* was not whether video recordings are speech, but whether wedding videos—

which involved "editorial judgments" about "what events to take on, what video content to use, what audio content to use, what text to use . . . the order in which to present the content, [and] whether to use voiceovers"—were speech. 936 F.3d at 747–48. That is unlike the blanket recording Plaintiff alleges here.

As this court in *Telescope Media* explained, the videos in that cause "will not just be simple recordings, the product of planting a video camera at the end of the aisle and pressing record. Rather, [videographers] intend to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage." *Id.* at 751. Such recordings, where a videographer "exercise[s] substantial 'editorial control and judgment,' including making decisions about the footage and dialogue to include, the order in which to present content, and whether to set parts of the film to music," made the recordings in *Telescope Media* more akin to "other types of films." *Id.* at 751 (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). In contrast, ICCI does not allege that it exercises any editorial control and judgment over its recordings. App.019, R.Doc.1 at ¶¶ 55–58 (stating only that ICCI records videos with "images and sound" of its "non-violent civil disobedience").

The district court's reliance on *Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021), is likewise misplaced. *See* App.118, R.Doc.75 at 10. There, the city's ordinance "forb[ade] photography and video recording in a public park." *Ness*, 11 F.4th at 918. And Ness took her photos and videos from the public park, from public sidewalks and streets, and from private driveways where there is no record of an owner objection. *See id.* at 919. As such, the conduct at issue was the photography and videography itself, not an illegal trespass.

Neither Plaintiff nor the district court have presented any authority showing First Amendment protection for committing a crime and making recordings. To hold otherwise would create a protected action in recording criminal activity as expressive conduct protected by the First Amendment. But Plaintiffs concede they can rightfully be charged for criminal trespass while they are recording. And they do not contend a stricter penalty is unconstitutional generally. They only contend that the stricter penalty for Trespass Surveillance is unconstitutional as applied to them. No case supports that result.

Because recording while committing a trespass is not speech or expressive conduct protected by the First Amendment, the Trespass-

Surveillance statute does not regulate conduct protected by the First Amendment, and the district court should be affirmed for dismissing Plaintiff's as-applied claims.

IV. The Trespass-Surveillance Statute Is Not Unconstitutional As-Applied to Plaintiffs.

Even assuming the Trespass-Surveillance statute raises some First Amendment-protected activity, the statute still is not unconstitutional as applied to Plaintiff because it is a permissible time, place, and manner restriction. "[C]itizens have a 'right to attempt to persuade others to change their views'" but "that right is not absolute. *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 686 (8th Cir. 2012) (quoting *Hill v. Colorado*, 530 U.S. 703, 716 (2000)). For example, "[t]he government may restrict disruptive and unwelcome speech to protect unwilling listeners when there are other important interests at stake." *Id.* (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208–09 (1975)). So, "[w]here there are competing interests and values, courts must find an 'acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners.'" *Id.* (quoting *Hill*, 530 U.S. at 714).

"To evaluate whether a statute violates the First Amendment, the first step is to articulate the level of scrutiny to apply in this court's analysis—i.e., the standard on which this court examines the fit between the statutory ends and means." *281 Care Comm. v. Arneson*, 766 F.3d 774, 782 (8th Cir. 2014) (citing *United States v. Alvarez*, 567 U.S. 709, 730–31 (2012) (Breyer, J., concurring) and *Wersal v. Sexton*, 674 F.3d 1010, 1019–1020 (8th Cir. 2012)). The correct level of scrutiny depends largely on whether the restriction is content based or content neutral. *See Phelps-Roper*, 697 F.3d at 686 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) and *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)).

A content-neutral regulation of the time, place, or manner of speech is subject to intermediate scrutiny. *See Turner Broad Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642–643 (1994); *ALDF III*, 89 F.4th at 1080; *Phelps-Roper*, 697 F.3d at 686. Under intermediate scrutiny, the State may impose reasonable restrictions on the time, place, or manner or protected speech, "provided the restrictions 'are [1] justified without reference to the content of the regulated speech, that they are [2] narrowly tailored to serve a significant governmental interest, and that they [3] leave open ample alternative channels for communication of the information.'" *Doe*

v. City of Minneapolis, 898 F.2d 612, 616–17 (8th Cir. 1990) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

This Court rejected ICCI's facial challenge, holding that the Trespass-Surveillance statute survives intermediate scrutiny. *ALDF III*, 89 F.4th at 1082. "Guided by the Eighth Circuit's analysis and applying intermediate scrutiny," the district court correctly concluded that the Trespass-Surveillance statute withstands ICCI's as-applied challenge. App.130, R.Doc. 75 at 22. This Court's earlier analysis likewise should guide it to affirm here.

A. Section 727.8A is a content-neutral time, place, and manner restriction.

"'The principal inquiry in determining content neutrality, in speech cases generally, and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" *Doe*, 898 F.2d at 617 (quoting *Ward*, 491 U.S. at 791). The controlling consideration in this inquiry is the government's purpose, and "'[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers and messages but not others.'" *Id.* (quoting *Ward*, 491 U.S. at 791). Further, "[a]s long as the

governmental regulation of expression can be 'justified without reference to the content of the regulated speech,' it can be considered content neutral." *Id.* (quoting *Ward*, 491 U.S. at 791–92).

1. This Court previously held that "the [Trespass-Surveillance statute] represents a content neutral time, place, and matter restriction." *ALDF III*, 89 F.4th at 1080 (citing *Peterson v. City of Florence, Minn.*, 727 F.3d 839, 843 (8th Cir. 2013)). The district court applied this holding in its analysis, explaining that the Trespass-Surveillance statute is content neutral because "[i]t 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." App.120, R.Doc.75 at 12. Rather, '[t]he Act's prohibition turns solely on the conduct of recording while trespassing, not on what the recording might express or advocate." *Id.*

That conclusion is consistent with the Trespass-Surveillance statute's text, which does not make any distinctions based a trespasser's message or the purpose of the trespasser's recording or trespass. *See* Iowa Code § 727.8A. Rather, it applies to anyone who, while trespassing, "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." *Id.*

The law looks only at: 1) whether a person is trespassing and, 2) if so, whether that person knowingly placed or used a recording device while trespassing. That person could be recording a protest of a company's alleged labor practices or a demonstration in support of a company that has come under fire for those alleged practices. That person might not be part of a protest or demonstration at all but is recording for some other reason. If the person recording commits a trespass as defined in Iowa law, the Trespass-Surveillance statute applies.

2. Before the district court, ICCI conceded that "[o]n this record, Plaintiffs agree that intermediate scrutiny is appropriate." R.Doc.65-1 at 13 n.3. ICCI added that "should the record be developed further Plaintiffs reserve their right to argue for strict scrutiny." *Id.* But ICCI did not put forth any potential arguments at the district court. *Id.*

ICCI now argues that this Court should reverse "to allow ICCI to challenge the district court's determination that intermediate rather than strict scrutiny was appropriate." Appellant's Brief at 46. ICCI argues for the first time on appeal that "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." *Id.*

"But '[i]t is old and well-settled law that issues not raised in the trial court *cannot be considered by this court as a basis for reversal*.'" *Dunn v. Does 1-22*, 116 F.4th 737, 752 (8th Cir. 2024) (quoting *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (8th Cir. 1976)); *see also Meinen v. Bi-State Dev. Agency*, 101 F.4th 737, 752 (8th Cir. 2024)).

And even if this Court considered ICCI's pretext argument, it would be bound by its decision in *ALDF III*. *See Bates v. Richardson*, 97 F.4th 582, 586 (8th Cir. 2024) ("[O]ne panel of this court has no authority to overrule an earlier decision of another panel." (quoting *Maxfield v. Cintas Corp., No. 2*, 487 F.3d 1132, 1135 (8th Cir. 2007)). There, this Court held that the Trespass-Surveillance statute "represents a content-neutral, time, place and manner restriction." *ALDF III*, 89 F.4th at 1080 (citation omitted). That "prior decision, therefore, continues to govern the legal issues presented in this appeal." *Bates*, 97 F.4th at 586 (citation omitted).

But if this Court were to address ICCI's pretext argument and set aside its own earlier decision, the district court nonetheless should be affirmed. "Legislatures are presumed to have acted constitutionally."

Schilb v. Kuebel, 404 U.S. 357, 364 (1971); *see also Alexander v. S.C. State Conf. of the NAACP*, 601 U.S. 1, 11 (2024) (presumption of good faith "reflects the Federal Judiciary's due respect for the judgment of state legislators). And "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Ambassador Books & Video, Inc. v. City of Little Rock, Ark.*, 20 F.3d 858, 863 (8th Cir. 1994) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)); *see also In re Hubbard*, 803 F.3d 1298, 1312 (11th Cir. 2015); *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013); *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 (7th Cir. 2013).

That is because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew such guesswork." *O'Brien*, 391 U.S. at 384. Thus, judicial inquiries into legislative motives "are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." *Ambassador*, 20 F.3d at 863 (quoting *Fleming v. Nestor*, 363 U.S. 630, 617 (1960)). The Iowa Supreme Court likewise does not look to legislators'

comments to identify the purpose of a statute. *See Donnelly v. Bd. of Trustees*, 403 N.W.2d 768, 771–72 (Iowa 1987) ("[W]e will not consider a legislator's own interpretation of the language or purpose of a statute, even if that legislator was instrumental in drafting and enacting the statute in question.").

The Trespass-Surveillance statute's text establishes that regardless of any supposed legislative intent, the law applies equally to any trespasser using or placing a recording device, independent from any message or viewpoint that speaker might seek to convey. The law's text distinguishes it from trespass-surveillance laws in other states, which make a person's intent for entering the property or for making the recording an element of the crime. *See, e.g.*, *PETA v. North Carolina Farm Burau Fed'n, Inc.*, 60 F.4th 815, 820 (4th Cir. 2023) (North Carolina law barring entry "for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer" (quoting N.C. Gen. Stat. § 99A-2(b)(1)–(3)); *Kelly*, 9 F.4th at 1235 (Kansas statute prohibiting nonconsensual recording at an animal facility with the intent to damage the enterprise conducted at that facility, damage or destroy

the facility, or damage or destroy any animal or property at that facility (citing Kan. Stat. Ann. § 47-1827)).

The district court thus properly applied intermediate scrutiny to Iowa's Trespass-Surveillance statute.

B. The district court correctly applied intermediate scrutiny to find Iowa's law survives.

To survive intermediate scrutiny, a content-neutral time, place, or manner restriction must be "narrowly tailored to serve a substantial governmental interest and leave[] open ample alternative channels for communicating the speech." *Peterson*, 727 F.3d at 843 (citing *Ward*, 491 U.S. at 791). "An ordinance is narrowly tailored if it 'promotes a substantial interest that would be achieved less effectively absent the regulation' and the means chosen does not 'burden substantially more speech than is necessary to further' the city's content-neutral interest." *Id.* at 843 (quoting *Excalibur Grp., Inc. v. City of Minneapolis*, 116 F.3d 1216, 1221 (8th Cir.1997); *see also Ward*, 491 U.S. at 799.

In enacting the Trespass-Surveillance statute, "[t]he State seeks to protect property rights by penalizing that subset of trespassers who—by using a camera while trespassing—cause further injury to privacy and property rights." *ALDF III*, 89 F.4th at 1081. This Court held the law

"survive[d] intermediate scrutiny against Plaintiffs' facial challenge." *Id.* at 1082. The following principles were essential to the Court's analysis:

- "Without a doubt, trespassing . . . harms the privacy and property interests of property owners and other lawfully-present persons." *Id.* at 1082;
- "Trespassers exacerbate that harm when they use a camera while committing their crime." *Id.*;
- The Trespass-Surveillance statute "is tailored to target that harm and redress that evil." *Id.*; and
- "Because the Act's restrictions on the use of cameras only apply to situations when there has first been an unlawful trespass, the Act does not burden substantially more speech than is necessary to further the State's legitimate interests." *Id.* (citing *McCullen*, 573 U.S. at 486).

Just as these key principles doomed ICCI's facial challenge, they also doom its as-applied challenge. ICCI pleads that its members and staff record audio and video while trespassing. *ALDF III*, 89 F.4th at 1075; *see also* App.018–019, R.Doc.1 ¶¶54, 55. Based on *ALDF III*, ICCI thus "harms the privacy and property interests of property owners and other

lawfully-present persons." *ALDF III*, 89 F.4th at 1080. ICCI members then "exacerbate that harm when they use a camera while committing their crime." *Id.* Thus, "[b]ecause the Act's restrictions on the use of a camera only apply" to ICCI "when there has first been an unlawful trespass, [the Trespass-Surveillance statute] does not burden substantially more speech than is necessary to further the State's legitimate interests." *Id.* The law thus satisfies intermediate scrutiny and the district court's dismissal of ICCI's claims should be affirmed.

1. Governmental interest—"There is nothing which so generally strikes at the imagination, and engages the affections of mankind, as the right of property." 2 William Blackstone, Commentaries on the Laws of England *2. And "the right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–80 (1979)); *see also Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994); *Nollan v. California Coastal Comm'n* 483 U.S. 825, 831 (1987); Thomas W. Merrill,

Property and the Right to Exclude, 77 Neb. L. Rev. 731, 725 (1998) ("[T]he right to exclude is the *sine qua non* of property.").

So it is unsurprising that this Court held that protecting "property rights and privacy are important governmental interest[s]." *ALDF III*, 89 F.4th at 1080. Relying on that conclusion, the district court agreed that protecting property rights and privacy are "two significant governmental interests . . . both firmly established in constitutional jurisprudence and recognized by the Eighth Circuit." App.121, R.Doc.75 at 13 (citing *ALDF III*, 89 F.4th at 1080).

Trespassing violates those property rights "which stand among the most fundamental interests protected under American law." *Id.* And "[w]hen trespassers document their unauthorized presence through recording devices, they transform what would otherwise be a discrete time-limited intrusion into something far more invasive[,] . . . extend[ing] the violation beyond the moment of physical entry." App.121–122, R.Doc.75 at 13–14 (citing *ALDF III*, 89 F.4th at 1082). "Such conduct represents a qualitatively different and more serious infringement than mere physical presence alone," creating a "spectrum of potential harms," ranging "from compromised security measures to exposure of confidential

operations to invasions of personal privacy." App.122, R.Doc.75 at 14. These harms "provide[] a substantial basis to conclude there is a significant governmental interest in this issue." *Id.*

2. Narrow tailoring—ICCI admits that "enforcing property owners' rules regarding the use of their land" is a "legitimate end" of the Trespass-Surveillance statute and concedes that protecting those rights is a "substantial government interest." Appellant's Br. 28; *id.* at 26–34. ICCI instead argues that because the Trespass-Surveillance statute does not "directly advance" those interests, it is not narrowly tailored. *Id.* at 26–34. But this argument depends on a misreading of the statute and of First Amendment precedent. When, like the district court's analysis, the law is examined through the correct framework, it is "narrowly drawn, as it only applies to recording during already unlawful conduct." App.128, R.Doc.75 at 20.

"To be narrowly tailored, a regulation must not "'burden substantially more speech than is necessary to further the government's legitimate interests," but "the regulation 'need not be the least restrictive or least intrusive means of serving the government's interests.'" *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo.*,

775 F.3d 969, 975 (8th Cir. 2014) (quoting *McCullen*, 573 U.S. at 486). And "the choice as to the most effective and appropriate method" of addressing a substantial governmental interest "is a policy decision to be resolved by legislative action." *Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978).

In rejecting ICCI's facial challenge, this Court held that the Trespass-Surveillance statute "is tailored to target" the harm that trespassers cause when they violate a property owners' property rights and "exacerbate that harm when they use a camera while committing their crime." *ALDF III*, 89 F.4th at 1082. The law "does not burden substantially more speech than is necessary to further the State's legitimate interests," "[b]ecause the Act's restrictions on the use of cameras only apply to situations when there has first been an unlawful trespass." *Id.* (citing *McCullen*, 573 U.S. at 486). The district court explained that "[t]he Constitution permits greater regulation of expression when it intersects with unlawful conduct, which is precisely what the intermediate scrutiny standard recognizes." App.122, R.Doc.75 at 14. "[R]ecording 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." App.122, R.Doc.75 at 14. The Trespass-Surveillance law "targets th[is] precise harm." *Id.*

a. Property owner consent to record is irrelevant to the narrow tailoring analysis—ICCI argues that its recordings do not cause these harms because "ICCI's staff and members do not seek to protest and record where property owners have prohibited recordings" and there is "no record of property owners objecting to ICCI's recordings." Appellant's Br. at 29–30 (App.51, R.Doc.65-3 ¶ 15). As such, ICCI contends that its activities do not produce any privacy intrusions. *Id.*

As an initial matter, the record does not support this statement. ICCI states only that ICCI's action "involve[] staying at the location of the action after a person with actual or apparent authority asks ICCI and its Members to leave, with the express purpose of the action being labeled a trespass." App.51, R.Doc.65-3 ¶ 15. "Indeed, . . . ICCI staff and its Members have been subject to arrest during these actions." *Id.* Neither ICCI's complaint nor its declarations state that ICCI limits its actions to locations where recording is not prohibited.

But even if it were true, ICCI's argument flips the Trespass-Surveillance statute on its head. Whether a property owner objects to recordings specifically is irrelevant as both a legal and practical matter. The law is not a "consent to record" statute like the Fourth and Seventh Circuit cases upon which ICCI relies. *See* Appellant's Br. at 34–37 (citing *PETA*, 60 F.4th at 830–831, 833 (statute addressing hiding recording devices to record without the subject's knowledge") and *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012) (law making it a felony to record all or any part of a conversation unless all parties to the conversation consent)).

Rather, section 727.8A is a trespass statute with enhanced penalties. *See* Iowa Code § 727.8A. Liability under the statute does not turn on owner consent to record; it turns on whether the property owner wants the person recording on their property in the first place. Trespass is an element. *See id.* (applying only to "[a] person committing a trespass as defined in section 716.7" who places or uses a recording device "while the device is on the trespassed property"). And once a property owner asks a person on his property to leave, a trespass has occurred and that

request necessarily encompasses a request to cease any activity—recording or otherwise—that the trespasser is doing on the property.

If the property owner does not object to the person's presence, that person is not a trespasser under Iowa law and the Trespass-Surveillance statute does not apply. Indeed, as the district court recognized, "[t]he fact that the legislature specifically targeted the intersection of trespass and recording—rather than recording generally—supports the tailored nature of its approach." App.126–127, R.Doc.75 at 18–19.

b. "Background expectations of privacy" are irrelevant—As the district court explained, the owner's "expectation of privacy" is likewise irrelevant. App.123–125, R.Doc. 75 at 15–17. This Court "has upheld government restrictions on videotaping even when the public has a general right to access the venue or event to be recorded." *ALDF III*, 89 F.4th at 1080 (citing *Rice v. Kemper*, 374 F.3d 675, 678–679 (8th Cir. 2004)). And the State's interest becomes "even stronger" when a property owner revokes that general right of access or "when the public has no right to access the venue in the first place." *Id.* (citing *Frisby*, 487 U.S. at 485).

Further, recording exacerbates property and privacy harms even in public spaces. This is because recordings are "uniquely reliable and powerful methods of invading privacy." *Project Veritas*, 125 F.4th at 954. "Recordings may be made easily, stored indefinitely, disseminated widely, and played repeatedly." *Id.* They "also may be selectively edited, presented without context, manipulated, and shared across the internet" while "also creat[ing] the illusion of objectivity even where the recording omits critical context." *Id.* The rise of artificial intelligence also allows recordings to be used to create "'deepfakes' in which people appear to say things that they never actually said." *Id.* at 955.

Thus, the "intrusion" that the Trespass-Surveillance law is designed to avoid occurs when someone commits a trespass, interfering with the property owner's right to exclude, and recording exacerbates that initial intrusion through electronic memorialization. The recording need not be an independent intrusion.

To be sure, "the statute cannot be said to advance the aim of protecting property when the owners do not seek to restrict the activity." Appellant's Br. at 31. But if "owners do not seek to restrict the activity"—that is, if owners do not object to ICCI's presence—then the Trespass-

Surveillance statute does not apply at all. In those cases, there has been no trespass so there can be no liability under section 727.8A. Indeed, under ICCI's sweeping as-applied claim, some of its intended activity might occur in places where ICCI is welcome. The fact that ICCI's claim includes conduct that is not covered under the Trespass-Surveillance statute at all also underscores the improper breadth of its as-applied challenge.

c. The State met its evidentiary burden—ICCI also argues that intermediate scrutiny requires a substantial legislative record. Appellant's Br. at 38–47. But ICCI vastly overstates the showing that is required. This Court has held that the government generally must make a "threshold showing that the factual situation demonstrate[d] a real need" for the regulation at issue. *See City of Desloge*, 775 F.3d at 975 (quoting *Assoc. of Cmty. Orgs. for Reform Now v. St. Louis Cnty.*, 930 F.2d 591, 595 (8th Cir. 1991)). And "[o]nce a governmental entity has made such a showing, its 'choice among the means to accomplish its end is entitled to deference.'" *Id.* (quoting *St. Louis Cnty.*, 930 F.2d at 595).

Indeed, "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 the desired results." *Doe*, 898 F.2d at 617 (quoting *Wall Distrib. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir. 1986)). Evidence only need be "'reasonably believed to be relevant to the problem' that the government is addressing." *Id.* (quoting *City of Renton v. Playtime Theaters*, 475 U.S. 41, 51–52 (1986)). And judicial review "goes only to whether the legislative determination of justification and fitness is not facially without factual support, hence not arbitrary and capricious." *Id.* (citation omitted).

ICCI acknowledges this binding precedent but argues that recent Supreme Court decisions call it into question and contends that Defendants nonetheless cannot meet this standard. Both assertions are incorrect.

No recent Supreme Court decision alters the standard that applies here. *Cf. TikTok, Inc. v. Garland*, 145 S. Ct. 57 (2025); *McCullen v. Coakley*, 573 U.S. 464 (2014); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Turner Broad. Sys., Inc. v. F.C.C. ("Turner II")*, 520 U.S. 180 (1997); *Turner Broad. Sys., Inc. v. F.C.C. ("Turner I")*, 512 U.S. 622 (1994) (plurality opinion). *First*, this Court has continued to apply the standard set forth in *Doe* even after some of the Supreme Court

cases ICCI discusses. *See SOB, Inc. v. Cnty. of Benton*, 317 F.3d 856, 860 (8th Cir. 2003) (a content-neutral law "will withstand First Amendment scrutiny 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses'" (quoting *Renton*, 475 U.S. at 51–52); *Jake's Ltd., Inc. v. City of Coates*, 284 F.3d 884, 888 (8th Cir. 2002) ("[A] city need not conduct its own studies to demonstrate that a proposed ordinance will serve to reduce secondary adverse effects, 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses'" (citations omitted); *Missouri Republican Party v. Lamb*, 270 F.3d 567, 570 (8th Cir. 2001) ("The First Amendment does not require [a legislative body' before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated.").

Second, many of the Supreme Court cases are distinguishable. For example, the Court noted that the record in *Turner I* and *Turner II* was "unusually detailed." *See Turner I*, 512 U.S. at 646; *Turner II*, 520 U.S. at 187 (explaining that after remand "[t]he district court oversaw another 18 months of factual development 'yielding a record of tens of thousands of pages of evidence comprised of materials acquired during Congress's

three years of preenactment hearings, as well as additional expert submissions, sworn declarations and testimony, and industry documents") (internal quotations marks and citations omitted).

The extensive record was not only "unusual" but driven by the complex technical nature of the regulations at issue. Those cases, which involved cable and broadcast television regulations in an emerging cable market, required an extensive factual record because they concerned "industries undergoing rapid economic and technological change." *Turner II*, 520 U.S. at 196. Indeed, the Court devoted nearly ten pages of its opinion in *Turner I* to explaining the relevant technology, history, and regulations essential to its analysis. 512 U.S. at 526–635. In contrast, trespass is a long-established and easily understood concept requiring far less factual development.

The challenged law in *Milavetz* also required a more fact-intensive analysis. As ICCI recognized, the law in *Milavetz* restricted misleading commercial speech. Appellant's Br. at 39 (citing *Milavetz*, 559 U.S. at 249). Whether speech is "misleading" is necessarily going to be a more fact-specific inquiry than whether someone has committed a trespass. *See, e.g.*, *In re K-Tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 897 (8th Cir. 2002)

(whether public statement is misleading is a question of fact unless reasonable minds could not differ); *Silver v. H & R Block, Inc.*, 105 F.3d 394, 396 (8th Cir. 1997) (same); *United States v. Nepute*, 2023 WL 4623089, at *9 (E.D. Mo. Jul. 19, 2023) (whether marketing statements about drug efficacy were likely to mislead was a question of fact). Even then, ICCI takes the Court's statement in *Milavetz* out of context. The Court explained that "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determined that the [advertisement] had a tendency to mislead.'" *Milavetz*, 559 U.S. at 251 (quoting *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 652–653 (1985)). As a result, the much simpler legislative record was "adequate." *Id.*

And as the district court explained, *McCullen* also "involve[d] fundamentally different circumstances." App.125, R.Doc.75 at 17. *McCullen*, restricted speech "in quintessential public forums—specifically, public sidewalks" that the Supreme Court has recognized "as holding 'a special position in terms of First Amendment protection.'" *Id.* (citing *McCullen*, 573 U.S. at 476). Further, unlike in *McCullen*, the

Trespass-Surveillance statute "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." App.125–126, R.Doc.75 at 17–18. And "the evidentiary burden operates differently when analyzing a statute that only restricts expression occurring during an already unlawful conduct." App.126, R.Doc.75 at 18.

Creating "buffer zones" on public property—like in the law in *McCullen*—also necessarily requires a more detailed record to determine the burden on speech because the law will apply differently based on adjacent property layout. *See McCullen*, 573 U.S. at 473–474 (explaining how the buffer zones operated differently depending on property setbacks and main entrance locations, altering the burden on speech).

Third, both this Court's precedent and the Supreme Court's decision in *TikTok* support the evidentiary standard applied here.

In *TikTok*, the Court's "holding and analysis are based on the public record, without reference to" other evidence in the record, including classified government evidence. 145 S. Ct. at 69 & n.3. In that case "[p]ublic reporting has suggested that TikTok's 'data collection practices

extend to age, phone number, precise location, internet address, device used, phone contacts, social network connections, the content of private messages sent though the application, and videos watched." *Id.* (citation omitted).

This Court likewise has upheld legislative determinations based on publicly available documents. *See, e.g.*, *Jake's Ltd.*, 284 F.3d at 888 (relying on records from other communities); *Lamb*, 270 F.3d at 570 (relying on documents produced in a separate court case). Further, this Court has held that simple common sense can support a regulation. *See, e.g.*, *Sisney v. Kaemingk*, 15 F.4th 1181, 1192 (8th Cir. 2021) ("[C]ommon sense confirms that pornographic writings . . . can present the same obstacles to legitimate penological interests and pornographic images"); *St. Louis Cnty.*, 930 F.2d at 594, 596 (determining that the county had demonstrated a "real need" to act to protect its significant governmental interest and that "there can be no doubt from the evidence, as well as one's own common sense, that soliciting in the streets in inherently dangerous").

Here, as the district court explained, Defendants "identif[ied] two examples of trespass and recording prior to enactment of the Act."

App.126, R.Doc. 75 at 18 (citation omitted). And "[t]his evidence, coupled with the logical connection between the recording and the enhanced invasion of property rights, satisfies Defendants' threshold evidentiary burden." *Id.* "Defendants are not required to produce further statistical analyses or site-specific studies demonstrating why alternative, more limited approaches would fail to achieve [their] legitimate interests in protecting property rights and privacy during trespass." App.127, R.Doc.75 at 19.

Finally, Defendant need not show that these public records were "operating subjectively in the minds of the legislators to motivate them when they enacted th[e] statute." *Lamb*, 270 F.3d at 570. Rather, [w]e think that a statute is constitutional if there is objective evidence of facts sufficient to render that statute valid." *Id.* Indeed, "it makes little constitutional sense to invalidate [a] statute when it would have been perfectly constitutional if it could have been shown that the . . . legislature (in some collective sense?) had passed the statute with the proper frame of mind." *Id.* "Any other rule would prove unworkable because, among other things, the minds of legislators are largely unknowable, individual legislators have various motives for voting the

same way on the same bill, and legislative history is nonexistent in many states." *Id.*

Ultimately, the district court correctly held that the Trespass-Surveillance statute "logically advances" the State's interests, "and the State is entitled to deference in its choice of regulatory approach under intermediate scrutiny." App. 127, R.Doc.75 at 19 (citing *Turner II*, 520 U.S. at 214).

3. Alternate channels of communication—"[T]he First Amendment does not guarantee the right to communicate one's view at all times and places or in any manner that may be desired." *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 918 (8th Cir. 2017) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981)). "The requirement that 'ample alternative channels' exist does not imply that alternative channels must be perfect substitutes for those channels denied to plaintiffs by the regulation at hand; indeed, were we to interpret the requirement in this way, no alternative channels could ever be deemed 'ample.'" *Id.* (quoting *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 101 (2d Cir. 2006)).

Thus, the district court correctly concluded that "[t]he 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." App.128, R.Doc.75 at 20 (citing *Ward*, 491 U.S. at 802 and *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)).

Here, ample alternative channels exist—including speech in public forums. As this Court explained, "the Act's restrictions on the use of a camera only apply to situations when there has first been an unlawful trespass." *ALDF III*, 89 F.4th at 1082 (citing *McCullen*, 573 U.S. at 486). "The limited nature of the prohibition makes it virtually self-evident that ample alternatives remain." *Frisby*, 487 U.S. at 483–484 (holding that a law barring picketing in front of a particular residence left open ample alternatives, including neighborhood marches, door-to-door canvassing, literature distribution or mailing, and non-harassing telephone contact).

The Trespass-Surveillance statute "does not restrict speech in traditional public forums where First Amendment protections reach their apex." App.128, R.Doc.75 at 20. ICCI also can "document its protests from adjacent public spaces, obtain contemporaneous written accounts, or

secure permission" to protest on the property and record its actions. *See* App.129, R.Doc.75 at 21. "Although these alternatives may lack the dramatic impact" of recording during a trespass, "they nevertheless enable [ICCI] to gather and disseminate information central to [its] advocacy mission[]." *Id.*

ICCI questions whether alternatives like handwritten notes have "an equivalent persuasive value" but concedes that "under this Circuit's precedent, the district court was correct in holding that § 727.8A allows for adequate alternatives to ICCI's desired speech." Appellant's Br. at 25 n.1.

The district court therefore correctly concluded that ample alternatives for communication existed, completing its thorough constitutional analysis grounded in this Court's precedent. And the district court's conclusion should be affirmed.

CONCLUSION

The district court properly granted Defendants' Motion to Dismiss and correctly denied Plaintiff's Motion for Summary Judgment. Defendants therefore respectively ask that this Court to affirm the district court.

July 28, 2025

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Local R. 25A, I certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,407 words, excluding those parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because the brief has been prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft Office 365.

3. This brief complies with the electronic filing requirements of Local R. 25A because the text of the electronic brief is identical to the text of the paper copies and because the electronic version of this brief has been scanned for viruses and no viruses were detected.

July 28, 2025

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on July 28, 2025. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

July 28, 2025

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