

No. 20-3082

**IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH
CIRCUIT**

ANIMAL LEGAL DEFENSE FUND, CENTER FOR FOOD SAFETY, SHY 38, INC. AND HOPE
SANCTUARY,
PLAINTIFFS-APPELLEES,

v.

LAURA KELLY, IN HER OFFICIAL CAPACITY AS GOVERNOR OF KANSAS, AND DEREK
SCHMIDT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF KANSAS,
DEFENDANTS-APPELLANTS

On Appeal from the United States District Court for the District of Kansas
The Honorable Kathryn H. Vratil
District Court No. 2:18-cv-02657-KHV

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 18 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS-APPELLEES SEEKING AFFIRMANCE**

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STATEMENT OF INTEREST¹

Amici curiae are the Reporters Committee for Freedom of the Press, Atlantic Media, Inc., Colorado Freedom of Information Coalition, First Look Media Works, Inc., Freedom of the Press Foundation, International Documentary Assn., Investigative Reporting Workshop at American University, Kansas Institute for Government Transparency, Kansas Press Association, Kansas Sunshine Coalition for Open Government, The Media Institute, Meredith Corp., on behalf of KCTV and KSMO, MPA - The Association of Magazine Media, National Press Photographers Association, The News Leaders Association, POLITICO LLC, Radio Television Digital News Association, Society of Environmental Journalists, and Society of Professional Journalists. Full descriptions of the amici are provided in Appendix A to this brief.

Amici are news media organizations, publishers, and groups dedicated to defending the First Amendment and newsgathering rights of the press and the public. As representatives of the news media, amici have an interest in ensuring that reporters have access to newsworthy information. The news media relies on photographs and audio and video recordings obtained from sources to report about

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E) amici state as follows: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

the agricultural industry, including animal facilities, and to shed light on safety, sanitation, and other conditions in that industry. In the past, sources have informed journalists of dangerous, illegal, or unethical activities in the agricultural industry—and provided photo and video documentation of that wrongdoing—so that journalists could, in turn, inform the public.

Three provisions of the Kansas Farm Animal and Field Crop and Research Facilities Protection Act are at issue in this case: K.S.A. § 47-1827(b) (prohibiting “acquir[ing] or otherwise exercis[ing] control over an animal facility, an animal from an animal facility or other property from an animal facility, with the intent to deprive the owner of such facility, animal or property and to damage the enterprise conducted at the animal facility”), K.S.A. § 47-1827(c) (prohibiting, among other things, “enter[ing] an animal facility to take pictures by photograph, video camera or by any other means” without the owner’s effective consent “and with the intent to damage the enterprise conducted at the animal facility”), and K.S.A. § 47-1827(d) (prohibiting, “without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, enter[ing] or remain[ing] on an animal facility if the person: (A) Had notice that the entry was forbidden; or (B) received notice to depart but failed to do so”).² These provisions

² Amici refer to K.S.A. § 47-1827(b), (c) and (d) collectively as the “Kansas Ag-Gag Statute” or the “Act.” The term “ag-gag” was coined by then-*New York Times* writer Mark Bittman in 2011. See Mark Bittman, *Who Protects the*

expose workers at animal facilities and others to potential criminal liability for taking pictures or making video or audio recordings in certain circumstances.³ The Act thereby chills sources' willingness to speak and provide documentary evidence to reporters and, as a result, inhibits reporters from informing the public. The Kansas Ag-Gag Statute thus hinders journalists' ability to report the news and deprives the public from receiving information about matters of public concern regarding Kansas animal facilities, such how food production impacts the environment and the working conditions of animal facility employees.

Amici respectfully submit this brief in support of Plaintiffs-Appellees ALDF, CFS, Shy 38, Inc. and Hope Sanctuary (collectively, "Plaintiffs") to emphasize the public interests at stake in this case and to highlight the chilling

Animals?, N.Y. Times (Apr. 26, 2011), <https://perma.cc/N74F-JUE8>. "Ag-gag" refers to state laws that, among other things, forbid filming or photography at concentrated animal feeding operations or otherwise protect the agriculture industry by discouraging whistleblowing.

³ Subsection (c) explicitly prohibits photograph and video recording. K.S.A. § 47-1827(c)(4). Before the district court, Plaintiff-Appellee Animal Legal Defense Fund ("ALDF") explained that Subsections (b) and (d) also proscribe photography and video and audio recording, namely, with respect to Subsection (b), "exercis[ing] control over an animal facility by accepting a supervisory role or closing off part of a facility to covertly take photographs" which "could lead public officials or law enforcement to seize or remove [the animals] to animal sanctuaries," App. Vol. II 162, and with respect to Subsection (d), "us[ing] deception to gain access to an animal facility and ignor[ing] posted notices to keep investigators out or prohibit photography." *Id.* at 168. Plaintiffs-Appellees Center for Food Safety ("CFS"), Shy 38, Inc., and Hope Sanctuary explained that they wished to "listen to or to receive information that ALDF would obtain in an undercover investigation." *Id.* at 169.

effect of the Kansas Ag-Gag Statute on communications between journalists and their sources.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a)(2), this brief is filed with the consent of all parties.

SUMMARY OF THE ARGUMENT

The Kansas Ag-Gag Statute unconstitutionally stifles free speech and undermines public safety by criminalizing photography and video and audio recording at animal facilities in certain circumstances. *See* K.S.A. § 47-1827(b), (c) and (d). Creation and dissemination of photos and video and audio recordings are First Amendment protected speech and a critical component of newsgathering.

Photographs and recordings taken at animal facilities are speech of the utmost public concern. Journalists and news organizations that investigate animal facilities have shed light on dangers to workers, the safety of food the public consumes, and the environmental impact of the agricultural industry. Today, in particular, news reports have revealed dangerous conditions at animal facilities as meatpacking plants around the country became hotspots for COVID-19 outbreaks. News reports about animal facilities often rely on photographs and video and audio recordings provided by sources. By criminalizing the taking of photographs and making of recordings, the Act chills the very journalism that has previously led to

positive changes in the agricultural industry, including safer workplaces and a healthier food supply.

Amici agree with the district court that the Act imposes “content-based and viewpoint-discriminatory restrictions on speech” that cannot survive strict scrutiny. App. Vol. II 179. The Act targets speech based on its communicative content—namely, whether an individual’s speech to animal facility representatives was deceptive and whether photographs or recordings were made “with the intent to damage the enterprise” of the animal facility. K.S.A. §§ 47-1826–27. The “intent to damage the enterprise” element makes the Act viewpoint discriminatory and particularly destructive to public discourse. Moreover, the Kansas Ag-Gag Statute fails strict scrutiny because Defendants-Appellants (“Defendants”) did not advance any interest, and certainly not a “compelling” one, to justify the restrictions on protected speech.

For these reasons, amici urge the Court to affirm the district court’s well-reasoned decision striking down the Kansas Ag-Gag Statute as violative of the First Amendment.

ARGUMENT

I. Taking photographs and making video and audio recordings is protected speech.

Contrary to Defendants’ argument, *see* Opening Br. at Section II, the Kansas Ag-Gag Statute regulates speech, not conduct. The First Amendment’s scope

“encompasses a range of conduct related to the gathering and dissemination of information” and prohibits the government from “limiting the stock of information from which members of the public may draw.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). Thus, as numerous courts, including this Court, have recognized, the First Amendment protects the taking of photographs and making of video and audio recordings. Because the Act prohibits photography and video and audio recording at animal facilities in certain circumstances, the district court correctly concluded that it regulates speech rather than conduct.⁴ App. Vol. II 177.

In *Western Watersheds Project v. Michael*, this Court held that a statute governing the “collection of resource data” was subject to review under the First Amendment. 869 F.3d 1189, 1195–98 (10th Cir. 2017). The Court explained that “collection of resource data,” which the statute defined to include the taking of photographs, “constitutes the protected creation of speech.” *Id.* at 1195–96. The Court further stated that “[a]n individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter.” *Id.* at 1196 (citing *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of *making* an audio or audiovisual recording is

⁴ Amici write to highlight the Act’s prohibition on the First Amendment protected activities of photography and video recording. Amici do not address the Act’s prohibition on the use of “deception” to secure consent to gain entry to animal facilities, which is fully addressed by Plaintiffs’ brief. *See* Appellees’ Br. Section I.A.1.

necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”)).

Indeed, there is broad consensus among federal appellate courts that the First Amendment protects the taking of photographs and the creation of video and audio recordings, as courts across the country have held in cases concerning the right to film the police. Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. Rev. Discourse 230, 236–37 (2016) (“[M]ost courts of appeal . . . have acknowledged that the First Amendment broadly protects the right to make audio or visual recordings of police activity.”). Moreover, the United States Courts of Appeal for the Fifth and Seventh Circuits, noting that the Supreme Court has long held film to be protected speech, have recognized as a corollary that “the First Amendment protects the act of making film, as ‘there is no fixed First Amendment line between the act of creating speech and the speech itself.’” *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) (quoting *Alvarez*, 679 F.3d at 596). Because recording and photography are acts of creating speech, they are protected by the First Amendment. *See id.*

In addition, the First Amendment provides heightened protection to speech about matters of public importance and government affairs. *See id.* (explaining that “a major purpose of [the First] Amendment was to protect the free discussion

of governmental affairs” (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); see also *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a “First Amendment right to film matters of public interest” in the context of a man who “was videotaping people on the streets of Seattle,” including police, during a public protest march). Speech about conditions and other issues at animal facilities—such as food safety concerns, workers’ rights, environmental impacts, and ethical treatment of animals—are undeniably matters of legitimate public concern. Accordingly, the First Amendment’s protection for speech about animal facilities, including taking photographs and making video and audio recordings at these facilities, is particularly strong.

II. Journalism about animal facilities has a long tradition of sparking public debate and reform.

News reports about safety problems and other issues in meat production facilities have played a key role in public discourse. There are numerous examples of journalism about the agricultural industry prompting reform and improvements that benefit the public at large—a real-world example of how “[s]unlight is . . . the best of disinfectants.” *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting Louis Brandeis, *Other People’s Money* 62 (1933)).

In many respects, investigative journalism was born out of Upton Sinclair’s infamous 1906 book on Chicago’s slaughterhouses, *The Jungle*, and the work of his contemporaries. See James O’Shea, *Raking the Muck*, Chi. Trib. (May 21,

2006), <https://perma.cc/SD53-EQN4>. While *The Jungle* is a work of fiction, Sinclair's story was rooted in extensive research. He interviewed health inspectors and industry workers and went undercover in meatpacking facilities to document unsanitary conditions. James Diedrick, *The Jungle*, Encyclopedia of Chicago (Janice L. Reiff, Ann Durkin Keating, & James R. Grossman, eds. 2005), available at <https://perma.cc/5Q28-5ZBF>. And Sinclair's work is credited with aiding the passage of the Pure Food and Drug Act and Meat Inspection Act, both enacted in 1906, which protected the public by instituting vigorous reforms in the meatpacking industry. *Id.*

In the decades since *The Jungle*, journalism about animal facilities has continued to spark important public debate and led to reforms. For example, in the late 1960s, *Minneapolis Tribune* reporter Nick Kotz published a series of articles that revealed widespread unsanitary conditions in the country's meatpacking plants. 113 Cong. Rec. 21283–86 (daily ed. Aug. 3, 1967). Kotz's reporting contributed to the passage of the Meat Inspection Act of 1967, which broadened federal regulation of slaughterhouses in the United States. *Id.* at 21283.

And as David Michaels, a professor of public health at George Washington University and former head of the Occupational Safety and Health Administration (“OSHA”), recently told journalist Jane Mayer, as part of an investigation of hazardous conditions leading to COVID-19 outbreaks in meatpacking plants:

“We’re very much back in Upton Sinclair’s ‘The Jungle.’” Jane Mayer, *How Trump Is Helping Tycoons Exploit the Pandemic*, *New Yorker* (July 13, 2020), <https://tinyurl.com/y8f5jny9>.

Investigative journalism’s independent and objective scrutiny of industry is all the more important because government inspections of agricultural facilities can be obstructed or insufficient. For example, *The Kansas City Star* has reported that abuse of farm animals on their way to slaughter continued even after efforts by slaughterhouses and meat inspectors to improve enforcement of the Humane Methods of Slaughter Act of 1958, which “requires that food animals be slaughtered in a way ‘that causes a minimum of excitement, pain, injury, or discomfort.’” Mike McGraw, *Animal abuse persists at some slaughter plants*, *Kan. City Star* (July 1, 2013, 12:33 PM), <https://tinyurl.com/y6ddr786>. An “undercover video by the Humane Society of the United States [that] showed a crippled, sick cow being shoved toward the kill floor of a California beef plant with a forklift” prompted, in part, some initial increased enforcement efforts. *Id.* However, according to a federal auditor and “two whistle-blowing meat inspectors,” even after stepped up enforcement efforts, meat inspectors continued to unevenly enforce humane-slaughter rules—or failed enforce them at all—“because their bosses won’t support them.” *Id.*

Moreover, at times, government inspection teams lack the necessary authority to intervene, making public oversight all the more essential. For example, *ProPublica* has reported about conflicts between meatpacking companies and government health agencies over the companies' response to the COVID-19 pandemic. Michael Grabell et al., *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies Over COVID-19 Outbreaks in Their Plants*, *ProPublica* (June 12, 2020, 2:04 PM), <https://perma.cc/TA4J-LD8Q>. *ProPublica's* reporting describes health officials in states with large agricultural sectors stymied by a lack of information and authority to enforce existing regulations. *Id.*

III. The Act chills speech critical to newsgathering.

A. Reporters rely on information and documentation from sources to inform the public about animal facilities.

As the Supreme Court has recognized, the press plays a critical role in acquiring and publishing information about matters of public concern. *See Mills*, 384 U.S. at 219 (“The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs.”) (discussing *Lovell v. City of Griffin*, 303 U.S. 444 (1938)). And, in many ways, sources are the lifeblood of journalism. Reporters rely on first-hand accounts, documents, photographs, or video or audio recordings obtained from sources

within a government entity, a company, or other organization in order to keep the public informed.

The same is true with respect to coverage of the agricultural industry, where reporters rely on sources such as agricultural employees, whistleblowers, and organizations like Plaintiffs. *See, e.g.*, Matt Olberding, *Animal Rights Group Alleges Abuse at Nebraska Calf Operation*, Lincoln J. Star (July 18, 2019), <https://perma.cc/W8BX-GHP2> (reporting on an undercover investigation by Animal Equality, an animal rights organization, at Summit Calf Ranch that revealed the abuse of calves). Some sources speak to reporters after they witness events or conditions on the job that they believe the public should know of, while others take jobs intending to carry out their employment responsibilities while also observing conditions and practices to inform the public.

Sources provide reporters (and their readers and viewers) with important information about the agricultural industry in Kansas, which processes more than a quarter of the nation's beef. Jonathan Shorman & Kevin Hardy, *Kansas altered meatpacking guidance to let possibly exposed workers stay on the job*, Kan. City Star (May 20, 2020, 7:50 AM), <https://www.kansascity.com/news/politics-government/article242852011.html>. For example, during the ongoing COVID-19 pandemic, Kansas newspapers have relied on meatpacking plant employees acting as sources to report on coronavirus outbreaks in the state's meatpacking plants that

have been linked to infections of thousands of people and numerous deaths. *Id.* Among other things, workers at some meatpacking facilities in Kansas have told reporters that social distancing practices are unenforced. Corrine Boyer, *Despite Meatpacking Plants' Efforts, Kansas Workers Say 'We're Right Next To Each Other'*, High Plains Public Radio (May 4, 2020, 2:29 PM), <https://perma.cc/E6J8-GTXJ> (quoting an employee at a National Beef plant in Kansas: “‘We’re right next to each other in the locker rooms,’ ‘The lunch line . . . they put stuff on the floor where we should stay six feet apart. But a lot of people are not listening and there’s nobody enforcing [social distancing] in there.’”).

The public benefits tremendously when sources can provide news outlets with documentation, like photographs or recordings, of the events or conditions they witness. Access to documentary materials and first-hand accounts enhances the accuracy and credibility of reporting, increases transparency and reader trust, and enriches news stories, allowing reporters to convey more than can be said based on the written word alone. For these reasons, the news media frequently uses photographs, videos, or audio recordings from sources.

For example, USA Today included a still from a video provided by the Humane Society of the United States when the news outlet reported on the settlement of a lawsuit brought by the federal government and the Humane Society against a California meatpacking plant under the federal False Claims Act.

Michael Winter, *Calif. meat packer to pay \$317M over abuse, recall*, USA Today (Nov. 16, 2012), <https://perma.cc/MP4T-MYNC>. The video, recorded by the Humane Society in 2007, “showed workers using electric prods, high-pressure hoses and forklifts to force so-called downer cattle to walk or be taken to slaughter,” a practice which “raised concerns about possible contamination with mad cow disease.” *Id.* The caption to the photograph included with USA Today’s article explained that it showed a “‘downer’ dairy cow too sick or injured to walk” at the plant. *Id.*

In another example, the Canadian Broadcasting Corporation (“CBC”) published a news report about a coronavirus outbreak at a slaughterhouse and meatpacking plant in Alberta, Canada, owned by U.S. food corporation Cargill, which at the time, was the largest coronavirus outbreak linked to a single facility in North America. Joel Dryden & Sarah Rieger, *Inside the slaughterhouse*, CBC News (May 6, 2020), <https://perma.cc/8CM5-4RWP>. The news story included an employee-provided video of a crowded changing room, and employee-provided photographs of other areas where employees worked or gathered that illustrated the “close quarters” in which employees said they worked. *Id.* In addition, the news report included photos by an employee that revealed additional safety problems in the plant—including packed hallways after an ammonia leak forced workers out of their stations. *Id.* After the CBC published this video and these photos, Cargill

released a statement promising more robust safety measures for employees not just in the Canadian plant, but in all North American “protein facilities.” Cargill, *Statement on Safety in Cargill’s North American Protein Facilities* (July 15, 2020), <https://perma.cc/AL8U-6N77>. All of the above examples of documentary evidence of dangerous working conditions and threats to public safety would, if they had occurred in Kansas, subject the whistleblower sources to criminal sanctions under the Kansas Ag-Gag Statute.

If sources are chilled from providing documentation to reporters (because they face criminal penalties for doing so), then news outlets will be forced to rely solely on photos provided by agricultural companies, images of the outside of animal facilities, or stock images, if they use photographs at all. *See e.g.*, Oliver Laughland & Amanda Holpuch, *‘We’re modern slaves’: How meat plant workers became the new frontline in Covid-19 war*, *Guardian* (May 2, 2020, 4:00 PM), <https://perma.cc/7L3Z-EATR> (reprinting AP photo of working conditions at a Georgia poultry processing plant provided to AP by Tyson Foods). Such images provide only limited, selective, and incomplete information to the public and give agricultural companies significant control over the “the stock of information” the public receives. In contrast, the photographs and recordings that sources provide to reporters ensure that the public gets the full story of what occurs at animal facilities.

B. The Act chills protected speech about the agricultural industry.

The news media, animal facility employees, and the public have mutually reinforcing First Amendment interests in disclosing conditions at those facilities. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”). As this litigation vividly illustrates, many sources want to disclose information about the animal facilities where they work, and news organizations want to report this information to the public which, in turn, wants to receive it.

The Act’s criminal penalties chill the flow of protected speech from sources to reporters. A violation of K.S.A. § 47-1827(b) is punishable by five to seven months’ imprisonment for a first offense, subject to presumptive probation, K.S.A. § 47-1827(g)(2);⁵ *id.* § 21-6804; a violation of K.S.A. § 47-1827(c) is punishable by a term of confinement in the county jail not to exceed one year, *id.* 47-1827(g)(3)⁶; *id.* § 21-6602; and a violation of K.S.A. § 47-1827(d) is punishable by a term of confinement in the county jail not to exceed six months, *id.* § 47-1827(g)(4);⁷ *id.* § 21-6602. The threat of criminal prosecution and punishment will

⁵ K.S.A. § 47-1827(g)(2) provides that a violation of Subsection (b) of the Act is “a severity level 10, nonperson felony.”

⁶ K.S.A. § 47-1827(g)(3) provides that a violation of Subsection (c) of the Act “a class A, nonperson misdemeanor.”

⁷ K.S.A. § 47-1827(g)(4) provides that a violation of Subsection (d) is “a class B nonperson misdemeanor.”

deter employees in every Kansas animal facility who witness misconduct or public health concerns at their place of employment from providing journalists with proof of such wrongdoing and a first-hand account of what they have witnessed.

Plaintiffs alleged that they fear prosecution under the Act because they intend to use deception to gain access to an animal facility to take pictures.⁸ App. Vol. II 165. However, even employees who do not use deception, but who happen upon misconduct or other newsworthy information, will be chilled from documenting it and providing that documentation to the media. These employees may fear facing prosecution under the Act under a theory—even if incorrect—that they acted deceptively for the purpose of sharing instances of wrongdoing with the press or otherwise obtained access to the facility by false pretenses.

In many cases, agricultural employees must already overcome a fear of retaliation by their employers to speak to members of the news media. For example, one source who spoke to journalist Jane Mayer about working conditions at a meatpacking plant operated by Mountaire Corporation—“one of the country’s largest purveyors of chicken”—explained that she needed Mayer to keep her identity confidential because she feared “retribution” from Mountaire, among others. Mayer, *supra*. In another example, a meatpacking worker at a JBS

⁸ The Act’s definition of “effective consent” provides that consent is ineffective if “[i]nduced by force, fraud, deception, duress or threat.” K.S.A. § 47-1826(e).

meatpacking plant in Greeley, Colorado, spoke to a local TV news station about a lack of social distancing at the meatpacking plant on the condition that it keep her identity confidential “due to the risk of losing her job.” Tony Kovaleski, *Governor ‘shocked’ after Denver7 Investigation uncovers more problems at Greeley slaughterhouse*, Denver7 (June 30, 2020, 8:54 PM), <https://perma.cc/B3TX-NTVH?type=image>. The plant had “produced one of the largest outbreaks of COVID-19 in the state.” *Id.*

The Kansas Ag-Gag Statute exacerbates sources’ concerns about speaking publicly about conditions at animal facilities because it also exposes them to potential criminal liability. By chilling communications between reporters and sources, the Act significantly diminishes the flow of information to the public. *See Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (explaining that when the government deters First Amendment protected expression, it “has an unmistakable tendency to chill that free play of the spirit” of others).

The media can perform their role of informing the public about animal facilities only if their access to sources and information is unimpeded by government and industry efforts to target, disrupt, and criminalize the reporter-source relationships. The reciprocal First Amendment interests of sources, journalists, and the public are harmed by the Kansas Ag-Gag Statute, which

muzzles would-be sources and inhibits the media’s ability to shine a spotlight on the agriculture industry.

IV. The Act is a content based and viewpoint discriminatory restriction on speech that fails strict scrutiny.

A statute is content based when it targets speech based on its communicative content, rather than content neutral aspects of speech such as time, place, or manner. *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015). “Government discrimination among viewpoints—or the regulation of speech based on ‘the specific motivating ideology or the opinion or perspective of the speaker’—is a ‘more blatant’ and ‘egregious form of content discrimination.’” *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Restrictions on speech are viewpoint based “where they distinguish between speech based on ‘the specific motivating ideology or the opinion or perspective of the speaker,’ or ‘proscribe[] views on particular disfavored subjects and suppress[] distinctive ideas conveyed by a distinctive message.’” *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 925 (S.D. Iowa 2018) (quoting *Reed*, 135 S.Ct. at 2230; *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 582 (1998)). Content based and viewpoint based restrictions on speech are presumptively invalid and subject to strict scrutiny. *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358 (2009) (quoting *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007)).

Courts have previously found statutes similar to the Kansas Ag-Gag Statute to be content based restrictions warranting strict scrutiny. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1196 (9th Cir. 2018) (quoting *United States v. Alvarez*, 567 U.S. 709, 719 (2012)) (striking down Idaho’s ag-gag statute, which criminalized entry into an agricultural production facility by “misrepresentation” because the provision “regulates protected speech while ‘target[ing] falsity and nothing more’”); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1209 (D. Utah 2017) (“A law is content based—and therefore subject to strict scrutiny—if determining whether someone violated the law requires looking at what was said.”); *People for Ethical Treatment of Animals, Inc. v. Stein*, --- F. Supp. 3d. ---, No. 1:16CV25, 2020 WL 3130158 (M.D.N.C. June 12, 2020) (holding North Carolina’s ag-gag statute, parts of which were subject to strict scrutiny, unconstitutional).

The Kansas Ag-Gag Statute is both a content based and viewpoint based speech restriction because it criminalizes only speech that is critical of animal facilities. As the district court explained, the Act prohibits acquiring or exercising control over an animal facility, animal, or other property from an animal facility, entering an animal facility to take pictures or video recordings, and entering or remaining on an animal facility without effective consent only if a person does so with “intent to damage the enterprise conducted at the animal facility.” For

example, as the district court noted, “[A]n undercover photographer would not violate subsection (c) if he or she lied to gain access to a Borden Dairy farm to covertly film a tribute to Elsie the cow.” App. Vol. II 180.

Thus, under the Act, owners and other supporters of animal facilities remain free to speak positively about them, while critics and whistleblowers will be deterred from—and potentially face criminal punishment for—providing truthful, but negative information about animal facilities to the press and public.

Journalists will thus have access to sources and documentation that paint animal facilities in a positive light, but fewer sources of documentary evidence of abuses or wrongdoing.

If the Kansas Ag-Gag Statute is to survive strict scrutiny, the government must show *both* that (a) the government interest in regulating speech is compelling *and* (b) the government’s speech-suppressing measures are narrowly tailored to a compelling government interest. *Reed*, 576 U.S. at 163. Defendants have not advanced any state interest in restricting the speech at issue in the Act. *See generally* Opening Br. Nor have they shown that the Act is narrowly tailored to further such an interest. *Id.* Accordingly, the Act does not survive strict scrutiny.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge this Court to affirm the district court’s judgment.

Respectfully submitted,

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APPENDIX A: DESCRIPTIONS OF AMICI

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated nonprofit association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Atlantic Media, Inc. is a privately held, integrated media company that publishes The Atlantic and National Journal. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. The Atlantic was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

The Colorado Freedom of Information Coalition (“CFOIC”) is a nonpartisan alliance of groups, news organizations and individuals dedicated to ensuring the transparency of state and local governments in Colorado by promoting freedom of the press, open courts and open access to government records and meetings. CFOIC helps Coloradans understand and use the Colorado Open Records Act, the Colorado Criminal Justice Records Act and the Colorado Open Meetings Law, as well as the rules governing court access. CFOIC also monitors

Colorado legislation, judicial decisions and violations of the state's open government laws.

First Look Media Works, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Media Works operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

Freedom of the Press Foundation (FPF) is a non-profit organization that supports and defends public-interest journalism in the 21st century. FPF works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including building privacy-preserving technology, promoting the use of digital security tools, and engaging in public and legal advocacy.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, based at the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Kansas Institute for Government Transparency (KIGT) is a non-partisan Kansas non-profit organization. Its specific purposes are to educate the public about: 1) transparency laws, including Kansas statutes requiring that government records and meetings be open to the public, 2) rules and regulations that affect the balance between the public's interest in access to information and competing interests in privacy and security, and 3) citizens' First Amendment rights to express themselves freely.

Kansas Press Association is a 501C(3) non-profit organization representing approximately 190 printed and digital newspapers in Kansas. We trace our founding back to 1863. Our mission is to advance the interests of a free press in Kansas. We provide educational programming, advertising placement services, legislative representation and other benefits to our members.

The Kansas Sunshine Coalition for Open Government was founded in 1999 by the director of the Elliott School of Communication at Wichita State

University. Its charter sponsors included the Kansas Association of Broadcasters, the Kansas Press Association, and the Kansas Chapter of the Society of Professional Journalists. The Coalition is dedicated to the principle that open government is essential to a democratic society. Its major focus is to promote open government through publications, videos, and education. It works to strengthen application of existing open meetings and open records laws and to monitor legislative activities and court proceedings related to open government at all levels of government.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

Meredith Corporation (NYSE: MDP), an Iowa corporation, owns or operates seventeen television stations reaching approximately eleven percent of United States households, including television stations in Phoenix, Arizona, Portland, Oregon, and Las Vegas, Nevada. Meredith's stations produce nearly 700 hours of local news and entertainment content each week, and operate leading local digital destinations.

MPA – The Association of Magazine Media, (“MPA”) is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA’s membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to

fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta

Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

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/s/ Steven Zansberg

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Counsel of Record for Amici Curiae

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I hereby certify that a copy of the foregoing Brief Amici Curiae of the Reporters Committee for Freedom of the Press and 18 Media Organizations in Support of Plaintiff-Appellee Seeking Affirmance was electronically filed with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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