FIRST AMENDMENT — "AG-GAG" LAWS — EIGHTH CIRCUIT UPHOLDS LAW CRIMINALIZING ACCESS TO AGRICULTURAL PRODUCTION FACILITIES UNDER FALSE PRETENSES. — *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021).

In *United States v. Alvarez*,[1] a fractured Court invalidated the Stolen Valor Act of 2005[2] — prohibiting any person from "falsely represent[ing] himself or herself" as having "been awarded any [military] decoration or medal" — on First Amendment grounds.[3] "[F]alse speech," a plurality of the Court declared, is not "a general category" of its own, "presumptively unprotected."[4] In *Alvarez*'s wake, however, lower courts have struggled to figure out just which lies the First Amendment protects.[5] Recently, in *Animal Legal Defense Fund v. Reynolds*[6] (*ALDF*), the Eighth Circuit read *Alvarez* to permit an Iowa statutory provision that criminalizes gaining access to a farm under "false pretenses,"[7] splitting with the Ninth Circuit, which invalidated an almost identical provision in 2018.[8] The panel's tidy holding — that trespass is a "legally cognizable harm," and therefore any lies associated with it can be safely proscribed[9] — ignored a far messier question: whether the proscribed conduct constitutes trespass at all. Based on early and contemporary common law, the answer is not straightforward. By ignoring this issue, the panel missed the statute's overbreadth.

In 2012, in response to undercover investigations by animal rights activists on private farmland,[10] the Iowa General Assembly passed

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1 567 U.S. 709 (2012).

2 18 U.S.C. § 704 (2006), *invalidated by Alvarez*, 567 U.S. 709.

3 *Alvarez*, 567 U.S. at 715–16 (plurality opinion) (quoting 18 U.S.C. § 704(b)).

4 *Id.* at 722.

5 Must a false impersonation statute, for example, include a requirement that the mimic intend to deceive others? *Compare* United States v. Chappell, 691 F.3d 388, 396–99 (4th Cir. 2012) (upholding a false impersonation statute without such a requirement), *with* United States v. Bonin, 932 F.3d 523, 533–36 (7th Cir. 2019) (upholding a false impersonation statute but only on the basis that it contained such a requirement).

6 8 F.4th 781 (8th Cir. 2021).

7 *Id.* at 785 (quoting IOWA CODE § 717A.3A(1) (2021)); *see id.* at 785–86.

8 *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1194–99 (9th Cir. 2018) (invalidating an Idaho statute that criminalized gaining access to farmland "by . . . misrepresentation," *id.* at 1194 (quoting IDAHO CODE § 18-7042(1)(a) (2021))).

9 *ALDF*, 8 F.4th at 786 (quoting *Alvarez*, 567 U.S. at 719 (plurality opinion)).

10 For a paradigmatic example, see Anne-Marie Dorning, *Iowa Pig Farm Filmed, Accused of Animal Abuse*, ABC NEWS (June 29, 2011, 9:29 AM), https://abcnews.go.com/Business/iowa-pig-farm-filmed-accused-animal-abuse/story?id=13956009 [https://perma.cc/VEM2-KGPX], which describes an undercover video taken by a Mercy for Animals investigator of "[s]mall piglets being hurled to a concrete floor." *Id.* And for a paradigmatic response, see *Iowa Approves First Ag Protection Law*, NAT'L HOG FARMER (Mar. 2, 2012), https://nationalhogfarmer.com/business/iowa-approves-first-ag-protection-law [https://perma.cc/F7UK-HHXP], in which the legislative sponsor of House File 589 (H.F. 589) describes the bill's goal as "send[ing] a message that we prize agriculture in Iowa and it is a commodity that shouldn't be diminished by extremist vegans." *Id.*

House File 589 (H.F. 589), criminalizing "agricultural production facility fraud."[11] To commit the offense, a person must either (1) "[o]btain[] access to an agricultural production facility by false pretenses" (the "access provision") or (2) knowingly "[m]ake[] a false statement . . . as part of an application" to be hired at such a facility, "with an intent to commit an act not authorized by [the facility's] owner" (the "employment provision").[12] In 2017, five years after H.F. 589's enactment, several animal rights groups sued for declaratory and injunctive relief, alleging that the law violated the First Amendment.[13]

The district court granted the plaintiffs' motion for summary judgment and denied Iowa's cross-motion.[14] Senior Judge Gritzner proceeded in "three stages."[15] First, he held that H.F. 589 implicates protected speech.[16] Second, he noted that H.F. 589, as a content-based restriction on speech, would ordinarily be subject to strict scrutiny.[17] However, given the Court's "fragmented" decision in *Alvarez* — in which the plurality applied strict scrutiny, and a concurrence in the judgment applied only intermediate scrutiny — he acknowledged that the "legal framework for analyzing regulations that proscribe false speech," like H.F. 589, is "uncertain."[18] But he found no need to settle the question of which opinion in *Alvarez* controls, as, third, he held that H.F. 589 satisfies neither strict nor intermediate scrutiny.[19] In a subsequent order, he permanently enjoined enforcement of the law.[20]

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[11] Act of Mar. 2, 2012, ch. 1005, 2012 Iowa Acts 5 (codified at IOWA CODE § 717A).

[12] IOWA CODE § 717A.3A(1) (2021). A first violation is punishable by a fine and up to a year in prison, *id.* § 903.1(1), and any subsequent violation is punishable by a fine and up to two years in prison, *id.* § 903.1(2).

[13] *See* Civil Rights Complaint ¶¶ 115–48, Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812, 827 (S.D. Iowa 2019) (No. 17-cv-00362). The plaintiffs also alleged that H.F. 589 violated the Fourteenth Amendment's Equal Protection and Due Process Clauses. *Id.* ¶¶ 149–56.

[14] *Animal Legal Def. Fund* (*ALDF II*), 353 F. Supp. 3d at 827. In a prior order, Senior Judge Gritzner granted in part Iowa's motion to dismiss, dismissing the plaintiffs' equal protection claims. *See* Animal Legal Def. Fund v. Reynolds (*ALDF I*), 297 F. Supp. 3d 901, 928–29 (S.D. Iowa 2018).

[15] *ALDF II*, 353 F. Supp. 3d at 821.

[16] *Id.* at 821–22. H.F. 589 implicates speech, as it cannot be violated "without engaging in speech," *id.* (emphasis omitted) (quoting *ALDF I*, 297 F. Supp. 3d at 918), and that speech is protected, as it does not "cause a 'legally cognizable harm' or provide 'material gain' to the speaker," *id.* at 822 (quoting United States v. Alvarez, 567 U.S. 709, 719, 723 (2012) (plurality opinion)).

[17] *Id.* at 822. H.F. 589 is content based, as it cannot be enforced without reference to the *truthfulness* of the *content* of individuals' statements. *See id.*

[18] *Id.* at 823.

[19] *See id.* at 824–27. As to strict scrutiny, the state's interests in protecting "private property and biosecurity" were not "compelling," *id.* at 824 — as there was no evidence that the law was "actually necessary to protect perceived harms," *id.* at 825 — and even if they were, H.F. 589 was not "narrowly tailored" to achieve either, *id.* at 824. And because it was "so broad in its scope" — "criminaliz[ing] speech that inflicts no 'specific harm'" — it also failed intermediate scrutiny. *Id.* at 827 (quoting Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1198 (9th Cir. 2018)).

[20] Animal Legal Def. Fund v. Reynolds (*ALDF III*), No. 17-cv-00362, 2019 WL 1493717, at *3 (S.D. Iowa Feb. 14, 2019).

The Eighth Circuit affirmed in part, reversed in part, vacated the injunction in part, and remanded.[21] Writing for the panel, Judge Colloton[22] upheld the access provision and invalidated the employment provision.[23] Agreeing with the district court, he found that each provision regulates speech based on content.[24] As the content distinction at issue hinged on the speech's falsity, he too turned to *Alvarez*.[25] The challenge, however, was how to interpret the split in *Alvarez* itself. As neither opinion was "a logical subset"[26] of the other, neither controlled under *Marks v. United States*.[27] Instead, the court resolved to "bear in mind the reasoning of the various opinions" in considering the constitutionality of H.F. 589, even if *Alvarez*'s "only binding aspect" was its result.[28]

The court then considered the access provision. In the court's view, the "rule in light of *Alvarez* is that intentionally false speech undertaken to accomplish a legally cognizable harm may be proscribed without violating the First Amendment."[29] As the access provision prohibits only lies that cause such a harm — "namely, trespass to private property . . . [from which] 'the law [always] infers some damage'" — the First Amendment is not implicated at all.[30]

The employment provision, on the other hand, "sweeps more broadly."[31] Unlike the access provision — which proscribes only *material* misrepresentations — the employment provision criminalizes even "immaterial falsehoods."[32] As lies "that are not capable of influencing an offer of employment" do not cause a legally cognizable harm or fit within the exception carved out by the *Alvarez* plurality, the employment provision is subject to First Amendment scrutiny.[33] Under either strict or intermediate scrutiny, it fails: its scope is "too broad" and "less restrictive means" are too readily available.[34]

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[21] *ALDF*, 8 F.4th at 788.

[22] Judge Colloton was joined in full by Judge Grasz and in part by Judge Gruender.

[23] *See ALDF*, 8 F.4th at 786–87.

[24] *See id.* at 784.

[25] *Id.* at 784–85.

[26] *Id.* at 785.

[27] 430 U.S. 188 (1977).

[28] *ALDF*, 8 F.4th at 785.

[29] *Id.* at 786.

[30] *Id.* (quoting Nichols v. City of Evansdale, 687 N.W.2d 562, 573 (Iowa 2004)). Judge Colloton thus rejected the district court's view that the "nominal damage" recoverable in civil trespass actions is "damage in name only" and not a legally cognizable harm. *Id.* (quoting *ALDF I*, 297 F. Supp. 3d 901, 922 (S.D. Iowa 2018)).

[31] *Id.* at 787.

[32] *Id.*; *see id.* at 788.

[33] *Id.* at 787; *see id.* (referencing the exception for "false claims . . . made to . . . *secure* [an] offer[] of employment" (emphasis added) (quoting United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion))).

[34] *Id.*

Judge Grasz filed a brief concurrence, noting his "hesistan[cy]" in upholding the access provision "[a]t a time in history when a cloud of censorship appears to be descending."[35]

Judge Gruender concurred in part, as to the section of the court's opinion upholding the access provision, and dissented in part, as to the court's invalidation of the employment provision and its *Marks* analysis.[36] He addressed *Marks* first. Like the court, he agreed that neither *Alvarez* opinion "is a logical subset of the other," but unlike the court, he would not have stopped there.[37] Instead, he would have evaluated *Alvarez*'s reach using two other tests: deciphering the "opinion that offers the least change to the law,"[38] and assessing the outcome in *ALDF* "that would have commanded the votes of any five justices of the [*Alvarez*] Court, including any dissenters."[39] Both pointed to the plurality.[40]

Guided, then, by the *Alvarez* plurality, Judge Gruender turned to the access provision. Though he agreed with the panel that the provision is constitutional, he wrote separately to describe his view of what constitutes a "legally cognizable harm": specifically, "the kind of injury that [would have] supported standing . . . when the First Amendment was ratified in 1791."[41] As the access provision "is a trespass law," and as such laws predate the First Amendment, the proscribed speech is without constitutional protection.[42]

Finally, Judge Gruender would have upheld the employment provision, as "[t]he plain language of the *Alvarez* plurality" permits statutes that proscribe "lies [told] for the *purpose* of securing an offer of employment," regardless of their materiality.[43]

In upholding the access provision of H.F. 589, the Eighth Circuit emphasized the "ancient . . . pedigree" of the prohibition in question, "[t]respass by misrepresentation."[44] But its pedigree is not as "ancient" as the panel claimed. In fact, at both early and contemporary common law, fraudulently induced consent was, in some cases, sufficient to defeat a claim of trespass. The panel's oversimplified view of trespass led it to miss the potential overbreadth of H.F. 589.

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[35] *Id.* at 788 (Grasz, J., concurring).

[36] *Id.* at 789 (Gruender, J., concurring in part and dissenting in part).

[37] *Id.* (citing *id.* at 785 (majority opinion)).

[38] *Id.* at 790 (quoting United States v. Cundiff, 555 F.3d 200, 209 (6th Cir. 2009)).

[39] *Id.* (citing United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009)).

[40] *See id.* at 791. Judge Gruender dismissed a third option — following the opinion in *Alvarez* that "would hold the fewest statutes unconstitutional" — as impractical to apply here, given that the competing opinions disagreed on two axes: first, the appropriate *tier* of scrutiny, and second, *how many laws* that scrutiny applies to. *Id.* at 790 (quoting Coe v. Melahn, 958 F.2d 223, 225 (8th Cir. 1992)).

[41] *Id.* at 792.

[42] *Id.* at 794.

[43] *Id.* (emphasis added).

[44] *Id.* at 786 (majority opinion).

That H.F. 589 proscribed only conduct underlying "an ancient cause of action" appears to have been key to the Eighth Circuit's decision.[45] Although the panel did not express a view on Judge Gruender's argument that only legally cognizable harms as of 1791 escape First Amendment scrutiny,[46] it *did* emphasize that the harm at issue ("[t]respass by misrepresentation") is "long recognized in this country."[47] Indeed, that the panel felt the need to describe trespass as "comparable" to the harms mentioned in *Alvarez* — rather than define "legally cognizable harm" by reference to Iowa law — suggests such a limited view of which harms count in this context.[48]

It is problematic, then, that the one case cited by the Eighth Circuit to demonstrate the ancient pedigree of trespass by misrepresentation is not a trespass case at all.[49] Indeed, *De May v. Roberts*[50] does not mention "trespass" once. Instead, *De May* is an *invasion of privacy* case.[51] Dr. De May, a physician called to Mrs. Roberts's home to assist with her childbirth, arrived with a friend, Mr. Scattergood, whom Roberts presumed to be a student or physician, and who witnessed the birth.[52] But he was, instead, "a young unmarried man, . . . utterly ignorant of the practice of medicine."[53] And he was, along with De May, "guilty of deceit."[54] Roberts "had a legal right to the privacy of her apartment," and to "intrude" upon her (in labor, no less) was to violate that right.[55] That the Michigan Supreme Court had to "search[] to find a legal basis to grant a remedy for the violation it saw" in De May and Scattergood's conduct suggests that trespass alone did not provide a basis for recovery.[56]

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[45] *Id.*

[46] *See id.* at 792–93 (Gruender, J., concurring in part and dissenting in part).

[47] *Id.* at 786 (majority opinion).

[48] *Id.*

[49] *See id.* (citing De May v. Roberts, 9 N.W. 146, 149 (Mich. 1881)). The other case cited by the panel to support the claim that trespass by misrepresentation is a legally cognizable harm, *Nichols v. City of Evansdale*, 687 N.W.2d 562 (Iowa 2004), is just as unhelpful to its argument. While "every unlawful entry" and "every direct invasion of the person or property of another" may indeed constitute a trespass, this merely begs the question of what makes an entry "unlawful" (or a "direct invasion") in the first place. *ALDF*, 8 F.4th at 786 (quoting *Nichols*, 687 N.W.2d at 573).

[50] 9 N.W. 146.

[51] *See, e.g.*, Beaumont v. Brown, 257 N.W.2d 522, 526 (Mich. 1977) (noting that *De May* recognized "a cause of action for invasion of privacy"); Harkey v. Abate, 346 N.W.2d 74, 76 (Mich. Ct. App. 1983) (describing *De May* as an "early case" in which the Michigan Supreme Court "affirm[ed] a verdict . . . based on an invasion of privacy"). *But see* 1 RESTATEMENT (SECOND) OF TORTS § 173 cmt. b., illus. 1 (AM. L. INST. 1965) (presenting a fact pattern similar to *De May* in the context of trespass).

[52] *See De May*, 9 N.W. at 146–47.

[53] *Id.* at 146.

[54] *Id.* at 149.

[55] *Id.*

[56] MEGAN RICHARDSON, THE RIGHT TO PRIVACY 76 n.22 (2017); *cf. De May*, 9 N.W. at 148–49 (explaining that "[i]t would be shocking to our sense of right," *id.* at 148–49, for the law not to "afford an ample remedy" for the defendants' conduct, *id.* at 149).

In fact, several state high courts in the late nineteenth and early twentieth centuries rejected the very premise of trespass by misrepresentation.[57] In *Kimball v. Custer*,[58] for example, the Illinois Supreme Court had occasion to consider when a guest, invited in under false pretenses, becomes a trespasser. There, despite the fact that the guest (a "pretended insurance agent") had gained entry "by means of falsehood, fraud and deceit" — having sought permission to enter in order to examine the home's ventilation — he was not a trespasser from the moment he entered the home.[59] It was, instead, "*the moment* he attempted to unbolt the door and open the house" to allow "his confederates" in — "although notified not to do so" — that he "*became* [a] trespasser[]"[60] by "abus[ing] . . . the privilege for which he professe[d] to enter."[61] *Kimball*, in short, represents a formalist view of consent as *agreement*.[62] And as "[c]onsent is generally a full and perfect shield" to tort liability,[63] including trespass, it should come as no surprise that like-minded jurists would consider trespass by misrepresentation to be no trespass at all.[64]

Even from the perspective of contemporary common law — where fraud *does*, in some cases, vitiate consent — the panel oversimplified trespass. Compare *ALDF* with *Desnick v. American Broadcasting*

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[57] *See, e.g.*, Alexander v. Letson, 7 So. 2d 33, 36 (Ala. 1942) ("[A]n action for trespass . . . will not lie unless plaintiff's possession was intruded upon by defendant without his consent, even though consent may have been . . . procured by fraud . . . ."); North v. Williams, 13 A. 723, 727 (Pa. 1888) ("If a citizen desired to see another upon business which he knew to be unpleasant to the latter, and chose to assign some other than the real reason for asking admission, he certainly would not become a trespasser merely because he failed to give the true reason.").

[58] 73 Ill. 389 (1874).

[59] *Id.* at 392.

[60] *Id.* at 392–93 (emphases added).

[61] *Id.* at 390; *see also* Dumont v. Smith, 4 Denio 319, 322 (N.Y. Sup. Ct. 1847). This distinction originated in early common law, which distinguished entries based on "an authority in law," such as a court order, from those based on "an authority in fact," that is, a landowner's consent. Jewell v. Mahood, 44 N.H. 474, 474 (1863); *see* Six Carpenters' Case (1610) 77 Eng. Rep. 695, 696; 8 Co. Rep. 146 a, 146 a–46 b. A person who entered on "an authority in law," and exceeded that authority, was "a trespasser *ab initio*," that is, from the beginning. *Jewell*, 44 N.H. at 474. But a person who entered on "an authority in fact," and exceeded that authority, was "only liable for the excess." *Id.*

[62] This view was echoed by Iowa courts. *State v. Boggs*, 164 N.W. 759 (Iowa 1917), for example, interpreted a state statute that criminalized "taking and operating" an automobile "without the consent of the owner." *Id.* at 760. Boggs "obtained [the] consent of the [vehicle's] owner" to use it for a short period, but then abandoned it. *Id.* Still, he did not violate the statute, the court explained, as "the owner consent[ed] to the . . . taking and driving." *Id.*

[63] THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 163 (Chicago, Callaghan & Co. 1879).

[64] In line with its progressive outlook, the first Restatement of Torts expounded — without a single citation — that "[a]ssent of the possessor of land fraudulently obtained . . . is not a consent to . . . entry thereon." 1 RESTATEMENT OF TORTS § 173 (AM. L. INST. 1934). As the drafters' notes reveal, this rule was the American Law Institute's invention, with "[n]o cases on [the] question . . . found" to discern the appropriate standard. RESTATEMENT OF TORTS § 16 special note (AM. L. INST., Preliminary Draft No. 39, 1930).

Cos.[65] There, a television network aired an exposé of an ophthalmic clinic's fraudulent Medicare practices, aided by "secret videotapes" produced by agents of the network sent in to pose as patients.[66] The Seventh Circuit rejected the clinic's trespass claim.[67] Judge Posner focused on "the specific interests that the tort of trespass seeks to protect"[68] — "the ownership [and] possession of land" — and found that those interests were not violated by the network's actions.[69] Similarly, adopting "*Desnick*'s thoughtful analysis,"[70] the Fourth Circuit held that use of a false resume to seek employment was insufficient to "turn[] [an] employee into a trespasser."[71]

Under this competing understanding of trespass, many of the lies criminalized by the access provision would not constitute trespass at all. Take, for example, the misrepresentations that the plaintiffs in *ALDF* engaged in: "omitting investigators' affiliations with animal protection organizations . . . [and] their status as licensed private investigators" on job applications.[72] There is little doubt that such misrepresentations would be material — no factory farm would knowingly hire a spy — and thus allow an investigator to "[o]btain[] access to an agricultural production facility by false pretenses."[73] However, even "successful resume fraud" does not a trespasser make, per the Fourth Circuit.[74]

But this, then, leaves H.F. 589 on unstable footing. After all, the Eighth Circuit predicated the constitutionality of the access provision on the correspondence of "access . . . by false pretenses" and trespass.[75] And if some of the speech proscribed by the statute *is* constitutionally protected,[76] overbreadth doctrine — under which "a statute is facially

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[65] 44 F.3d 1345 (7th Cir. 1995).

[66] *Id.* at 1351; *see id.* at 1348–49.

[67] *Id.* at 1352.

[68] *Id.*

[69] *Id.* at 1353. The Fourth, Ninth, and D.C. Circuits have each approved of *Desnick*. *See* IMAPizza, LLC v. At Pizza Ltd., 965 F.3d 871, 882 (D.C. Cir. 2020); Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1196–97 (9th Cir. 2018); Food Lion, Inc. v. Cap. Cities/ABC, Inc., 194 F.3d 505, 517 (4th Cir. 1999). The panel, however, appears to have split from this consensus sub silentio.

[70] *Food Lion*, 194 F.3d at 517.

[71] *Id.* at 518. The Fourth Circuit upheld the trespass verdict, however, on the basis of a tortious breach of the duty of loyalty. *Id.* at 516. The North Carolina Supreme Court went on to reject this "incorrect[] interpret[ation]" of state law, explaining that the duty of loyalty is not itself a cause of action, but merely "a defense to a claim of wrongful termination." Dalton v. Camp, 548 S.E.2d 704, 709 (N.C. 2001).

[72] Civil Rights Complaint, *supra* note 13, ¶ 94.

[73] IOWA CODE § 717A.3A(1) (2021). Indeed, the only limiting principles identified by the panel were that the "false pretenses [must] be assumed intentionally," *ALDF*, 8 F.4th at 786, and any such misrepresentation must be material, *see id.* at 787–88.

[74] *Food Lion*, 194 F.3d at 518.

[75] *ALDF*, 8 F.4th at 785 (quoting IOWA CODE § 717A.3A(1)); *see id.* at 786.

[76] Based on the Eighth Circuit's logic, this conclusion seems inescapable. Imagine a journalist who hopes to write an exposé on factory farms. She gets permission from one such farm to go on a tour, telling the owner she is an incorrigible carnivore (when in truth she is a committed vegan) who

invalid if it prohibits a substantial amount of protected speech"[77] — may apply. This is, in practice, a comparative exercise: Are a "substantial number"[78] of H.F. 589's applications unconstitutional, "judged in relation to [its] plainly legitimate sweep"?[79]

Under the logic of *United States v. Stevens*,[80] it appears so. In *Stevens*, the Court invalidated as overbroad a federal statute that criminalized "'any . . . depiction' in which 'a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.'"[81] "[T]he presumptively impermissible applications" of the law — "hunting magazines and videos," for example — "far outnumber[ed] any permissible ones," such as those involving animal cruelty.[82] "[T]he market" for the former, the Court noted, "dwarfed" that of the latter.[83] So too here. While *some* of the conduct at issue may constitute trespass at common law — for example, instances in which a person enters the farm to poison its water supply or otherwise compromise its biosecurity, as Iowa relied on in its brief[84] — the State could not point to a single actual instance in which such a harm occurred.[85] The access provision's overbreadth seems sufficiently "real" and "substantial" to at least call its constitutionality into doubt.[86]

The Eighth Circuit's oversimplification of trespass led it to ignore the extraordinary breadth of H.F. 589. In sum, the panel missed an opportunity to clarify one doctrine's scope (*Alvarez*), and in so doing, muddied the doctrinal waters of another (trespass). While its impact may be limited in the long term — if a prosecution is commenced under H.F. 589, an as-applied challenge is almost certain to result — its consequences may not be so limited in the interim, particularly for the animal rights groups whose investigations cannot proceed while the law remains in place.[87] As the Court reminds us, "[t]he mere potential for the exercise of [such a] power casts a chill" — "a chill the First Amendment cannot permit."[88]

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will write a complimentary article (when in truth she will do nothing of the sort). H.F. 589, presumably, applies to her entry, despite the fact that her lies are constitutionally protected. *Cf. id.* at 787 (reasoning that "false statements that are not capable of influencing an offer of employment" — such as, "I like your . . . company philosophy" — are "protected by the First Amendment").

77 United States v. Williams, 553 U.S. 285, 292 (2008).

78 New York v. Ferber, 458 U.S. 747, 771 (1982).

79 *Id.* at 770 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)); *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 893–98 (1991).

80 559 U.S. 460 (2010).

81 *Id.* at 474 (quoting 18 U.S.C. § 48(c)(1) (2006)).

82 *Id.* at 481–82.

83 *Id.* at 482.

84 *See* Defendants'-Appellants' Brief and Argument at 43–44, *ALDF*, 8 F.4th 781 (No. 19-1364).

85 *See ALDF II*, 353 F. Supp. 3d 812, 825 (S.D. Iowa 2019).

86 Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). And unlike *Virginia v. Hicks*, 539 U.S. 113 (2003), where the Court upheld a criminal trespass law as consistent with the First Amendment — warning against "overbreadth challenge[s]" to laws "not specifically addressed to speech," *id.* at 124 — H.F. 589 cannot be violated *without* engaging in speech, *see ALDF*, 8 F.4th at 784.

87 *See* Civil Rights Complaint, *supra* note 13, ¶¶ 103–04.

88 United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion).