IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:16-cv-25

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.; CENTER FOR FOOD SAFETY; ANIMAL LEGAL DEFENSE FUND; FARM SANCTUARY; FOOD & WATER WATCH; GOVERNMENT ACCOUNTABILITY PROJECT; FARM FORWARD; and AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS,

Plaintiffs,

v.

JOSHUA H. STEIN, in his official capacity as Attorney General of North Carolina, and CAROL FOLT, in her official capacity as Chancellor of the University of North Carolina-Chapel Hill,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

STATEMENT OF THE CASE

This case involves a pre-enforcement challenge brought by eight public interest organizations against two State officials, the Attorney General of North Carolina and the Chancellor of the University of North Carolina at Chapel Hill,[1] in their official capacities. Plaintiffs challenge the constitutionality of the North Carolina Property Protection Act, 2015 N.C. Sess. Law. 50, *codified at* N.C. Gen. Stat. § 99A-2 ("Property Protection Act," "PPA," or "Act"), which protects all property owners in the State from damages resulting from individuals who intentionally gain access to nonpublic areas of an owner's property and engage in acts that are beyond the scope of those individuals' authority. Plaintiffs allege the Act violates the First Amendment because it improperly regulates speech, is a content-based and viewpoint-based statute, burdens press-related investigations and reporting, is overbroad, limits the right to petition the government, and is vague. Plaintiffs also allege the Act violates the Fourteenth Amendment because it creates a class of individuals subject to a speech restriction and is vague. Defendants now move for summary judgment on all Plaintiffs' claims.

STATEMENT OF FACTS

The North Carolina General Assembly enacted the Property Protection Act to strengthen the State's property protections. (Ex. 4 at 2-3, 31; Ex. 5 at 3-5, Ex. 8 at 2, 11; Ex. 11 at 2-4) The General Assembly was concerned that "North Carolina's weak property

[1] Carol Folt is named as a defendant, but she is no longer the Chancellor of The University of North Carolina at Chapel Hill. Dr. Kevin Guskiewicz is now serving as the Interim Chancellor and is automatically substituted as a party pursuant to Fed. R. Civ. P. 25(d).

protection laws put businesses as well as the privacy of their customers at serious risk." (Ex. 5 at 3; *see also* Ex. 4 at 3; Ex. 6 at 2) By enacting the PPA, the General Assembly intended to provide "stronger measures to protect [businesses'] data and merchandise against corporate espionage, organized retail theft, and internal data breaches," as well as from "unlawful access" and "individuals that engage in unauthorized activities in non-public areas of the business." (Ex. 5 at 3-5, 28; Ex. 4 at 2-3; Ex. 6 at 2-3; Exs. 12-20) To do this, the PPA "codifies and strengthens North Carolina trespass law to better protect property owners' rights." (Ex. 5 at 3-4; *see also* Ex. 4 at 3, 31; Ex. Ex. 6 at 5)

The PPA makes remedies available to property owners in addition to those previously available at common law or provided by North Carolina's statutes. N.C. Gen. Stat. § 99A-2(g). To safeguard property rights, the PPA declares that "[a]ny person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained." *Id.* § 99A-2(a). The term "nonpublic areas" is defined to mean "those areas not accessible to or not intended to be accessed by the general public." *Id.*

To give notice of the scope of its proscriptions, the statute enumerates five "act[s] that exceed[] a person's authority to enter the nonpublic areas of another's premises": (1) an employee who enters nonpublic areas "for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer's data, paper, records, or any other

documents and uses the information to breach the person's duty of loyalty to the employer"; (2) an employee who "intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer"; (3) any person who "[k]nowingly or intentionally plac[es] on the employer's premises an unattended camera or electronic surveillance device and us[es] that device to record images or data"; (4) "[c]onspiring in organized retail theft" as that term is defined in N.C. Gen. Stat. §§ 14-86.5-86.6; and (5) "[a]n act that substantially interferes with the ownership or possession of real property." *Id.* § 99A-2(b). Joint liability under the PPA extends to "[a]ny person who intentionally directs, assists, compensates, or induces another person to violate this section." *Id.* § 99A-2(c).

The PPA preserves North Carolina's statutory whistleblower protections: "Nothing in [the PPA] shall be construed to diminish the protections provided to employees under" North Carolina's retaliatory employment discrimination statute, N.C. Gen. Stat. §§ 95-240 to 95-249, or North Carolina's protection for reporting improper government activities law, N.C. Gen. Stat. §§ 126-84 to 126-89. *Id.* § 99A-2(e). No party covered by those whistleblower laws may be held liable for violating the PPA. *Id.* And the PPA does not apply "to any governmental agency or law enforcement officer engaged in a lawful investigation of the premises or the owner or operator of the premises." *Id.* § 99A-2(f).

A prevailing party under the PPA may be awarded equitable relief, compensatory damages, costs and fees (including reasonable attorneys' fees), and exemplary damages in the amount of $5,000 for each day the defendant is in violation of the statute. *Id.* § 99A-2(d).

The General Assembly intended the PPA to be a "generally applicable" law to safeguard private property of "North Carolina companies of all sizes and all industries." (Ex. 5 at 3, 5, 29) Further, Representative Whitmire explained that nearly half all of organized retail crime comes from the "insider[s]" that are the focus of the law. (Ex. 5 at 28; *see also* Exs. 12-13). At the same time, the PPA "protects whistleblowers," (Ex. 5 at 5; *see also* Ex. 4 at 7-9; Ex. 8 at 2), and "allows for legitimate employees to report illegal activities or work place practices" to the proper authorities (Ex. 10 at 4). The PPA does not apply to an employee acting within the scope of their bona fide employment who notices a problem and reports it. (Ex. 5 at 22-23) Instead, the law has a narrow scope that applies to individuals intentionally accessing nonpublic areas of a business, for a reason other than a bona fide purpose of performing their job, who then obtains information and uses it to breach that employee's duty of loyalty to his employer. (*Id*. at 6, 25; Ex. 4 at 35)

QUESTIONS PRESENTED

I. Whether the PPA violates the First Amendment when it is a law of general applicability that regulates conduct, not protected speech.

II. Whether the Act violates the First Amendment when it is content and viewpoint neutral and narrowly tailored to serve a substantial government interest.

III. Whether the Act is unconstitutionally overbroad when it can be applied in many ways that do not implicate protected speech at all.

IV. Whether the Act violates the Equal Protection Clause when it does not burden a fundamental right, applies equally to all individuals, and is rationally related to a legitimate government interest.

V. Whether the Act is unconstitutionally vague in violation of the Due Process Clause when it provides clear and sufficient notice of the conduct it prohibits.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material only if it might "affect the outcome of the suit," and a dispute over a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The summary judgment inquiry . . . scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof of his claim at trial." *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993). Even in cases where the defendant carries the burden of proof at trial, "the non-moving party must still provide evidence sufficient to create an issue for trial." *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 308 (4th Cir. 2006). "A mere scintilla of proof, however, will not suffice to prevent summary judgment[.]" *Peters v. Jenney*, 327 F.3d 307, 314 (4th Cir. 2003).

Moreover, "facial challenges to legislation are generally disfavored[.]" *United States v. Chappell*, 691 F.3d 388, 392 (4th Cir. 2012) (*quoting Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). "To succeed in a typical facial attack,

[a party] would have to establish 'that no set of circumstances exists under which [a statute] would be valid,' or that the statute lacks any 'plainly legitimate sweep.'" *Id.* (*quoting United States v. Stevens*, 559 U.S. 460, 472 (2010)).

ARGUMENT[2]

Defendants are entitled to summary judgment because the facts demonstrate that the Property Protection Act regulates conduct, not speech. Moreover, the conduct regulated by the Act is not protected under the First Amendment. It is well-established that there is no First Amendment right to trespass or otherwise intentionally gain access to nonpublic areas of an owner's property and engage in acts that are beyond the scope of a person's authority. Nor does the Act create a content-based or viewpoint-based restriction on speech in violation of the First Amendment, and the statute is narrowly tailored to serve a significant government interest. Furthermore, the Act can be applied in many ways that do not implicate protected speech. Finally, the Act applies equally to all individuals, is

[2] Defendants argued Plaintiffs lacked standing in their motion to dismiss. (DE 30 and 31) This Court agreed with Defendants and dismissed the Amended Complaint on standing grounds. (DE 49) The Fourth Circuit in an unpublished opinion reversed and remanded the matter to this Court, holding "that Plaintiffs [had] sufficiently alleged, at least at this stage of the litigation, an injury-in-fact sufficient to meet the first prong of the First Amendment standing framework . . . ." *PETA, Inc. v. Stein*, 737 F. App'x 122, 131 (4th Cir. 2018).

Defendants continue to contest that Plaintiffs have standing to bring this action against them and incorporate by reference their standing arguments as if set forth in full. Plaintiffs have not presented any evidence that establishes they have standing to assert their claims against Defendants.

rationally related to a legitimate government interest, and the record demonstrates it was enacted without discriminatory animus.

I. THE PROPERTY PROTECTION ACT DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT IS A LAW OF GENERAL APPLICABILITY THAT REGULATES CONDUCT, NOT PROTECTED SPEECH.

Plaintiffs allege that the PPA violates their rights to free speech as protected by the First Amendment. First Amendment free speech challenges involve a three-step analysis. First, the court must determine whether the speech at issue is even protected by the First Amendment. Second, if the court determines that the speech is protected, the court must determine what standard of review applies. Third, the court applies the standard of review to the facts of the case. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). Plaintiffs bear the burden of demonstrating the first factor – that the First Amendment is even applicable. *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). If the statute does not implicate speech protected by the First Amendment, the court "need go no further." *Cornelius*, 473 U.S. at 797; *see also Barnes v. Glen Theatre*, 501 U.S. 560, 572 (1991) (Scalia, J. concurring) (recognizing that a general law regulating conduct that is not specifically directed at expression is not subject to First Amendment scrutiny). Plaintiffs cannot meet that burden.

A. The PPA Regulates Conduct, Not Speech.

A general law regulating conduct that is not specifically directed at expression is not subject to First Amendment protection. *Barnes*, 501 U.S. at 572. Rather, the First Amendment only protects speech or "conduct that is inherently expressive." *Rumsfeld v.*

Forum for Acad & Inst'l Rights, Inc. 547 U.S. 47, 66 (2006); *see also United States v. O'Brien*, 391 U.S. 367, 376 (1968) (rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"). However, conduct that is merely accompanied by speech is not protected just because the speech might be. *Rumsfeld*, 547 U.S. at 66. Indeed, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (citation omitted). A statute regulates conduct, not speech, when it affects what a person "must *do* . . . not what they may or may not *say*." *Id.* at 60.

In this case, the First Amendment is not implicated because the PPA regulates conduct, not speech. Indeed, the General Assembly enacted the Act to strengthen the State's trespass laws and provide additional civil remedies to property owners for the interference with their property. *See* N.C. Gen. Stat. § 99A; (*see also* Ex. 4 at 2-3, 31; Ex. 5 at 3-5, Ex. 8 at 2, 11; Ex. 11 at 2-4). The statute makes clear that it applies only to specific conduct – the intentional gaining of access to nonpublic areas of another's property. N.C. Gen. Stat. § 99A-2(a). The statute also makes clear that it applies only to specific actions taken that exceed a person's authority to enter the nonpublic areas of another's property. *Id.* at § 99A-2(b). Thus, by its clear terms, the Property Protection Act regulates what a person can or cannot *do*, not what they can or cannot *say*.

B. Intentionally Gaining Access to Nonpublic Areas of An Owner's Property and Engaging in Acts Beyond the Scope of Authority is Not Protected by the First Amendment.

Moreover, the First Amendment is not implicated in this case because the conduct regulated by the PPA is not expressive speech under the First Amendment. Plaintiffs assert that the Act violates the First Amendment because it prevents them from conducting undercover, employment-based investigations used to gather and collection information that is shared with the public. However, as both the United States Supreme Court, the Fourth Circuit, and other courts have made clear, a person does not have a First Amendment right to unauthorized access to private property for information gathering purposes. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (recognizing the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"); *Houchins v. KQED*, 438 U.S. 1, 9 (1978) (recognizing that the First Amendment does not guarantee "a right of access to all sources of information"); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (concluding "the First Amendment does not guarantee the press the right [to] access information not available to the public generally"); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505,518-22 (1999) (determining the First Amendment does not shield information gatherers from liability when they gain access to non-public areas of property and commit acts in excess of their authority to be in those areas); *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1353 (7th Cir. 1995) (holding that even though the undercover journalists gained access to

property and made their recordings based on misrepresentations their entry was valid because they only accessed areas open to the general public and did not invade "any of the specific interests [relating to peaceable possession of land] the tort of trespass seeks to protect"). Moreover, even a person's authorized access to property does not warrant First Amendment protection if that person commits an act that is "in excess of and in abuse of the authorized entry." *Food Lion*, 194 F.3d at 519 (citation omitted); *see also Cohen*, 501 U.S. at 669 (recognizing that "the truthful information sought to be published [or reported] must have been lawfully acquired"); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office.").

Indeed, in *Cohen*, the U.S. Supreme Court held that publishers and reporters of information do not have First Amendment immunity from the application of general laws. 501 U.S. at 670. In that case, the plaintiff, who worked on the campaign of a candidate for Governor of Minnesota, gave damaging information about another candidate to two reporters on their promise that they would not disclose their source. The story later identified Plaintiff as the source and he sued the newspapers for breaking the promise of confidentiality.

The issue before the Court was whether the First Amendment barred the plaintiff from recovering damages under state promissory estoppel law. The defendants argued that the First Amendment protected them because they obtained the information lawfully and published truthful information about a matter of public interest. 501 U.S. at 668-69. The

Court disagreed and held that reporters do not have "special privilege to invade the rights and liberties of others," and that enforcement of general laws against the press and newsgatherers "is not subject to stricter scrutiny that would be applied to enforcement against other persons or organizations." *Id.* at 670.

Similarly, in *Food Lion*, the Fourth Circuit held that the First Amendment was not a defense to generally applicable tort laws, such as breach of duty of loyalty and trespass. 194 F.3d at 521-22. In *Food Lion*, two news reporters secured employment at two Food Lion grocery stores in order to do an undercover investigation and gather information regarding allegations of the company's unsanitary meat-handling practices. While employed at the stores, the reporters secretly videotaped employees in non-public areas of the store engaging in and discussing "what appeared to be unwholesome food handling practices." *Id.* at 510. The secret video footage was used by ABC in a television broadcast that was critical of Food Lion.

Food Lion sued the reporters, broadcasters, and producers of the news for *inter alia* breach of duty of loyalty and trespass. The Fourth Circuit affirmed the judgments against the reporters on the tort claims. The Fourth Circuit explained that under North Carolina (and South Carolina) law, employees "owe[] a duty of loyalty to [their] employer." *Id.* at 515. "Employees are disloyal when their acts are inconsistent with promoting the best interest of their employer at a time when they were on its payroll, and an employee who deliberately acquires an interest adverse to his employer is disloyal." *Id.* (quotations and internal citations omitted). The Court concluded that defendants breached their duty of

loyalty "by the filming in non-public areas, which was adverse to Food Lion – [and] was a wrongful act in excess of [the defendants'] authority to enter Food Lion's premises as employees." *Id.* at 518.

The defendants argued that the First Amendment protected the reporters' conduct because they were engaged in newsgathering. *Id.* at 520. The Fourth Circuit disagreed and held that the First Amendment did not apply because the tort laws at issue in the case (breach of duty of loyalty and trespass) are laws of general application that "do not single out the press or have more than an incidental effect upon its work." *Id.* at 522. The court concluded that it was "convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts." *Id.* at 521.

Here, the Act codifies the principles set forth in *Cohen* and *Food Lion* and regulates conduct in a neutral way that does not target constitutionally protected activity. As provided in Section 99A-2(a), anyone who "intentionally gains access to nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas" may be liable to the owner or operator for any damages caused. Intentionally entering the nonpublic areas of a premise and engaging in wrongful acts that are in excess of authority is not protected by the First Amendment. *See Food Lion*, 194 F.3d at 519; *Cohen*, 501 U.S. at 669; *Dietemann*, 449 F.2d at 249.

Sections 99A-2(b) defines acts that exceed a person's authority, which includes any employee "who enters nonpublic areas of an employer's premises . . . and without authorization captures or removes the employer's data, paper, records or any other

documents and uses the information to breach the person's duty of loyalty to the employer." *Id.* at § 99A-2(b)(1). It also includes any employee "who intentionally enters the nonpublic areas of an employer's premises . . . and [] without authorization," makes recordings within the premises, and "uses the recording to breach the person's duty of loyalty to the employer." *Id.* at § 99A-2(b)(2). As *Food Lion* makes clear, the First Amendment does not protect employees who access non-public areas and commit acts (including filming or recording) that are in excess of their authority to enter the premises as employees. 194 F.3d at 518, 520.

Section 99A-2(b)(3) provides that a person exceeds his authority by "knowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data."[3] However, as previously noted, the First Amendment does not provide the right to unauthorized access of *a non-public area* in order conduct electronic surveillance or record images or date. *Desnick*, 44 F.3d at 1353; *Dietemann*, 449 F.2d at 249.

Finally, Section 99A-2(b)(5) regulates acts that "substantially interfere[] with the ownership or possession of real property." It is well-established that there is no First Amendment right to interfere with someone's property rights. *See, e.g., Hudgens v. NLRB*, 424 U.S. 507, 519 (1976) (recognizing that the First Amendment does not "safeguard rights of free speech and assembly . . . on action by the owner of private property used

[3] Section 99A-2(b)(4) is not relevant to this case as it relates to organized retail theft and Plaintiffs do not contend they have a First Amendment right to engage in that.

nondiscriminatorily for private purposes only"); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568-69 (1972) (noting that "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes"); *Food Lion*, 194 F.3d at 521; *Armes v. Philadelphia*, 706 F. Supp. 1156, 1164 (E.D. Pa. 1989) ("The right to exclude others is a fundamental element of private property ownership, and the First Amendment does not create an absolute right to trespass."), *aff'd sub nom.*, 897 F.2d 520 (3d Cir. 1990).

In sum, the First Amendment is not implicated in this case because the PPA regulates conduct, not speech, and the conduct it regulates is not protected by the First Amendment.

II. EVEN IF THE FIRST AMENDMENT APPLIES, THE PROPERTY PROTECTION ACT IS VIEWPOINT AND CONTENT NEUTRAL AND NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENT INTEREST.

Even assuming *arguendo* the conduct regulated by the PPA implicates the First Amendment; the statute is both viewpoint and content neutral and narrowly tailored to serve a substantial government interest. Indeed, the PPA is a law of general application and there is no clear, discriminatory legislative purpose against a viewpoint under the statute. Moreover, the law is focused on regulating specific conduct of individuals, regardless of any message or political agenda they might have.

A. The PPA Is Viewpoint and Content Neutral.

A statute is content based when it regulates speech on only "specified disfavored topics." *Virginia v. Black*, 538 U.S. 343, 362 (2003). To meet this standard, the statute must

"draw content-based distinctions on its face." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014). That is, the statute must explicitly "require" the government to "'examine the content of the [speaker's] message … to determine whether a violation has occurred." *Id.* That is, the statute must explicitly "require[]" the government to "examine the content of the [speaker's] message to determine whether' a violation has occurred." *Id.* (citation omitted). "For example, a law banning the use of sound trucks for political speech—and only political speech—would be content-based," because one could not determine whether the law had been violated without examining the content of the broadcasts. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015).

Thus, when a statute directly regulates only conduct, it is inherently content neutral—even if that conduct can be sometimes paired with protected speech. Recently, the U.S. Supreme Court considered a law that established a "buffer zone" around clinics that perform abortions. *McCullen*, 573 U.S. at 480. The Court held that the law was content neutral, because it banned only the act of entering a buffer zone without a lawful purpose. *Id.* Although the conduct restriction naturally shut down a wide swath of abortion-related speech within the zones, this indirect speech restriction did not make it content based. *Id.* Because a person "can violate the Act . . . without displaying a sign or uttering a word," it was facially neutral and subject to only intermediate scrutiny. *Id.*

The same analysis applies here. In fact, a person can be liable under the statute without engaging in any acts that implicitly involve speech. For example, a person could be liable under the statute for stealing another's data or information and using that

information in a manner adverse to the owner. Thus, the PPA is content neutral. *McCullen*, 573 U.S. at 480.

Even if this Court were to conclude that the statute directly regulates speech, it would do so in a content-neutral way. By regulating only the capture, removal, or recoding and use of information or data by a person who intentionally gains access to the nonpublic areas to another's premises, and does so in excess of that person's authority, the statute merely regulates the *manner* in which the information is obtained. Such regulations are, by definition, content neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (determining that a law that bans loud music in Central Park is content neutral because it regulates speech based only on the place and manner of its delivery).

Here, likewise, liability under the PPA depends on a content-neutral criterion: whether the damage is caused by someone who intentionally gains access to nonpublic areas of another's premises and engages in an act that exceeds the person's authority to be there. That is, the statute allows anyone to use information or data gathered from another's premises, provided they do so lawfully and without breaching any duty of loyalty, or it is otherwise done within the scope of applicable whistleblower statutes.

Moreover, the statutes applies to all unauthorized gathering of information or data used to breach an employee's duty of loyalty, regardless of the content of that information. Thus, the statute is content neutral because liability under the statute does not depend on the type of information obtained. *See Hill v. Colorado*, 530 U.S. 703, 721 (2010) ("[The Court has] never held, or suggested, that it is improper to look at the content of an oral or

written statement in order to determine whether a rule of law applies to a course of conduct.").

B. The PPA Advances a Substantial Government Interest and Is Narrowly Tailored.

As a content-neutral law, the PPA is examined under intermediate scrutiny. Under this standard, a law is constitutional so long as it (1) advances a substantial government interest, (2) is narrowly tailored to serve that interest, and (3) leaves open sufficient alternatives for expression. *Ward*, 491 U.S. at 796; *Reynolds v. Middleton*, 779 F.3d 222, 225-26 (4th Cir. 2015). The PPA satisfies each part of this test.

First, the PPA's express purpose is to protect property owners from damages resulting from individuals acting in excess of the scope of permissible access and conduct granted to them. N.C. Gen. Stat. § 99A-2. The law allows all property owners to recover damages from anyone who intentionally gains access to the nonpublic areas of another's premises and engages in any act that exceeds the scope of that person's authority to enter those areas. *Id.* The protection of private property from corporate espionage, organized retail theft, and damage caused by unauthorized access and unauthorized acts is a legitimate governmental interest. *McCullen*, 573 U.S. at 486-87 (recognizing protecting property rights to be a legitimate government interest); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1201-02 (9th Cir. 2018) (same).

Second, the statute is narrowly tailored to serve that interest. A law is narrowly tailored when it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. Narrow tailoring thus requires

only "'a reasonable fit between the challenged regulation' and the state's interest." *Capital Associated Indus. v. Stein*, 922 F.3d 198, 209-10 (4th Cir. 2019).

The PPA is narrowly tailored for two main reasons: it includes a scienter requirement and it only regulates specific instances of conduct that result in a legally cognizable harm to the property owner. Moreover, the statute preserves alternative channels of gathering and reporting information. Indeed, the PPA only applies to people who act with the requisite intent and exceed the scope of their authority. *See* N.C. Gen. Stat. § 99A-2(a). The PPA also expressly protects whistleblowers and governmental agencies. *Id.* at § 99A-2(e)-(f).

In sum, the PPA survives intermediate scrutiny because it is narrowly tailored to advance the government's substantial interest in protecting private property rights.

III. THE PPA HAS MANY APPLICATIONS THAT DO NOT IMPLICATE PROTECTED SPEECH.

Plaintiffs claim that the PPA violates the First Amendment because it is overbroad. However, "the allowance of a facial overbreadth challenge to a statute is an exception to the traditional rule," *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999), and should only be employed "as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982) (citation omitted). Indeed, "[i]nvalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" *United States v. Williams*, 553 U.S. 285, 293 (2008) (citation omitted). As a result, Plaintiffs are required to demonstrate "that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* at 292; *accord Ferber*, 458 U.S. at 771 (cautioning that "a

law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications").

Plaintiffs cannot meet their burden of demonstrating "a substantial number" of unconstitutional applications, both "in an absolute sense" and "relative to the statute's plainly legitimate sweep." *Id.; Williams*, 553 U.S. at 292. As previously noted, the PPA regulates conduct, not expressive speech, and can be applied in many ways that do not implicate protected speech at all. Moreover, because the PPA is content neutral, there are numerous applications that regulate speech in ways that are consistent with the First Amendment. *See supra* Section II.A. Thus, Plaintiffs' facial challenge presumptively fails because the statute has "a number of indisputably constitutional applications." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 584-85 (1998).

IV. THE PPA DOES NOT BURDEN A FUNDAMENTAL RIGHT, APPLIES EQUALLY TO ALL INDIVIDUALS, AND IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST.

Plaintiffs argue that the PPA violates the Equal Protection Clause because its "purpose and effect is to express the state's disapproval of a class of individuals and restrict their fundamental right to free speech." Am. Compl. ¶ 124. Plaintiffs contend the statute "targets those whose speech is perceived as working against employer's and property owners' interests[,]" and, therefore, is subject to strict scrutiny. *Id.* Plaintiffs argument is without merit.

The Equal Protection Clause provides that no state may deny any person the equal protection of the law. U.S. Const., amend. 14, sec. 1. However, that principle is not

absolute. "[I]t is a practical necessity that most legislation classify for one purpose or another, with resulting disadvantage to various groups or persons." *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996). "In fact, laws are presumed to be constitutional under the equal protection clause for the simple reason that classification is the very essence of the art of legislation." *Giarrtano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (citation and quotation omitted).

If a statute targets a suspect class or involves a fundamental right, courts will apply a heightened level of scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Greenville Women's Clinic v. Bryant*, 222 F.3d. 157, 172 (4th Cir. 2000). However, when a statute neither violates a fundamental right nor targets some protected class, such as race, religion, or gender, it is presumed valid and need only to be "related to a legitimate state interest." *City of Cleburne*, 476 U.S. at 440; *see also Greenville Women's Clinic*, 222 F.3d at 172 (declining to apply strict-scrutiny to South Carolina's standards regulating abortion clinics because the regulations did not impinge upon a fundamental right); *Heller v. Doe*, 509 U.S. 312, 319 (1993). This case does not involve a fundamental right – there is no fundamental right to intentionally gain access to nonpublic areas of an owner's property and engage in acts that are beyond the scope of authority. Nor does it involve a suspect classification – it is a statute that is applicable to everyone. Accordingly, the statute is subject to rational basis review, not strict scrutiny.

The rational basis standard is "quite deferential" and "simply require[d] courts to determine whether the classification in question is, at a minimum, rationally related to

legitimate governmental goals." *Wilkins*, 734 F.3d at 347-48 (citing *City of Cleburne*, 473 U.S. at 440). "Under this deferential standard, the plaintiff bears the burden 'to negate every conceivable basis which might support' the legislation." *Giarratano*, 521 F.3d at 303 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)); *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012). Moreover, "the State has no obligation to produce evidence to support the rationality of the statute, which may be based on rational speculation unsupported by any evidence or empirical data." *Giarratano*, 521 F.3d at 303 (citation and quotation omitted). A statute will satisfy rational basis review "if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer*, 517 U.S. at 632.

As discussed in Section II.B above, the PPA protects the rights of property owners, a legitimate governmental interest. *McCullen*, 573 U.S. at 486-87 (recognizing protecting property rights to be a legitimate government interest). Moreover, the PPA is rationally related to the State's legitimate governmental interest of protecting property rights. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (recognizing "the right to exclude" to be "a fundamental element of the property right"). While North Carolina already had a statute that provided a civil remedy for recovering damages for the interference with certain property rights, the General Assembly was concerned the existing laws were insufficient. (Ex. 4 at 2-3, 31; Ex. 5 at 3-5, Ex. 6 at 2; Ex. 8 at 2, 11; Ex. 11 at 2-4) The General Assembly recognized the increased threat posed to businesses in the State from corporate

espionage, organized retail theft, internal data breaches, and other unauthorized acts committed on a business's premises and enacted the PPA to better safeguard property rights. (Ex. 5 at 3-5, 28; Ex. 4 at 2-3; Ex. 6 at 2-3; Exs. 12-21) The General Assembly reasonably determined that because its existing laws were not sufficient to safeguard property rights, it needed to provide additional ways to help businesses in the State.

Plaintiffs, citing stray remarks made by a couple of legislators while debating the bill, contend that the statute was enacted with animus against "whistleblowers," and therefore subject to strict scrutiny. Am. Compl. ¶¶ 104-05, 124. However, "whistleblowers" are not a protected class. Moreover, nothing in the statute restricts the rights of whistleblowers from reporting improper activities. To the contrary, the Act expressly preserves those rights. *See* N.C. Gen. Stat. § 99A-2(e). Moreover, the motives of individual legislators are not an appropriate basis for reviewing a statute's validity under the Equal Protection Clause. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986). Furthermore, as both the text of the statute and the legislative record demonstrate, the motivating factor driving the legislature's effort in enacting the PPA was not animus, but rather a clearly stated desire to "strengthen North Carolina trespass law to better protect property owner's rights." (Ex. 5 at 3-4; *see also* Ex. 4 at 3, 31; Ex. Ex. 6 at 5) Plaintiffs have not presented any material evidence to the contrary.

V. THE PPA PROVIDES CLEAR AND SUFFICIENT NOTICE OF THE CONDUCT IT PROHIBITS.

The Defendants join and adopt in full the Intervenor-Defendants' argument regarding vagueness and the Due Process Clause and incorporate that argument by reference herein.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion for summary judgment and dismiss Plaintiffs' Amended Complaint in its entirety with prejudice.

Respectfully submitted this the 3rd day of September, 2019.

JOSHUA H. STEIN
Attorney General

/s/Matthew Tulchin
Special Deputy Attorney General
NC State Bar No. 43921
mtulchin@ncdoj.gov

/s/ Kimberly D. Potter
Special Deputy Attorney General
NC State Bar No. 24314
kpotter@ncdoj.gov

NC Department of Justice
PO Box 629
Raleigh, NC 27602-0629
Tel: 919.716.6900
Fax: 919.716.6763

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE WITH RULE 7.3(d)

Undersigned counsel certifies that the **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** is in compliance with Local Rule 7.3(d) of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina including the body of the brief, heading and footnotes, contains no more than 6,250 words as indicated by Word, the program used to prepare the brief.

Electronically submitted this the 3rd day of September, 2019.

Electronically Submitted
Matthew Tulchin
Special Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all registered CM/ECF users.

This the 3rd day of September, 2019.

/s/Matthew Tulchin
Special Deputy Attorney General