Case No. 20-1776 (L)

In the United States Court of Appeals
for the Fourth Circuit

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-Appellees, Cross-Appellants

v.

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,
Intervenor-Defendant-Appellant, Cross-Appellee

and

JOSH STEIN, in his official capacity as Attorney General of North Carolina, and DR. KEVIN GUSKIEWICZ, in his official capacity as Chancellor of the University of North Carolina-Chapel Hill,
Defendants-Appellants, Cross-Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina

REPLY BRIEF OF APPELLEES

David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiffs-Appellees, Cross-Appellants
(additional counsel listed on inside cover)

Daniel K. Bryson
N.C. Bar Number: 15781
Jeremy Williams
N.C. Bar Number: 48162
Whitfield Bryson
900 W. Morgan Street
Raleigh, NC 27603
(919) 600-5000
dan@whitfieldbryson.com
jeremy@whitfieldbryson.com
Counsel for Plaintiffs-Appellees, Cross-Appellants

Gabriel Walters
PETA Foundation
1536 16th St. NW
Washington, DC 20036
(202) 483-7382
gabew@petaf.org
Counsel for People for the Ethical Treatment of Animals, Inc.

Matthew Strugar
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
(323) 696-2299
matthew@matthewstrugar.com
Counsel for People for the Ethical Treatment of Animals, Inc.

Cristina Stella
Kelsey Eberly
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931
(707) 795-7533
cstella@aldf.org
keberly@aldf.org
Counsel for Animal Legal Defense Fund

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

STATUTES

Defendants' Response confirms the challenged provisions of North Carolina General Statute § 99A-2 are facially unconstitutional. In an effort to evade First Amendment review, Defendants continue to recast the issues, claiming Plaintiffs assert a privilege to speak "wherever they choose." Defs.' Response 1. In reality, Plaintiffs merely seek to be free from special restrictions North Carolina has created for their speech. Defs.' Response 19 (agreeing § 99A-2(b)(1)-(2) punish gathering information and "publishing" it); *id.* 7-8, 14-15 (agreeing recordings, penalized by § 99A-2(b)(2)-(3), have been held to be protected speech); *id.* at 46 (characterizing § 99A-2(b)(5) as a "catch all" meant to capture similar activities). As this Court's case law, which Defendants fail to address, explains, one of the "premise[s]" of "[t]he First Amendment is [it is] meant to serve as a bulwark" against "government-defined and government-enforced restriction[s] on [] speech." *Overbey v. Mayor of Balt.*, 930 F.3d 215, 224 (4th Cir. 2019) (first alteration in original).

Accordingly, Defendants double down on the "core private-public property distinction" they claim makes § 99A-2 immune from First Amendment review. Defs.' Response 1-2. Their papers, however, demonstrate no such rule exists.

They do not attempt to satisfy the resulting scrutiny. Instead, Defendants make internally inconsistent arguments to avoid strict scrutiny and dodge their evidentiary burdens under intermediate scrutiny. Thus, they cannot establish any of § 99A-2's speech restrictions are justified.

The parade of horribles Defendants rollout to dissuade the Court from reaching this conclusion rely on the same errors. Sentencing enhancements, antidiscrimination laws, and the like would not be endangered because those statutes, unlike § 99A-2, do not regulate "conduct on the basis of its expressive elements," which is what distinguishes them from laws that require First Amendment review. *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 650 (4th Cir. 1995) (citing *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)). Regulations of non-expressive conduct, like invasion of privacy statutes, have also long protected against the intrusions Defendants feign will follow if § 99A-2 is invalidated. *See* Plfs.' Opening Br. 30-32. And, if the government needs to restrict speech rather than conduct it can do so, it simply must carry its burden to show conduct restrictions are insufficient.

When Defendants briefly turn to defending § 99A-2's breadth, they do not contest that the district court erred in failing to consider all the speech and speakers that can fall within the statute. *See* Plfs.' Opening Br. 16, 61; Law Prof. Amicus Br. 21-23. Moreover, they agree the law's text prohibits a host of protected whistleblowing activities. Defs.' Response 56-60. They ask the Court to save the law by reading in definitions and exceptions.

Their suggestions are not only insufficient, but inappropriate. Courts "will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish [the

legislature's] incentive to draft a narrowly tailored law in the first place." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (cleaned up).

In this manner, Defendants reveal two distinct paths to holding the challenged provisions facially invalid. The Court can determine Plaintiffs' restricted activities are protected by the First Amendment, which requires scrutiny the challenged provisions wholly fail. Alternatively, it can avoid deciding whether Plaintiffs' activities are covered and whether the law can satisfy scrutiny, confirm the challenged provisions reach a substantial volume of protected speech, and hold them overbroad. *United States v. Miselis*, 972 F.3d 518, 530 (4th Cir. 2020).

I. Two types of First Amendment inquiries can result in facial relief.

The Supreme Court has specified that "in the First Amendment context" there are two "type[s] of facial challenge[s]." *Stevens*, 559 U.S. at 473. The first requires courts to "resolve whether the[] applications of" the law complained of "are in fact consistent with the Constitution," and the other "invalidat[es] [a law] as overbroad." *Id*.

While the former is frequently conflated with a "no set of circumstances" test, *see* J.A. 442 (district court decision), the Supreme Court has explained this is a mistake. *City of Chi. v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) (explaining the no-set-of-circumstances language "has never been the decisive factor in any decision of this Court."); *see also* Law Prof. Amicus Br. 8-10 (providing

additional Supreme Court authority). Indeed, the Supreme Court held the "disposition" of First Amendment cases should not be determined by the remedy. *Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

The first type of facial review simply employs First Amendment scrutiny. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124-27 (10th Cir. 2012) (collecting cases). If the "permissibility of [a law] restricting" speech is fully undermined, as is the case if the government cannot show any aspect of the statute's restrictions on speech pass scrutiny, that "implicates the facial validity of the law." *Citizens United*, 558 U.S. at 331; *see also id.* at 336 ("statute which chills speech can and must be invalidated" facially where it cannot meet "First Amendment standards"). As-applied relief is granted if, after engaging in First Amendment scrutiny, a court determines some aspects of the law's speech restrictions survive and thus a "'narrower remedy'" is appropriate. *Id.* at 331 (quoting *United States v. Treasury Emps.*, 513 U.S. 454, 477-78 (1995)).

Accordingly, while referencing the "no set of circumstances" language, this Court has held that if the government "fails to identify a single circumstance" where the challenged provisions "could be lawfully applied," they can be enjoined "in toto." *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 408 (4th Cir. 2019); *see also Billups v. City of Charleston*, 961 F.3d 673, 690 (4th Cir. 2020) ("district court correctly declared the Ordinance unconstitutional" because it failed

intermediate scrutiny); *Cahaly v. Larosa*, 796 F.3d 399, 406 (4th Cir. 2015) (similar). Defendants address none of the above authority. It establishes facial relief should be granted when a law is inconsistent with the Constitution because no aspects of its speech restrictions survive scrutiny and thus those restrictions are not justified.

Defendants complain the challenger, not the government, should bear the burden of showing a law is facially unconstitutional. Defs.' Response 52-53. But challengers do so when courts apply scrutiny. "[T]he plaintiff bears the initial burden of proving that speech was restricted by the governmental action in question." *Reynolds v. Middleton*, 779 F.3d 222, 226 (4th Cir. 2015). Only after that "initial showing" does "the burden then fall[] on the government to prove the constitutionality of the speech restriction" in light of the appropriate level of scrutiny. *Id*. Even then challengers must establish none of the government's proffered justifications sustain any aspect of the speech restrictions to obtain facial relief. *See Citizens United*, 558 U.S. at 331.

This process distinguishes the two types of facial relief. The first inquiry requires challengers to show their desired activities are protected by the First Amendment, which presents a dispute requiring scrutiny. *See Miselis*, 972 F.3d at 530-31 & n.4. Overbreadth, in contrast, can turn "on hypothetical applications of the law to nonparties," establishing the law is facially unconstitutional if there are "a

substantial number of" potential unconstitutional applications, "even if the law is constitutional as applied" to the challenger. *Id*. Overbreadth does not require a court to parse the First Amendment's applicability, but is most readily employed when the government "makes no effort to defend" numerous applications of the law. *Stevens*, 559 U.S. at 473, 481.

As a result, "the usual judicial practice" is for courts to address overbreadth only after they have conducted the first inquiry. *Miselis*, 972 F.3d at 531 & n.4. It is both preferable and distinct to resolve a matter without considering the "hypothetical conduct of others." *Id*.

Nevertheless, Defendants argue that in assessing § 99A-2's facial validity the Court should apply overbreadth and not engage in scrutiny at all. Defs.' Response 53. They cite *Richmond Medical Center for Women v. Herring*—a case that does not arise under the First Amendment—to suggest overbreadth is a "more relaxed" test. 570 F.3d 165, 174 (4th Cir. 2009) (en banc).

However, where courts have described overbreadth as more "relaxed," this is because it does away with "standing requirements," allowing a challenger to raise unconstitutional applications of the law to others. *Peterson v. Nat'l Telecomms. & Info. Admin.*, 478 F.3d 626, 633 (4th Cir. 2007). This does nothing to suggest

overbreadth subsumes the first inquiry. Indeed, as laid out below, while both inquiries result in facial relief here, it is for different reasons.[1]

II. The challenged provisions are facially invalid because they require, and wholly fail First Amendment scrutiny.

To defeat the first type of First Amendment review, Defendants claim: (i) Plaintiffs' restricted activities are not protected by the First Amendment and thus the Court should not apply scrutiny; (ii) intermediate rather than strict scrutiny applies; and (iii) they do not need to carry their evidentiary burdens to satisfy intermediate scrutiny. They are wrong thrice over. Moreover, because they do not attempt to satisfy scrutiny, the challenged provisions are facially invalid.

A. The challenged provisions restrict Plaintiffs' protected speech, so the First Amendment applies.

Defendants persist in arguing § 99A-2, elements of which they concede restrict speech, is outside the First Amendment's reach; they insist it is "settled law" speech on private property "does not fall under the First Amendment." Defs.' Response 1. They still do not explain why this rule has any bearing on §§ 99A-2(b)(1)-(2), (5), which prohibit the public communication of information after it is

[1] Defendants' argument that the Court should abandon one facial inquiry in favor of the other is particularly peculiar because they concede Plaintiffs raise as-applied challenges and those require the Court to determine the First Amendment applies and the law's applications satisfy scrutiny. Defs.' Response 26-50. Thus, the only way the Court could short circuit its work is if it holds for Plaintiffs and concludes the law is facially invalid because it is overbroad.

collected on private property, Plfs.' Opening Br. 6-7; nor why this rule that they describe as protecting "privacy" applies to § 99A-2's restrictions in "nonpublic areas," which are defined to include areas open to third-parties, such as loading docks. *Compare* Defs.' Response 13 *with* N.C. Gen. Stat. § 99A-2(a). Regardless, Defendants' discussion of the case law reveals that when the government restricts speech on private property the First Amendment *applies*. Their "settled law" only establishes statutes whose elements do not encompass speech may be used against would-be speakers without First Amendment concern.

Defendants effectively recognize their notion that the government can freely pass laws restricting speech on private property contradicts Supreme Court precedent. They do not reconcile their contention with *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, which applied First Amendment scrutiny to a prohibition on commercial speech in a "nonpublic forum," the equivalent of private property. 473 U.S. 788, 799, 806 (1985).

Moreover, they admit *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton* struck down a prohibition on the "'dissemination of ideas'" on private property. Defs.' Response 12 (quoting *Watchtower*, 536 U.S. 150, 160 (2002)). Their statement that *Watchtower* only engaged in First Amendment review because the speech was especially important shows there is no "core private-public property distinction." *See* Defs.' Response 12. Their reading is also rejected by

Watchtower, which stated an ordinance limited to "commercial activities and the solicitation of funds" on private property would be subject to the First Amendment, although "arguably" satisfy scrutiny. 536 U.S. at 165.

Defendants point to recent developments in Fourth Amendment law to suggest the property at issue in *Watchtower* was not actually private, Defs.' Response 12-13 (citing *Florida v. Jardines*, 569 U.S. 1, 8 (2013)), but again that is not consistent with the opinion. *Watchtower* stated the law at issue "protect[ed] [] residents' privacy" by stopping people "from going on private property." 536 U.S. at 165. Nonetheless, the First Amendment applied. *Id.*

Defendants' discussion of circuit authority is similar. They agree *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 949-54 (7th Cir. 2015), subjected a prohibition on disclosing private personal information to First Amendment review. Defs.' Response 20. Defendants' notion that § 99A-2 is distinguishable because subsections (b)(1) and (2) prohibit disclosure of private information that also breaches the "duty of loyalty," *id.*, confirms their public-private distinction has no traction.

Defendants' claim that the Tenth Circuit in *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017), Defs.' Response 14, drew a public-private property distinction was rejected by the district court in that case on remand. It explained the Tenth Circuit established that "conduct may occur on private land does

not prevent this Court from conducting its analysis" under the First Amendment. *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1188-89 & n.7 (D. Wyo. 2018). Moreover, the Tenth Circuit has cited *Western Watersheds Project* for the proposition that if the state "targets the creation of speech that the Supreme Court has long categorized as protected by the First Amendment," those laws are "'not shielded from constitutional scrutiny merely because they touch upon access to private property.'" *Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 983-84 (10th Cir. 2020) (quoting *W. Watersheds Project*, 869 F.3d at 1192). This makes sense. One could only violate the statute at issue in *Western Watersheds Project* if one first trespassed, so to subject that law to the First Amendment the court had to determine the interest in protecting private property did not trump the First Amendment. *W. Watersheds Project*, 869 F.3d at 1193-94.

Lastly, Defendants are simply wrong in claiming *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553 (6th Cir. 2007), did not address speech on private property. *See* Defs.' Response 15-16. The Sixth Circuit explained it was subjecting a rule that "closed to the public" a previously open park—which the government argued allowed it to prohibit recording while the park was closed—to First Amendment scrutiny. *S.H.A.R.K.*, 499 F.3d at 561-62.

Defendants' primary authority, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), concerns whether would-be speakers have a right "to enter" onto private property or

can be punished for trespass (non-expressive conduct), not whether the State may restrict speech on private property. Defs.' Response 5, 10; *see also Lloyd*, 407 U.S. at 565 (question was whether private property owner was compelled to extend an "invitation to the public to use" the property); *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 655 (D.C. Cir. 1994) (*Lloyd* only establishes there is "no general First Amendment right to trespass on private property") *ALDF v. Herbert*, 263 F. Supp. 3d 1193, 1208 (D. Utah 2017) (similar); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1026 (S.D. Ohio 1997) (similar); *State v. Marley*, 509 P.2d 1095, 1104 (Haw. 1973) (similar).

Defendants' additional case law confirms holding the First Amendment creates "no special privilege" to trespass or violate other constitutional restrictions does not establish the State can "punish" speech, which is the issue here. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991); *see also Bartnicki v. Vopper*, 200 F.3d 109, 118-19 (3d Cir. 1999) (same, but unaddressed by Defendants). In this Court's words, Defendants' cases do not speak to when speech itself could "ever be punished." *Ostergren v. Cuccinelli*, 615 F.3d 263, 274-75 (4th Cir. 2010) (discussing inter alia *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)); *see also* Plfs.' Opening Br. 28-33 (explaining Defendants' other case law is the same).

Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999), relied on the principle that the First Amendment does not create special privileges

to uphold a law it understood to regulate non-expressive conduct against a claim the First Amendment exempted reporters from that tort; it does nothing to authorize North Carolina to enact § 99A-2 and regulate speech. Indeed, *Food Lion* explained it was upholding the tort because it understood the tort was not restricting "some form of expression," and the First Amendment does not exempt the press from laws that solely restrict non-expressive conduct. 194 F.3d at 522.

Defendants cherry-pick two statements from *Food Lion* that explain recordings were used to prove the reporters in that case breached their "duty of loyalty" to claim *Food Lion* approved restrictions on speech. Defs.' Response 25-26. The clause and sentence that directly follow Defendants' selective quotations explain the reporters were not being held liable for making the recordings (speech), but because they engaged in a "wrongful act in excess of … authority," namely working for an "interest … diametrically opposed to Food Lion's." *Food Lion*, 194 F.3d at 516, 518. The activity regulated in *Food Lion* was working against an employer's interest by serving a second master. The videos merely proved this non-expressive conduct occurred. *Id*. The "evidentiary use of speech" to prove a fact does not make a law a restriction on speech. *E.g.*, Defs.' Response 31; *see also ALDF v. Reynolds*, 297 F. Supp. 3d 901, 918 (S.D. Iowa 2018) (torts at issue in *Food Lion* "did not actually prohibit any speech or expressive conduct"), *appeal docketed* No. 19-1364 (8th Cir. Feb. 22, 2019); *Democracy Partners v. Project Veritas Action*

Fund, 285 F. Supp. 3d 109, 119 (D.D.C. 2018) (*Food Lion* upholds tort of "exceed[ing] consent"); J.A. 442 (district court opinion holding similar).

Defendants' effort to single out the recordings regulated by § 99A-2(b)(2)-(3) as uniquely unworthy of First Amendment protection is more of the same. They cite *Dietemann v. Time, Inc.*, a case about whether a recording established an invasion of privacy, a non-expressive act. 449 F.2d 245, 249 (9th Cir. 1971). Indeed, the Ninth Circuit has since emphasized that an invasion of privacy can only be established through proving the act of "intrud[ing] into … private affairs," non-expressive conduct. *Med. Lab'y Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 818 & n.6 (9th Cir. 2002). Notably, it elaborated this cannot be shown "in a workplace" open to "potential business partners"—like what is regulated by § 99A-2's restrictions in "nonpublic areas"—as there is "no reasonable expectation of [] privacy" there. *Id.*

It is for these reasons the Ninth Circuit in *ALDF v. Wasden* was able to "easily" strike down a law that prohibited nonconsensual recording on private business property as unconstitutional. 878 F.3d 1184, 1203-04 (9th Cir. 2018). Defendants' suggestion that *Wasden* did not recognize it was applying the First Amendment on private property or explain why it was appropriate to do so, Defs.' Response 7-8, borders on frivolous. *Wasden* acknowledged the argument that the provision at issue "protect[ed] both property and privacy," but held that insufficient

to outweigh the challengers' speech rights. *Wasden*, 878 F.3d at 1204. It also explained that recording is like "the process of writing," what justifies its protection has nothing to do with where it occurs, but that it is "inherently expressive." *Id.* at 1203.

Defendants do not address *ALDF v. Kelly*, which similarly held "the prohibition on taking pictures at an animal facility regulates speech for First Amendment purposes." 434 F. Supp. 3d 974, 999 (D. Kan. 2020), *appeal docketed* No. 20-3082 (10th Cir. May 1, 2020).

Their efforts to distinguish *Herbert*, 263 F. Supp. 3d at 1207-09—which held "restrictions on recordings" that "occur[] on a private agricultural facility" are covered by the First Amendment—has already been rejected by this Court. Defendants state the law in *Herbert* created a criminal fine, whereas the law here establishes civil penalties. Defs.' Response 14-15. But, in the prior appeal *in this case*, this Court explained the State abandoned the argument that the First Amendment distinguishes between criminal and civil statutes and, regardless, the Court had "no trouble concluding" § 99A-2's substantial sanctions would chill speech in a manner equivalent to a criminal statute. *PETA v. Stein*, 737 F. App'x 122, 131 n.4 (4th Cir. 2018) (unpublished) (citing *Mobil Oil Corp. v. Att'y Gen. of Va.*, 940 F.2d 73, 75 (4th Cir. 1991)).

Finally, the above case law demonstrates Defendants' fearmongering, that treating recordings as speech will lead to videotaping in locker rooms, is just that. Defs.' Response 17. Numerous laws whose elements solely encompass conduct not speech, like invasion of privacy statutes, already address such concerns; and if the government needed additional laws to protect sensitive locations it could tailor them to address those matters. *Wasden*, 878 F.3d at 1205; *see also* Defs.' Response 17 (citing *Miller v. Brooks*, 472 S.E.2d 350, 354-55 (N.C. Ct. App. 1996), which recognizes tort in North Carolina for "offensive" "invasions," but also explains a tort for "public disclosure of private facts" would "implicate First Amendment concerns").

In sum, "speech is speech, and it must be analyzed as such for purposes of the First Amendment." *Stuart v. Camnitz*, 774 F.3d 238, 247 (4th Cir. 2014) (explaining government's ability to "restrict entry" to a profession through licensure does not equate to the ability to regulate speech). While a property owner could choose to deny entry to a union organizer or political activist, that is not the same as the State creating special punishments for people who organize or advocate on private property without permission. Controlling authority rejects Defendants' claim that

the latter is free from First Amendment review. Thus, § 99A-2's restrictions on Plaintiffs' speech require First Amendment scrutiny.[2]

B. The challenged provisions require and fail strict scrutiny.

A law's text or "purpose" can establish it is content based and requires strict scrutiny. *Lucero v. Early*, 873 F.3d 466, 471 (4th Cir. 2017). While Defendants critique Plaintiffs for "ask[ing] the Court to look behind th[e] fac[e]" of the law to hold it content-based, Defs.' Response 42, this Court has recognized that under recent Supreme Court precedent "even if the law is facially content neutral," if its "justific[ations]" are content based it must be treated as such. *Lucero*, 873 F.3d at 470-71. Further, Plaintiffs' reading is consistent with § 99A-2's text. Defendants paradoxically respond by offering an interpretation of § 99A-2 derived from less authoritative legislative history, which is inconsistent with its text, and even if true establishes the provisions are content based.

The law's sponsors described it as content based. They stated it was designed to spare companies "embarrassment" by keeping information from the "media," and "private special interest organizations" like Plaintiffs that provide the information to the public to pressure businesses to abandon illegal or unethical practices. J.A. 202-

[2] In light of the above, Defendants make clear their focus on whether § 99A-2 is a "generally applicable law" is a distraction, as that label is only applicable if the law targets activities not "protected under the First Amendment." Defs.' Response 22-23; *see also* Plfs.' Opening Br. 34-38.

04, 251-52, 286, 330-32. Accordingly, the State's binding discovery responses explain the law is meant to stop "undercover investigat[ions]" like Plaintiffs', J.A. 111-12. Restricting speech because of its anti-corporate purpose is a content-based restriction. *Kelly*, 434 F. Supp. 3d at 1000; *see also Cahaly*, 796 F.3d at 405 (restrictions on "consumer or political" speech are content-based restrictions).[3]

These objectives are carried out by § 99A-2(e), which narrows the law so it only punishes communications made outside a list of approved, official channels, training the law against public communications. *See* Plfs.' Opening Br. 7-8 (detailing subsection (e)'s coverage). Defendants claim this is a whistleblower protection, Defs.' Response 8, but the law's lead sponsor stated § 99A-2(e) narrows to whom information can be reported to keep it from "the media," so it would not discredit businesses, J.A. 332.

In addition, to the extent the challenged provisions regulate conduct in "nonpublic areas," those are defined as areas the employer did "not intend" to be open to "the general public." N.C. Gen. Stat. § 99A-2(a). This subjective standard

[3] Defendants' assertion that Plaintiffs did not previously argue each of the challenged provisions is content based is patently false. *Compare* Defs.' Response 28 *with* Plfs.' Opening Br. 10-11, 45-47 (explaining that "each of the challenged" provisions is content based because of the statute's structure and legislative history). To the extent they seek to separate Plaintiffs' content-based and viewpoint arguments this is misleading; viewpoint discrimination is an "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

creates "censorial power" that allows employers to turn § 99A-2 against any speech that would harm their interests, confirming the law's content-based aim. *Child Evangelism Fellowship of MD, Inc., v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 386 (4th Cir. 2006). Defendants' note that a finder of fact will ultimately determine whether the employer proved the elements of § 99A-2, does not differentiate § 99A-2 from the criminal statutes Defendants agree are governed by *Child Evangelism Fellowship*'s prohibition on subjective speech restrictions. Defs.' Response 39. Their further suggestion that Plaintiffs cannot raise this issue because they pressed their First Amendment and not void-for-vagueness claims on appeal, *id.* 40, forgets that this is a First Amendment issue, *Child Evangelism Fellowship*, 457 F.3d at 380, 386; *see also* J.A. 468 (district court explaining vagueness is a due process claim).

Defendants counter by claiming in one breath Plaintiffs' use of legislative history is improper, Defs.' Response 40-43, while in another arguing the law is content neutral because "legislative history show[s]" § 99A-2(b)(1)-(2) are content neutral. Defs.' Response 29. They do not address the other provisions.

Specifically, in Defendants' view, the legislative history shows subsections (b)(1) and (2) refer to a "duty of loyalty" to import a particular concept from *Food Lion*: that employees should not have "an intent to act adversely to [a] second employer for the benefit of the first." *Id.* Thus, according to Defendants, subsections (b)(1) and (2) turn on the violator's intent, not the content of their speech. *Id.*

This argument fails for three reasons. First, while Plaintiffs rely exclusively on the statements of the law's sponsors, Defendants' history depends on a random amalgamation of views. Plfs.' Opening Br. 11-12 & n.2 (reviewing Defendants' legislative history). The Supreme Court has explained the sponsors' statements are the "'authoritative guide to the statute's construction.'" *Rice v. Rehner*, 463 U.S. 713, 728 (1983) (quoting *Bowsher v. Merck & Co.*, 460 U.S. 824, 832 (1983)) (unaddressed by Defendants); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (same).

Second, Defendants' reading is in tension with the law's text. The text does not define "duty of loyalty" to have any special meaning, but does contain intent requirements, none of them linked to the "duty of loyalty" elements. Accordingly, Defendants informed the district court the phrase should be given its natural meaning, that it prohibits disloyal speech, J.A. 406 (hearing transcript), which renders the law content based.

Third, even if Defendants are correct, *Food Lion* also described the "duty of loyalty" as prohibiting an employee from acting "diametrically opposed" to his employer. 194 F.3d at 516. Thus, if *Food Lion* is read into § 99A-2(b)(1)-(2), the provisions still penalize a person gathering and communicating a specific type of information: that which is against the employer. For this same reason, Defendants' claim that because laws that prohibit speech that happens to "cause harm" are

regularly held to be content-neutral so should § 99A-2(b)(1)-(2), does not follow. Defs.' Response 33. Reading *Food Lion* into § 99A-2(b)(1)-(2) means the "duty of loyalty" element does not merely require damages, but damages caused by speech that counteracts the employer's messaging.

Defendants' overwrought claim that if the Court applies strict scrutiny here it would need to do so for everything from treason to antitrust laws depends on their unfounded and incomplete reading of the statute. Defs.' Response 36-37. It asks the Court to assume the *only* thing § 99A-2(b)(1)-(2) regulate is the "duty of loyalty" as Defendants define it. *See id.* 31. If that were the case, then, like with those other laws, speech would only be used to prove the existence of some non-expressive conduct: intentionally acting against an employer. However, § 99A-2(b)(1)-(2)'s additional elements directly regulate speech. As Defendants' authority explains, when a law is "directed at expression," rather than speech being used to prove other facts, the First Amendment applies. *Mitchell*, 508 U.S. at 487, 489. The "distinction between targeting the expressive elements of conduct and targeting the proscribable elements of conduct" is a central difference between constitutional and unlawful statutes. *Am. Life League, Inc.*, 47 F.3d at 650 (citing, inter alia, *Mitchell*, 508 U.S. 476); *see also* Plfs.' Opening Br. 40-41, 50 n.6.[4]

[4] Defendants' only example involving speech restrictions, *San Francisco. Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), subjected

Given the authoritative legislative history and the statute's actual text, the challenged provisions are content-based and subject to strict scrutiny. Defendants make no effort to satisfy that standard. As a result, the challenged provisions are particularly worthy of being held facially invalid. Content-based laws are the most extreme First Amendment violations. The "government must abstain" from them and they are "presumptive[ly]" invalid. *Rosenberger*, 515 U.S. at 829.

C. The challenged provisions also fail intermediate scrutiny.

Even were the Court to conclude the law is content-neutral, Defendants cannot justify any aspect under the requisite intermediate scrutiny.

While Defendants continue to pretend it is an open question whether the State had to "present evidence" to show it "actually tried or considered less-speech-restrictive alternatives" before passing this law, *Billups*, 961 F.3d at 688, they cannot maintain that charade, J.A. 410 (Defendants admitting below such evidence is required). Abandoning their prior argument that evidence is only required for "new law[s]," Defs.' Opening Br. 57-58—as § 99A-2 is such a law, *see* Plfs.' Opening Br. 53—they now claim evidence is only required for "unprecedented speech restriction[s]," Defs.' Response 48. Yet they do not identify a single case articulating

---

a trademark statute to First Amendment review, merely limiting its analysis to intermediate scrutiny because the statute solely concerned commercial speech. *Id.* at 535-37.

this (or their earlier) rule. Moreover, they agree *Ross v. Early* required the government to produce "evidence in order to satisfy" intermediate scrutiny, 746 F.3d 546, 556 (4th Cir. 2014), and that case concerned "a mine-run pedestrian-traffic policy," Defs.' Response 48 n.2. They focus on Plaintiffs' misstatement that *Ross* struck down the law, *id.*, but the salient point is the government was required to meet its evidentiary burden, *Ross*, 746 F.3d at 556 (government had submitted "undisputed evidence" showing prior restrictions were insufficient). Thus, even under their reading of the case law, the State was required to produce evidence showing that it tried alternatives before restricting speech with § 99A-2. *See also* Plfs.' Opening Br. 51-53 (citing additional controlling authority explaining evidence is required). Defendants have pointed to none, meaning no aspect of the law can survive intermediate scrutiny.

Were that not enough, Defendants also confirm they cannot defend the law based on its plain text. A law fails intermediate scrutiny if its text is either over-inclusive (because it covers more speech than necessary to achieve the legislature's objective), or under-inclusive (because it does not regulate all conduct that it purports to protect against). Plfs.' Opening Br. 54. Rather than explain how § 99A-2 meets these requirements, Defendants circularly state it is tailored because the law identifies the activities of concern. Defs.' Response 49. If that were correct, every law would be tailored. Every law's text describes what it seeks to regulate.

Defendants' claim is also inconsistent with the State's binding representations in discovery that the law's purpose is to "protect businesses" from activities "specifically … corporate espionage and organized retail theft." J.A. 111. Defendants similarly stated in their Opening Brief that the law is meant to broadly "protect[] property rights." Defs.' Opening Br. 6. Taking these statements as true, the law is not tailored. Plfs.' Opening Br. 55-56.[5]

In addition, Defendants confirm that the challenged provisions do not serve a substantial governmental purpose. *See* Defs.' Response 44 (admitting this is also required). Where the government cannot justify its policy, courts can conclude the law's purpose was to suppress speech and thus is illegitimate. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-30 (1993). Although, as Defendants state, "common sense" *may* show a law furthers a proper purpose, the Court may also "require[] the government to present evidence" depending on the circumstances. *Reynolds*, 779 F.3d at 227. Defendants do not offer a consistent "common sense" rationale for the law nor any evidence. Their suggestion that the Court assume the law has some connection to protecting "property rights," Defs.' Response 44, is

[5] Defendants' suggestion that because people have invoked the statute its text must be properly crafted is incorrect. Defs.' Response 49-50. This analysis is concerned with whether the government can show the law sufficiently serves *the government's* purpose, not whether the law is employed in any way. *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016).

especially nonsensical because the law is not limited to protecting items or areas kept private, but prohibits publicly disclosing any information observed in "nonpublic areas."[6]

Thus, the Court has several independent bases to conclude the challenged provisions fail intermediate security. While content-neutral statutes are less noxious than content-based laws, intermediate scrutiny and its evidentiary requirements, stem from the fact that the government "may not regulate expression" even in a content-neutral manner if it cannot satisfy these standards. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Therefore, as Defendants have failed to show any aspect of the law's speech restrictions pass intermediate scrutiny, they should be held facially invalid and the State should be required to "enact legislation" consistent with the Constitution. *Id*. at 491.

III. The challenged provisions are also overbroad.

Separately, the challenged provisions are facially invalid because they restrict a substantial amount of protected speech beyond that of Plaintiffs. *Miselis*, 972 F.3d at 531. Defendants do not deny the law's plain text penalizes numerous whistleblowing activities that are protected by the First Amendment, but argue

[6] For this reason, even if the Court were to apply the "no-set-of-circumstances test" each of the challenged provisions would also be facially invalid because that "test" also requires the law serve a legitimate purpose. Plfs.' Opening Br. 60.

§ 99A-2 should be treated as narrower. Their approach makes clear why courts will not proceed in this manner. *See id.* at 537; *see also Stevens*, 559 U.S. at 480-81 (Court will not read in single modifier to one element).

In particular, Defendants do not contest § 99A-2's prohibitions on private employees gathering information about workplace activities of concern and reporting them to third-parties—such as federal agencies or the legislature—would be a substantial infringement on First Amendment freedoms and are *not* exempted from the law's reach by § 99A-2(e).[7] Instead, they once again argue the Court should define "subsections (b)(1) and (b)(2)" in light of *Food Lion*, now so the provisions only restrict people if they are "working simultaneously for two employers." Defs.' Response 59.

Yet, this does nothing to protect workers from the law's reach who are serving two conflicting masters by acting on behalf of their union to document workplace matters. *See* United Farm Workers ("UFW") Amicus Br. 14. As a result, Defendants

[7] Defendants note that subsection (e)'s exemptions provide broader protections for State employees who "[P]laintiffs seek to become." Defs.' Response 38. But, overbreadth considers "applications of the law to nonparties," such as the private employees the law also restricts, but for whom it provides no similar exceptions. *Miselis*, 972 F.3d at 530. Nonetheless, that Defendants do not dispute that an employee taking notes on or recording sexist or racist remarks made in the "nonpublic areas" of a workplace so as to document that matter for the legislature is protected speech, *see* Defs.' Response 59, further undermines their public-private-property distinction.

ask the Court to add that the "duty of loyalty" is not breached when a person discloses criminal activity, an addition they do not suggest can be found anywhere in North Carolina law. Defs.' Response 58.

Were the Court to make this amendment, it still does nothing to protect the union worker who is documenting non-criminal regulatory violations or sexual harassment. UFW Amicus Br. 18-25. It also fails to address long-protected undercover investigations—from Upton Sinclair to Mercy for Animals—where reporters and activists gain employment to document conditions they believe should change, but are presently lawful. Law Prof. Amicus Br. 26-27; *see also* Reporters Amicus Br. 8.

Further still, even with all of Defendants' re-drafting, they agree that if any of the above activities involve a person placing a camera to gather information they would still fall within § 99A-2(b)(3). Defs.' Response 60.

To claim the activities do not also violate § 99A-2(b)(5)—whether they involve a recording or not—Defendants ask the Court to read text *out* of that provision. They claim § 99A-2(b)(5) should be understood to apply only if a person harms "real property." Defs.' Response 60. However, subsection (b)(5) penalizes "substantially interfer[ing] with the ownership or possession of real property." Interfering with "ownership" captures reputational harm created by releasing information to the public. *See Kelly*, 434 F. Supp. 3d at 990.

Defendants further suggest that in addition to modifying the law's elements the Court could read more whistleblower protections into the law to limit (although not eliminate) its chill, claiming the legislature does not have to "cross-reference every" such rule. Defs.' Response 56. Incorrect. "[U]nder the maxim *expressio unius est exclusio alterius*, [the Court] must presume that" where, as here with subsection (e), the legislature lists "a number of limited [] exemptions … that th[o]se were the only [] cases [it] intended to exempt." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978).

This Court has explained that where a statute prohibits a "whole realm of advocacy" that is protected by the Constitution the law "encroach[es] substantially upon free speech" and is overbroad, regardless of its purported legitimate uses. *Miselis*, 972 F.3d at 541. Defendants do not argue otherwise, but try to salvage the law through improperly rewriting it. Even then, it still prevents multiple realms of advocacy. Thus, it is overbroad.

Defendants' notion that the Court should still sustain the law because its overreach will be eventually held preempted is likewise wrong. *See* Defs.' Response 57. Overbreadth exists to ensure the government cannot "chill[] protected expression" by passing laws encompassing a substantial amount of speech and requiring people to risk sanction to secure the Constitution's protections. *Id*. at 530.

Moreover, § 99A-2 could only be preempted to the extent there are relevant federal laws.

The challenged provisions are overbroad and facially invalid.

IV. Conclusion.

For the foregoing reasons, the Court should affirm the district court's conclusion that the challenged provisions restrict Plaintiffs' First Amendment protected speech, but hold each of them facially invalid, which it can do either because Defendants have failed to show any instance in which the speech restrictions would survive scrutiny, or because the challenged provisions are overbroad.

April 30, 2021

Respectfully submitted,

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiffs

Daniel K. Bryson
N.C. Bar Number: 15781
Jeremy Williams
N.C. Bar Number: 48162
Whitfield Bryson
900 W. Morgan Street
Raleigh, NC 27603
(919) 600-5000
dan@whitfieldbryson.com
jeremy@whitfieldbryson.com
Counsel for Plaintiffs

Gabriel Walters
PETA Foundation
1536 16th St. NW
Washington, DC 20036
(202) 483-7382
gabew@petaf.org
Counsel for People for the Ethical Treatment of Animals, Inc.

Matthew Strugar
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
(323) 696-2299
matthew@matthewstrugar.com
Counsel for People for the Ethical Treatment of Animals, Inc.

Cristina Stella
Kelsey Eberly
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931
(707) 795-7533
cstella@aldf.org
keberly@aldf.org
Counsel for Animal Legal Defense Fund

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief or other document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments): this brief or other document contains 6,471 words.

This brief or other document complies with the typeface and type style requirements because: this brief or other document has been prepared in a proportionally spaced typeface using Microsoft Word with Times New Roman 14-point font.

Date: April 30, 2021

/s/ David S. Muraskin

David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the April 30, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

DATED this April 30, 2021.

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiffs