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.

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

and

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Intervenor-Defendant-Appellant, Cross-Appellee.

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

RESPONSE/REPLY BRIEF OF DEFENDANTS-APPELLANTS

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INTRODUCTION

Plaintiffs' case hinges on rewriting the North Carolina Property Protection Act and remaking First Amendment law. Plaintiffs may disagree with the Act as a matter of policy. But under the Act's plain terms—and under the First Amendment as courts have long understood it—plaintiffs' arguments fall short. In passing the Act, the North Carolina General Assembly provided landowners with an enhanced damages remedy for certain tortious conduct that takes place on nonpublic property. This legislation is well within constitutional bounds.

Start with the threshold question of whether the First Amendment applies. Plaintiffs seek a right to engage in what they call "expressive activity" wherever they choose. But it has been settled law for almost a half-century that conduct on nonpublic property, even when that conduct generates "speech" in the colloquial sense of the term, does not fall under the First Amendment. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). The hodgepodge of cases that plaintiffs cite in seeking to circumvent this rule only reinforces the core private-public

property distinction that explains why the First Amendment does not govern here.

Plaintiffs also claim a related right to gather information however they choose, including through tortious conduct. But it is well-established that the First Amendment does not provide a right to violate generally applicable laws. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). This rule is why, for example, a computer hacker does not have a First Amendment right to download trade secrets, or a trespasser a right to install a camera that records homeowners.

The Act does not implicate the First Amendment because it is generally applicable: it applies to all individuals who engage in tortious conduct on all types of nonpublic property. This Court's decision in *Food Lion Inc. v. Capital Cities/ABC Inc.*—a decision that the Act codifies into law—confirms the point. 194 F.3d 505 (4th Cir. 1999). In fact, *Food Lion* held that the First Amendment does not protect the very same conduct that plaintiffs seek to undertake here. *Id.* at 521.

If the First Amendment applies, plaintiffs' arguments fare no better. Plaintiffs make a bid for strict scrutiny with the startling claim that the Act is content based because it has an intent-to-harm

requirement and that speech may be evidence of this underlying intent. That is like saying that antidiscrimination laws are content based because speech may show a discriminatory motive, or that the antitrust laws are content based because speech may show an anticompetitive motive. The Supreme Court, however, has made clear that the First Amendment permits this evidentiary use of speech to prove motive or intent. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

That is exactly what the Act does. Under subsections (b)(1) and (b)(2), the Act regulates conduct by employees who act with an intent to harm their employer. N.C. Gen. Stat. § 99A-2(b)(1), (b)(2). Thus, these provisions are content neutral. In addition, plaintiffs have notably failed to argue or explain how the text of the Act's other two challenged provisions—one that prohibits installing a hidden camera; the other, substantially interfering with real property, *id.* § 99A-2(b)(3), (b)(5)—could be content based.

Plaintiffs also claim that the Act is not narrowly tailored to advance the government's significant interest in protecting property rights. They see no need for the law. Yet the Act has been put to use in the real world across different contexts, none of which pose

constitutional problems. Since the Act's passage, individuals and entities have sued under both the Act and other common-law and statutory causes of action for injuries ranging from the misappropriation of trade secrets to fraud.

An analogy helps explains why. The Act resembles a sentencing enhancement. It takes conduct that already violates tort law—just like a sentencing enhancement takes conduct that already violates criminal law—and pinpoints that conduct for an enhanced sanction. North Carolina property owners have therefore invoked the Act to ensure that they can recover a meaningful damages remedy for uniquely harmful invasions of their pre-existing property rights. Thus, the Act is narrowly tailored.

Finally, plaintiffs' arguments for facial relief are fundamentally flawed. Plaintiffs' far-fetched hypotheticals about how the Act could allegedly be applied in an unconstitutional fashion ignore the Act's text and rules about how courts read statutes. Facial relief is a strongly disfavored remedy that requires plaintiffs to carry a heavy burden to show that a law should be enjoined in all its applications. Plaintiffs have fallen far short of meeting that heavy burden here.

For all these reasons, defendants respectfully request that this Court reverse the judgment of the district court.

ARGUMENT

I. The Act Does Not Implicate The First Amendment.

In their opening brief, defendants explained that plaintiffs' First Amendment challenges to the Act must fail because the statute does not regulate any protected speech. Plaintiffs' contrary arguments are unpersuasive.

First, cases such as *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972), establish that the First Amendment does not provide a license to enter into the nonpublic areas of property and engage in speech or speech-related conduct. Opening Br. 22-24.

Second, cases such as *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991), establish that the First Amendment does not provide a defense for engaging in torts such as trespass, invasion of privacy, or theft, all of which are the focus of the Act. Opening Br. 27-32.

Third, still other cases such as *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), hold that the scope of First Amendment protection for eventual publication of information by someone other

than the information-gatherer can depend on whether published information is lawfully obtained. This line of cases reinforces the principle that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Opening Br. 26.

Fourth, this Court's decision in *Food Lion*, 194 F.3d at 521, holds that the very conduct plaintiffs want to engage in—working undercover for one employer at the direction of a second employer and secretly videotaping the first employer to serve the interests of the second employer—is not protected by the First Amendment. Opening Br. 27-28, 30.

A. Even if the Act restricts "expressive activity," that is not a regulation of "protected speech" required for the First Amendment to apply.

Plaintiffs argue that the Act "restrict[s] expressive activities." PETA Br. 16, 20-24. They claim that the law prohibits "use" of information that they illicitly gathered, including communicating that information to others, in violation of their duty of loyalty. PETA Br. 20, 22. They also claim that the Act prevents "[t]he development of speech" by proscribing the "gathering [of] information," such as by video

recording. PETA Br. 21-22. They argue that the act of recording is protected speech regardless of whether the recordings are made on public or private property because it is an expressive activity. PETA Br. 22-23. Plaintiffs, however, labor under the mistaken belief that "expressive activities" are automatically accorded First Amendment protection.

The First Amendment generally does not confer a right to engage in expressive activities without consent on the private or nonpublic property of others. Expressive activities conducted in those areas are not protected speech. For instance, *Lloyd* held that an individual did not have a First Amendment right to engage in political speech—an unquestionably expressive activity—on private property. 407 U.S. at 568. *Food Lion* similarly held that parties did not have the right to breach their duty of loyalty to their employer by videotaping activities in the nonpublic areas of the employer's business—conduct that plaintiffs here claim is expressive. 194 F.3d at 521.

Plaintiffs cite *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), to argue that a recording is "protected speech," even if the recording is made on private property without the property

owner's consent. PETA Br. 22-23. While *Wasden* did hold that making recordings is protected speech, and it applied that conclusion to recordings made on private property, the court did not address the private-public property distinction drawn in this case. 878 F.3d at 1203-04. Without such a discussion, *Wasden* offers no support to plaintiffs. And to the extent *Wasden* can be read to hold that making a recording on private property falls under the First Amendment, that decision was wrongly decided because it did not apply Supreme Court precedent. *See Lloyd*, 407 U.S. at 568.

Plaintiffs also claim that the First Amendment applies because the Act singles out the press for "differential treatment." PETA Br. 23-24. This argument misunderstands the Act. Contrary to plaintiffs' argument, the Act does not create special or unique penalties when an employee breaches his duty of loyalty by sharing ill-gotten information with the press as opposed to a rival company or a conspirator. The statute does carve out certain whistleblower activities for reporting conduct to government officials, but that does not disfavor the press, and plaintiffs cite no authority to the contrary. *See* N.C Gen. Stat. § 99A-2(e).

Instead, they cite only inapt authority such as *California Motor Transportation Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), which held that efforts to institute judicial proceedings could not be an antitrust violation. The Act does not prevent any individual from initiating a court proceeding, nor from "communicat[ing] with the legislature," as plaintiffs insinuate. *See* PETA Br. 23. Instead, subsections (b)(1) and (b)(2) apply only when an employee breaches his duty of loyalty. The Act does not apply to nonemployees, and plaintiffs do not explain how communicating with the legislature or the courts would be a breach of loyalty. *See also infra* Part III.C.

B. Plaintiffs do not have a First Amendment right to engage in their so-called expressive activity in the nonpublic areas of property.

Plaintiffs cite a variety of cases in seeking to circumvent the rule in *Lloyd* that the First Amendment confers no right to engage in expressive activities without consent on the private or nonpublic property of others. These cases do not support plaintiffs' arguments.

To begin, the rule in *Lloyd* applies with full force here. In *Lloyd*, the Court addressed whether parties, "in the exercise of asserted First Amendment rights, may distribute handbills on . . . private property

contrary to [the owner's] wishes and contrary to a policy enforced against all handbilling." 407 U.S. at 567. The Court explained that it "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." *Id.* at 568. The Court expressly rejected the premise "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Id.*; *see Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736-37 (1970) ("[I]t seems to us that the mailer's right to communicate must stop at the mailbox of an unreceptive addressee. . . . To hold less would tend to license a form of trespass[.]").

Under *Lloyd*, plaintiffs have no First Amendment right to access "the nonpublic areas of another's premises" and engage in expressive conduct there. Thus, the Act does not implicate any First Amendment interests. N.C. Gen. Stat. § 99A-2(a) ("Any 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.").

Plaintiffs attempt to distinguish *Lloyd* on the irrelevant basis that the decision "primarily addressed what constitutes a 'company town' for the purposes of the state action doctrine." PETA Br. 29. They also state that "[t]o the extent it speaks to the present case, [*Lloyd*] discussed the application of a generic trespass rule." PETA Br. 29. That is beside the point. *Lloyd* held that the public has no First Amendment right to go onto private property and engage in speech or speech-related conduct there irrespective of whether the conduct was a trespass or some other tort. Because plaintiffs have no such right, the Act's prohibitions on certain conduct that occurs in the nonpublic areas of others' property can have no First Amendment dimension.

Plaintiffs rely on *Watchtower Bible & Track Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), for their argument that the government cannot evade First Amendment scrutiny by linking a speech restriction to private or nonpublic areas of property. PETA Br. 3, 25. *Watchtower* addressed a village ordinance that required door-to-door canvassers to register with the village's mayor and to obtain a permit before canvassing. 536 U.S. at 153-54. The Court explained that "[f]or over 50 years, [it] has invalidated restrictions on door-to-door

canvassing and pamphleteering." *Id.* at 160. The Court emphasized "the historical importance of door-to-door canvassing and pamphleteering as vehicles of dissemination of ideas" and "the important role that door-to-door canvassing and pamphleteering has played in our constitutional tradition of free and open discussion." *Id.* at 162. In striking down the ordinance, the Court further noted that homeowners were protected from the intrusiveness of the canvassers because they could post "No Solicitation" signs or could "refuse to engage in conversation with unwelcome solicitors." *Id.* at 168.

Watchtower did not hold that the public has a right to enter other people's private or nonpublic property beyond the threshold of the front door, which is all the door-to-door canvassers sought to do. The limited scope of *Watchtower*'s holding is consistent with the Court's other jurisprudence that the public has an implied license "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Florida v. Jardines*, 569 U.S. 1, 8 (2013); *see id.* ("We have accordingly recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers

and peddlers of all kinds.") (internal quotation marks omitted). In other words, the homeowner's privacy and property rights are not invaded by a door-to-door solicitor. Nothing in *Watchtower*, however, suggests that the First Amendment allows members of the public to go beyond the front door and engage in speech or expressive activity within private property. In fact, *Lloyd* held the opposite. 407 U.S. at 568-70.

Plaintiffs also rely on *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017), PETA Br. 25-26, but that decision addressed speech or speech-related activity on *public* property and thus says nothing about the application of the First Amendment to the Act. The Tenth Circuit analyzed a Wyoming law that created a new crime when an individual "[c]rosses private land to access adjacent or proximate land where he collects resource data." *W. Watersheds*, 869 F.3d at 1194. Although plaintiffs speculate that the phrase "adjacent or proximate land" in the statute could mean "public or private land," PETA Br. 25, the court squarely rejected that possibility when it explained that the phrase "adjacent or proximate land" must reach *only* "public land." *W. Watersheds*, 869 F.3d at 1194 ("Provided that such land is adjacent or

proximate to private property, [the challenged provisions] apply to the collection of resource data *on public land*.") (emphasis added).

By contrast, the other subsections of the Wyoming law dealt with collection of data on *private* land. The district court found that the First Amendment did not apply to those provisions, and the plaintiffs did not appeal that decision. *See id.* at 1193-94.

Thus, the plaintiffs in *Western Watersheds* "d[id] not assert a right to engage in activity on private land," and "the question [was] not whether trespassing is protected conduct, but whether the act of collecting resource data on *public lands* qualifies as protected speech." *Id.* (emphasis added); *see id.* at 1195 ("We thus consider whether the collection of resource data on public lands is entitled to First Amendment protection."). In concluding that collecting data on public land is protected speech, the court relied on decisions from other circuits that "held that the First Amendment protects the recording of officials' conduct *in public*." *Id.* at 1196 (emphasis added).

Plaintiffs also misplace reliance on *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017). PETA Br. 25. In *Herbert*, the district court examined a Utah law "criminalizing both

lying to get into an agricultural operation and filming once inside." 263 F. Supp. 3d at 1196. The court applied First Amendment scrutiny only because it was reviewing a *criminal* law. According to that court, the *Lloyd* line of cases "answer[s] the question of whether a landowner can remove someone from her property or sue for trespass even when the person wishes to exercise First Amendment rights. And generally, as the cases make clear, the answer is yes." *Id.* at 1209. But, in the specific context of criminal sanctions, "the fact that speech occurs on a private agricultural facility does not render it outside First Amendment protection." *Id.*

To be sure, the district court's conclusion is difficult to square with the plain holding of *Lloyd* that there is no First Amendment right to engage in speech or speech-related conduct in the nonpublic areas of other people's property. And the court cited no contrary authority in creating its civil-criminal dichotomy. In any event, the Act is not a criminal law, so even the *Herbert* court would apply *Lloyd* to find that the Act is not subject to First Amendment scrutiny.

Finally, *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553 (6th Cir. 2007), does not support plaintiffs' position that a law

that blocks access to property and, in turn, prevents individuals from accessing information, must receive First Amendment scrutiny. *See* PETA Br. 26. In *S.H.A.R.K.*, the plaintiffs placed cameras on *public* park property during open park hours to record activity after the public property closed for the night. 449 F.3d at 557-58. The court's resolution of whether those plaintiffs had a First Amendment right to record images on *public* property is irrelevant here, given that the Act applies only to property that is private.

C. Plaintiffs do not have a First Amendment right to commit torts in order to gather information.

In their opening brief, defendants explained that plaintiffs do not have a right to gather information in ways that violate other generally applicable laws, including torts such as trespass, theft, invasion of privacy, and breach of an employee's duty of loyalty to an employer. Opening Br. 23-28. Defendants also explained how the provisions of the Act codify those tort concepts. Opening Br. 23-28.

Plaintiffs' asserted right to violate a generally applicable law to gather information and engage in expressive activity, *e.g.*, PETA Br. 34, has no limiting principle. Under plaintiffs' theory, the First Amendment could protect breaking into an office, stealing sensitive

legal documents, and sharing those documents with opposing parties. It could similarly protect hacking into a computer, downloading trade secrets, and providing those secrets to rival companies. Plaintiffs' rule could even extend the First Amendment to video recording the backrooms of doctor's offices or the locker rooms of gyms. Obviously, this cannot be the law.

Further, plaintiffs do not address how their theory would apply to privacy laws or laws that prohibit eavesdropping in private and other nonpublic areas. For example, under plaintiffs' theory that all video or audio recording is "expressive activity" that is also "protected speech," the First Amendment would apply any time someone decided to break into a home and record the inhabitants because the intruders have made "decisions about content, composition, lighting, volume, and angles" of their recordings. PETA Br. 23. Although those home intruders may be engaged in "expressive activity," that activity does not qualify as "protected speech." *See, e.g.*, *Miller v. Brooks*, 472 S.E.2d 350, 355 (N.C. App. Ct. 1996).

The same with the Act. Employees who break into the nonpublic areas of businesses or intruders who choose locations and angles for the

video cameras that they hide in nonpublic areas of property are making the type of "expressive" decisions plaintiffs exalt, but the First Amendment has never been read to provide protection to those actions. Indeed, plaintiffs' theory could even bring peeping statutes under constitutional attack. *See* 18 U.S.C. § 1801.

The case law does not support plaintiffs' arguments. For example, in *Dietemann v. Time, Inc.*, the Ninth Circuit held that the First Amendment did not protect newsgatherers from an invasion-of-privacy claim because "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. 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." 449 F.2d 245, 249 (9th Cir. 1971). The court emphasized that "there is no First Amendment interest in protecting news media from calculated misdeeds." *Id.* at 250. For these reasons, the court had "little difficulty in concluding that clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent resulting in his

emotional distress warrants recovery for invasion of privacy in California." *Id.* at 248.

Plaintiffs attempt to distinguish *Dietemann* because the illicit recording was only "used to prove the conduct, but the relevant conduct was merely a trespass." PETA Br. 30. *Dietemann*, however, was not "merely a trespass" case. The conduct alleged there—making a secret recording in a nonpublic area—is the same conduct that plaintiffs wish to engage in.

Plaintiffs also find relevance in the fact that "publication" was not an element of the invasion-of-privacy tort in *Dietemann*. PETA Br. 30. But publication is not an element of the Act, either. To the extent that plaintiffs claim that "using" the stolen or secretly recorded information to breach their duty of loyalty under subsections (b)(1) and (b)(2) is a publication, that argument fails because it is the breach of duty of loyalty, not publication, the Act targets. Further, plaintiffs' argument does not apply to subsection (b)(3), which prohibits only recording, not any "use" of the information. Plaintiffs' theory that *all* recording is "protected speech" because it is "expressive activity" cannot be squared

with *Dietemann*'s holding that the secret recordings in that case were not protected by the First Amendment.

Similarly, plaintiffs cite *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937 (7th Cir. 2015), for the proposition that restricting publication of illicitly obtained material is a "direct regulation of speech." PETA Br. 27. In *Dahlstrom*, the court rejected a claim that the First Amendment protected a newspaper from a charge that it illegally obtained information from driving records because the limitation on access to that information was not "a cognizable First Amendment injury." 777 F.3d at 947. The court also upheld a different statutory provision that prohibited disclosure of the illegally obtained information, though it applied a First Amendment analysis to that provision. *Id.* at 949-54.

Here, the Act does not apply to mere disclosure of information. Subsection (b)(3) applies only to "recording." Subsections (b)(1) and (b)(2) apply only when an employee breaches his duty of loyalty. Plaintiffs cite no authority for the proposition that "use" of stolen information to commit the breach-of-loyalty tort is a "publication" or "disclosure" of the information that is protected by the First

Amendment. Indeed, this Court in *Food Lion* held otherwise. 194 F.3d at 521.

Plaintiffs also cite *Bartnicki v. Vopper*, 532 U.S. 514 (2001), for the proposition that the First Amendment protects publication of information "known to be unlawfully obtained." PETA Br. 33. In *Bartnicki*, constitutional protection was given to defendants who published information where they "played no part in the illegal interception" of the information and "their access to the information was *lawfully* obtained." 532 U.S. at 525 (emphasis added). Here, the Act does not apply to mere "publication" of information. Rather, it applies only to individuals who "played [a] part in the illegal interception" or gathering of the information. *Id.* *Bartnicki* thus is not relevant.

D. The Act is a generally applicable law not aimed at speech.

In their opening brief, defendants explained that the Act is a generally applicable tort law that applies equally to all people and is aimed at trespass, theft, invasion of privacy, and breaches of loyalty. Opening Br. 28-32. Any effect the Act has on "speech" is incidental to its regulation of that tortious conduct.

Plaintiffs argue that "if a law has a 'speech-creation element' it cannot be 'generally applicable.'" PETA Br. 35 (quoting *W. Watersheds*, 869 F.3d at 1197). But they are confusing the relevant concepts. A law does not affect *protected* speech if it applies to unauthorized conduct in nonpublic areas of property, which are predicates for any Act violation. Therefore, there is no "speech-creation element" involved in a violation of the Act.

The cases Plaintiffs cite, PETA Br. 35, do not stand to the contrary: as discussed above, *Western Watersheds* involved collection of data on public—not private—land; and *American Civil Liberties Union of Illinois v. Alvarez*, involved a statutory prohibition applied to recording police officers "while performing their duties in traditional public fora." 679 F.3d 583, 594 (7th Cir. 2012). The Act has no application to those facts.

Indeed, in discussing generally applicable laws, *Alvarez* stated that heightened First Amendment scrutiny may be warranted if the prohibited conduct "'was intimately related to expressive conduct *protected under the First Amendment*.'" 679 F.3d at 602 (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.3 (1986)) (emphasis added).

Plaintiffs concede that their argument rests on their contention that "[a] law that directly regulates *protected speech* is not 'generally applicable.'" PETA Br. 36 (emphasis added). As explained, however, the conduct prohibited by the Act is not intimately connected to First Amendment protected speech. For this reason, plaintiffs' reliance on this Court's decision in *American Life League, Inc. v. Reno* also does not help them, PETA Br. 38, because there this Court addressed a law that affected "some conduct with *protected* expressive elements," such as "peaceful but obstructive picketing" in *public*. 47 F.3d 642, 645, 648 (4th Cir. 1995) (emphasis added).

E. *Food Lion* establishes that the Act is not subject to First Amendment scrutiny.

In *Food Lion*, this Court held that the First Amendment did not apply to breach-of-duty-of-loyalty and trespass claims against two individuals who went undercover as grocery-store employees to record video for a news station. 194 F.3d at 521. In other words, the very conduct plaintiffs want to undertake—posing as employees and conducting undercover activities for a different employer—is not protected by the First Amendment from the application of the tort rules embodied in the Act.

Although this Court's decision in *Food Lion* is on all fours with the facts here, plaintiffs effectively ask the Court to overrule it. *See* PETA Br. 39. Their arguments on this score are unpersuasive.

Plaintiffs assert that *Food Lion* has "questionable precedential value." PETA Br. 39. But a panel of this Court cannot overrule prior panel precedent "unless the prior opinion has been overruled by an intervening opinion from this court sitting en banc or the Supreme Court." *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc). Plaintiffs claim that "the Supreme Court has revisited" many of the issues raised in *Food Lion*." PETA Br. 39. Yet they cite no authority for that proposition.

Plaintiffs also argue that *Food Lion* is of limited precedential value because it "misread[ ]" North Carolina law. PETA Br. 47. Not so. The North Carolina Supreme Court later held that a breach of the duty of loyalty does not give rise to an independent cause of action under North Carolina common law unless the employer and employee have a fiduciary relationship. *Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001). However, the state high court explained that, even outside the

fiduciary context, an employer may still use an employee's breach of loyalty as an affirmative defense to a wrongful-termination action. *Id.*

The Act turns what was, in some circumstances, an affirmative defense under state common law into a statutory cause of action. Thus, by passing the Act, the General Assembly extended *Food Lion* to codify it fully into state law. Plaintiffs argue that "the contours of the tort *Food Lion* upheld are complicated to discern," PETA Br. 39, but that has no bearing on their First Amendment claim.[1]

Plaintiffs also argue that defendants "sorely misread *Food Lion*" because, they claim, that decision only holds that "employees could be liable for . . . having two competing employers," which was "entirely non-expressive conduct." PETA Br. 39-40. That is incorrect.

The trespass and breach-of-duty-of-loyalty torts applied to the ABC employees because of their acts and their intent while working undercover. This Court "affirm[ed] the [jury's] finding of trespass . . . because the breach of duty of loyalty—*triggered by the filming in non-*

[1] Plaintiffs did allege that subsection (b)(1) of the Act is unconstitutionally vague, but the district court granted summary judgment to defendants on that claim, J.A. 470-74, and plaintiffs do not challenge that part of the court's judgment on appeal.

public areas which was adverse to Food Lion—was a wrongful act in excess of [the employees'] authority to enter Food Lion's premises as employees." *Food Lion*, 194 F.3d at 518 (emphasis added). The employees "served ABC's interest, at the expense of Food Lion, *by engaging in the taping for ABC* while they were on Food Lion's payroll." *Id.* at 516 (emphasis added). Thus, the employees' undercover filming with an intent to harm Food Lion was essential to the torts, but their "expressive activity" (in plaintiffs' words) was not protected by the First Amendment.

In the end, plaintiffs' reading of *Food Lion* is factually wrong and rests on a legal theory that finds no support in the case law. In *Food Lion*, the undercover employees committed torts because they accessed nonpublic areas of Food Lion's property and videotaped Food Lion's operations for ABC, with an intent to harm Food Lion. The Act proscribes that *exact* conduct.

II. As Applied To Plaintiffs, The Act Does Not Violate The First Amendment.

Even if the First Amendment applies here, the Act is a content-neutral speech regulation that is narrowly tailored to advance a significant government interest.

A. The Act is content neutral.

As defendants showed in their opening brief, the Act governs the manner in which individuals gather and use information from the nonpublic areas of private property. Opening Br. 39-50. It is therefore content neutral. None of plaintiffs' arguments in response change that conclusion.

First, the Act does not regulate speech based on its content. At most, the Act permits the evidentiary use of speech to prove intent. The Supreme Court has held that using speech in this way does not violate the First Amendment. Plaintiffs would have this Court preemptively overrule Supreme Court precedent, create a circuit split, and endanger the constitutionality of countless federal and state laws to reach the opposite result. The Court should decline that invitation.

Second, the Act is not viewpoint based. The Act plainly does not target particular opinions or ideas. Plaintiffs arrive at a contrary conclusion only by misconstruing the Act's text.

Third, the legislative history does not change the analysis. Plaintiffs' reliance on legislative history is contrary to how courts interpret statutes and proves too much in any event.

1. The Act's text does not draw content-based distinctions.

Plaintiffs have neither argued nor explained how the text of subsections (b)(3) or (b)(5) are content based. The district court was right to hold that these two provisions are content neutral. *See* Opening Br. 39-42.

Plaintiffs focus on subsections (b)(1) and (b)(2), which apply only when an employee uses information to breach her duty of loyalty to an employer. Plaintiffs' argument that these subsections are content based because they target "anti-employer speech" is wrong. PETA Br. 44-45, 47-50.

a. This Court's decision in *Food Lion* controls the interpretation of subsections (b)(1) and (b)(2).

This Court's decision in *Food Lion* provides important context for understanding subsections (b)(1) and (b)(2). *See supra* Part I.E. Plaintiffs claim that the *Food Lion* decision is "unworthy of the attention it has been provided." PETA Br. 42. But the Act's text mirrors *Food Lion*, a prior precedent of this Court, and for good reason: the Act was passed to codify the *Food Lion* rule.

Both the Act's text and its legislative history show that subsections (b)(1) and (b)(2) codify the *Food Lion* rule. By using the term "duty of loyalty," subsections (b)(1) and (b)(2) incorporate the same language that this Court used to describe an employee who "deliberately acquires an interest adverse to his employer." *Food Lion*, 194 F.3d at 515 (quoting *Long v. Vertical Techs., Inc.*, 439 S.E.2d 797, 802 (N.C. Ct. App. 1994)). The legislative history bolsters the conclusion that the term "duty of loyalty" traces its roots to *Food Lion*. After all, the North Carolina General Assembly repeatedly stated that its goal was to codify this Court's decision in *Food Lion* by passing the Act. J.A. 203-04, 206, 257, 282, 284-85.

Under *Food Lion*, a breach of the duty of loyalty turns on an employee's intent, not on what an employee says. This Court held that an employee must "*deliberately* acquire[ ] an interest adverse to his employer" to breach a duty of loyalty. *Food Lion*, 194 F.3d at 515 (quoting *Long*, 439 S.E.2d at 802) (emphasis added). For example, an employee breaches a duty of loyalty when she has an "*intent* to act adversely to the second employer for the benefit of the first." *Id.* at 516 (citing *Long*, 439 S.E.2d at 802) (emphasis added).

As a result, the reporters in *Food Lion* did not—as plaintiffs claim—breach a duty of loyalty solely because they used "hidden cameras." PETA Br. 40-41. Nor did the reporters breach a duty of loyalty by engaging in "anti-employer speech." PETA Br. 44. Rather, this Court made clear that it was the reporters' *intent* to harm one of their employers that mattered. *Food Lion*, 194 F.3d at 515-16.

The Court's decision in *Food Lion* holds that a breach of the duty of loyalty is a matter of intent to cause harm. The Act codifies *Food Lion* into state law. *See supra* Part I.E. Thus, the duty of loyalty in subsections (b)(1) and (b)(2) is likewise a matter of intent.

b. Subsections (b)(1) and (b)(2) are content neutral because they regulate intent, not speech.

Because an employee breaches a duty of loyalty only when she uses information with an intent to harm her employer, subsections (b)(1) and (b)(2) are content neutral.

The facts of this case show why. Here, PETA and ALDF employees will apply for jobs at The University of North Carolina at Chapel Hill. J.A. 138-42, 151. Once hired, the employees will have competing loyalties. They will serve PETA's and ALDF's interests, at

the expense of the University's, by conducting undercover investigations in nonpublic areas of the University's property, J.A. 141-42, 151-52—just like the reporters did in *Food Lion*. 194 F.3d at 515-16. To decide whether plaintiffs breach their duty of loyalty, a factfinder will have to ask whether plaintiffs deliberately acquired an interest that was adverse to the University. *See id.* Plaintiffs' speech might be *evidence* of that underlying intent requirement. But the evidentiary use of speech does not make subsections (b)(1) or (b)(2) content based. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

Plaintiffs attempt to distinguish *Mitchell* on the ground that its holding is limited to a law that allows speech to be evidence of a *nonspeech* element, like discriminatory intent. PETA Br. 50 n.6. But that characterization describes this case. Under the Act, speech may be evidence of a nonspeech element—here, an intent to cause harm.

But although speech may serve as evidence of intent, the most probative evidence of an employee's intent to breach her duty of loyalty might not be speech at all. A factfinder could consider, for example, the employee's job history, testimony from coworkers about the employee's attitude and conduct on the job, the hours the employee clocked in and

out of the job site, the specific locations the employee visited while on the property, or video or photos of the employee at work. *See Food Lion*, 194 F.3d at 510-11. A factfinder could also take account of the employers for whom the individual worked—what each stood to gain or lose by hiring the employee, the extent to which the employers' interests were adverse, or the differences between the employee's responsibilities for the different employers. *See id.* at 516.

The Ninth Circuit's decision in *Wasden* helps illustrate this point. In that case, the Ninth Circuit rejected a First Amendment challenge to one part of an Idaho statute that barred employees from getting hired by making a misrepresentation with an intent to cause harm to the employer. *Wasden*, 878 F.3d at 1201 (citing Idaho Code § 18-7042(1)(c)). This law complied with the First Amendment, the court explained, in part because its intent requirement "cabin[ed] the prohibition's scope." *Id.*

Specifically, the intent requirement did "not mean that every investigative reporter hired under false pretenses intends to harm the employer." *Id.* at 1202. Instead, intent was "a critical element that requires proof." *Id.* Like the Idaho statute in *Wasden*, subsections

(b)(1) and (b)(2) have an underlying intent requirement—the breach of the duty of loyalty—that cabins their scope and requires proof of an employee's motive to cause harm. These features show that the Act complies with the First Amendment. *See id.*

Plaintiffs argue that subsections (b)(1) and (b)(2) are nonetheless content based because both provisions bar "us[ing]" information to breach the duty of loyalty. PETA Br. 45, 48. But the law is full of rules prohibiting the use of information when doing so would cause harm. Consider grand-jury secrecy rules. Fed. R. Crim. P. 6(e)(2)(B), (e)(7) (bar on knowing disclosure of matters occurring before the grand jury). Or laws against espionage. 18 U.S.C. § 793(d) (bar on willful disclosure of "information relating to the national defense" that "could be used to the injury of the United States or to the advantage of any foreign nation"). Or rules prohibiting individuals from disclosing confidential or otherwise private information. 18 U.S.C. § 2710(b) (bar on knowing disclosure of "personally identifiable information" about video-rental customers).

It is well-established that laws of this kind do not ordinarily raise First Amendment concerns. *See Boehner v. McDermott*, 484 F.3d 573,

578 & n.2 (D.C. Cir. 2007) (en banc) (collecting these and other examples). The Supreme Court has likewise held that false speech with an intent to gain a material advantage or cause a legally cognizable harm falls outside the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 719-21, 723 (2012) (plurality opinion); *id.* at 734-37 (Breyer, J., concurring in the judgment) (similar).

These laws, like the Act, do not turn on the content of the information gathered or conveyed. Rather, they prohibit using or misrepresenting information—whatever its content—to cause harm. *Compare with, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (law applying only to "political" speech depends on the content of what someone says and is necessarily content based); PETA Br. 50 (using this example).

c. Plaintiffs' contrary arguments have no limiting principle and would upend First Amendment law.

In seeking a different rule, plaintiffs ask the Court to remake First Amendment doctrine. Adopting plaintiffs' analysis here would make this Court the first to hold that motive-based speech regulations

are content based. It would generate a circuit split. And it would call into question the constitutionality of countless federal and state laws.

Plaintiffs argue that motive-based regulations of speech are content based. PETA Br. 47-48. They concede, however, that this sweeping claim rests entirely on one sentence of dicta from the Supreme Court's decision in *Reed*. PETA Br. 48-49 (citing 576 U.S. at 163). All that sentence says is that "[*s*]*ome*" laws may be content based because they "defin[e] [the] regulated speech by its function or purpose." *Reed*, 576 U.S. at 163 (emphasis added). It is undisputed, moreover, that the law at issue in *Reed* did not itself regulate speech based on its function or purpose. *See id.* at 164-65.

The First and Eleventh Circuits have declined to interpret this stray comment in *Reed* as overruling the long-settled principle that motive-based regulations of speech are content neutral. *Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1319 (11th Cir. 2020); *March v. Mills*, 867 F.3d 46, 58 (1st Cir. 2017), *cert. denied* 138 S. Ct. 1545 (2018). This approach is consistent with the rule that lower courts do not preemptively conclude that the Supreme Court's "more recent

cases have, by implication, overruled [its] earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Plaintiffs have no answer for the First and Eleventh Circuit's recent, persuasive analysis. Instead, plaintiffs effectively ask this Court to create a circuit split. *See United States v. Terry*, 257 F.3d 366, 369 (4th Cir. 2001) (rejecting argument in part because it would "create a circuit split"). The Court should decline plaintiffs' invitation to become the first federal appellate court to give *Reed* plaintiffs' novel interpretation.

But the reasons to reject plaintiffs' arguments do not end there. Crediting plaintiffs' understanding of content discrimination here would throw into doubt the constitutionality of innumerable federal and state laws. Plaintiffs argue that the Act is content based because it prohibits anti-employer speech while permitting pro-employer speech. PETA Br. 44. That argument misunderstands the law. For example, under plaintiffs' theory:

- Laws against treason would be content based because they prohibit disloyal speech while permitting loyal speech. *But see Haupt v. United States*, 330 U.S. 631, 641-42 (1947).

- Trademark-infringement laws would be content based because they prohibit speech that causes confusion among potential customers while permitting speech that does not cause confusion. *But see San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539-41 (1987).

- The antitrust laws would be content based because they prohibit anticompetitive speech while permitting procompetitive speech. *But see Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 411-12 (1921).

- Antidiscrimination laws would be content based because they prohibit discriminatory speech while permitting nondiscriminatory speech. *But see Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

Plaintiffs nonetheless assert that under the rule they propose, there would "clearly [be] bases" to uphold various motive-based laws against future First Amendment challenges. PETA Br. 49 n.5. But they do not explain what those "bases" are. Indeed, plaintiffs' understanding of content discrimination admits of no limiting principle. *Compare Hill v. Colorado*, 530 U.S. 703, 721 (2000) (holding that "[i]t is common in the law to examine the content of a communication to determine the speaker's purpose"), *with* PETA Br. 45 (arguing that a statute is content based any time it "require[es] the finder of fact to consider the communication").

2. The Act's text does not draw viewpoint-based distinctions.

Plaintiffs argue in passing that the Act discriminates on the basis of viewpoint as well as content. *See* PETA Br. 43-47. The district court did not reach plaintiffs' viewpoint-discrimination argument. This Court should reject it.

Everyone agrees that "[t]he government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Plaintiffs claim that the Act is viewpoint based in two ways. First, plaintiffs argue that the Act prevents them from speaking to the media and legislatures. *See* PETA Br. 46-47. Second, plaintiffs argue that the Act gives an employer discretion to censor their ideas or opinions. *See* PETA Br. 45-46. Both arguments fail.

First, the Act does not prevent plaintiffs from speaking to the media or legislatures. The Act's plain text does not target speech of that kind. *See also infra* Part III.C. In addition, the Act incorporates North Carolina's Whistleblower Act, N.C. Gen Stat. § 126-84 *et seq*. *See* NC. Gen. Stat. § 99A-2(e). The Whistleblower Act provides that state employees, which plaintiffs seek to become, are to be "free of

intimidation or harassment when reporting to *public bodies* about matters of *public concern*." N.C. Gen. Stat. § 126-84(b) (emphasis added). The North Carolina Supreme Court has also read the Whistleblower Act in parallel with "numerous state and federal court decisions identifying the essential elements of comparable whistleblower provisions in various state and federal statutes." *See Newberne v. Dep't of Crime Control & Pub. Safety*, 618 S.E. 2d 201, 206 (N.C. 2005).

Second, the Act does not allow employers to punish employees for their opinions or ideas. Plaintiffs' argument on this score suffers from a fundamental flaw: the Act is not a criminal statute that opens the door to selective prosecutions. *Compare with Wasden*, 878 F.3d at 1197. The Act merely provides a civil cause of action.

To recover damages, the employer must prove its case to a properly instructed jury. Plaintiffs are therefore incorrect that whether an employee breaches a "duty of loyalty" or enters a "nonpublic area" of land under the Act are decisions left entirely to an employer's whims. To the contrary, these are questions for the factfinder. *See Food Lion*, 194 F.3d at 516. Thus, although an employer may decide in its

discretion to file a lawsuit, that does not mean the *law itself* suffers from impermissibly discretionary standards. *See* J.A. 473 (district court drawing this same distinction). And in any event, plaintiffs have expressly abandoned their vagueness challenge. PETA Br. 16 n.3.

3. Plaintiffs' reliance on legislative history does not change the analysis.

Plaintiffs intersperse their various arguments about content and viewpoint discrimination with references to the legislative record. Their analysis is a prime example of why courts no longer place dispositive weight on legislative history.

The Supreme Court has made clear that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 942 (2017) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). Even for those who consult legislative history, "floor statements by individual legislators rank among the least illuminating forms of legislative history." *Id.* at 943. As this Court has explained, "[i]t is manifestly impossible to determine with certainty the motivation of a legislative body by resorting to the utterances of individual members thereof—even statements made by sponsors and

authors of the act—since there is no way of knowing why those, who did not speak, may have supported or opposed the legislation." *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1261 (4th Cir. 1989) (footnote omitted).

These principles carry special force in the First Amendment context. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [courts] to eschew guesswork." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). For example, in rejecting a First Amendment challenge to a state law, this Court held that it would not "look beyond facially neutral legislation" by relying on "the opinions of selected members" of a state legislature. *Campbell*, 883 F.2d at 1261. That approach, the Court explained, would be "inappropriate" because it would impute to a multimember legislative body "the apparent motivations of a few voluble legislators." *Id.* at 1262.

So too here. The Act is neutral on its face. The Act's terms do not single out speech by any particular speaker, to any particular listener, on any particular topic. Instead, the Act applies to all types of

individuals who invade all types of property, from medical clinics, to retail stores, to tech companies. This scope is a feature, not a flaw: the Act's general applicability "help[s] confirm that [the law] was not enacted to burden a narrower category of disfavored speech." *McCullen v. Coakley*, 573 U.S. 464, 481 (2014).

Yet plaintiffs ask the Court to look behind this facially neutral law based on floor statements from all of three legislators. PETA Br. 10-12. But the North Carolina General Assembly has 170 members. And the Act passed by overwhelming, bipartisan margins in both chambers. *See* Opening Br. 10-11. This Court has rejected a similar effort to challenge a facially neutral law under the First Amendment based on a handful of statements in the legislative record. *See Campbell*, 883 F.2d at 1262 (the views of nine out of 170 state legislators did not "reflect[ ] the sentiments of the legislature as a whole" or otherwise show that they had "persuaded others to adopt the challenged legislation"). It should do so again here.

In any event, plaintiffs overstate the evidence. For example, plaintiffs cite comments from Representative Jordan to support their argument that the Act was adopted for the "content-based aim" of

banning anti-employer speech. PETA Br. 45 (citing J.A. 202-04). Representative Jordan did say that one benefit of the law was that it may protect the restaurant industry from "embarrassment," J.A. 204, but his statement also made clear that he supported the Act because he was "in favor of protecting private property," J.A. 202, and because he wanted to codify this Court's decision in *Food Lion*, J.A. 203; *see also* J.A. 476-78 (district court's analysis rejecting plaintiffs' reliance on legislative history in the context of their equal-protection claim). Critically, plaintiffs also sweep under the rug many statements by other members of the General Assembly expressing support for the Act based on their desire to strengthen property rights—a content-neutral aim. J.A. 174-75, 236-37, 244, 261-62, 279, 304, 313.

* * *

All told, the Act is content neutral. Neither its text nor its history shows impermissible content- or viewpoint-based discrimination on speech.

B. The Act passes intermediate scrutiny.

Because the Act is content neutral, intermediate scrutiny applies. Applying that standard here shows that the Act advances a significant government interest in a narrowly tailored fashion.

1. The Act advances a significant government interest.

Plaintiffs are incorrect that the Act does not advance a significant government interest. PETA Br. 56-57.

Plaintiffs fault the State for failing to introduce "evidence" on this score. PETA Br. 57. But under this Court's precedents, a state need not present evidence to demonstrate that a law advances a significant government interest. *Reynolds v. Middleton*, 779 F.3d 222, 227 (4th Cir. 2015). Case law, together with common sense and logic, are enough. *Id.* at 228-30.

Here, the Supreme Court has held that protecting property rights is a significant government interest. *McCullen*, 573 U.S. at 486. And the Act, by its terms, obviously advances this interest: it provides property owners with an enhanced damages remedy for certain types of tortious conduct on the nonpublic areas of their property. The Act

therefore advances a significant government interest. *See Reynolds*, 779 F.3d at 229-30.

2. The Act is narrowly tailored.

Plaintiffs next claim that the Act is not narrowly tailored. Plaintiffs argue that the record does not show that the State tried or considered less-speech-restrictive alternatives before passing the Act. PETA Br. 51-54. Plaintiffs also argue that the Act is both over- and underinclusive. PETA Br. 54-56. Plaintiffs misunderstand the Act.

To begin, the State did not need to show that it first tried or considered less-speech-restrictive alternatives before it passed the Act. Defendants acknowledge that under this Court's precedents, the government must ordinarily show evidence that before it passed a content-neutral speech regulation, the government "actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest." *Billups v. City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020); *Reynolds*, 779 F.3d at 231-32; *see also McCullen*, 573 U.S. at 494.

That said, courts "read general language in judicial opinions as referring in context to circumstances similar to the circumstances then

before the [c]ourt and not referring to quite different circumstances that the [c]ourt was not then considering." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004). And as defendants explained in their opening brief, the *McCullen* line of cases refer in context to different circumstances than those presented here. Opening Br. 54-58.

Specifically, the laws at issue in *McCullen*, *Billups*, and *Reynolds* restricted speech on public property in unprecedented ways. *McCullen*, 573 U.S. at 490; *Billups*, 961 F.3d at 677-78 & n.3; *Reynolds*, 779 F.3d at 230-31. The government was required to make an evidentiary showing that it tried or considered less-speech-restrictive alternatives as a result. *See, e.g.*, *McCullen*, 573 U.S. at 490.

The Act is different. The Act merely provides an enhanced damages remedy for conduct that the common law has long deemed tortious.

Take the hidden-camera provision, subsection (b)(3). No one can seriously dispute that installing a hidden camera on private property can constitute a common-law trespass. *See, e.g.*, *Miller*, 472 S.E.2d at 355-56. The same is true of the catch-all provision, subsection (b)(5). It is black-letter law that a substantial interference with real property is

tortious. *See, e.g.*, *Duffy v. E.H. & J.A. Meadows Co.*, 42 S.E. 460, 461 (N.C. 1902). A property owner does not need the Act to have a civil *cause of action* under these types of circumstances.

But a property owner may need the Act to have a meaningful *remedy*. In many cases, the common law limits a landowner to recovering only nominal damages for property invasions of this kind. *See, e.g.*, *Keziah v. Seaboard Air Line R.R. Co.*, 158 S.E.2d 539, 548 (N.C. 1968). Consider the defendants in *Food Lion*. They were awarded $2 for their successful trespass and duty-of-loyalty claims. *Food Lion*, 194 F.3d at 524. By contrast, under the Act, those defendants could have received actual compensation. N.C. Gen. Stat. § 99A-2(b)(1), (b)(2), (d).

In this way, the Act resembles a sentencing enhancement. The sentencing enhancement the Court considered in *Mitchell*, for example, increased from two to seven years the maximum penalty for aggravated battery when a defendant intentionally selected a victim based on race. 508 U.S. at 480. In other words, it imposed a harsher punishment for conduct that was already criminal when the crime was committed with a uniquely harmful motive. *See id.* The Act operates in a similar

fashion, but in a civil context. It imposes a harsher civil remedy for conduct that was already tortious when the manner of, or motive behind, the tort is particularly harmful.

This analogy to a sentencing enhancement reinforces why the Act is so different from the laws in *McCullen* and the related cases. The Act is not creating an unprecedented speech restriction on public property. *Compare with McCullen*, 573 U.S. at 490; *Billups*, 961 F.3d at 677-78 & n.3; *Reynolds*, 779 F.3d at 230-31. Rather, the Act relies on common-law principles to provide an enhanced remedy for tortious conduct on private property. The rationale for the evidentiary rule in *McCullen*—the "concern that the [government] has too readily forgone options that could serve its interests just as well," 573 U.S. at 490—therefore is not implicated in this case.[2]

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[2] Plaintiffs' reliance on *Doe v. Cooper*, 842 F.3d 833 (4th Cir. 2016), and *Ross v. Early*, 746 F.3d 546 (4th Cir. 2014), does not support their argument. PETA Br. 52-53. The law at issue in *Cooper* shared all the same features of the laws at issue in the *McCullen* line of authority: it was a novel speech restriction on public land that prohibited convicted sex offenders from visiting "a wide variety of places associated with First Amendment activity." 842 F.3d at 845. By contrast, in *Ross*, this Court *upheld* against a First Amendment challenge a mine-run pedestrian-traffic policy. 746 F.3d at 560; *compare with* PETA Br. 53 (misstating that *Ross* "struck down" the law at issue).

The sentencing-enhancement analogy also helps show why the Act is neither over- nor underinclusive. As the Supreme Court has explained, the government may pinpoint "conduct [that] is thought to inflict greater individual and societal harm" for enhanced sanction. *Mitchell*, 508 U.S. at 487-88. In *Mitchell*, for example, the Court rejected a First Amendment challenge to a sentencing enhancement for racially motivated battery, even though the state already had a separate battery statute that punished the same conduct. *Id.* at 480.

The Act has functioned like a sentencing enhancement in the real world too. Since the Act's passage, individuals and entities have used it to sue in North Carolina federal and state courts. For example:

- In *Tucker Auto-Mation of N.C., LLC v. Rutledge*, the plaintiff, a door manufacturer, sued its former president under the Act, alleging that he misappropriated confidential consumer information and trade secrets to start his own competing business. Am. Compl., No. 1:15-CV-893, 2016 WL 11003637 (M.D.N.C. Sep. 26, 2016).

- In *Budler v. MacGregor*, the plaintiff, an individual who wanted to start a small business, sued her real-estate developer under the Act, alleging that he fraudulently induced her to sign over deeds to land that she owned. Compl., 18 CVS 1153, 2018 WL 9539078 (N.C. Super. Ct. Feb. 16, 2018).

- In *Harris v. Peters*, the plaintiffs sued their investment advisor under the Act, alleging that he committed fraud relating to their purchase of a piece of property. Compl., 18 CVS 1646, 2018 WL 9903428 (N.C. Super. Ct. Feb. 27, 2018).

In all of these cases, moreover, plaintiffs sued under the Act *in addition to* asserting other state common-law and statutory causes of action. That is, they invoked the Act in an attempt to recover a meaningful damages remedy. These examples show that the Act is narrowly tailored to achieve its objective: to provide a meaningful damages remedy for landowners that will compensate them for uniquely harmful invasions of their pre-existing property rights.

* * *

In sum, the Act is narrowly tailored to advance a significant government interest. Thus, it satisfies intermediate scrutiny.[3]

III. The Act Is Facially Constitutional.

Plaintiffs also seek to facially invalidate the Act's four challenged provisions. Plaintiffs have not shown that they are entitled to facial relief.

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[3] Plaintiffs concede that the State does not need to show that the Act leaves open ample alternative channels of communication. PETA Br. 57 n.7.

Because the district court facially enjoined the Act only in part, both parties have appealed from different portions of the district court's decision. The district court facially enjoined subsections (b)(2) and (b)(3). J.A. 485. As defendants explained in their opening brief, the district court erred in holding that these two provisions are facially invalid merely because they *implicate* speech. Opening Br. 61-66. By contrast, the district court correctly rejected plaintiffs' facial challenges to subsections (b)(1) and (b)(5). J.A. 485. Plaintiffs cross-appeal that decision, arguing that the district court applied the wrong legal standard for facial challenges and that subsections (b)(1) and (b)(5) are overbroad. PETA Br. 58-64.[4]

Defendants set out their reply in support of their appeal and their response to plaintiffs' cross-appeal in the same section below. The Court can resolve plaintiffs' facial challenges under the First Amendment overbreadth doctrine. Applying that familiar standard here shows that the Act is facially constitutional.

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[4] Plaintiffs have not cross-appealed the district court's decision that the Act complies with the Equal Protection and Due Process Clauses of the Fourteenth Amendment. PETA Br. 16 n.3.

A. Plaintiffs' arguments about the legal standard for facial challenges are incorrect.

Plaintiffs argue that the district court applied the wrong legal standard for facial challenges. PETA Br. 58-61. They are incorrect.

Plaintiffs first argue that the district court erred by holding that their facial challenges could succeed only if plaintiffs showed that the Act is always unconstitutional. PETA Br. 58-61. But that is not what the district court held. Relying on this Court's precedent, the district court correctly explained that plaintiffs could secure facial relief by showing "that no set of circumstances exists under which the law would be valid, *or* that the law lacks any plainly legitimate sweep." J.A. 430 (quoting *Educ. Media Co. at Va. Tech., Inc. v. Insley*, 731 F.3d 291, 298 n.5 (4th Cir. 2013)) (emphasis added); *accord* J.A. 442, 444-45 (applying this disjunctive standard).

Plaintiffs also argue that the government has the burden to show that a statute passes the relevant level of scrutiny for it to survive a facial challenge. PETA Br. 59-60. That is not the law. When, as here, the "claim and the relief that would follow . . . reach beyond the particular circumstances of the[ ] plaintiffs," they must "satisfy [the] standards for a facial challenge to the extent of that reach." *John Doe*

No. 1 v. Reed, 561 U.S. 186, 194 (2010). Applying those standards, this Court has made clear that plaintiffs—not the government—have the burden to show that the challenged law is facially unconstitutional. *Insley*, 731 F.3d at 298 n.5; *accord United States v. Stevens*, 559 U.S. 460, 472 (2010) (party bringing facial challenge "would have to establish" entitlement to facial relief).

B. Plaintiffs' facial challenges can be resolved under familiar overbreadth principles.

In any event, plaintiffs overcomplicate this analysis. Whatever theoretical differences exist among the various standards for facial relief, all of plaintiffs' claims here can be resolved under the First Amendment overbreadth doctrine.

To secure facial relief, plaintiffs must ordinarily show that a law is either always or almost always unconstitutional. *Richmond Med. Ctr. For Women v. Herring*, 570 F.3d 165, 174 (4th Cir. 2009) (en banc). That is, plaintiffs must show that "no set of circumstances exists under which the [statute] would be valid" or that "the statute lacks any plainly legitimate sweep." *United States v. Miselis*, 972 F.3d 518, 530 (4th Cir. 2020) (quoting *Wash. State Grange,* 552 U.S. 442, 449 (2008);

Stevens, 559 U.S. at 472), *cert. pet. filed* Nos. 20-1241 & 20-7377 (Mar. 4, 2021).

Under the First Amendment, however, plaintiffs may secure facial relief through the overbreadth doctrine. The overbreadth doctrine relaxes the normal standards for facial relief. For example, plaintiffs may seek to facially enjoin a law under the overbreadth doctrine even when the law is constitutional as applied to them. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483 (1989). Specifically, plaintiffs must show that "a substantial number of [a statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Miselis*, 972 F.3d at 530 (quoting *Stevens*, 559 U.S. at 473). They do not need to clear the "high bars" of showing that a law is always or almost always unconstitutional. *See id.*

As discussed below, plaintiffs have not shown that the Act's challenged provisions are facially overbroad. *See infra* Part III.C. Thus, the Court need not reach plaintiffs' arguments about the proper standards for facial relief outside the overbreadth context. *See Herring*, 570 F.3d at 174 (declining to address "the uncertainty regarding the appropriate criteria for entertaining facial challenges" when a facial

challenge failed under a legal standard similar to the overbreadth doctrine).

C. The Act is not facially overbroad.

The Act's four challenged provisions are not facially overbroad. The Act has a plainly legitimate sweep. And the Act's text, together with background principles of statutory interpretation, foreclose the hypothetical, unconstitutional applications of the Act that plaintiffs imagine.

To begin, the Act has a plainly legitimate sweep. As shown above, individuals and entities have sued under the Act in North Carolina state and federal courts across different contexts, from misappropriation of trade secrets to fraud. *See* pp 49-50, *supra*. These applications of the Act disprove plaintiffs' assertion that "there is no need for [the Act], unless the goal is to suppress speech." PETA Br. 63. To the contrary, the Act's real-world use shows how the law is narrowly tailored to achieve a specific, nonspeech-related objective: providing property owners with a meaningful damages remedy for certain types of torts conducted in the nonpublic areas of private property.

Against this plainly legitimate sweep, plaintiffs have failed to show that the law has a substantial number of unconstitutional applications. Plaintiffs speculate about how the Act might purportedly be applied in an unconstitutional fashion. PETA Br. 61-64. But the Act's text and background principles of statutory interpretation squarely foreclose these far-fetched hypotheticals.

Plaintiffs imagine that the Act could punish individuals who engage in whistleblowing activity protected under various state and federal laws. PETA Br. 62-63. They are wrong. The Act expressly incorporates two sets of state-law whistleblower protections for private and public employees. N.C. Gen. Stat. § 99A-2(e) (incorporating by reference N.C. Gen. Stat. § 95-240 *et seq.*, and N.C. Gen. Stat. § 126-84 *et seq.*).

Plaintiffs point to many other federal and state whistleblower protections that the Act does not mention. PETA Br. 62-63. But the Act need not cross-reference every whistleblower protection in existence to comply with the First Amendment. Rather, legislatures may pass laws against background legal rules about how courts interpret statutes. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014).

Here, two background legal rules resolve plaintiffs' concerns about how the Act could punish whistleblower speech in a way that violates the First Amendment.

The first rule is that federal law preempts contrary state law. *See* U.S. Const. art. VI, cl. 2. Because a state law cannot make illegal conduct that federal law protects, individuals cannot be sued under the Act for engaging in federally protected whistleblower activity. *See Arizona v. United States*, 567 U.S. 387, 406-07 (2012).

The second rule is that courts read statutes in harmony rather than in conflict whenever possible. Thus, although there are other state-law whistleblower protections that the Act does not reference, those separate protections do not disappear in the face of the Act. North Carolina courts have long read laws *in pari materia*—laws on the same subject—to "reconcile them, if possible, to give effect to each." *In re B.L.H.*, 852 S.E.2d 91, 96 (N.C. 2020); *accord Blowing Rock v. Gregorie*, 90 S.E.2d 898, 904 (N.C. 1956). Courts therefore read the whistleblower protections in subsection (e) to work together with any other state laws that offer similar protections for whistleblower speech.

But plaintiffs' hypotheticals suffer from an even more fundamental flaw: none involve an actual violation of the Act.

Take the nursing-home employee who reports elder abuse to a journalist. *See* PETA Br. 63. That employee would not breach a duty of loyalty to her employer under subsections (b)(1) or (b)(2). She would not, for example, be working for two different employers, with an intent to harm one and benefit the other. *See Food Lion*, 194 F.3d at 515-16. Nor would she owe her employer any duty to refrain from disclosing that information. After all, illegal conduct is not a protected right for which an employer can demand loyalty in the first place. *See, e.g.*, Restatement (Third) of Agency § 8.05(c) ("An agent may reveal otherwise privileged information to protect a superior interest of the agent or a third party," including "that the principal is committing or is about to commit a crime."). The employee would not violate subsections (b)(3) or (b)(5) either, because those provisions require an individual to install a hidden camera in a nonpublic area of private property or otherwise substantially interfere with real property.

Amici's hypotheticals are even wider of the mark. None of their examples come close to constituting an actual violation of the Act. Consider the following:

- A university student working on campus who reports safety violations to OSHA. *See* Law Prof. Br. 29.
- An employee who shares with a legislator a photograph of a memo describing a workplace accident. *See* Law Prof. Br. 30.
- An employee who records an employer's sexist and racist remarks on a cell phone and uses that recording as evidence in a discrimination lawsuit. *See* Law Prof. Br. 31-32.
- A farm worker who reports abusive workplace conditions to government agencies or who brings a lawsuit against an employer for wrongful conduct. *See* Farm Workers Br. 18-30.
- A whistleblower who reports environmental violations at his workplace to a journalist. *See* Reporters Comm. Br. 17-18.

Under the Act's plain text, liability would not attach in any of these situations. Start with subsections (b)(1) and (b)(2). An individual violates those provisions only when she breaches a duty of loyalty to her employer. The individuals described above would not be in breach of that duty. For example, they would not be working simultaneously for two employers, with an intent to benefit one and to work against the interests of the other. *Food Lion*, 194 F.3d at 515. And as discussed, employees do not breach a duty of loyalty by reporting or seeking to

adjudicate an employer's unlawful conduct. In addition, subsections (b)(3) and (b)(5) would be similarly off point. The individuals described above would not be committing a trespass by installing a hidden camera or otherwise substantially interfering with the employer's real property.

Thus, employees who, for example, speak out against wrongful workplace conditions, or who pursue related legal claims in court, cannot face liability under the Act's plain terms. And if the Act leaves any doubt on that score, it is at least "fairly possible" to interpret the Act in this way to avoid raising constitutional concerns. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

Regardless, even if the Court were to conclude that the Act admits of some potential unconstitutional applications, the proper remedy would be for plaintiffs to seek relief on an as-applied rather than facial basis. *See Virginia v. Hicks*, 539 U.S. 113, 124 (2003). The burden to show that plaintiffs are entitled to a facial remedy is heavy. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). Plaintiffs here have failed to carry it.

CONCLUSION

Defendants respectfully request that this Court reverse the judgment of the district court.

Respectfully submitted, this the 9th day of April 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(A)(i) because it contains 11,592 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface: 14-point Century Schoolbook font.

Respectfully submitted, this the 9th day of April 2021.

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CERTIFICATE OF SERVICE

I certify that on April 9, 2021, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Respectfully submitted, this the 9th day of April 2021.

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