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

OPENING BRIEF OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

I certify, pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, that no appellant is in any part a publicly held corporation, a publicly held entity, or a trade association, and that no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation.

Dated: December 23, 2020

/s/ Nicholas S. Brod
Nicholas S. Brod

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JURISDICTIONAL STATEMENT

Plaintiffs allege violations of the First and Fourteenth Amendments to the U.S. Constitution under 42 U.S.C. § 1983. J.A. 88-91. The district court had jurisdiction under 28 U.S.C. § 1331.

The district court entered a final judgment on June 12, 2020. J.A. 484-86. The North Carolina Farm Bureau Federation and the State defendants timely filed notices of appeal on July 10 and July 13, respectively. J.A. 487-89, 490-92; Fed. R. App. P. 4(a)(1)(A). Plaintiffs timely cross-appealed on July 23. J.A. 493-95; Fed. R. App. P. 4(a)(3). This Court has jurisdiction under 28 U.S.C. § 1291.

Plaintiffs moved to dismiss Farm Bureau's appeal for lack of jurisdiction. Dkt. 14. Farm Bureau opposed the motion. Dkt. 24. The State defendants took no position. Dkt. 23. The Court deferred ruling on the motion until after completion of merits briefing. Dkt. 28.

ISSUES PRESENTED

The North Carolina Property Protection Act, N.C. Gen. Stat. § 99A-2, gives property owners a cause of action for certain torts committed in the nonpublic areas of their property. The issues presented are:

I. Did the district court err by subjecting the Act to First Amendment scrutiny?

II. Did the district court err by holding that all of the Act's challenged provisions violate the First Amendment?

INTRODUCTION

For centuries, the tort of trespass has provided a neutral rule of decision that governs disputes over a property owner's right to exclude others—that right "which so generally strikes the imagination, and engages the affections of mankind." 2 William Blackstone, *Commentaries on the Laws of England*, *2.

In *Food Lion, Inc. v. Capital Cities/ABC Inc.*, this Court addressed a particular type of employment-related trespass. 194 F.3d 505 (4th Cir. 1999). Making an *Erie* guess about North Carolina tort law, the Court anticipated a cause of action for an employer against an employee who turns out to be a double agent. An employee of that kind, the Court explained, commits a trespass when she enters nonpublic areas of the employer's property and breaches a duty of loyalty by harming the employer to benefit a second, adverse employer. *Id.* at 519.

Roughly fifteen years later, the North Carolina General Assembly sought to codify *Food Lion* in a statute. *E.g.*, J.A. 203-04, 282. The result was the North Carolina Property Protection Act, N.C. Gen. Stat. § 99A-2. With bipartisan support, the Act passed by an overwhelming margin. Its goal: to strengthen property protections across the State

with a meaningful damages remedy for specific types of trespass. *Id.* § 99A-2(d).

This appeal is about whether four parts of the Act comply with the First Amendment. Two of the challenged provisions codify the *Food Lion* rule. *Id.* § 99A-2(b)(1), (2). They allow an employer to sue an employee who trespasses by breaching her duty of loyalty. *Id.* The other two provisions trace their roots to black-letter tort law. One says that an individual cannot place and use a recording device on private property, *id.* § 99A-2(b)(3)—an act the North Carolina Court of Appeals has already held to constitute a trespass. *Miller v. Brooks*, 472 S.E.2d 350, 355-56 (N.C. Ct. App. 1996). The other similarly provides that an individual cannot substantially interfere with the ownership or possession of real property, N.C. Gen. Stat. § 99A-2(b)(5)—a tort in and of itself. *See, e.g.*, *Duffy v. E.H. & J.A. Meadows Co.*, 42 S.E.2d 460, 461 (N.C. 1902).

Plaintiffs here are organizations that seek to enjoin the Act so they can engage in undercover animal-cruelty investigations and publicize what they find. By its terms, however, the Act does not target plaintiffs, or anyone else, for who they are or what they say. The Act,

for example, could apply to a disgruntled employee who uses his firm's trade secrets to launch a competitive start-up. It could stop an enterprising campaign intern from going undercover to record a rival political party's election strategy. It could stand in the way of a hate group's efforts to infiltrate a house of worship. It could provide a damages remedy to a medical clinic whose patient information is exposed to the public. And so on.

Despite the Act's general application and narrow focus, the district court below held that all four of the Act's challenged provisions violate the First Amendment. The district court's First Amendment analysis erred in two critical ways.

First, the district court was wrong to subject the Act to First Amendment scrutiny. The First Amendment does not provide a right to trespass on private property, even for those seeking to gather information. As this Court held in *Food Lion*, trespass is a law that applies generally to regulate the conduct of all individuals. And so too with the Act, which merely turns this Court's decision in *Food Lion* into positive law. Like any other law of general application—copyright, tax, or antitrust, to name a few—the Act does not trigger First Amendment

review merely because it might apply to conduct with some connection to speech.

Second, even if the Act does implicate the First Amendment, the district court erred by holding that the Act is unconstitutional. The Act is content neutral. It regulates the *manner* in which individuals gather and use information on nonpublic property. The Act is also narrowly tailored to advance the government's significant interest in protecting property rights. In fact, the Act cannot be any more narrowly tailored: by defining the bounds of private property rights under North Carolina law, the Act's restrictions *are* the very interest it seeks to advance.

The district court's contrary holding signals an unprecedented expansion of the First Amendment. By applying the First Amendment to a law that regulates tortious conduct on nonpublic areas of land, the district court effectively created a First Amendment easement on private property for individuals seeking to gather information. And by enjoining all of the Act's challenged provisions under the First Amendment, the district court cast doubt on innumerable state and federal statutes that share the Act's central features.

The Court should reject this invitation to upend decades of free-speech law. The judgment of the district court should be reversed.

STATEMENT OF THE CASE

A. The North Carolina General Assembly passes the Act by an overwhelming margin.

In 2015, the North Carolina General Assembly passed the Act, which seeks to "codif[y] and strengthen[ ] North Carolina trespass law to better protect property owners' rights." J.A. 237. As one of the Act's chief sponsors explained, the law "puts greater protection in place to safeguard businesses' property from unlawful access and provide[s] appropriate recourse against individuals that engage in unauthorized activities in non-public areas of the business." J.A. 236 (statement of Rep. Szoka).

The Act starts with a general prohibition. It provides that "[a]ny person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained." N.C. Gen. Stat. § 99A-2(a).

The statute then lists five acts that exceed a person's authority to enter nonpublic property. Plaintiffs challenge four of those five provisions here:

- *Subsection (b)(1): The capture-or-remove provision.* A person exceeds her authority when she (1) enters the nonpublic areas of an employer's property, without a "bona fide intent" to perform her job; (2) "captures" or "removes" the employer's "data, paper, records, or any other documents"; and (3) uses that information to breach a duty of loyalty to the employer. *Id.* § 99A-2(b)(1).

- *Subsection (b)(2): The recording provision.* A person exceeds her authority when she (1) enters the nonpublic areas of an employer's property, without a "bona fide intent" to perform her job; (2) "records images or sound"; and (3) uses that information to breach a duty of loyalty to the employer. *Id.* § 99A-2(b)(2).

- *Subsection (b)(3): The hidden-camera provision.* A person exceeds her authority when she (1) "[k]nowingly or intentionally plac[es] on the employer's premises an unattended camera or electronic surveillance device," and (2) "us[es] that device to record images or data." *Id.* § 99A-2(b)(3).

- *Subsection (b)(5): The catch-all provision.* A person exceeds her authority when she otherwise "substantially interferes with the ownership or possession of real property." *Id.* § 99A-2(b)(5).

Property owners may seek equitable relief, compensatory damages, costs (including attorney's fees), and exemplary damages for violations of the Act. *Id.* § 99A-2(d).

The General Assembly was careful to carve out exceptions to the Act. The Act does not diminish state-law protections for whistle-blowers. *See id.* § 99A-2(e). Nor does the Act apply to lawful investigative activity by law enforcement or government agencies. *Id.* § 92A-2(f).

The General Assembly modeled the Act on this Court's decision in *Food Lion Inc. v. Capital Cities/ABC Inc.*, 194 F.3d 505 (4th Cir. 1999). For example, one representative stated that the Act was meant to be "consistent" with the decision in *Food Lion* "in every way, shape, and form." J.A. 204. Another legislator explained his view that by passing the Act, the General Assembly was "agreeing with" and "codify[ing]" the *Food Lion* case. J.A. 282. Indeed, throughout the debates on the Act, legislators looked to this Court's decision in *Food Lion* as a lodestar. J.A. 203, 206, 257, 284-85.

In that case, two ABC reporters used false identifies and references to get hired at Food Lion, a grocery-store chain, in an effort to investigate allegedly improper food-handling practices. *Food Lion*, 194 F.3d at 510. The reporters then used hidden cameras and

microphones to gather footage from the nonpublic areas of the store. *Id.* ABC featured some of the footage in a television exposé. *Id.* at 511.

Food Lion sued the two reporters for trespass and breaching a duty of loyalty. *Id.* This Court affirmed a jury verdict for Food Lion on both claims. *Id.* at 515-19. Making an *Erie* guess under North Carolina law, this Court held that the reporters trespassed by committing a "wrongful act in excess of [their] authority to enter Food Lion's premises as employees"—namely, "filming in non-public areas" and thereby "breaching their duty of loyalty to Food Lion." *Id.* at 518. The Court explained that the reporters breached this duty because they intended to benefit one employer, ABC, while "work[ing] against the interests of [their] second employer, Food Lion, in doing so." *Id.* at 519. The Court went on to hold that the First Amendment did not bar imposing tort liability under these circumstances. *Id.* at 520-22.

After extensive debate and amendment in both chambers, the General Assembly ratified *Food Lion* in the Act. With bipartisan support, the Act passed by an overwhelming margin—the House, by a vote of 99 to 19; the Senate, by a vote of 32 to 13. The General Assembly then enacted the law, notwithstanding a gubernatorial veto,

by a 79-to-36 vote in the House and a 33-to-15 vote in the Senate. *See* N.C. General Assembly, *Property Protection Act*, https://bit.ly/3rka6Og.

B. Plaintiffs bring a pre-enforcement challenge to the Act.

After the Act became law, plaintiffs filed a pre-enforcement challenge under 42 U.S.C. § 1983, alleging that the Act violated the First and Fourteenth Amendments to the U.S. Constitution, as well as various provisions of the North Carolina Constitution. J.A. 36-99.

Plaintiffs are organizations that seek to enjoin the Act so they can engage in undercover animal-cruelty investigations and publicize what they find. Two of the organizations, People for the Ethical Treatment of Animals and the Animal Legal Defense Fund, plan to have their employees apply for jobs at various employers that they suspect of abusing animals. J.A. 138, 151. When the employees submit an application, they will not disclose that PETA or ALDF also employs them. J.A. 152. If they are hired, the employees then intend to enter nonpublic areas of the second employer's property and gather information about how the employer treats animals. J.A. 139-40, 151-52. PETA and ALDF plan to distribute that information, including to

several other plaintiff-organizations, who will broadcast what they learn to their members and the public at large. J.A. 143-44, 163, 168.

Plaintiffs challenge the Act on its face and as applied. In their as-applied challenge, plaintiffs seek an injunction preventing the Chancellor of The University of North Carolina at Chapel Hill—and the North Carolina Attorney General, who would represent the University in court—from suing them under the Act. In their facial challenge, plaintiffs seek to enjoin the Act as overbroad.

The district court dismissed plaintiffs' claims for lack of standing. This Court reversed. *People for Ethical Treatment of Animals, Inc. v. Stein*, 737 F. App'x 122 (4th Cir. 2018) (per curiam).

On remand, the district court dismissed plaintiffs' state-law claims, but allowed the federal-law claims to proceed. No. 16-cv-25, Dkt. 73. The district court subsequently granted Farm Bureau's motion for permissive intervention. Dkt. 92.

Following discovery, the parties filed cross-motions for summary judgment. Dkts. 98, 107, 109. The fact record consists primarily of affidavits from plaintiffs to establish their standing to sue, as well as the Act's legislative history.

C. The district court enjoins all four of the Act's challenged provisions under the First Amendment.

The district court enjoined all four of the Act's challenged provisions, holding that they violate the First Amendment, either facially or as-applied. J.A. 484-86.

The district court started with the question whether the Act implicates the First Amendment. The district court recognized that subsection (a)'s general bar against "intentionally gain[ing] access to the nonpublic areas of another's premises and . . . exceed[ing] [a] person's authority to enter those areas" is a "law of general application" covering conduct, not speech. J.A. 438. The court nonetheless declined to follow *Food Lion* and concluded that the Act's challenged provisions in subsection (b) trigger the First Amendment, because they "include speech as an element of proof" or "have more than an incidental effect" on speech. J.A. 435-36, 438.

To begin, the court reasoned that subsection (b)(1)—the capture-or-remove provision—regulates speech. In the court's view, subsection (b)(1) could potentially apply to "image capture," "a speech act in which Plaintiffs wish to engage." J.A. 442. But the court acknowledged that subsection (b)(1) could also reach "myriad" types of "non-speech"

conduct, for example, "an individual who removes an employer's data and relies on it to start his own competitive business." *Id.* The court therefore held that plaintiffs' First Amendment challenge to subsection (b)(1) could proceed "as-applied." J.A. 442-43.

Next, the district court held that subsections (b)(2) and (b)(3)—the recording and hidden-camera provisions—also regulate speech. Both subsections, the court explained, implicate speech because they "create liability for individuals who, in some form, record images." J.A. 443. According to the court, recording images or data is speech, either as "expressive conduct" in its own right, or as "conduct essentially preparatory to speech." J.A. 432. Because these provisions "always target speech," the district court thought that plaintiffs' First Amendment challenge to these two provisions could proceed facially, rather than as applied. J.A. 443, 463.

Finally, the court held that subsection (b)(5)—the catch-all provision—did not "singl[e] out" speech on its face, but could conceivably regulate speech as-applied. J.A. 444.

The court then turned to the appropriate level of First Amendment scrutiny. It held that subsections (b)(1) and (b)(2) were

content-based restrictions subject to strict scrutiny, because liability under these subsections turns on whether a defendant "use[d]" unlawfully obtained information to breach a duty of loyalty. J.A. 448-49.

By contrast, the court held that subsection (b)(3) was content-neutral, and thus subject to intermediate scrutiny, because "[l]iability for using an unattended camera to record images or data does not define the regulated speech by subject matter" or by the "function or purpose" of the recording. J.A. 450-51. The Court also held that subsection (b)(5) was content neutral because it directly regulated conduct and affected speech only incidentally. J.A. 451-52.

The court then turned to the merits. The court first held that subsections (b)(1) and (b)(2) failed strict scrutiny because defendants did not offer any compelling interest to which the law was narrowly tailored. J.A. 455. In the alternative, the court stated that it would also find that those subsections failed intermediate scrutiny. J.A. 461-62.

The court next addressed whether subsections (b)(3) and (b)(5) survived intermediate scrutiny. The court accepted that the Act's

purpose of protecting property rights was a significant government interest but held that defendants had not "demonstrate[d] narrow tailoring." J.A. 459-62. Specifically, the court noted that other North Carolina laws "address[ed] property protection." J.A. 461. The court saw no reason why these statutes were "insufficient to address the problem." J.A. 462.

All told, the district court held that each of the Act's challenged provisions violate the First Amendment.

Turning to the remedy, the court enjoined subsections (b)(2) and (b)(3) on their face, because those provisions "always target speech." J.A. 463. By contrast, the district court enjoined subsections (b)(1) and (b)(5) only as applied to plaintiffs. J.A. 463-64. The court rejected plaintiffs' argument that subsections (b)(1) and (b)(5) are overbroad. Instead, the court held that these provisions have many constitutional applications. J.A. 466-67.

The district court concluded its opinion by rejecting plaintiffs' vagueness and equal-protection challenges. On the vagueness claim, the court held that subsections (b)(1) and (b)(5) provide a sufficiently definite standard that would give a person of ordinary intelligence fair

notice of what is prohibited. J.A. 470-74. On the equal-protection claim, the court held that there was no evidence that the legislature acted with unconstitutional animus in passing the Act. J.A. 476-78.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court's First Amendment analysis departed from well-settled law in at least two ways.

First, the district court erred by holding that the Act is subject to First Amendment scrutiny. The First Amendment does not provide a right to trespass on private property, even for those seeking to gather information or engage in speech-related activities. *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551, 568 (1972). Nor does the First Amendment give individuals license to break generally applicable laws, even when doing so might involve speech. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

Those principles decide this case. The Act bars individuals from breaching a duty of loyalty to an employer and trespassing on nonpublic property. And it applies equally to the conduct of all individuals across

North Carolina. The Act is therefore the type of generally applicable statute that does not implicate the First Amendment at all.

This Court's decision in *Food Lion* confirms the point. The Court held that the torts of trespass and breach of the duty of loyalty are generally applicable and do not trigger First Amendment review. 194 F.3d at 521. The Act codifies this Court's decision in *Food Lion*. Thus, as in *Food Lion*, the First Amendment does not apply here.

The district court reached the contrary conclusion based largely on its view that the Act applies to speech-related activities like taking pictures or recording videos. But the district court overlooked the geography of the First Amendment: filming a video may indeed be protected speech in a public park, but not in the nonpublic areas of private property. The Act's repeated references to "nonpublic property" sharply draw that distinction.

Second, even if the First Amendment applies, the district court erred by holding that the Act is unconstitutional.

To begin, the Act is content neutral. Deciding whether plaintiffs have violated the Act does not require examining the content of what

they say. Rather, the Act focuses on the manner in which plaintiffs gather and use information.

The district court incorrectly held that two of the Act's provisions—subsections (b)(1) and (b)(2)—are content based. It reasoned that because these provisions apply only when an employee breaches a duty of loyalty to an employer, they target speech based on its purpose and, in turn, its content. But "[i]t is common in the law to examine the content of a communication to determine the speaker's purpose." *Hill v. Colorado*, 530 U.S. 703, 721 (2000). This use of speech as *evidence* of a law's underlying intent requirement is content neutral.

Because the Act is content neutral, intermediate scrutiny applies. The Act survives this scrutiny because it is narrowly tailored to serve a significant government interest. The government has a significant interest in strengthening protections for property rights. And the Act furthers that interest in a narrowly tailored fashion. By creating an enhanced damages remedy for particular types of trespass, the Act defines the bounds of private property under North Carolina law. Its restrictions *are* the very property interests that the State seeks to protect.

The district court held that the government failed to show that the Act is narrowly tailored because the legislature did not first try or consider less-speech-restrictive alternatives. But on the unique facts of this case—where the State sought merely to codify this Court's *Food Lion* decision in a statute—the state legislature did not need to develop a detailed fact record for the Act to pass intermediate scrutiny.

Finally, the Act is not overbroad. Plaintiffs did not carry their heavy burden to show that the Act violates the First Amendment in a substantial number of its applications. Indeed, there is no record of unconstitutional applications here at all.

In sum, the Act complies with the First Amendment. Defendants respectfully request that this Court reverse the judgment of the district court.

ARGUMENT

Standard of Review

This Court reviews a district court's ruling on cross-motions for summary judgment de novo. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

Discussion

I. The Act Does Not Implicate The First Amendment.

Judicial review of a statute begins with the principle that "every statute is presumed to be constitutional." *United States v. Bollinger*, 798 F.3d 201, 207 (4th Cir. 2015). To overcome this presumption, plaintiffs must make a "plain showing" that a statute "has exceeded its constitutional bounds." *Id.*

In resolving a First Amendment challenge, courts first decide whether the speech or speech-related activity at issue is "protected by the First Amendment, for, if it is not, [a court] need go no further." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). Plaintiffs' speech interest therefore frames the First Amendment analysis.

As discussed above, plaintiffs seek to conduct undercover investigations in the nonpublic areas of property to expose suspected animal mistreatment. Two principles foreclose plaintiffs' argument that the First Amendment protects their conduct. First, there is no First Amendment right to engage in unauthorized speech or speech-related activity in the nonpublic areas of private property. Second, and

more broadly, the First Amendment protects only the right to gather information *lawfully*. That is, the First Amendment does not confer the right to trespass—or violate any other generally applicable law—in order to facilitate protected speech.

For these reasons, the Act does not affect any First Amendment interests, and plaintiffs' claims fail.

A. The First Amendment does not protect the right to gather information in the nonpublic areas of private property.

To start, the First Amendment does not authorize plaintiffs to enter the nonpublic areas of private property to gather information. Because the Act restricts plaintiffs' ability to gather information in those areas, it does not implicate the First Amendment.

The Supreme Court "has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551, 568 (1972). In rejecting a claim that individuals had a First Amendment right to enter private property and engage in expressive activity, the Court "vigorously and forthrightly" disavowed the premise that individuals

have a constitutional right to engage in speech-related activities "whenever and however and wherever they please." *Id.* This rule "respect[s] and protect[s]" the "Fifth and Fourteenth Amendment rights of private property owners." *Id.* at 570.

To hold otherwise "would tend to license a form of trespass." *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970). Courts have therefore recognized that "individuals generally do not have a First Amendment right to engage in speech on the private property of others." *See, e.g.*, *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1194 (10th Cir. 2017). Instead, "a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns." *Cornelius*, 473 U.S. at 801.

Thus, under Supreme Court precedent, individuals "may not with impunity break and enter an office or dwelling to gather news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). To the contrary, the well-settled rule is the opposite: the First Amendment does not authorize the commission of torts on private property to gather information. *See id.* at 669-70 (holding that a publisher of information

"has no special privilege to invade the rights and liberties of others"). Plaintiffs' free-speech claims fail as a result.

B. The First Amendment does not protect the right to violate a generally applicable law—like the Act—in order to engage in speech.

A second, related principle also forecloses plaintiffs' claims: generally applicable laws that do not target protected speech fall outside the First Amendment.

1. The First Amendment does not protect unlawful information gathering.

Plaintiffs do not have a First Amendment right to gather information in ways that violate other generally applicable laws.

As the Supreme Court has long held, "[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). The First Amendment does not provide "a constitutional right of special access to information." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *cf. McBurney v. Young*, 569 U.S. 221, 232 (2013) (holding that "there is no constitutional right to obtain all the information provided by FOIA laws"). Rather, the Supreme Court "has repeatedly declined to confer . . . an expansive right to gather information, concluding that such an

approach would 'present practical and conceptual difficulties of a high order.'" *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 946 (7th Cir. 2015) (quoting *Branzburg*, 408 U.S. at 684). If the public does not have a right to access certain property, it therefore does not have a First Amendment right to gather information there. *Branzburg*, 408 U.S. at 684; *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (individuals seeking to gather information "have no constitutional right of access" to locations "beyond that afforded the general public"). Just as a computer hacker has no protected First Amendment right to violate cybersecurity laws to gather information, a trespasser has no constitutional right to invade private property to rifle through private papers. *See Cohen*, 501 U.S. at 669. Assessing damages for harms suffered when "wrongfully acquired data are purveyed to the multitude chills *intrusive* acts. It does not chill freedom of expression guaranteed by the First Amendment." *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971) (emphasis added).

Recognizing these rules, this Court has held that, although news-gathering activities in some instances may be protected by the First Amendment, the Amendment does not "confer a license" on a news-

gatherer to violate generally applicable laws. *United States v. Matthews*, 209 F.3d 338, 344 n.3 (4th Cir. 2000); *see also Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999). This media-focused rule applies to all members of the public. "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." *Dietemann*, 449 F.2d at 249. Thus, "generally applicable laws do not offend the First Amendment simply because their enforcement" may have "incidental effects on [the] ability to gather and report the news." *Cohen*, 501 U.S. at 669.

In other words, to implicate the First Amendment, "truthful information sought to be published must have been *lawfully acquired*." *Id.* (emphasis added); *see also, e.g.*, *The Florida Star v. B.J.F.*, 491 U.S. 524, 533-34 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979); *Ostergren v. Cuccinelli*, 615 F.3d 263, 275 (4th Cir. 2010). Plaintiffs therefore do not have a First Amendment right to gather or use information they obtained in violation of generally applicable laws, like the Act.

This Court's decision in *Food Lion* confirms that the Act does not implicate the First Amendment. As discussed above, in *Food Lion*, two television reporters used false resumes to obtain employment at a grocery store and then secretly videotaped food-handling practices at the store. 194 F.3d at 510. Among other things, the jury found in favor of Food Lion on its breach-of-duty-of-loyalty and trespass claims against the reporters. *Id.* at 511. This Court affirmed the district court's refusal to set aside those parts of the verdict, *id.* at 516, 519, and rejected the reporters' argument that "the district court erred in refusing to subject Food Lion's claims to *any level of First Amendment scrutiny*," *id.* at 520 (emphasis added).

The Court explained that the First Amendment does not protect news-gathering efforts against the application of generally applicable laws, such as trespass. *Id.* at 520-21 (citing, among others, *Cohen*, 501 U.S. at 668-70). The Court held that the "key inquiry" was whether the laws at issue were generally applicable, because individuals attempting to gather information must abide by such proscriptions. *Id.* at 521.

A law is generally applicable if "it 'does not target or single out the press,' but instead applies 'to the daily transactions of all citizens [of the

State].'" *Id.* (quoting *Cohen*, 501 U.S. at 670). The trespass and breach-of-duty-of-loyalty torts at issue in *Food Lion* were laws of general applicability because neither tort targeted the press, and both torts applied to the daily transactions of all individuals. *Id.*

2. The Act is a generally applicable law that does not implicate the First Amendment.

Under *Food Lion*, the Act is a generally applicable law that is not subject to First Amendment scrutiny.

Like the torts at issue in *Food Lion*, the Act here applies equally to all individuals. For example, the law could apply to a competitor's employees who obtain employment and seek to discover information to gain a competitive advantage, individuals who desire to obtain confidential legal information from a law office, or individuals who want to uncover embarrassing personal information that they can use for their own gain. N.C. Gen. Stat. § 99A-2(a). And the Act applies to *all* "nonpublic areas of another's premises," so it does not create special rules for any type of business or industry. *Id.*

Further, the Act incorporates the very same tort principles of trespass and the duty of loyalty underlying the claims in *Food Lion*, in addition to other generally applicable tort rules such as theft and

invasion of privacy. The Act applies only to a person who intentionally gains access to nonpublic areas of a premises and, once there, engages in an "act that exceeds the person's authority to enter those areas." *Id.* These restrictions protect the property owner's privacy and possessory rights and are squarely in line with the Supreme Court's admonition that the First Amendment does not authorize an individual to "break and enter an office or dwelling to gather news." *Cohen*, 501 U.S. at 669; *see also Food Lion*, 194 F.3d at 521.

Each of the Act's challenged provisions, moreover, accord with the type of generally applicable law that this Court upheld against a First Amendment challenge in *Food Lion*.

First, subsections (b)(1) and (b)(2)—the capture-or-remove and recording provisions—are generally applicable. These provisions forbid an employee from entering into a nonpublic area "for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer." N.C. Gen. Stat. § 99A-2(b)(1), (2). An individual must therefore engage in conduct beyond the scope of an employer's consent—in other words, a trespass. *See Miller v. Brooks*, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996) ("Even an authorized entry

can be trespass if a wrongful act is done in excess of and in abuse of authorized entry."). The employee must then "without authorization" capture or remove documents or data, N.C. Gen. Stat. § 99A-2(b)(1); or record images or sound, *id.* § 99A-2(b)(2). Capture or removal of an employer's property without authorization is theft. And unauthorized recording is both a trespass and invasion of privacy. All are generally applicable tort rules.

Subsections (b)(1) and (2) are also generally applicable because they cover only those employees who breach a duty of loyalty to an employer. The duty of loyalty is another generally applicable rule that has, at most, an incidental effect on speech-related activity. Indeed, this Court held in *Food Lion* that both the duty of loyalty and trespass "fit neatly" into the Supreme Court's framework of generally applicable laws that are not shielded by the First Amendment. *Food Lion*, 194 F.3d at 521. After all, the "First Amendment is not a license . . . to steal" or otherwise engage in "calculated misdeeds." *Dietemann*, 449 F.2d at 249-50.

Second, subsection (b)(3)—the hidden-camera provision—prohibits any person from knowingly or intentionally "placing on the

employer's premises an unattended camera or electronic surveillance device and using that device to record images or data." N.C. Gen. Stat. § 99A-2(b)(3). This is another generally applicable rule that serves property owners' privacy and property interests in the nonpublic areas of their premises.

Moreover, it is consistent with North Carolina law prohibiting an individual from using electronic surveillance to intercept communications. *Id.* § 15A-287. Like North Carolina's Electronic Surveillance Act, subsection (b)(3) recognizes a long-standing privacy interest in being free from electronic surveillance. *See, e.g.*, *State v. Hendricks*, 258 S.E.2d 872, 880 (N.C. Ct. App. 1979). As the North Carolina Court of Appeals has explained, "[i]t offends common sense to suggest that . . . continuous electronic surveillance would not violate any reasonable expectation of privacy." *Id.*; *see also Dietemann*, 449 F.2d at 249. Similarly, this Court in *Food Lion* held that the First Amendment does not protect clandestine recording through trespass. 194 F.3d at 519. Under these cases, the First Amendment does not apply to a law that prohibits unauthorized recording in the nonpublic areas of a business or facility.

Finally, subsection (b)(5)—the catch-all provision—prohibits any individual from accessing the nonpublic areas of property and, once there, intentionally engaging in an act "that substantially interferes with the ownership or possession of real property." N.C. Gen. Stat. § 99A-2(b)(5). This provision incorporates the same trespass principles that *Food Lion* held were general rules of applicability not subject to First Amendment scrutiny. 194 F.3d at 521.

In sum, the challenged provisions of the Act do not implicate the First Amendment.

3. The district court's contrary analysis is unpersuasive.

The district court's holding that the First Amendment applies here cannot be reconciled with *Food Lion* and similar cases.

Despite the many similarities between *Food Lion* and the Act, the district court found *Food Lion* "largely misplaced" in the context of this case. J.A. 435. The district court noted that the North Carolina Supreme Court later disagreed with a part of this Court's analysis in *Food Lion*. J.A. 436-37. Specifically, the state high court held that this Court was incorrect to anticipate that North Carolina law would recognize a breach of the duty of loyalty as a cause of action. *Dalton v.*

Camp, 548 S.E.2d 704, 709 (N.C. 2001). But that is precisely what the North Carolina General Assembly did when it passed the Act. J.A. 285; N.C. Gen. Stat. § 99A-2(b)(1), (2). And in any event, the existence of an independent cause of action for breaching a duty of loyalty under North Carolina law is irrelevant to the First Amendment question here: whether a prohibition on an employee breaching a duty of loyalty is a rule of general applicability, the relevant legal principle under *Food Lion*.

More broadly, the district court also observed that "even a generally applicable law can be subject to First Amendment scrutiny as applied to speech that falls within its terms." J.A. 434-35. In support, the court cited *Billups v. City of Charleston*, 916 F.3d 673, 684 (4th Cir. 2020). But *Billups* invalidated a municipal ordinance that required permits for tour guides and thus prohibited unlicensed tour guides "from expressing [their] ideas on public thoroughfares." *Id.* The ordinance in *Billups* was aimed only at people who were engaged in

speech in public. The Act, by contrast, is aimed at people who violate generally applicable standards of conduct in *nonpublic* areas.[1]

Similarly, the district court held that trespass cases such as *Miller* and *Dietemann* were distinguishable because the trespass and invasion-of-privacy laws at issue in those decisions did not "require speech as an element of proof." J.A. 437-38. But the Act does not require *protected* speech as an element of proof in any of its provisions. Instead, it prohibits activity in the nonpublic areas of private property, and there is no right to engage in speech-related conduct in those areas.

Nor does it matter that subsections (b)(1) and (b)(2) prohibit "us[ing]" stolen or illicitly recorded information to breach an employee's duty of loyalty. *See* J.A. 440, 443. As discussed above, the First Amendment does not confer a right to publish, without repercussion,

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[1] Like *Billups*, the two other cases that the district court cited for this proposition, J.A. 435, did not involve speech on nonpublic property or speech-related activity that violated generally applicable tort rules. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upholding content-based restriction on speech prohibiting provision of financial assistance to terrorist organizations); *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198 (4th Cir. 2019) (applying intermediate scrutiny and upholding prohibition on corporate practice of law that burdened the right of corporations to engage in otherwise lawful speech).

information that is obtained illegally. *The Florida Star*, 491 U.S. at 533-34; *Daily Mail*, 443 U.S at 103; *Dietemann*, 449 F.3d at 250.

The district court also noted that the act of recording may be "expressive conduct." J.A. 432. But that does not mean that any person has a First Amendment right to engage in that expressive conduct on private property. *See Food Lion*, 194 F.3d at 518 (affirming trespass verdict based on breach of loyalty "triggered by the filming in non-public areas, which was adverse to Food Lion"). There is no question, for example, that distributing handbills protesting the Vietnam War is expressive conduct, but the Supreme Court in *Lloyd* held that the First Amendment does not confer a right to engage in that speech on private property. 407 U.S. at 568.

Ignoring the crucial relevance of the fact that plaintiffs seek to record and capture information about private parties in the nonpublic areas of property, the district court relied on cases such as *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), and *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017), for the respective propositions that the acts of making recordings and capturing images are expressive conduct. J.A. 432-33. *Alvarez*, however, involved making recordings of police

officers performing their official functions *in public*. 679 F.3d at 597. Similarly, *Fields* addressed the "First Amendment right to record police activity *in public*." 862 F.3d at 355 (emphasis added). The Act, however, applies *only* to recordings made "in nonpublic areas of another's premises." N.C. Gen. Stat. § 99A-2(a).

* * *

In sum, the Act is not subject to "any level of First Amendment scrutiny." *Food Lion*, 194 F.3d at 520.

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

Even if this Court were to apply the First Amendment here, plaintiffs' as-applied challenge would still fail. The Act is a content-neutral law that is narrowly tailored to further a significant government interest.

A. The Act is content neutral.

Neither the text nor the purpose of the Act targets plaintiffs' speech based on its content. Rather, the Act applies to the manner in which plaintiffs intend to collect and use information gathered from the nonpublic areas of an owner's property. Time, place, and manner regulations of this kind are, by definition, content neutral.

To decide whether a law regulates speech based on its content, courts start with the law's text and ask whether it draws content distinctions on its face. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The question is whether the law requires "'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).

Here, the district court correctly held that two of the Act's challenged provisions—subsections (b)(3) and (b)(5)—are content neutral. J.A. 450-52. Those parts of the Act prevent individuals from intentionally placing and using a recording device on an employer's property or otherwise substantially interfering with real property. Deciding whether plaintiffs have violated these provisions here does not require a court to examine the content of their speech. *See infra* Part II.A.1.a.

By contrast, the district court was wrong to hold that the Act's other two challenged provisions—subsections (b)(1) and (b)(2)—are content based. J.A. 448-50. Those parts of the Act apply only when an

employee uses information collected from the nonpublic areas of an employer's property for a specific purpose: to breach the employee's "duty of loyalty" to the employer. As this Court held in *Food Lion*, an employee breaches a duty of loyalty when she "promot[es] the interests of one [employer] to the detriment of a second" and has the "intent to act adversely to the second employer for the benefit of the first." 194 F.3d at 516.

Thus, deciding whether plaintiffs breach a duty of loyalty does not depend on what they say. Rather, it depends on their intent to harm one employer to benefit another. In this way, the statute regulates speech based on its motive, not its content, and is therefore content neutral. *Hill v. Colorado*, 530 U.S. 703, 721 (2000).

The district court disagreed because it misinterpreted the Supreme Court's recent decision in *Reed*. The court thought that under *Reed*, *all* motive-based regulations of speech are content based. But at least two federal appellate courts have rejected that sweeping conclusion. This Court should do the same. Indeed, to hold otherwise would throw into doubt the constitutionality of countless state and federal laws. *See infra* Part II.A.1.b.

When a law does not draw content-based distinctions on its face, courts next ask whether the law can be "justified without reference to the content of the regulated speech" and whether the law was adopted because of the government's disagreement with the message the speech conveys. *Reed*, 576 U.S. at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Although the district court did not expressly reach this second part of the content-neutrality analysis, the Act easily satisfies it. The Act imposes civil liability for certain types of trespass without reference to any particular industry. And the North Carolina General Assembly gave content-neutral reasons for justifying the law: to strengthen protections for property owners. *See infra* Part II.A.2.

In short, the Act is content neutral.

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

By their terms, the Act's challenged provisions do not single out speech for its content.

a. The district court was right to hold that subsections (b)(3) and (b)(5) are content neutral.

First, the district court was right that subsection (b)(3) does not discriminate based on the content of speech. J.A. 450-51. This

provision applies when an individual knowingly or intentionally places a camera or other surveillance device on an employer's property to record images or data. N.C. Gen. Stat. § 99A-2(b)(3).

Here, as part of their undercover investigations, plaintiffs intend to place hidden cameras on an employer's property to record animal mistreatment. J.A. 139, 151-52. To decide whether plaintiffs violate the Act, a court need not examine the content of what plaintiffs record. The Act applies whether plaintiffs use a camera to document animal abuse, a political strategy session, an office party, or even an empty room. Subsection (b)(3) is therefore plainly content neutral.

Second, the district court was also right that subsection (b)(5) is content neutral. J.A. 451-52. This provision applies when an individual engages in an "act" that substantially interferes with the ownership or possession of real property. N.C. Gen. Stat. § 99A-2(b)(5).

As the district court recognized, this part of the statute directly regulates conduct and affects speech only incidentally. J.A. 452. A law that directly regulates conduct is inherently content neutral, even if it has incidental effects on speech. *United States v. O'Brien*, 391 U.S. 367, 375 (1968); *accord Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198,

209 (4th Cir. 2019) ("*CAI*"). For example, in *O'Brien*, the Supreme Court held that a statute making it unlawful to burn a draft card directly regulated the act of destroying a government-issued document. *O'Brien*, 391 U.S. at 375. Although the statute also prevented the defendant in that case from communicating an anti-war message, the statute regulated his speech only indirectly. *Id.* at 376-77. The statute was content neutral as a result. *Id.*; *see also CAI*, 922 F.3d at 209 (law directly regulating professional conduct and affecting speech only incidentally was content neutral).

A similar analysis applies here. The Act's ban on substantially interfering with real property directly regulates what plaintiffs do, not what they say. Under North Carolina property law, a substantial interference with real property takes place when there is "an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental." *See Long v. City of Charlotte*, 293 S.E.2d 101, 109 (N.C. 1982), *superseded on other grounds by statute*, 1981 N.C. Sess. Laws 1382, 1402. Thus, plaintiffs do not trigger this part of the Act by communicating a message. Their conduct

is all that matters. To the extent the Act affects plaintiffs' speech, it does so only incidentally, in a content-neutral fashion.

In sum, the district court correctly held that subsections (b)(3) and (b)(5) are content neutral.

b. The district court was wrong to hold that subsections (b)(1) and (b)(2) are content based.

The district court erred when it held that the Act's other two challenged provisions—subsections (b)(1) and (b)(2)—regulate speech based on its content. J.A. 448-50.

These two parts of the Act use similar language and share the same structure. Under subsection (b)(1), an employee is liable when she (1) enters the nonpublic areas of an employer's property, without a bona fide intent to perform her job; (2) captures or removes data, paper, records, or other documents; and (3) uses that information to breach a duty of loyalty to the employer. N.C. Gen. Stat. § 99A-2(b)(1). Subsection (b)(2) applies under the same circumstances when an employee—instead of capturing or removing documents—records images or sound. *Id.* § 99A-2(b)(2).

The legislative record also demonstrates that these two provisions have a common origin: they trace their roots to this Court's decision in *Food Lion*. *E.g.*, J.A. 203-04, 282. As discussed above, in *Food Lion*, this Court held that an employee breaches a duty of loyalty when she "promot[es] the interests of one [employer] to the detriment of a second" and has the "intent to act adversely to the second employer for the benefit of the first." 194 F.3d at 516. In that case, the ABC reporters had an "intent to act adversely to [Food Lion] for the benefit of [ABC]" when they "engag[ed] in [undercover] taping for ABC while they were on Food Lion's payroll." *Id.* The reporters were also liable to Food Lion for committing a trespass, because they breached their duty of loyalty when they "videotaped in non-public areas of the store and worked against the interests of [their] second employer, Food Lion, in doing so." *Id.* at 519.

This Court's decision in *Food Lion* makes clear that subsections (b)(1) and (b)(2) regulate speech in a content-neutral manner. The critical part of both provisions is that an employee must use information that she gathers from the nonpublic areas of her employer's property to breach a duty of loyalty. Under *Food Lion*, a breach of that

duty only happens when an employee has a specific intent: to promote the interests of one employer to the detriment of a second. *Id.* at 516.

Motive-based regulations of speech like subsections (b)(1) and (b)(2) are content neutral. "The First Amendment . . . does not prohibit the evidentiary use of speech to . . . prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). After all, "[i]t is common in the law to examine the content of a communication to determine the speaker's purpose." *Hill*, 530 U.S. at 721.

For example, under Title VII, an employee may lawfully use her employer's speech as evidence that impermissible discrimination played a motivating role in an adverse employment action. *Mitchell*, 508 U.S. at 490; *accord Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (plurality opinion). Applying Title VII in that situation does not require a court or a jury to render a judgment on the content of what the employer said. Instead, the employer's speech—no matter its content—supplies evidence of motive. *See Price Waterhouse*, 490 U.S. at 251-52 (plurality opinion). This use of speech as *evidence* of a law's underlying intent requirement is content neutral. *See Mitchell*, 508 U.S. at 490; *Hill*, 530 U.S. at 720-21.

So too here. Subsections (b)(1) and (b)(2) come into play only when an employee uses information that she gathers from the nonpublic areas of an employer's property to breach a duty of loyalty. Breaching that duty, in turn, requires the employee to act with a specific intent—the intent to harm the employer to benefit another employer. *Food Lion*, 194 F.3d at 516. Thus, the content of the information that plaintiffs intend to gather—whether documents, data, images, sound, or anything else—is irrelevant under these parts of the Act. *See* N.C. Gen. Stat. § 99A-2(b)(1), (2). Rather, the question is whether plaintiffs use that information in a way that breaches their duty of loyalty to the second employer—whether, in the words of *Food Lion*, they have the "intent to act adversely to [a] second employer for the benefit of the first." 194 F.3d at 516.

The district court, however, held that any purpose-based regulation of speech is necessarily content based. To support this ruling, the district court relied on the Supreme Court's decision in *Reed*. J.A. 449 (citing *Reed*, 576 U.S. at 163). But *Reed* does not stand for this sweeping proposition. To be sure, the Supreme Court stated that "[*s*]*ome*" laws may "subtl[y]" regulate speech based on its content

because they "defin[e] [the] regulated speech by its function or purpose." *Reed*, 576 U.S. at 163 (emphasis added). Yet the Court did not have occasion to consider such a law. Rather, the sign ordinance the Court analyzed in *Reed* was far from subtle: it drew distinctions based "*entirely*" on what the signs said—so-called "political signs" faced one set of regulations; "ideological signs," another; and so on. *Id.* at 164 (emphasis added). The challenged ordinance did not examine the purpose or motive behind particular forms of speech at all.

Taking account of this context, the First and Eleventh Circuits have declined to extend *Reed* beyond its facts to declare all motive-based laws to be content-based restrictions on speech. As the Eleventh Circuit recently explained, the portion of *Reed* on which the district court relied here "is dicta . . . because the Supreme Court did not apply it" to the facts of that case. *Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1319 (11th Cir. 2020). The First Circuit has similarly reasoned that the "single sentence in *Reed*" on which the district court relied has "little bearing" on the question whether a purpose-based law discriminates on content. *March v. Mills*, 867 F.3d 46, 58 (1st Cir. 2017), *cert. denied* 138 S. Ct. 1545 (2018). Instead, *Reed* only addressed

a law that "depend[ed] *entirely* on the communicative content" of the regulated speech. *Id.* (emphasis added) (quoting *Reed*, 576 U.S. at 164).

There is good reason to follow the First and Eleventh Circuit's approach. The district court's expansive understanding of *Reed* would revolutionize free-speech law. The statute books burst with motive-based regulations that, like the Act, turn on an individual's purpose for gathering and then using information. Many of those statutes take place in analogous situations involving trespass, conversion, or other property-based torts. The Computer Fraud and Abuse Act, for example, makes it unlawful for a person to exceed her authorized access to a computer "with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation" and then "willfully communicate[ ]" that information "to any person not entitled to receive it." 18 U.S.C. § 1030(a)(1). The Economic Espionage Act similarly makes it unlawful for any person who "without authorization appropriates" a trade secret "intending or knowing that the offense will benefit any foreign government." 18 U.S.C. § 1831(a)(1).

These are only a few of the many laws across a variety of contexts—from the antitrust statutes, to tax regulations, to securities laws, to food-and-drug regulations—that may depend in part on an individual's motive. For all of these laws, moreover, evidence of a defendant's motive can come in the form of speech. Under the district court's logic, regulations of this kind are content-based and must survive strict scrutiny, the most demanding standard in constitutional law. But a stray sentence in *Reed* did not overrule decades of precedent on this question, casting doubt on the constitutionality of innumerable state and federal statutes. *See Mitchell*, 508 U.S. at 489; *Hill*, 530 U.S. at 721.

In sum, the district court erred by holding that subsections (b)(1) and (b)(2) draw content-based distinctions. Instead, those two provisions are content neutral.

2. The Act's purpose does not reflect content-based discrimination.

The Act's purpose also reflects content-neutral justifications for the law.

To begin, the Act's text does not raise any inference of an impermissible content-based motive. "The broad reach of a statute can

help confirm that it was not enacted to burden a narrower category of disfavored speech." *See McCullen*, 573 U.S. at 481. That is the case here. The Act is not, for example, limited to any particular industry. *Compare with, e.g.*, *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1191 (9th Cir. 2018) (Idaho statute applying only to "agricultural production facilities"). Rather, the Act applies across the board—to agricultural facilities, technology companies, medical clinics, and so on.

Another important difference is that the Act imposes civil rather than criminal liability. It therefore does not raise the kind of selective-prosecution concerns that have troubled other courts evaluating whether a law reflects an impermissible content-based purpose. *Compare with id.* at 1197.

The legislative record provides further support for the conclusion that the Act was adopted for content-neutral reasons. The record shows that lawmakers overwhelmingly justified the Act on the ground that it would strengthen protections for property rights in North Carolina. *E.g.*, J.A. 174-75, 202, 236-37, 244, 261-62, 279, 304, 313; *accord* J.A. 476-77. To be sure, the record also reveals several isolated statements from lawmakers concerned about undercover investigations that are

then reported to the public. *See* J.A. 474, 476-77. But isolated statements from a handful of lawmakers are not enough to undermine the constitutionality of the entire Act.

The Ninth Circuit took this approach in *Wasden*. There, animal-rights organizations brought a First Amendment challenge to a law that, among other things, criminalized obtaining records at an "agricultural production facility" by making a misrepresentation. 878 F.3d at 1199-1200. Although "some legislators wanted to silence investigative journalists" by passing the challenged law, the "full legislative history" showed that the statute's primary purpose was to "prevent harm from damaged or stolen records." *Id.* at 1200. The court declined to infer from statements by a small group of legislators that the law reflected an impermissible content-based purpose. *See id.* If anything, the evidence of a content-neutral purpose in this case is even stronger than it was in *Wasden*, where, unlike the Act, the statute at issue targeted a specific industry.

In sum, the Act's purpose does not reflect content-based discrimination.

B. The Act passes intermediate scrutiny.

Because the Act's challenged provisions are content neutral, intermediate scrutiny applies. Under intermediate scrutiny, the Act must (1) serve a significant government interest, (2) in a narrowly tailored fashion, and (3) leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Billups*, 961 F.3d at 685. The Act satisfies each of these requirements.

1. The Act advances a significant government interest.

First, the district court was right that the Act advances a significant government interest—the protection of property rights. J.A. 458-59. Indeed, plaintiffs have never disputed the significance of this interest.

For good reason. To show that a law advances a significant government interest, a party need not "present evidence." *Reynolds v. Middleton*, 779 F.3d 222, 227 (4th Cir. 2015). Rather, "common sense and the holdings of prior cases have been found sufficient." *Id.*

Here, as discussed above, the Act's text and legislative history show that the statute seeks to strengthen property protections. *See*

supra Part II.A. The Supreme Court has held that the government has a significant interest in protecting property rights. *McCullen*, 573 U.S. at 486. And it is "obvious" that the Act serves this interest. *See Reynolds*, 779 F.3d at 229. After all, the Act provides property owners with an enhanced damages remedy for particular types of trespass. N.C. Gen. Stat. § 99A-2(d).

In sum, the district court correctly held that the Act advances a significant government interest.

2. The Act is narrowly tailored.

The district court went on to hold, however, that the Act is not narrowly tailored. The district court based this conclusion on its view that the State, before it passed the Act, neither tried nor considered less-speech-restrictive alternatives to further its interests in protecting property rights. J.A. 459-63. But the State did not need to make that showing here. And it satisfied it in any event.

To decide whether a law is narrowly tailored, courts ask whether the law "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. "So long as the means chosen are not substantially broader than

necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800.

Here, the Act does not burden substantially more speech than is necessary to further the government's interest in strengthening protections for property rights. By creating an enhanced damages remedy for particular types of trespass, the Act itself defines the bounds of private property under North Carolina law. The Act therefore cannot be any more narrowly tailored: the Act's restrictions *are* the very property interests that the State seeks to protect. Consider, for example, that the Act does not apply to speech about matters of public concern on public property. It does not even close off access to the areas of an employer's private property that are open to the public. N.C. Gen. Stat. § 99A-2(a).

The Act is narrowly tailored in still other ways. It applies only when an individual acts intentionally. *Id.* It protects employees who enter nonpublic property for bona fide reasons. N.C. Gen. Stat. § 99A-2(b)(1), (2). It does not apply unless an individual's interference with

the owner's property causes harm. *Id.* § 99A-2(a). And it carves out protections for whistle-blowers and government investigations. *Id.* § 99A-2(e), (f). In short, the Act is laser-focused on providing property owners with a meaningful remedy for a particular injury. An individual violates the Act only by entering nonpublic property and only with a specific intent to commit a specific type of trespass that results in damages. These characteristics are all hallmarks of narrow tailoring. *See, e.g.*, *Dahlstrom*, 777 F.3d at 954 (identifying a statute's scienter requirement, limited scope, and various exceptions as evidence of narrow tailoring).

The district court held otherwise, explaining that the Act could not be narrowly tailored because the North Carolina General Assembly failed to consider less-speech-restrictive alternatives. J.A. 462. The district court erred by taking an unduly broad view of that requirement under the unique circumstances of this case.

When considering whether a law is substantially broader than necessary to achieve the government's interest, courts look to whether the government first tried or considered less-speech-restrictive alternatives. For example, in *McCullen*, the Supreme Court addressed

the constitutionality of a "truly exceptional" state law that created a fixed, 35-foot speech-free "buffer zone" around every reproductive-health clinic in the state. 573 U.S. at 490. The law swept far more widely than the problem it meant to fix—allegedly disruptive speech "shown to arise only once a week in one city at one clinic." *Id.* at 493. And it did so despite the fact that it applied to speech "about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history." *Id.* at 496.

A novel law of this kind "raise[s] concern that the [state] has too readily forgone options that could serve its interests just as well, without substantially burdening" speech. *Id.* at 491. The Court therefore required the state to establish "that it seriously undertook to address the problem with less intrusive tools readily available to it" or "that it considered different methods that other jurisdictions have found effective." *Id.* at 494.

In a pair of recent cases, this Court has applied the narrow-tailoring analysis in *McCullen* to similarly novel speech restrictions of unprecedented breadth.

In *Reynolds v. Middleton*, a county passed an ordinance prohibiting leafletting and solicitation on all roadways and medians. 779 F.3d at 225. The ordinance swept far more broadly than the problem it sought to address. It applied to "*all* roadside leafletting and solicitation" throughout the county, even though the record showed that solicitation was a safety risk only at "busy intersections in the west end of the county." *Id.* at 231 (emphasis added). And it did so despite the fact that it "burden[ed] a wide range of protected speech" on public property. *Id.* at 230. Thus, the ordinance's breadth required the county to present evidence that it tried or considered less-speech-restrictive alternatives before passing the regulation, and that those alternatives could not advance its interest in public safety. *Id.* at 231-32.

The challenged ordinance this Court considered in *Billups v. City of Charleston* also restricted speech in unprecedented ways. In *Billups*, the city of Charleston had an ordinance requiring tour guides to pass a 200-question written exam on the city's history and architecture. 961 F.3d at 676. The city's burdensome exam went far beyond "discourag[ing] potential fraudsters" and ensuring "that tour guides possess adequate knowledge about [the city's] history." *Id.* at 686. In

effect, the ordinance prevented numerous potential tour guides from "speaking to visitors [to the city] on certain public sidewalks and streets." *Id.* at 683. As a result, the Court required the government to show that, before it passed the ordinance, "it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest." *Id.* at 688.

Here, the district court read the *McCullen* line of authority as requiring the State, before passing the Act, to have tried or considered less-speech-restrictive alternatives for advancing its interest in protecting property rights. The district court erred by imposing this burden in the unique circumstances of this case.

The Act is fundamentally different from the laws in *McCullen*, *Reynolds*, and *Billups*. The Act does not make new law. Rather, it merely codifies in state law an *Erie* guess that this Court made roughly twenty years ago in *Food Lion*. The trespass and duty-of-loyalty claims that *Food Lion* recognized are hardly "exceptional." *McCullen*, 573 U.S. at 490. They trace their roots to tort-law concepts that date back centuries. And they protect private property, itself a constitutional

interest. *Lloyd*, 407 U.S. at 570. Before codifying a judicially recognized tort in a statute that may implicate speech on private property, a state legislature should not have to develop a record that it first tried or considered less-speech-restrictive alternatives.

A requirement of that kind makes sense for novel speech restrictions that ban speech on public streets. In those circumstances, a court has reason to wonder whether the government "has too readily forgone options that could serve its interests just as well, without substantially burdening" speech. *McCullen*, 573 U.S. at 491. But that is not the case here: a state legislature's exercise of its police powers to protect the rights of private property owners to exclude others—rights already recognized by courts in case law and rights imbued with constitutional significance—needs no heightened explanation.

But even if a requirement of that kind were to apply, the State had no other less-speech-restrictive alternatives to consider. The district court suggested that the State could have tried to rely on a different statute, N.C. Gen. Stat. § 99A-1, that gives property owners a cause of action for interference with their property rights. J.A. 461-62. But section 99A-1 applies only to *personal*, not real, property, and so it

does not address the type of employment-related trespass that concerned the legislature here. N.C. Gen. Stat. § 99A-1.

The district court also suggested that the State could have tried to rely on the cause of action for trespass that this Court recognized in *Food Lion*. J.A. 461-62. This suggestion suffers from a fatal flaw: as explained above, the Act codified *Food Lion* in a statute. *See* pp 32-33, *supra*. And the legislature had good reason to turn *Food Lion* into positive law. Several years after *Food Lion*, the North Carolina Supreme Court disagreed with how this Court had interpreted North Carolina common law in that case. *Dalton*, 548 S.E.2d at 709. The legislature therefore codified *Food Lion* to resolve any uncertainty about the scope of property protections in the wake of those two conflicting decisions. This was well within the legislature's authority under state law. *See Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 8 (N.C. 2004) ("[W]hen [the General Assembly] elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." (quoting *McMichael v. Proctor*, 91 S.E.2d 231, 234 (1956)).

In sum, the Act is narrowly tailored to advance the State's significant interest in protecting private property.

3. The Act leaves open ample alternative channels of communication.

Because the district court held that the Act is not narrowly tailored, it did not reach the last step of the intermediate-scrutiny analysis: whether the Act leaves open ample alternative channels of communication. J.A. 462. The Act satisfies this final requirement.

To decide whether a law leaves open ample alternative channels of communication, courts ask whether the law "provides avenues for the more general dissemination of a message," even if the alternatives are not the speaker's preferred option. *Ross v. Early*, 746 F.3d 546, 559 (4th Cir. 2014) (quoting *Green v. City of Raleigh*, 523 F.3d 293, 305 (4th Cir. 2008)).

Here, the Act leaves open ample alternative channels for plaintiffs' speech. The Act does not apply to areas of an owner's property that are open to the public, where plaintiffs may still go to conduct undercover investigations. N.C. Gen. Stat. § 99A-2(a). Nor does the Act apply if plaintiffs' employees enter the nonpublic areas of another employer's property with a bona fide intent to seek or hold a

job. *Id.* § 99A-2(b)(1), (2). The Act also protects speech by whistle-blowers and government investigators. *Id.* § 99A-2(e), (f). And, of course, nothing in the Act prevents plaintiffs from engaging in any form of speech they would like that does not occur on private property.

In sum, the Act leaves open ample alternative channels for plaintiffs' speech.

* * *

All told, plaintiffs' as-applied challenge to the Act fails. The Act is a content-neutral speech regulation that is narrowly tailored to serve a significant government interest.

III. The Act Is Facially Constitutional.

In addition to their as-applied challenge, plaintiffs also claim that the Act violates the First Amendment on its face. Because the Act has many constitutional applications, plaintiffs cannot meet their heavy burden to show that they are entitled to facial relief.

A. Facial challenges are strongly disfavored.

A facial challenge is an "attack on [the] statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015). Challenges of this kind are strongly disfavored.

To begin, "[c]laims of facial invalidity often rest on speculation." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). As a result, they "risk premature interpretation of statutes," divorced from how statutes actually operate in practice. *Id.* For this reason, facial challenges also "run contrary to the fundamental principle of judicial restraint." *Id.* In addition, "facial challenges threaten to short circuit the democratic process," because statutes "embody[ ] the will of the people" and should remain in force whenever they can be "implemented in a manner consistent with the Constitution." *Id.* at 451.

In most cases, these concerns counsel against facially invalidating a law unless a party can show that "the law is unconstitutional in all of its applications," or that it lacks any "plainly legitimate sweep." *Id.* at 449. In the First Amendment context, however, courts apply a slightly more lenient standard. For a law to be facially overbroad under the First Amendment, a party must show that a "substantial number of [its] applications are unconstitutional." *United States v. Stevens*, 559 U.S. 460, 473 (2010).

This standard is still "strong medicine" that courts apply "sparingly and only as a last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). Courts "vigorously enforce[ ] the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). A party must therefore show that the "vast majority" of the law's applications violate the First Amendment. *Stevens*, 559 U.S. at 473. It is not enough for a party to conjure up "hypothetical or imaginary cases" in which the law could be unconstitutional. *Grange*, 552 U.S. at 450. Rather, a party must "describe the instances of arguable overbreadth of the contested law" and then show that those examples are more than a "mere possibility." *Id.* at 449 n.6, 455.

In short, because facial challenges are strongly disfavored, a party has a "heavy burden" to show that it is entitled to facial relief. *Finley*, 524 U.S. at 580.

B. The Act is not facially overbroad.

The district court correctly applied these standards to hold that subsections (b)(1) and (b)(5) are not facially overbroad. J.A. 464-67.

The district court erred, however, in holding that plaintiffs carried their heavy burden to show that the Act's other two challenged provisions—subsections (b)(2) and (b)(3)—violate the First Amendment in a substantial number of their applications. J.A. 463.

To begin, the district court was right that subsections (b)(1) and (b)(5) are not facially overbroad.

As for subsection (b)(1), the district court explained that the Act's ban on capturing or removing data or documents to breach a duty of loyalty to an employer had "possible myriad legitimate applications." J.A. 442. For example, it could apply to "an individual who removes an employer's data and uses it to start his own competitive business." J.A. 440. As for subsection (b)(5), which bans any substantial interference with real property, the district court observed that "[a]ll sorts of non-speech acts" can trigger this prohibition without violating the First Amendment. J.A. 445. The district court gave the examples of "erecting a barrier or opening a gate to let livestock out." J.A. 445.

In concluding that the Act's two other challenged provisions—subsections (b)(2) and (b)(3), the recording and hidden-camera provisions—are facially overbroad because they always apply to speech,

the district court misunderstood the overbreadth doctrine. The question in an overbreadth challenge is whether a law *violates the First Amendment* in a substantial number of its applications. *Stevens*, 559 U.S. at 473. And, of course, many speech regulations are perfectly constitutional. A law may, as the district court put it, "always target speech," J.A. 463, and still comply with the First Amendment. Indeed, some laws that apply to speech based on its content may even have constitutional applications. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (collecting cases). The district court therefore erred in holding that these two provisions are overbroad merely because they *implicate* speech. J.A. 463.

Instead, the district court should have asked whether plaintiffs carried their heavy burden to show that subsections (b)(2) and (b)(3) violate the First Amendment in a substantial number of applications. Plaintiffs did not. In fact, plaintiffs failed to develop *any* record evidence showing that the challenged provisions have ever been applied in the real world to violate the First Amendment. *See Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (overbreadth must be shown "from the text of the law and from actual fact").

Rather, plaintiffs have attempted to demonstrate the Act's overbreadth by "envisioning the most extreme applications conceivable." *Contra Finley*, 524 U.S. at 587; J.A. 464 (referencing hypotheticals that plaintiffs offered below). But the "mere possibility" of an unconstitutional application cannot justify enjoining a statute on its face. *Grange*, 552 U.S. at 455. And even if the Court were to conclude that the Act could be applied in some of the ways plaintiffs imagine, the proper remedy would be to allow as-applied challenges to proceed under those circumstances. *See Hicks*, 539 U.S. at 124.

In sum, plaintiffs have failed to carry their heavy burden to show that the Act violates the First Amendment in a substantial number of its applications. Thus, the Act's challenged provisions are not facially overbroad.

CONCLUSION

Defendants respectfully request that this Court reverse the judgment of the district court. Defendants request that the Court remand the case with instructions to enter judgment for defendants on all of plaintiffs' remaining claims.

REQUEST FOR ORAL ARGUMENT

Defendants respectfully request oral argument on this appeal. Oral argument would help the Court decide the complex issues raised in this case.

Respectfully submitted, this the 23rd day of December 2020.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,407 words, excluding the parts of the petition 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 23rd day of December 2020.

/s/ Nicholas S. Brod
Nicholas S. Brod

CERTIFICATE OF SERVICE

I certify that on December 23, 2020, 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 23rd day of December 2020.

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CONTENTS OF ADDENDUM

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Add. 2

North Carolina General Statutes

Chapter 99A

Civil Remedies for Interference with Property

§ 99A-1 Recovery of damages for interference with property rights

Notwithstanding any other provisions of the General Statutes of North Carolina, when personal property is wrongfully taken and carried away from the owner or person in lawful possession of such property without his consent and with the intent to permanently deprive him of the use, possession and enjoyment of said property, a right of action arises for recovery of actual and punitive damages from any person who has or has had, possession of said property knowing the property to be stolen.

An agent having possession, actual or constructive, of property lawfully owned by his principal, shall have a right of action in behalf of his principal for any unlawful interference with that possession by a third person.

In cases of bailments where the possession is in the bailee, a trespass committed during the existence of the bailment shall give a right of action to the bailee for the interference with his special property and a concurrent right of action to the bailor for the interference with his general property.

Any abuse of, or damage done to, the personal property of another or one who is in possession thereof, unlawfully, is a trespass for which damages may be recovered.

Add. 3

North Carolina General Statutes

Chapter 99A

Civil Remedies for Interference with Property

§ 99A-2 Recovery of damages for exceeding the scope of authorized access to property

(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. For the purposes of this section, "nonpublic areas" shall mean those areas not accessible to or not intended to be accessed by the general public.

(b) For the purposes of this section, an act that exceeds a person's authority to enter the nonpublic areas of another's premises is any of the following:

(1) An employee who enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer's data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer.

(2) An employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer.

(3) Knowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data.

(4) Conspiring in organized retail theft, as defined in Article 16A of Chapter 14 of the General Statutes.

(5) An act that substantially interferes with the ownership or possession of real property.

(c) Any person who intentionally directs, assists, compensates, or induces another person to violate this section shall be jointly liable.

(d) A court may award to a party who prevails in an action brought pursuant to this section one or more of the following remedies:

(1) Equitable relief.

(2) Compensatory damages as otherwise allowed by State or federal law.

(3) Costs and fees, including reasonable attorneys' fees.

(4) Exemplary damages as otherwise allowed by State or federal law in the amount of five thousand dollars ($5,000) for each day, or portion thereof, that a defendant has acted in violation of subsection (a) of this section.

(e) Nothing in this section shall be construed to diminish the protections provided to employees under Article 21 of Chapter 95 or Article 14 of Chapter 126 of the General Statutes, nor may any party who is covered by these Articles be liable under this section.

(f) This section shall not apply to any governmental agency or law enforcement officer engaged in a lawful investigation of the premises or the owner or operator of the premises.

(g) Nothing in this section shall be construed to limit any other remedy available at common law or provided by the General Statutes.