Case No. 20-1776 (L)

In the United States Court of Appeals
for the Fourth Circuit

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

v.

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

and

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

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

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees, Cross-Appellants ("Plaintiffs") do not issue stock and have no parent corporations.

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I. JURISDICTIONAL STATEMENT.

Plaintiffs agree with the State-Defendants' ("the State's") and Intervening-Defendant's ("Intervenor's") (collectively "Defendants'") jurisdictional statements concerning the bases for jurisdiction and that the notices of appeal were timely filed. Defs.' Br. 1. Plaintiffs brought claims under the Constitution and 42 U.S.C. § 1983, providing the district court jurisdiction under 28 U.S.C. §§ 1331 and 1343. Joint Appendix ("J.A.") 5 (Complaint). The district court entered a final order and judgment on June 12, 2020. J.A. 481-86. Intervenor timely filed a notice of appeal on July 10, 2020, followed by a timely notice of appeal by the State on July 13, 2020, followed by a timely cross-appeal by Plaintiffs on July 23, 2020, J.A. 487-95; *see also* Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. § 1291.

For the reasons stated in Plaintiffs' motion to dismiss Intervenor from this appeal, carried with the case, Intervenor lacks the necessary standing to have filed the lead notice of appeal and to proceed further in this matter. It should be dismissed.

II. ISSUES PRESENTED.

1. Whether statutory provisions that all parties and the district court agree directly regulate speech are subject to the First Amendment.

2. Whether those provisions fail constitutional scrutiny, particularly when all parties and the district court agree that the State failed to produce any evidence justifying the provisions' infringements on speech.

3. Whether provisions that lack any justification for their infringements on speech should be held facially invalid.

4. Whether the challenged provisions are also overbroad, providing a separate and independent basis to hold them facially invalid.

III. INTRODUCTION.

Defendants obfuscate and rationalize, but the fact remains, North Carolina General Statute § 99A-2 directly regulates "protected speech." J.A. 394, 399 (State's briefs below). Elements of § 99A-2(b)(1)-(3) and (5), the provisions at issue, are met by a person collecting information for the purpose of communicating it (a protected predicate to speech), or actually engaging in expression (protected speech).

Indeed, far from creating a "general bar against" activities in "nonpublic areas" as Defendants pretend, Defs.' Br. 13, subsections (b)(1)-(3) and (5) prohibit the specific activities Plaintiffs pursue to advance their political "agendas." J.A. 396 (Intervenor's brief below). A "central tenet" of Plaintiffs People for the Ethical Treatment of Animals' ("PETA's") and Animal Legal Defense Fund's ("ALDF's") missions is to facilitate undercover investigations, which enables them to document misconduct at factory farms, laboratories and the like, "expose cruelty to animals" that is otherwise hidden, and thereby "build public pressure for change." J.A. 137-39, 143-44; J.A.148-50 (organizational declarations). The State admitted below that § 99A-2 is designed to punish such "undercover investigat[ions]." J.A. 133

(Governor Pat McCrory's statement describing the law); J.A. 111-12 (State representing that Governor McCrory accurately identified the "governmental interest" the law was designed to address, including stopping "undercover investigat[ions]").

Section 99A-2 is thus part of a "novel," nationwide trend in which states "restrict[] speech" as a response to "high profile undercover investigations" that had "devastating consequences" due to "boycotts" and heightened regulation. *ALDF v. Herbert*, 263 F. Supp. 3d 1193, 1196-97 (D. Utah 2017). The investigated entities and their legislative allies responded by seeking to keep the motivating speech from recurring. *See id.* at 1198.

Defendants' arguments to sustain this law are fanciful. Defendants initially direct the Court to the law's other components, suggesting they enable it to overlook that § 99A-2 also targets speech. This is the exact opposite of what the First Amendment requires. Contrary to Defendants' assertions, the government cannot link a restriction on entering "nonpublic areas" to a restriction on speech and evade First Amendment review. *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002); *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1194-95 (10th Cir. 2017) (Defendants' authority). Nor does the fact that Defendants claim the law's elements make it "generally applicable" hold the Constitution at bay. Defs.' Br. 24. "Generally applicable laws" that restrict speech

are subject to the First Amendment. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2010). And, § 99A-2 cannot be labeled "generally applicable" because it "single[s] out" First Amendment activities among its elements. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994). The First Amendment is implicated when a law restricts speech, and cannot be eluded through bells and whistles.

Food Lion Inc. v. Capital Cities/ABC Inc., 194 F.3d 505 (4th Cir. 1999), does not alter this rule, nor could it. It simply holds that a law that only regulates non-expressive conduct does not require First Amendment review. Hence, Defendants work to recast § 99A-2 as exclusively aimed at unwanted entry, but to do so they must omit key text. *Food Lion* is inapplicable to § 99A-2 as it is actually written.

When Defendants turn to applying the First Amendment to § 99A-2, they ask this Court to disregard numerous layers of Supreme Court precedent so the law can stand. They request the Court reject what the Supreme Court has said renders a law content based and subject to strict scrutiny, which they concede if applied here establishes a standard they cannot meet. Defs.' Br. 51-61 (solely defending the law against intermediate scrutiny). They also craft a never-before-heard-of exception to the government's evidentiary burden under intermediate scrutiny because they cannot satisfy that standard either. Defs.' Br. 55-59 (failing to adduce any evidence); *see also* J.A. 410 (conceding in district court hearing such evidence is required). To narrow the relief to which Plaintiffs are entitled, Defendants—similar to the district

court—intermix scrutiny with overbreadth, when the Supreme Court has distinguished the two. *United States v. Stevens*, 559 U.S. 460, 481-82 (2010). In fact, Plaintiffs are entitled to facial relief because the challenged provisions wholly fail First Amendment scrutiny, *Citizens United v. FEC*, 558 U.S. 310, 331 (2010), and separately because they are overbroad.

Put simply, the amount of briefing does not reflect the difficulty of the issues, but the lengths to which Defendants must go to try to avoid the dictated result. The Court should affirm the district court's conclusion the challenged provisions violate the First Amendment. Although the district court held that some of the provisions were only unconstitutional as-applied, this Court should conclude each is facially invalid; as-applied relief only perpetuates the law's unconstitutional chilling effect.

IV. STATEMENT OF THE CASE.

A. Section 99A-2's plain text directly regulates speech.

Although § 99A-2(a) frames the law as focused on preventing "access to [] nonpublic areas" and "engag[ing] in an act that exceeds the person's authority to enter those areas," § 99A-2(b) goes on to define the "act[s] that exceed[] a person's authority" in "nonpublic areas" to mean engaging in speech, both in "nonpublic areas" and in public. Per subsection (b) the law can only be violated if a person engages in one of five acts, four of which are challenged here. Each of the challenged acts is defined to include speech, particularly the speech necessary for undercover

investigations and related political advocacy. Subsection (b) also makes clear that breaching the "duty of loyalty"—a term Defendants fixate on, but is only referenced in subsections (b)(1) and (2), and left undefined—is but one element of the law's restrictions.

Specifically, subsections (b)(1) and (2) prohibit: (i) an employee "enter[ing] 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"; (ii) gathering information; and (iii) "us[ing] the information to breach the person's duty of loyalty to the employer." The provisions differ slightly with regard to what information they prohibit gathering: subsection (b)(1) prohibits gathering any sort of "data, paper, records or any other documents"; subsection (b)(2) prohibits gathering any information through making a recording. With both provisions, the term "nonpublic" is not defined to mean private, as Defendants suggest, *e.g.*, Defs.' Br. 29, but any area "not accessible to or not intended to be accessed by the general public," N.C. Gen. Stat. § 99A-2(a). It covers areas open to employees, contractors, and delivery personnel. The term "use[]" is undefined, but standard dictionary definitions provide this element is met by "publishing" information or "creating an expressive work based on it[]." J.A. 440 (district court decision providing dictionary definitions). Thus, subsections (b)(1) and (2) are violated if a person sets out to gather information in "nonpublic areas" in order to communicate it, actually

communicates it publicly, and that communication "breach[es] the person's duty of loyalty."

Subsection (b)(3) prohibits "[k]nowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data." It makes no reference to a "duty of loyalty." It also does not only prohibit recording in "nonpublic areas," but applies to the entire "premises." N.C. Gen. Stat. § 99A-2(b)(3). It prohibits selecting and capturing photos or videos regardless of their content or whether they be for the media or any other purpose.

Subsection (b)(5) is a "catch-all." Defs.' Br. 8. It too makes no reference to a "duty of loyalty," but states any "act that substantially interferes with the ownership or possession of real property" is prohibited. N.C. Gen. Stat. § 99A-2(b)(5). Interfering with "ownership"—as opposed to "property," on which Defendants focus, Defs.' Br. 41—has been interpreted to mean creating "reputational … harm" through releasing truthful information to the public. *ALDF v. Kelly*, 434 F. Supp. 3d 974, 990 (D. Kan. 2020), *appeal docketed* No. 20-3082 (10th Cir. May 1, 2020).

Beyond subsections (b)'s direct prohibitions on speech, subsection (e) further limits communications. Per subsection (e), a person is not liable under the law if they fall within the "protections provided to employees under Article 21 of Chapter 95 or Article 14 of Chapter 126 of the General Statutes"—the former applies to all

employees, the later only to State employees. N.C. Gen. Stat. § 99A-2(e). Those provisions allow employees to report certain types of information through official channels, but they do not allow for public disclosures. In fact, while subsection (e) allows State employees to report information to the State legislature, N.C. Gen. Stat. §§ 126-84, 126-85, it provides no such exemption for private employees. Subsection (e) provides no protection for any employee reporting information to Congress or to the media.

Violating § 99A-2 can result in equitable relief, compensatory damages, exemplary damages of $5,000 "for each day, or portion thereof, that a defendant has acted in violation" of the act, and attorneys' fees and costs. N.C. Gen. Stat. § 99A-2(d). The law also holds "jointly liable" anyone who "directs, assists, compensates or induces" a violation. *Id.* § 99A-2(c).

B. The law directly regulates Plaintiffs' speech.

Subsection (b)'s definitions make the law perfectly crafted to restrict Plaintiffs' advocacy. PETA and ALDF seek to provide "truthful information" to the public about "illegal, unethical, and inhumane practices." J.A. 143-44, 153-54 (organizational declarations). They do this by having investigators gain employment at animal facilities, where the investigators fulfill all lawfully assigned job functions and rely on their access to identify misconduct, "chiefly by making notes." J.A. 143, 151. The investigators may also record conduct with a "minute camera" on their

person, or, in certain circumstances, leave a camera behind, so as to capture images of animals or their treatment that demonstrates abuse. J.A. 139-40, 151-52. PETA and ALDF alert government officials to their findings and release the information to the public. J.A. 143, 149. In doing so, they hope the public will repudiate the conduct and this will lead to change, either through economic pressure or legislative action. J.A. 143-44, 149-50. Put simply, PETA and ALDF's investigatory techniques are what is described by subsections (b)(1)-(3), and (5).

Similarly, Plaintiff American Society for the Prevention of Cruelty to Animals ("ASPCA") relies on "undercover investigations" for its media and "to inform its members, the public, and the government about the inhumane treatment" of animals. J.A. 161, 163 (ASPCA declaration). Although it does not conduct investigations itself, it provides "grant funding for investigations" by others. J.A. 163. Thus, subsection (c)'s joint liability keeps ASPCA from developing its desired information and communications regarding North Carolina. *See id.*

Further, Plaintiff Government Accountability Project ("GAP") works with the media to highlight "the important evidence that whistleblowers" of all sorts provide and thereby enhance protections for their disclosures. J.A. 168 (GAP declaration). In GAP's experience, whistleblowers gather information in the ways described by § 99A-2, and release information to the public and media. *See* J.A. 167, 169-71. Because of § 99A-2, news organizations in North Carolina will no longer work with

GAP to document whistleblowers' stories, as they too fear joint liability. J.A. 171-72.

C. The law's legislative history makes clear it is aimed at public advocacy.

The law's legislative history confirms its aim is to squelch public whistleblowing. Where, as here, the legislature did not create committee reports in support of the law, the legislative record of the law's sponsors' statements are the "'authoritative guide to the statute's construction.'" *Rice v. Rehner*, 463 U.S. 713, 728 (1983) (quoting *Bowsher v. Merck & Co*., 460 U.S. 824, 832 (1983)); *see also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982). Section 99A-2's sponsors repeatedly stated the law's goal is to stop the collection and communication of information to the media and the public.

Representative Szoka, the lead sponsor of the bill and one of two advocates for the law designated to speak in favor of it to the House and Senate committees, J.A. 125, 127 (House and Senate minutes), stated that the law is designed to punish people who report information to "the media and [] private special interest organizations" like Plaintiffs. J.A. 332. Representative Jordan, another sponsor and the other spokesperson, J.A. 125, similarly stated the "crux" of the law is to punish people who go "running off to a news outlet," J.A. 286.

Representative Dixon, another sponsor, explained the law seeks to prevent, for example, a "T.V. station report[ing] several times that Mercy for Animals … had

disturbing and shocking video of animal cruelty on a [B]utterball farm." J.A. 251. Mercy for Animals engages in similar activities to PETA and ALDF.[1]

Governor McCrory's veto statement and the sponsors' response verify these objectives. Governor McCrory's veto message applauded the law's goal of "discourag[ing] … undercover investigat[ions]," particularly of "our agricultural industry." J.A. 133. However, it also warned that the law hampers the dissemination of information the Governor believed valuable, such as information about the abuse of "vulnerable population[s]." *Id.*

In successfully arguing to overturn the Governor's veto, Representative Szoka insisted the veto statement, particularly its statement that the law will prevent "undercover investigat[ions]," shows "the need for the bill." J.A. 331. Accordingly, in sworn statements to the district court, the State explained the veto statement accurately captured the law's objectives. J.A. 111-12.

To the extent the sponsors referenced the *Food Lion* decision, as Defendants state, Defs.' Br. 9, they made clear that was because they believed *Food Lion* empowered them to suppress public communication of information they felt should

[1] A Mercy for Animals investigation was recently featured in the New York Times' Sunday Review. Nicholas Kristof, *The Ugly Secrets Behind the Costco Chicken*, N.Y. Times (Feb. 6, 2021), https://www.nytimes.com/2021/02/06/opinion/sunday/costco-chicken-animal-welfare.html.

be kept quiet. Indeed, Defendants quote a speech by Representative Jordan, Defs. Br. 9, in which he explained he was sponsoring the law because he has "family and friends who are in the restaurant industry" and he wished to prevent "embarrassment" to them from people revealing what goes on. J.A. 202-04. As a result, he acknowledged the law at least has an "incidental effect on news gathering," but he stated this was justified because he was "convinced that the media can do its" job in other ways. J.A. 203.

Defendants also rely on a statement from Representative Szoka, Defs.' Br. 7, where he emphasized the law will only protect whistleblowers who "report [] to authorities," not the media or public, because the aim of the law is to restrict the media. J.A. 238. He elaborated that he believed the media should be limited to covering activities in "public area[s]" and thus the law is meant to encumber their ability to do otherwise. *Id.*

Beyond statements of Representatives Szoka and Jordan, Defendants cite unauthoritative statements. They reference multiple statements by Representative Glazier, who was not a sponsor, and statements by other legislators Defendants do not identify. J.A. 206, 257, 282, 284.[2]

[2] Towards the end of their brief, Defendants move from claiming the law was a specific response to *Food Lion* to claiming the legislature sought to create a new, broad protection for private property. Defs.' Br. 49. The only statements they reference by other sponsors in the connected string cite are by: (i) Representative

D. The district court correctly recognized the law restricts speech and rejected Defendants' efforts to limit the First Amendment.

In a seventy-three-page summary judgment opinion, the district court confirmed what all the parties had recognized: § 99A-2 targets speech. Therefore, it concluded the First Amendment applied, rejecting the claimed exceptions to the Constitution Defendants repeat on appeal. Moreover, because the legislature made no effort to justify the restrictions on speech, the district court explained the law failed First Amendment scrutiny. The district court, however, stopped short of fully invalidating all of the challenged provisions, believing the fact that certain provisions have some applications that do not involve speech prevented facial relief and demonstrated they were not overbroad.

The district court initially explained that subsections (b)(2)-(3)'s prohibitions on recording and picture taking restrict speech because the choice of what and when to record is an "expressive" act, as it reflects the recorder's agenda. J.A. 432-33. For the same reasons, it then stated the prohibition on capturing information in subsection (b)(1) can restrict expression. J.A. 441-42. Although the court stated

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McGrady, defending the law against charges that it was an "Ag-Gag" law designed to stop Plaintiffs' advocacy, by emphasizing the law applied more broadly, not just to agricultural investigations, without disagreeing that it has the same aim and effect, J.A. 243; and (ii) Representative Whitmire, explaining the law is needed to protect against retail theft, which is covered by subsection (b)(4), the provision Plaintiffs do not challenge, J.A. 261-62.

"us[ing]" information, as prohibited by subsections (b)(1)-(2), need not necessarily involve speech, it also recognized that element is met when one communicates information and thereby it restricts speech. J.A. 440. Finally, because subsection (b)(5) is a catchall meant to reach activities like those regulated by (b)(1)-(3), the district court concluded it too could be used against "speech and nonspeech." J.A. 444.

As part of examining the law's plain text, the court also rejected Defendants' suggestion that the law simply codified a "duty of loyalty." Indeed, it stated such a claim was hard to square with the face of the statute, which does not "define acts that breach the duty of loyalty" and ties that "standalone cause of action" to other activities, particularly engaging in speech. J.A. 437.

Moreover, the court rejected Defendants' claim that if otherwise protected speech occurs on private property the First Amendment does not apply. It explained that while the desire to engage in speech "enjoys no special status to avoid [] laws" that "operate independent of speech"—so a person could be prosecuted for trespass regardless of their desire to speak on the land—that rule has no application where a law's elements target speech. J.A. 433. In other words, just because there are ways to protect private property that might also exclude speakers "does not mean the category of speech" can be restricted because of where it occurred. *Id.*

The court further explained Defendants' characterization of the law as "generally applicable" was incorrect and irrelevant. "[W]here liability is triggered by engaging in First Amendment protected activity" a law cannot be classified as a "[g]enerally applicable law[]." J.A. 434; *see also* J.A. 438 (laws that prevent trespass are not "laws of general application" if they also "require speech as an element of proof"). Regardless, "even a generally applicable law can be subject to First Amendment scrutiny as applied to speech falling within its terms." J.A. 434-35.

The court then explained § 99A-2 failed even the lowest potentially applicable level of First Amendment scrutiny, intermediate scrutiny. To survive such review, Defendant had to produce evidence showing there was a need to restrict speech to achieve the statute's purported lawful ends, and Defendants produced nothing to show "the recited harms" § 99A-2 is meant to address "are real" or that the law "alleviates these harms in a direct and material way." J.A. 459-61 (cleaned up).

The court, however, allowed certain provisions to stand even though it found no justification for their intrusions on speech. It stated it could not provide a facial remedy against subsections (b)(1) and (5) due to the "no set of circumstances" test it believed applied. J.A. 442, 444-45. It concluded that because Plaintiffs could not demonstrate subsections (b)(1) and (5) always require a person to engage in protected speech to violate their terms, there were circumstances in which the First Amendment would not be implicated, and thus those provisions could stand facially

under the no-set-of-circumstances test. *Id.* That is, the court concluded that even if a law restricts (and thereby chills) speech, if there is any way a person could be held liable under it without engaging in speech, every person potentially captured by the law needs to separately challenge it and receive as-applied relief. *Id*. Similarly, it held subsections (b)(1) and (5) were not unconstitutionally overbroad because they could be applied in ways that did not require a person to engage in speech. J.A. 467. It did hold subsections (b)(2) and (3) facially invalid because they always require a person to engage in speech to violate their terms and they could not survive First Amendment review. J.A. 463-64.[3]

V. STANDARD OF REVIEW.

This Court "review[s] the district court's grant of summary judgment *de novo* to decide if a genuine dispute of material fact exists." *Varner v. Roane*, 981 F.3d 288, 294 (4th Cir. 2020).

VI. SUMMARY OF ARGUMENT.

The challenged provisions of § 99A-2 restrict expressive activities, and therefore First Amendment scrutiny is required. As this Court recently explained,

[3] The district court also concluded each Plaintiff had substantiated its standing to challenge the law. J.A. 418-25. In doing so, it largely relied on this Court's prior decision that held Plaintiffs had successfully pled standing, *PETA v. Stein*, 737 F. App'x 122 (4th Cir. 2018) (unpublished), concluding Plaintiffs substantiated those allegations. It further addressed equal protection and void for vagueness claims that Plaintiffs do not press on appeal. J.A. 467-78.

"[o]ne of the premises of the First Amendment" is a "mistrust of governmental power," particularly when that power manifests as a "government-defined and government-enforced" restriction on expression. *Overbey v. Mayor of Balt.*, 930 F.3d 215, 224 (4th Cir. 2019) (cleaned up). Thus, because North Carolina chose to restrict expressive activities, its law must satisfy First Amendment review.

Defendants' claimed exceptions to the First Amendment do not exist. They cite case law, including *Food Lion*, that establishes a person's desire to engage in speech does not prevent enforcement of constitutional laws. Defendants then leap to the conclusion that if a regulation is purportedly meant for some constitutional end—be it protecting private property, or enforcing "tort principles" that Defendants characterize as "generally applicable"—the law can directly restrict speech and need not pass First Amendment review. Defs.' Br. 28. To the contrary, the First Amendment "constrain[s] Congress' ability to accomplish certain goals," "limit[ing] Congress to legislative measures that do not abridge the Amendment's guaranteed freedoms." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 644 (1996) (Thomas, J., concurring in part in plurality opinion). The First Amendment demands courts determine if a law contains elements that restrict speech. If so, the law's additional features are not a shield against First Amendment review, but considered in the First Amendment analysis. Courts cannot simply note there are non-speech elements and move on.

Because the First Amendment governs, the Court must apply the appropriate level of scrutiny. Here, the law's text and legislative history demonstrate the challenged provisions target anti-employer speech, and thus they are content based and subject to strict scrutiny. In addition, the law provides employers discretion to wield it against any speech they consider undesirable, which this Court has held means the challenged provisions must be treated as viewpoint discriminatory, an extreme form of content discrimination. Likewise, the challenged provisions single out communications with the media and legislature, a fact that independently mandates they be subject to strict scrutiny.

Defendants do not even argue the law survives such review. Defs.' Br. 51-61. Thus, the law should be held to violate the First Amendment.

Were that not enough, although Defendants claim the law survives intermediate scrutiny, it fails that test as well in three different ways. First, the case law makes clear "intermediate scrutiny does indeed require the government to present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary" and thus that the law is properly tailored. *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015) (Defendants' authority). Defendants have no such evidence. Defs.' Br. 58-59. Second, the plain text of the challenged provisions also demonstrate they are not tailored. Third, with

the record here, the law cannot be said to further a significant governmental interest, a separate requirement of intermediate scrutiny.

Since Defendants have not justified any of the restrictions on speech, all of the challenged provisions should be declared facially invalid. *E.g.*, *Citizens United*, 558 U.S. at 331. As multiple circuits have recognized, *Citizens United* makes clear there is no such thing as the no-set-of-circumstances test, but rather if provisions fail First Amendment scrutiny they cannot stand. Indeed, this Court recently indicated individuals should not be required to bring separate as-applied challenges when faced with the prospect of unconstitutional sanction, as that chills speech. *See Kolbe v. Hogan*, 849 F.3d 114, 148 n.19 (4th Cir. 2017) (en banc).

In addition, the challenged provisions are also unconstitutionally overbroad, which separately justifies facial relief. They restrict a substantial amount of speech beyond that of Plaintiffs, including that of whistleblowers and the press. Defendants have not shown any of those restrictions on speech are necessary, so the law's purported legitimate ends cannot counterbalance its unconstitutional ones. *See Doe v. Cooper*, 842 F.3d 833, 845 (4th Cir. 2016).

In sum, the challenged provisions' text and history show they are meant to suppress First Amendment-protected speech, particularly Plaintiffs' speech. In fact, they are the most noxious type of intrusion on First Amendment rights. Defendants

have offered no rationale for such restrictions. Therefore, the Constitution demands the challenged provisions fall.

VII. ARGUMENT.

A. Section § 99A-2 targets protected First Amendment activities.

While it is uncontested § 99A-2 regulates expression, Defendants and the district court actually understate the extent. Numerous aspects of law target activities long held to lie at the core of the freedom of speech, including communicating information to others and the creation of those communications. The law also infringes on the freedom to petition and of the press.

Its prohibitions on "us[ing]" information, such as in speech with the media or to motivate a boycott, N.C. Gen. Stat. § 99A-2(b)(1)-(2), (5), go against the very essence of free speech. It is beyond dispute that "[a]n individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011).[4]

[4] Subsection (c)'s prohibitions on "direct[ing]" or "induc[ing]" the prohibited activities also encompass the mouthing of words, archetypal speech. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1577-78 (2020) (remanding for determination that a prohibition on "encourag[ing] or 'inducing" an activity was unconstitutional under the First Amendment solely to examine the issue as-applied rather than facially).

However, the First Amendment does not only protect active expression. The development of speech is "speech within the meaning of the First Amendment." *Id.* at 570. Courts recognize "[l]aws enacted to control or suppress speech may operate at different points in the speech process" and all of them are equally subject to First Amendment review. *Citizens United*, 558 U.S. at 336; *see also Brown v. Ent., Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference" under the First Amendment). Otherwise the government could "simply proceed upstream and dam the source" of communications it dislikes. *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015); *see also Sorrell*, 564 U.S. at 571 ("Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."). Thus, for example, the Tenth Circuit held the mere collection of environmental "resource data constitutes the protected creation of speech," because the statute "coupled" the prohibition on collection with language indicating it was "'operat[ing]' at the front end of the speech process" to stop conduct that leads to speech. *W. Watersheds Project*, 869 F.3d at 1195-97 (quoting *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012)).

Each of the challenged provisions seeks to stop speech creation and thereby implicates the First Amendment. The text of § 99A-2(b)(1) and (2) prohibit

gathering information for its "use[]"—in addition to its actual "use[]." Just as in *Western Watersheds Project*, they connect a prohibition on information gathering with a prohibition on communication, demonstrating the former is designed to interfere with the latter, *i.e.*, the law seeks to stop speech by stopping speech creation. Moreover, subsection (e)—which prohibits information collected under any of the provisions from being communicated outside of a few limited channels—makes clear all of the provisions' restrictions on information gathering are meant to limit the information's subsequent dissemination. The provisions exist to dam the source of communications and thereby stop the communications themselves. Indeed, these goals were detailed by the law's sponsors. *E.g.*, J.A. 286, 332.

Further, to the extent the challenged provisions restrict recording, they infringe on speech by both undermining its development (preventing the recording's distribution), and by directly restricting expression. Recordings are not only necessary to produce speech, *e.g.*, *Am. Civil Liberties Union of Ill.*, 679 F.3d at 595, but are themselves "inherently expressive," *ALDF v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018).

Defendants' claim that recordings are only protected speech if they occur "*in public*," Defs.' Br. 35-36 (emphasis in original), is false. *Wasden* considered a provision that "prohibit[ed] a person from entering a private agricultural production facility and, without express consent from the facility owner, making audio or video

recordings." 878 F.3d at 1203. It "easily dispose[d] of Idaho's claim that the act of creating an audiovisual recording is not speech protected by the First Amendment." *Id.*; *see also Kelly*, 434 F. Supp. 3d at 999 ("[T]he prohibition on taking pictures at an animal facility regulates speech for First Amendment purposes."); *Herbert*, 263 F. Supp. 3d at 1207-08 (similar).

Wasden also explains why this must be the case. What renders a recording expressive is that it requires "decisions about content, composition, lighting, volume, and angles" that reflect and communicate a viewpoint. *Wasden*, 878 F.3d at 1203. That does not change based on where the recording occurs. Defendants' focus on the need to protect privacy, *e.g.*, Defs.' Br. 31, is addressed by balancing speech interests against other interests, not denying that recording is speech—and that is assuming a recording in "nonpublic areas" implicates privacy concerns.

Finally, § 99A-2's efforts to limit to whom information is communicated establishes the challenged provisions not only infringe on the freedom of speech, but the freedom to petition and of the press. *See* N.C. Gen. Stat. § 99A-2(e). By preventing people from reporting information outside a limited set of procedures, including prohibiting communications with the legislature, the provisions restrict the "use [of] the channels and procedures of state and federal agencies and courts to advocate their causes and points of view" and thereby are "destructive of the rights of association and of petition." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404

U.S. 508, 510-11 (1972); *see City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988) ("The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech."). Because those same prohibitions also prevent communications with the media, the law creates "differential treatment" of the press and thereby is inconsistent with their special constitutional protections. *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). Once again, these were the law's sponsors' stated goals. J.A. 286, 332.

Put simply, § 99A-2 is stuffed with restrictions on First Amendment freedoms. Its elements and structure, as confirmed by its legislative history, establish it seeks to prevent speech, as well as the necessary steps to generate that speech. All of which is protected by the First Amendment.

B. That some of the regulated speech occurs on private property does not remove the First Amendment's protections.

Defendants argue that while § 99A-2's activities would normally be protected by the First Amendment, the definition of protected speech changes when it occurs in "nonpublic areas of private property." Defs.' Br. 22. To support their atextual claim that there are "geographic" distinctions as to what is First Amendment speech, *id.* at 18, they also note that speech in a "nonpublic area" might follow a trespass, which they suggest indicates the Constitution should yield, *id.* at 24-25. Defendants

offer no explanation for why their claimed distinctions should apply given § 99A-2's expansive definition of "nonpublic areas," N.C. Gen. Stat. § 99A-2(a), or why the Court should consider this argument when the law also restricts communications in public, including by prohibiting information's "use[]," *id.* § 99A-2(b)(1)-(2). Regardless, the notion that "private property rights extinguish" First Amendment protections that otherwise exist "finds no support in the case law." *Herbert*, 263 F. Supp. 3d at 1208.

Watchtower Bible & Track Society considered a law that prohibited "going in and upon private residential property" without a license. 536 U.S. at 154. The Court agreed the law "protect[ed] [] residents' privacy" from unwanted intrusion, but held this irrelevant. *Id.* at 165-55. Because the law burdened "solicitation" (speech) on private property it required First Amendment scrutiny. *Id.*

Western Watersheds Project, on which Defendants rely, expressly rejects Defendants' reading that the First Amendment does not reach laws that protect private property. *See* Defs.' Br. 23. The law there could only be violated if an "individual first trespasse[d] on private land." 869 F.3d at 1194. It prohibited a person from then "collecting resource data" on "adjacent or proximate land" to the trespassed-upon property, be that public or private land. *See id.* at 1193. The Tenth Circuit held that the law's prohibition of trespass—potentially twice over, by prohibiting trespassing to access "adjacent" private land where the person collected

data without permission—was of no moment. While the state can prohibit conduct on private land, "under the First Amendment the question is not whether trespassing" can be regulated. *Id.* at 1194; *see also id.* at 1195 ("The fact that one aspect of the challenged statutes concerns private property does not defeat the need for First Amendment scrutiny."). Instead, the only issue is whether any part of the activities regulated by the law "qualif[y] as protected speech." *Id.* at 1194. If so, people are entitled to challenge that "differential treatment" of speech under the First Amendment. *Id.*; *see also Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988) ("protected free speech interests" cannot be "subordinated" to enable other regulations).

The Sixth Circuit similarly labeled Defendants' focus on the fact that a law limits access to property a "circular endeavor." *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 560 (6th Cir. 2007). Courts cannot "merely determine[] that there was a rule prohibiting access and then stop[] there." *Id.* Constitutional rules are not meant to disappear in the face of other interests. The correct question is whether "the rule blocking access is, itself, constitutional." *Id.* That inquiry entails determining whether the rule limiting access also "prohibits the plaintiffs from access[ing] [] information." *Id.* If so, it implicates the First Amendment, requiring scrutiny, even if the "blockade[d] access" also protects property. *Id.* As a result, the

court held the government could not deny people the right to record activities merely because it had closed an area to the public. *Id.* at 561-62.

There are numerous other examples in which the fact that a law protected privacy failed to immunize it from First Amendment review. As noted above, the law at issue in *Wasden* required a violator to enter "a private agricultural facility [] without express consent" and the court still struck down the law's prohibition on "making audio or video recordings" following that unauthorized entry onto private land. 878 F.3d at 1203-05. Likewise, Defendants' authority *Dahlstrom v. Sun-Times Media, LLC*, considered a prohibition on "obtain[ing] or disclos[ing]" certain information in order to protect individual privacy. 777 F.3d 937, 941 (7th Cir. 2015). *Dahlstrom* held that given the nature of the information—which it explained was "hardly [] an instrument" of speech—the government could constitutionally prohibit obtaining it. *Id*. at 948. But, despite that conduct being unlawful, because the government went on and prohibited disclosing the unlawfully obtained information, that required First Amendment scrutiny. *Id.* at 949. That additional restriction was a "direct regulation of speech" and thus needed to pass First Amendment review, notwithstanding that it prohibited the disclosure of unlawfully obtained information implicating privacy interests. *Id*.

The First Amendment stems from the premise that where the government regulates speech, we must be fearful it "seeks not to advance a legitimate regulatory

goal, but to suppress unpopular ideas or information or manipulate the public debate." *Turner Broad. Sys.*, 512 U.S. at 641. The amendment's function is to require scrutiny of such laws regardless of whether they also prohibit access or purportedly protect privacy.

i. ***Defendants' authority does not identify any instance in which regulations of speech are free from First Amendment review.***

Defendants rely on three lines of authority, none of which establish the state can freely regulate speech in any circumstance. In fact, several cases distinguish their circumstances, which do not involve assessing prohibitions on speech, from those where the court must analyze such restrictions. They confirm that while the former does not require the First Amendment review, the latter does.

1. Defendants' first line of authority addresses pure prohibitions on access, which, the cases explain, do not implicate the First Amendment because the laws do not target any component of speech, but solely non-expressive conduct. In relying on this authority, Defendants "confuse[] two related but distinct concepts: a landowner's ability to exclude from her property someone who wishes to speak" by wielding a law that does not make speech one of its elements, such as a "trespass" statute, and the government's ability to create a punishment "for that speech," as is the case with § 99A-2. *Herbert*, 263 F. Supp. 3d at 1208 (discussing, inter alia, *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972)).

Lloyd Corporation primarily addressed what constitutes a "company town" for the purposes of the state action doctrine. 407 U.S. at 561. To the extent it speaks to the present case, it discussed the application of a generic trespass rule. *Id.* at 554-56. As the Court put it, the only thing that law regulated was "property rights," *i.e.*, whether landowners could decide who could enter and remain, and because that did not directly implicate "the asserted right of free speech," the First Amendment did not apply. *Id.* at 567.

Similarly, *Rowan v. U.S. Post Office Department* allowed people to request to be kept off mailing lists for erotic material, which the Court stated was the same as "mak[ing] the householder the exclusive and final judge of what will cross his threshold." 397 U.S. 728, 736 (1970). According to the Court, the law solely restricted entry and therefore did not infringe on the right to free speech. *Id.* at 737.

Likewise, *Zemel v. Rusk* concerned an executive order "refus[ing] to validate the passports of United States citizens for travel to Cuba" regardless of the purpose of the travel. 381 U.S. 1, 7 (1965). Identical to the other authority, the Court emphasized the only "inhibition" created by the law was "an inhibition of action" not speech. *Id.* at 16.

McBurney v. Young is not a First Amendment case at all, but concerned the Privileges and Immunities Clause and the dormant Commerce Clause. 569 U.S. 221 (2013). Assuming it is applicable, it merely reiterated that in certain instances the

States can "den[y] [] the right to access," without discussing whether a prohibition on access can be joined with a prohibition on speech. *Id.* at 232.

Lastly, *Dietemann v. Time, Inc.* held that a magazine could be sued for "invasion of privacy" because the court determined in that as-applied challenge the only activities at issue were "intrusive acts," not speech. 449 F.2d 245, 249-50 (9th Cir. 1971). The court went out of its way to note the claimed First Amendment freedom, "publication," was not an element of the cause of action. *Id.* A recording was used to prove the conduct, but the relevant conduct was merely a trespass. *Id*. Defendants concede their passing reference to *Miller v. Brooks* is no different, it allowed a tort that only required "intrusion," not speech. 472 S.E.2d 350, 354 (N.C. Ct. App. 1996); Defs.' Br. 34 (citing J.A. 437-38).

In relying on this case law, Defendants read out elements of § 99A-2, proceeding as if the law merely prohibited "enter[ing] the nonpublic areas of an employer's premises," instead of demonstrating laws like § 99A-2, which also restrict speech, do not raise constitutional concerns. Such authority only shows the state can successfully protect private property without referencing speech, logically indicating there are First Amendment concerns when it does.

2. Defendants' second, related, line of case law stands for the uncontroversial proposition that a person's desire to engage in speech does not create an exception to a law that survives constitutional scrutiny. Put another way, Defendants are again

assuming § 99A-2 does not raise constitutional concerns rather than proving it should stand. Their authority establishes that Plaintiffs' desire to engage in speech does not require courts to narrow the law's applications, if it survives First Amendment review, but none of it resolves whether a law "may constitutionally be applied" in the first place. *Bartnicki v. Vopper*, 200 F.3d 109, 118-19 (3d Cir. 1999) (discussing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)), *aff'd*, 532 U.S. 514 (2001).

Of particular note, *Branzburg v. Hayes* holds "reporters [must] respond to grand jury subpoenas as other citizens do" because it has already been established that "[c]itizens generally are not constitutionally immune from grand jury subpoenas." 408 U.S. 665, 682 (1972). However, it continues, a law would raise First Amendment concerns if a subpoena imposed special burdens on the press. *Id.* at 707-08. *Cohen*, relying on *Branzburg*, similarly provides there is "no special privilege" to violate laws because one wishes to engage in speech. 501 U.S. at 670. But it elaborates if the state sets out to "target … the press," which was not the case in *Cohen*, that law would need to satisfy First Amendment review before being applied. *Id*.

Pell v. Procunier merely holds a regulation limiting access to prisoners that passed constitutional scrutiny could be applied to the press. 417 U.S. 817, 827-28 (1974); *see also id.* at 831 (the media is not entitled to "a special privilege"). *United*

States v. Matthews states "a journalist engaged in newsgathering" is not entitled to "any special exemption … not available to others." 209 F.3d 338, 344 n.3 (4th Cir. 2000).

The most this case law shows is Defendants' emphasis on the fact that "[t]he First Amendment does not provide a right to trespass on private property, even for those seeking to gather information" is misleading. *E.g.*, Defs.' Br. 17. That a person wishes to speak does not entitle them to breach a trespass law because that law does not implicate speech, and thus that constitutional law can be applied to would-be speakers. That does not address § 99A-2's constitutionality.

3. Finally, Defendants cite cases that hold states cannot "bar newspapers from publishing" information lawfully obtained. *Ostergren v. Cuccinelli*, 615 F.3d 263, 274-75 (4th Cir. 2010) (discussing Defendants' other authority *Florida Star v. B.J.F.*, 491 U.S. 524, 533-34 (1989), and *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)). They rewrite these holdings to declare the government can restrict the use of information unlawfully obtained. Defs.' Br. 26. However, protection of one type of speech does not create a constitutional exemption for another. Indeed, *Ostergren* explains this line of case law "avoided deciding the ultimate question of whether truthful publication could ever be prohibited" no matter how the information is derived. 615 F.3d at 276; *see also Bartnicki*, 200 F.3d at 117 ("The Supreme Court has explicitly repudiated any suggestion that *Smith* answers the

question whether a statute that limits the dissemination of information obtained by means of questionable legality is subject to First Amendment scrutiny.”).

Nonetheless, in direct opposition to Defendants’ presentation, the Court recently expanded the First Amendment’s protections to include publishing information known to be unlawfully obtained. In doing so it noted any law that “imposes sanctions on publication of truthful information of public concern … implicates the core purposes of the First Amendment.” *Bartnicki*, 532 U.S. at 525, 533-34.

Defendants’ only case distinct from the collections above confirms the First Amendment applies here. *Cornelius v. NAACP Legal Defense & Education Fund, Inc.* holds the government’s decision to prohibit solicitations requires First Amendment review, even though that restriction only applied in a “nonpublic forum,” the equivalent of private property. 473 U.S. 788, 799, 806 (1985). The language Defendants cite from this case suggesting the type of property at issue may be relevant, Defs.’ Br. 23, is part of the decision’s “forum analysis,” which only occurs once the First Amendment applies. *Id.* at 800. Moreover, forum analysis is designed to allow the government to exclude individuals from its property to the same extent private landowners could under standard trespass laws. It does not empower the government to “act[] as lawmaker with the power to regulate” speech. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (citing

Cornelius, 473 U.S. at 800). Thus, *Cornelius* disproves Defendants' claim that the regulation of speech on closed property is free from First Amendment review. It demonstrates that if, like here, the government enacts a broad policy—as opposed to merely regulating its own land—and restricts speech, that law requires traditional First Amendment review.

C. Defendants wrongly characterize § 99A-2 as a "generally applicable law," but even if they were correct, that would not free the law from First Amendment review.

Defendants' argument that § 99A-2 is a "generally applicable law" and thereby free from First Amendment review is likewise based in misdirection. A law is not "generally applicable" when, like § 99A-2, it targets speech. Moreover, because the First Amendment protects against restrictions on speech, "generally applicable laws" that burden speech are subject to the First Amendment.

i. ***Section 99A-2 is not a "generally applicable law."***

Laws that "impose special obligations upon" speech are distinct from "law[s] of general application." *Turner Broad. Sys., Inc.*, 512 U.S. at 640-41. "Generally applicable laws" can also "be subject to heightened scrutiny under the First Amendment" if they burden speech. *Id.* But, laws that "single out" speech "are always subject to at least some degree of heightened First Amendment scrutiny" and they are not generally applicable. *Id.* In other words, "[w]hen the expressive element of an expressive activity triggers the application" of the law, "First Amendment

interests are in play" and the infringement on First Amendment freedoms cannot be called "generally applicable." *Am. Civil Liberties Union of Ill.*, 679 F.3d at 601-02 (citing *Turner Broad Sys.*, 512 U.S. at 640; *Food Lion*, 194 F.3d at 521-22). Put yet another way, if a law has a "speech-creation element" it cannot be "generally applicable." *W. Watersheds Project*, 869 F.3d at 1197; *see also ALDF v. Reynolds*, 297 F. Supp. 3d 901, 918 (S.D. Iowa 2018) (law not generally applicable if it "regulates conduct to some extent, [but] it also restricts speech"), *appeal docketed* No. 19-1364 (8th Cir. Feb. 22, 2019).

Thus, Defendants err in suggesting that if a law "incorporates … tort principles" it must be generally applicable and the First Amendment should not apply. Defs.' Br. 28. Again, the label "generally applicable" does not have the consequence Defendants desire; it does not prevent First Amendment review. *Turner Broad. Sys.*, 512 U.S. at 640. But more importantly, like above, Defendants focus on the wrong issue. The question is not whether there is a tort principle at work, but whether the law also restricts speech. *See id.*; *W. Watersheds Project*, 869 F.3d at 1197.

Defendants' discussion demonstrates why this must be the case. They claim the State needs to protect "owner[s'] privacy and possessory rights," Defs.' Br. 29, but they provide examples of how it can do so without referencing speech, through "theft and invasion of privacy" laws, *id.* at 28-29, or prohibitions on "computer

hack[ing],” *id.* at 25. “The prime objective of the First Amendment is not efficiency” in rulemaking, but rather to require the government to employ “alternative measures that burden substantially less speech” if they would be sufficient to “achieve the governmental interest.” *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). Thus, to achieve the First Amendment’s ends, the focus must be on whether and how the law implicates speech, not what else it does.

Defendants’ further suggestion that § 99A-2 must be “generally applicable” and the First Amendment cannot apply, because it regulates the speech of a person on private land without consent, merely collects the misstatements above. Defs.’ Br. 33-35. A law that directly regulates protected speech is not “generally applicable.” What is protected by the First Amendment does not change because the speech occurs on private property. Therefore, that § 99A-2 regulates speech in “nonpublic areas” does not establish it is “generally applicable.”

Finally, the word game Defendants play, suggesting § 99A-2 must be “generally applicable” because it does not limit its reach to specific populations but applies generally “to all individuals,” is hollow. Defs.’ Br. 28. Whether a law singles out certain speakers is relevant to determining the appropriate level of First Amendment scrutiny, not whether the First Amendment applies at all. *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015). A law that banned all political speech would

not be privileged under the First Amendment because it did not identify certain political speakers.

If engaging in speech is enough to satisfy a law's elements, the law is not "generally applicable." Defendants do not contest that subsections (b)(2) and (3) can only be proven if a person makes a recording, nor that collecting information for speech and communicating it meets several elements of the challenged provisions. Therefore, the First Amendment applies, and the "generally applicable law" label does not.

ii. ***Even "generally applicable laws" that restrict speech are subject to the First Amendment.***

Defendants' reliance on the "generally applicable" label is all the more inappropriate because even generally applicable laws can be subject to First Amendment review if they can be used to restrict speech. The Supreme Court explained that a "prohibition on destroying draft cards" was a "generally applicable" law because "the only thing actually at issue" under the law was "conduct," which only in certain circumstances was expressive. *Holder*, 561 U.S. at 26-27. Nonetheless, First Amendment scrutiny was required because the law could "burden[] [people's] expression." *Id.*

Likewise, this Court has explained a law that limits the location of protests—restricting conduct in ways that could, but need not, inhibit expression—was

"generally applicable," but still required First Amendment review. *Ross v. Early*, 746 F.3d 546, 551-52 (4th Cir. 2014) (Defendants' authority). This Court has similarly stated courts must "examine [an] [a]ct under the First Amendment" that only "target[s] unprotected activities," but "might incidentally affect some conduct with protected expressive elements." *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 648 (4th Cir. 1995); *see also United States v. Kaczynski*, 551 F.3d 1120, 1126-27 (9th Cir. 2009) ("restitution lien statute is a generally applicable law," but still required First Amendment review because it could have "an incidental effect" on speech).

Section 99A-2 is not aimed at non-expressive conduct. However, were the Court to accept Defendants' *ipse dixit* that it is a "generally applicable law," because its elements can restrict speech, it would still be subject to First Amendment review.

D. *Food Lion* is entirely consistent with the binding precedent on which Plaintiffs rely.

Defendants treat *Food Lion* as a cure all, but *Food Lion* is consistent with Plaintiffs' presentation, not Defendants'. It establishes that the government can restrict non-expressive conduct without implicating the First Amendment, but that is not what the State did here. *Reynolds*, 297 F. Supp. 3d at 918 (tort at issue in *Food Lion* "did not actually prohibit any speech or expressive conduct").

Before turning to the substance, however, it is important to note *Food Lion*'s questionable precedential value. The Supreme Court has revisited many of the issues Defendants rely on the case to resolve since *Food Lion* was handed down, holding against Defendants' statements purportedly derived from *Food Lion*. Moreover, *Food Lion* guessed how North and South Carolina would define the "duty of loyalty" and, based on that guess, upheld a verdict against reporters for breaching that duty and trespassing by breaching that duty, rejecting First Amendment challenges. 194 F.3d at 512. The North Carolina Supreme Court subsequently held the State has never "sanction[ed] an independent action for breach of duty of loyalty," *Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001), and the South Carolina courts stated the duty only describes fiduciaries' already existing obligations, *Coves Darden, LLC v. Ibanez*, 2016 WL 4379419, at *5 (S.C. Ct. App. Aug. 17, 2016). Thus, the contours of the tort *Food Lion* upheld are complicated to discern, particularly as the reporters were not fiduciaries. Perhaps for this reason, only one Fourth Circuit case has cited this portion of *Food Lion*. It does so solely as a "see also" cite, in a footnote, for the statement that the desire to engage in speech does not exempt one from constitutional laws. *Matthews*, 209 F.3d at 344 n.3.

Nonetheless, Defendants sorely misread *Food Lion* to give it the novel meaning they require and cannot find elsewhere. *Food Lion* held the "duty of loyalty" could be breached when employees committed to give "complete loyalty"

to two employers, but those employers' interests "were adverse." 194 F.3d at 516. In other words, *Food Lion* held that employees could be liable for pure conduct: having two competing employers. The court emphasized this was entirely non-expressive conduct. *Id.* (person liable because they served "one master [] to the detriment of a second"); *see also id.* at 522 (duty of loyalty does not implicate "some form of expression"). Thus, *Food Lion* does not speak to § 99A-2, which directly regulates speech.

Indeed, contrary to Defendants' suggestion that *Food Lion* held anything labeled a "generally applicable law" does not receive First Amendment review, Defs.' Br. 27, the court stated that where "a generally applicable law … covered nude dancing, which was expressive conduct," First Amendment scrutiny would apply. *Food Lion*, 194 F.3d at 521. In contrast, First Amendment review was not required in *Food Lion* because the duty of loyalty was different.

Defendants focus on the facts that substantiated the torts in *Food Lion*, which involved speech, but using speech to prove a person engaged in non-expressive conduct is not the same thing as speech being an element of the law at issue. *See* Defs.' Br. 44 (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993), for this same proposition). As *Mitchell* explains, the First Amendment does not prohibit "the evidentiary use of speech to establish the elements of a crime" that are distinct from speech, such as "motive or intent." 508 U.S. at 489. The First Amendment applies

where expression satisfies an element, not where a statement allows the finder of fact to reach another conclusion. *Id*.

Food Lion relies on this distinction. The defendants in *Food Lion* were shown to breach the duty of loyalty by demonstrating they "wore hidden cameras" to document "unsanitary practices." *Id.* at 515. The decision explains the existence of the cameras was relevant because it showed the reporters' initial employer, ABC News, had interests "diametrically opposed to Food Lion's," not because the state could constitutionally regulate recording on private property or the recording's release. *Id.* at 516. Hence the verdict was solely for "nominal damages of $1.00," *id.* at 515, not the damage caused by the recording—although those latter damages are provided for in § 99A-2, N.C. Gen. Stat. § 99A-2(d).

Just like a recording of trespassing is relevant to prove a person entered private property without converting a trespass law into a restriction on speech, the cameras were relevant to show the defendants in *Food Lion* served two adverse masters, but that did not convert the "duty of loyalty" into a restriction on speech. Unlike with § 99A-2, a recording was neither required nor sufficient to satisfy elements of the "duty of loyalty" applied in *Food Lion*. It was for this reason that the panel held the First Amendment did not prohibit the verdict.

In this manner, *Food Lion* puts the lie to Defendants' claim that § 99A-2 "codif[ies] *Food Lion* in a statute." *E.g.*, Defs.' Br. 3. Nothing in § 99A-2 defines

liability as an employee having two "diametrically opposed" employers. More importantly, whatever meaning the "duty of loyalty" is given in § 99A-2, it is but one component of two subsections, whose other elements encompass speech, including by prohibiting "us[ing]" information. N.C. Gen. Stat. § 99A-2(b)(1)-(2). Speech and speech alone meets those elements, which makes § 99A-2 entirely unlike the duty upheld in *Food Lion*.

Defendants still seek to wedge § 99A-2 into *Food Lion* by arguing aspects of § 99A-2's elements are similar to torts that only regulate non-expressive conduct, such as trespass, theft, and invasion of privacy. Therefore, they claim that despite § 99A-2's distinctions, the logic of *Food Lion* applies. *See* Defs.' Br. 28-30. This argument just continues the pattern of Defendants asking the Court to overlook the parts of the law that regulate speech. The First Amendment, however, requires the Court to focus on the speech elements. *E.g.*, *W. Watersheds Project*, 869 F.3d at 1197 (quoting *Alvarez*, 679 F.3d at 596).

Food Lion is unworthy of the attention it has been provided. That it concerned a law that had some of the same words as the one at issue here does not save § 99A-2. Nor does it call into question Plaintiffs' or the district court's analysis that § 99A-2 requires constitutional scrutiny.

E. The challenged provisions are subject to strict scrutiny that Defendants do not even seek to satisfy, but also fail intermediate scrutiny.

Because the First Amendment covers § 99A-2, the Court must apply the appropriate level of scrutiny. Content-based laws receive strict scrutiny. Content-neutral ones receive intermediate scrutiny. *See Reed*, 576 U.S. at 165-66. Contrary to Defendants' approach that combines scrutiny with remedy, *see* Defs.' Br. 36, such analysis then informs whether the Court should provide as-applied or facial relief. *See* § VII(F), *infra*.

Section 99A-2 is content based because, as Defendants admit, its text reveals it is focused on restricting anti-employer speech, allowing pro-employer speech generated in the same way. Defs.' Br. 38. It also targets communications with the legislature and media, which mandates strict scrutiny, and it provides employers boundless discretion to turn the law against speech they dislike, which makes the law not just content-based but viewpoint discriminatory. Defendants do not try to sustain the law against strict scrutiny, thus it fails. Further, even if the Court were to accept Defendants' argument that the law is content neutral and subject to intermediate scrutiny, it also fails that review.

Unfortunately, here too Defendants take the Court on a long jog. They ask for yet more exceptions, now from Supreme Court and Fourth Circuit precedent. These

requests are baseless and gratuitous. No such exceptions are warranted, and the law would fail even if they were granted. Yet, they still must be addressed.

i. ***Section 99A-2 is content based, and Defendants concede they cannot defend such a law.***

A law's text or legislative history can establish it is content based if either shows the law "target[s] speech based on its communicative content." *Reed*, 576 U.S. at 163-65. For instance, this Court has held a restriction on "consumer or political" speech was content based. *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015); *see also Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (prohibition on commercial art content based). As Defendants note, a law is also content based if a finder of fact would need to examine the speech to determine if the law applied, Defs.' Br. 37, although contrary to their claims, this is not the only test, *Sorrell*, 564 U.S. at 573 (content-based nature can be derived from law's structure).

The text of subsections (b)(1) and (2) establishes the provisions restrict anti-employer speech, rendering them content based. *Kelly*, 434 F. Supp. 3d at 999 (laws that prohibit speech to damage an operation, but not speech with "the intent to *benefit* the enterprise … impermissibly discriminates based on the speaker's views" (emphasis in original)). The subsections only prohibit gathering information for speech and communicating it if that "breach[es] the person's duty of loyalty to the

employer." N.C. Gen. Stat. § 99A-2(b)(1)-(2). By their plain terms, disloyal speech is prohibited, whereas speech that promotes the employer is not. *See Sorrell*, 564 U.S. at 564 (law that permits "academic" speech, but not commercial speech is viewpoint discriminatory). The legislative history confirms this content-based aim. J.A. 202-04 (Defendants' citation stating goal is to stop "embarrassment" to employers).

The text of subsections (b)(1) and (2) also meets Defendants' preferred test, that one must "examine the content of the message" to determine a violation. Defs.' Br. 37. To prove liability, an employer must show that the "use[]" of information violated the "duty of loyalty." N.C. Gen. Stat. §99A-2(b)(1)-(2). That is, the statute turns on the nature of the communication, requiring the finder of fact to consider the communication.

Separately, the law's text also allows it to be bent to serve employers' whims, so it can target any speech they dislike, which renders it not merely content-based but viewpoint discriminatory. As this Court has put it, where a law can be invoked based on whether the person wielding it "endors[es]" the speech, it provides "censorial power" and thus must be treated as "suppressing a particular point of view." *Child Evangelism Fellowship of MD, Inc., v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 380, 386 (4th Cir. 2006). In other words, when a statute turns on subjective standards it "fails to 'provide adequate safeguards to *protect* against the

improper exclusion of viewpoints'" and must be treated as content based and viewpoint discriminatory. *White Coat Waste Project v. Greater Richmond Transit Co.*, 2018 WL 4610089, at *7-8 (E.D. Va. Sept. 25, 2018) (emphasis in original) (quoting *Child Evangelism Fellowship of MD*, 457 F.3d at 384)), *appeal docketed* No. 20-1710 (4th Cir. June 30, 2020).

Section 99A-2 contains two elements that turn entirely on an employer's discretion. First, subsections (b)(1) and (2) only apply if the communications are determined to be "disloyal," which the statute leaves undefined, allowing the employer to supply their desired definition. Moreover, each of the challenged provisions can be invoked if the activities occur in areas the "owner or operator" did not "intend[]" to be accessible to the public, another subjective standard. N.C. Gen. Stat. § 99A-2(a).

Finally, the law's structure also establishes each of the challenged provisions targets communications with the media and the legislature. Whether or not a law targets a particular type of speech, laws that single out the media or right to petition are content based. Because of the separate protections of those freedoms, laws that impinge on those rights require strict scrutiny. *Minneapolis Star & Tribune Co.*, 460 U.S. at 585; *McDonald v. Smith*, 472 U.S. 479, 486 (1985) (Brennan, J., concurring). Section 99A-2 allows certain communications, but prohibits communicating the same information to the media, Congress, or by private employees to the state

legislature. N.C. Gen. Stat. § 99A-2(e). Again, the law's sponsors make clear the law was drafted with this aim. *E.g.*, J.A. 238, 332. Thus, the challenged provisions must be subject to strict scrutiny.

a. Defendants' counterarguments fail.

Defendants do not address the ways in which the statute was designed to single out the press and communications with legislators. To the extent they discuss the fact that it provides owners and operators unbridled discretion, they illogically claim there can be no "selective-prosecution concerns" here because the law imposes only civil penalties. Defs.' Br. 49. Yet, the concern with statutes that turn on subjective standards is that an enforcer can conjure up sentiments to satisfy the law and thereby punish speech they dislike. This is true whether the statute imposes civil or criminal penalties. Thus, *White Coat* did not concern a criminal statute, but a municipality censoring an advertisement. 2018 WL 4610089, at *2.

Defendants focus their arguments on re-labeling the restrictions on anti-employer speech in subsections (b)(1) and (2) as "motive-based" restrictions, which is both incorrect and irrelevant. Defs.' Br. 38. Their characterization stems from their pretense that because *Food Lion*, in misreading North Carolina law, said breaching the "duty of loyalty" required intent—although that was not the only requirement—the "duty of loyalty" referenced in § 99A-2 must solely be about the violator's desire to harm, not the nature of his expressions. Defs.' Br. 38, 43. But, that is not what

§ 99A-2 says, providing yet another basis to distinguish § 99A-2 from the "duty of loyalty" in *Food Lion*. Indeed, Defendants previously explained, "the gravamen of a duty of loyalty claim [in § 99A-2] is that the individual did something … that was disloyal," not that the speaker intended it to be disloyal. J.A. 406 (hearing transcript). This is because § 99A-2 contains intent requirements, none of which are connected to breaching the "duty of loyalty." Instead, the statute provides that so long as one "uses information" in a manner that causes a "breach [of] the person's duty of loyalty" that is sufficient to meet those elements. N.C. Gen. Stat. § 99A-2(b)(1)-(2).

Regardless, Defendants acknowledge that even if the Court were to accept their strained reading, subsections (b)(1) and (2) would still be content based under the recent Supreme Court decision in *Reed*. Defs.' Br. 45-46. *Reed* holds that a law that restricts speech based on the speech's "function or purpose" is content based. 576 U.S. at 163. Even in Defendants' view, § 99A-2(b)(1)-(2) are solely concerned with speech made with "the intent to harm the employer." Defs.' Br. 45. Under *Reed* this is not only a content-based distinction, but a viewpoint-discriminatory one. *Reed*, 576 U.S. at 168 (law based on "motivati[on]" of the speaker "discriminat[es] among viewpoints").

As a result, Defendants ask this Court to disregard *Reed*'s statements as dicta, Defs.' Br. 45-46, but this Court has explained it "give[s] great weight to Supreme Court dicta," *NLRB v. Bluefield Hosp. Co.*, 821 F.3d 534, 541 n.6 (4th Cir. 2016)

(citing *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 182 n.2 (4th Cir.2012); *United States v. Fareed*, 296 F.3d 243, 246 (4th Cir.2002)). This should be particularly true of *Reed*, which this Court has characterized as a "crucial decision," guiding all future First Amendment analysis. *Lucero v. Early*, 873 F.3d 466, 471 (4th Cir. 2017).[5]

This tangent is all the more head scratching because, even assuming the Court were to go along, subsections (b)(1) and (2) would still be content based under other controlling authority. *Reed* built on established rules, namely that laws that distinguish between types of speech are content based. *Sorrell*, 564 U.S. at 564-65 (law that allows information to be used by "speakers with diverse purposes and viewpoints" but singles out one viewpoint is a content-based and viewpoint-discriminatory law). A law like § 99A-2 that seeks to prohibit speech that is disloyal or that the speaker intends to be disloyal is content-based under this earlier authority. It is akin to a prohibition on political speech, identifying a type of speech based on its characteristics and goals, which this Court has held is content based. *Cahaly*, 796 F.3d at 405.

Likely for this reason, Defendants tack on that the law is not content based because it does not single out speech about a particular industry, but regulates all

[5] Defendants try to scare the Court into deviating from its precedent by suggesting if *Reed* were applied here it would also call into question espionage statutes. Defs.' Br. 47. However, there are clearly bases to prevent speech to protect against foreign espionage that do not apply to § 99A-2.

anti-employer speech. Defs.' Br. 50. However, if a law can be content based if it prohibits political speech without identifying the politics, § 99A-2 can be content based without identifying a protected industry of concern. *Cahaly*, 796 F.3d at 405; *see also Rigdon v. Perry*, 962 F. Supp. 150, 164 n.14 (D.D.C. 1997) ("anti-lobbying restriction is content- and viewpoint discriminatory" though it "applies regardless of … issue").[6]

Put simply, Defendants again seek to prevail through distraction. Their cascade of unusual claims is unsupported and ultimately of no consequence. Thus, because they do not defend the law against strict scrutiny, the challenged provisions are unconstitutional. Defs.' Br. 51-61 (solely defending the law against intermediate scrutiny).

ii. ***The law also fails intermediate scrutiny.***

Even were the law deemed content neutral and subject to intermediate scrutiny as Defendants request, it fails that review in three ways.

[6] Defendants point out that the First Amendment does not prohibit courts from using speech as evidence to prove motive, Defs.' Br. at 44, but that rule does not go to whether a law is content based or content neutral. As Plaintiffs explain above, § VII(D), *supra*, this principle recognizes using a "comment[]" to prove a non-speech element, such as discriminatory intent, does not transform a law about discrimination into a law that restricts speech. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (Defendants' authority). That rule is not implicated here because speech alone satisfies numerous elements of § 99A-2. Since § 99A-2 restricts speech, the Court must determine the nature of that speech restriction. Doing so does not expand the scope of the First Amendment.

a. The law fails as it lacks evidence supporting its restrictions on speech.

This Court has consistently held that for a law to survive intermediate scrutiny the government must "present actual evidence" showing the speech restriction "does not burden substantially more speech than necessary" and thereby is properly tailored; "argument unsupported by the evidence will not suffice to carry the government's burden." *Reynolds*, 779 F.3d at 229. Specifically, the government must "*prove*" with evidence that "it seriously undertook to address the problem with less intrusive tools" and those alternatives "would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 231-32 (emphasis in original); *see also Billups v. City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020) ("To prove that a content-neutral restriction on protected speech is narrowly tailored to serve a significant governmental interest, the government must, inter alia, present evidence showing that — before enacting the speech-restricting law — it seriously undertook to address the problem with less intrusive tools readily available to it."); *Doe*, 842 F.3d at 847 ("[I]t was incumbent upon the [S]tate to prove [a provision] was appropriately tailored to further [its] interest. … [T]he State here simply failed to meet its burden of proof" and accordingly the law was unconstitutional.); *Ross*, 746 F.3d at 556 (holding the government must present "empirical evidence" to show the law is tailored).

Although this Court's rule predates the Supreme Court's decision in *McCullen*, that opinion affirms the approach. *McCullen* held unconstitutional a buffer zone around abortion clinics because, despite testimony in the legislative record stating the restriction was necessary, the state failed to show it had first sought to protect abortion clinics by using existing laws, or that a law burdening "less speech" would fail to achieve the state's claimed objectives. *McCullen*, 573 U.S. at 494-95.

It is undisputed the required evidence is lacking here. *See* Defs.' Br. 58-59 (failing to cite any evidence to show Defendants carry their burden). Indeed, before the district court, Defendants conceded that under "*Reynolds v. Middleton* and *McCullen*" there "needs to be some kind of evidentiary showing" to justify restricting speech and Defendants have not sought to put forward such evidence. J.A. 410 (hearing transcript).

As a result, Defendants argue evidence should only be required to support "novel" speech restrictions. Defs.' Br. 55. Because none of the authority above hints at such a rule, Defendants turn to the facts, claiming those cases involved "exceptional" laws and that justified the evidentiary requirement. Defs.' Br. 54-55. False. *Doe* concerned a sex offender registration requirement that the parties "agree[d] North Carolina has a substantial interest" in enforcing and the court suggested "could have met constitutional standards" had the State attempted to carry

its evidentiary burden. 842 F.3d at 847. *Ross* struck down a "generally applicable" restriction designed to ensure "the flow of pedestrian traffic." 746 F.3d at 554-55.

Moreover, *McCullen* explains it is not the nature of the law that mandates the evidentiary requirement, but the need to protect First Amendment interests. When "First Amendment interests [are] at stake it is not enough for [the government] simply to say that other approaches" are insufficient. 573 U.S. at 496. It must prove it.

This entire aside is also unnecessary because § 99A-2 does not meet Defendants' proposed exception. Defendants state evidence should not be required where an act "does not make new law" but is codifying existing law, as in those circumstances there is no "reason to wonder" why the restriction was passed. Defs.' Br. 57-58. However, § 99A-2 *is* a new law. Even accepting Defendants' wrong assertion that the law seeks to replicate *Food Lion*, it would be doing so approximately fifteen years after the North Carolina Supreme Court held those activities were not covered by State law. *Dalton*, 548 S.E.2d at 709. Thus, there are plenty of reasons to wonder why the legislature decided the State could live without this tort for fifteen years, but needs it now. What is more, elsewhere Defendants concede they cannot characterize subsections (b)(3) and (5), which make no reference to the "duty of loyalty," as codifying *Food Lion*, Defs.' Br. 4, they just forget this when seeking to survive intermediate scrutiny.

As a last salvo, Defendants behave as if they can carry their evidentiary burden through argument. Defs.' Br. 58-59. The Supreme Court and this Court have unequivocally held otherwise. *McCullen*, 573 U.S. at 496; *Reynolds*, 779 F.3d at 229. Rationalizations are not enough. The State needed to show that the restriction on speech was needed.

In sum, there is extensive, binding precedent requiring evidence to justify restrictions on speech. Were this Court to disregard that, under Defendants' logic the State still needed to produce an evidentiary record. It failed to produce that evidence. Thus, the law fails intermediate scrutiny.

b. The law is over- and under-inclusive, and therefore not tailored.

It is also plain from the law's text that it is not sufficiently tailored. Under intermediate scrutiny, if "a substantial portion of the burden on speech does not serve to advance the State's content-neutral goal," it is over-inclusive and fails. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 n.* (1991). Likewise, if a law does not capture a significant amount of activities that produce the harm it is purportedly designed to address, it is under-inclusive and fails. *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2375 (2018). The challenged provisions are both.

Defendants claim the purpose of the law is to broadly "strengthen[] protections for property rights." Defs.' Br. 53. Notably, in sworn statements below, the State identified the "issues" the law was primarily concerned with were narrower, "corporate espionage and organized retail theft." J.A. 111. There can be no doubt the challenged provisions are over-inclusive based on that representation. Section 99A-2(b)(4), which is not challenged, regulates retail theft, indicating the other provisions are not necessary to serve that end. Further, there is no reason for the law to prohibit accessing all information and communicating it, thereby stopping Plaintiffs' ability to identify animal abuse, if the State is only concerned with protecting trade secrets. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc) (solicitation ban over-inclusive when it applied to all in-street solicitation, but goal was only to stop solicitation that blocked traffic).

Defendants' shifting position does not change the result. There is no need to restrict speech to protect property. The State could have passed laws prohibiting entry or theft. Further still, because the law's restrictions are so broad, it prohibits whistleblowers revealing third-parties' unlawful activities, imposing a speech restriction that does nothing to protect the property. *Id.*; *see also, e.g.*, N.C. Gen. Stat. § 99A-2(b)(3).

Moreover, a law that focused on prohibiting entry or theft would have much better protected property, making this law under-inclusive. Currently the law only captures a narrow subset of potential intruders, those who take information to communicate it or gather it in a certain way. *See Showtime Ent., LLC v. Town of Mendon*, 769 F.3d 61, 75 (1st Cir. 2014) (law purportedly addressing aesthetic and traffic concerns fatally under-inclusive when targeted only at adult entertainment).

Defendants argue otherwise through the circular claim that the law is tailored because it is focused on "a particular injury" of concern. Defs.' Br. 54. Under this logic, all laws are tailored because they focus on their stated activities. Defendants needed to explain why it was sensible to restrict speech to protect against "trespass" and that restricting speech rather than legislating in another manner meaningfully achieved that goal. They have failed on both accounts. *See* Defs.' Br. 54, 59.

c. The law does not further a significant governmental interest.

Finally, in addition to being tailored, to satisfy intermediate scrutiny a law must also advance "a significant governmental interest." Defs.' Br. 51. While Plaintiffs do not contest protecting property can be such an interest, this law cannot be said to further that end. Where the government passes a restriction on speech and wholly "fail[s] to justify that policy," that establishes the law's purpose is not the stated rationale, but to suppress speech. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993). In other words, the government's inability to

establish *any* need to restrict speech undermines the claim that the law "serves a significant governmental interest." *Buehrle*, 813 F.3d at 979; *see also Watchtower Bible & Tract Soc'y*, 536 U.S. at 169 (noting the "absence of any evidence" establishing a purported governmental interest). This is particularly true where a law that did not target speech "would have precisely the same beneficial effect." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992). In those circumstances, the Supreme Court has concluded "the only interest distinctively served" by the law is to show "hostility" towards the regulated activities, not to advance some other end. *Id.*

Defendants provide no evidence showing they needed to suppress speech, abandon the initial justification for the law because it is untenable, and fail to offer a plausible alternative justification for restricting speech. These facts indicate the law does not serve a neutral end, but is designed to be hostile towards the regulated speech. The entire premise of the First Amendment is the state cannot pass a law to attack speech. Therefore, the Court should hold the law's objective is illegitimate and it fails intermediate scrutiny. *See id.*[7]

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[7] Defendants also discuss whether the law leaves "open ample alternatives for communication." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). That consideration only applies when the government, acting as landowner, is limiting the use of its property, what is sometimes referred to as a time, place and manner restriction. *Id.* With § 99A-2, the State is acting as lawmaker—passing a prohibition applicable to all sorts of land—not merely proprietor of government property. Yet, were to the Court to consider this issue, Defendants are incorrect on this count as well. They claim there are "ample alternatives" for Plaintiffs to create

F. Because the challenged provisions fail every application of First Amendment scrutiny they should be held facially invalid.

Now the Court turns to the "distinction between facial and as-applied challenges," which "goes to the breadth of the remedy" that should be provided, rather than the allegations and evidence needed to prove the law unconstitutional, as Defendants would have it. *Citizens United*, 558 U.S. at 331. The Fourth Circuit has never considered the implications of this holding from *Citizens United*. Thus, the district court relied on the no-set-of-circumstances test. *E.g.*, J.A. 430. As discussed below, Plaintiffs are entitled to facial relief under that test. However, as multiple circuits have concluded, *Citizens United* establishes the "no set of circumstances" language does not describe a test to be applied, but "the outcome of a facial challenge" where provisions fail scrutiny; they can no longer be applied in any circumstance. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123-27 (10th Cir. 2012).

Indeed, following *Citizens United*, the Tenth Circuit canvassed Supreme Court case law and concluded "[t]he idea that the Supreme Court applies the 'no set of circumstances' test to every facial challenge is simply a fiction"; instead the extent

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their desired communications because Plaintiffs could investigate areas "open to the public," but that is not the speech Plaintiffs seek to produce. Defs.' Br. 60. Moreover, the statute makes clear its goal is to prohibit the "general dissemination" of the speech Plaintiffs desire to produce, *e.g.*, N.C. Gen. Stat. § 99A-2(e), which Defendants acknowledge is enough to defeat their claim that the law leaves open sufficient channels, Defs.' Br. 60.

to which a law survived the "relevant constitutional test" (scrutiny) determined the appropriate relief. *Id.*; *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016) ("The Court has often considered facial challenges simply by applying the relevant constitutional test to the challenged statute, without trying to dream up whether or not there exists some hypothetical situation in which application of the statute might be valid."). In other words, if the entirety of a law fails scrutiny, it should be held facially invalid.

The Supreme Court has yet more recently indicated this approach is correct. When describing content-based laws, it has emphasized they are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. That is, they only stand if they pass scrutiny. Similarly, in discussing content-neutral laws the Court indicated the point of tailoring analysis is to ensure the statute's total burden on speech is acceptable, meaning it determines whether the law as whole can stand. *See McCullen*, 573 U.S. at 486.

Consistent with this, this Court, although referencing the "no set of circumstances" language, has placed the burden on the government to show there are instances in which the law's restrictions on speech can be justified. *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 408 (4th Cir. 2019). Where the

government failed to do so, this Court stated the law is "unconstitutional" as a whole and can be enjoined "in toto." *Id.*

Defendants have introduced no evidence to show there is any need for § 99A-2 to target speech. Had they shown there were some instances the State needed to restrict speech, Plaintiffs possibly could have been limited to as-applied relief, as part of the restriction on speech could stand and be enforced. However, the only effect of allowing the challenged provisions to remain is to unconstitutionally squelch speech by exposing other potential speakers to the risk of unconstitutional suit. *See Kolbe*, 849 F.3d at 148 n.19. Therefore, facial relief is warranted. *Citizens United*, 558 U.S. at 331.

Even so, facial relief is also warranted under the no-set-of-circumstances test. As the district court recognized, subsections (b)(2) and (3) can *only* be violated through engaging in protected speech and thus there is "[n]o set of circumstances" in which these provisions need not pass constitutional scrutiny, which they fail. J.A. 463. Moreover, under the no-set-of-circumstances test a law also falls facially if it "lacks any plainly legitimate sweep." J.A. 442. For the reasons discussed above that is true here. § VII(E)(ii)(c), *supra*.

Defendants' cases do not address any of the above. They focus on whether the law is overbroad, which they recognize is a separate form of facial challenge. Defs.'

Br. 61-66. That is addressed in the next section. Yet, based on the scrutiny alone, facial relief is warranted.

G. The challenged provisions are also unconstitutionally overbroad, providing an independent basis to hold them facially invalid.

The challenged provisions of § 99A-2 may also be struck down facially because they are overbroad. This is a "second type of facial challenge" allowed in First Amendment cases, which does not turn on whether the law passes scrutiny, but whether it has "a substantial number" of unconstitutional applications "judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473; *see also id*. at 481-82. Contrary to the district court's approach, J.A. 467, this Court has stated the focus is on the amount of speech regulated not the law's potential to regulate other activities. Where there is a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections," then the overbreadth is by definition "real" and "substantial." *Doe*, 842 F.3d at 845.

Defendants emphasize the need to defer to legislators. Defs.' Br. 62. But the Supreme Court has explained "vigorously enforc[ing]" the overbreadth analysis sufficiently balances the need to ensure an open marketplace of ideas against judicial deference to the legislative branch. *United States v. Williams*, 553 U.S. 285, 292 (2008).

The challenged provisions can be applied in a significant number of unconstitutional ways. For instance, in addition to prohibiting Plaintiffs' speech, the record establishes the law discourages newspapers from publishing articles on public whistleblowers because they fear joint liability under § 99A-2(c). J.A. 171 (GAP declaration). In addition, because § 99A-2(e)'s exceptions focus on whistleblowing under State law, employees who gather and report evidence of environmental pollution or harm to endangered species, as federal law encourages, can be liable. 16 U.S.C. § 1533(b)(3)(A); 40 C.F.R. § 1506.6(d). Likewise, private employees who act outside their duties, gather evidence of contracting fraud, and provide that information to the federal government under the federal False Claims Act are at risk of penalties. 31 U.S.C. §§ 3729-33. Further, since not all State laws that mandate reporting are exempted from § 99A-2's reach, private employees also can be liable if they enter "nonpublic areas," document abuse of developmentally disabled people, and provide that evidence to officials, as is required. N.C. Gen. Stat. § 122C-66(b), (b1).

Defendants assert these are "the most extreme applications conceivable," Defs.' Br. 66, but the record is to the contrary. The legislative history reveals legislators were concerned the law would discourage whistleblowing and Representative Szoka conceded the legislature might "need to add a phrase or a sentence or paragraph" to truly protect whistleblowers. J.A. 335-36. Representative

Jordan similarly conceded a "separate act" should be passed to ensure the law encompasses "all the whistleblower protections." J.A. 288. Moreover, the Governor vetoed the law because he determined it would conflict with "Burt's Law," the State reporting requirement regarding abuse of developmentally disabled individuals, as well as other laws that encourage or require employees to "report illegal activities." J.A. 133. For these same reasons, the Wounded Warrior Project and AARP opposed the law because they were concerned it would inhibit people reporting abuse in hospitals and nursing homes. J.A. 382-84 (Senate statements explaining those organizations' opposition).

Moreover, should the Court wish to compare § 99A-2's unconstitutional applications against its "legitimate sweep," there is nothing to balance. Because Defendants have failed to justify the law's restrictions on speech, the Court should conclude the only interest the law "distinctively serve[s]" is to restrict speech. *See, e.g.*, *R.A.V.*, 505 U.S. at 396. Indeed, each of Defendants' proposed uses for the law that do not infringe on speech could be accomplished through other laws, further undermining the notion that § 99A-2 serves a legitimate function. For instance, they say the law could stop removing information from an employer's property, Defs.' Br. 64, a form of theft. Likewise, they note the law would prohibit "opening a gate to let livestock out," *id.*, a form of trespass. Put simply, Defendants' examples highlight that there is no need for this law, unless the goal is to suppress speech.

The State passed the law anticipating that it would infringe on a large volume of speech, which the record now bears out. That is a basis to hold it overbroad. *Doe*, 842 F.3d at 845. The law is also overbroad because it lacks any legitimate function to counterbalance its unconstitutional applications. Thus, it is facially invalid.

VIII. CONCLUSION.

For the foregoing reasons, the Court should affirm the district court's holding that § 99A-2(b)(1)-(3) and (5) are subject to the First Amendment and fail First Amendment scrutiny. It should also conclude that all of the challenged provisions are facially invalid because they fail scrutiny and are overbroad, remanding for the district court to enter a new declaration and injunction consistent with that holding.

IX. REQUEST FOR ORAL ARGUMENT.

Plaintiffs request oral argument should the Court wish to consider the issues of remedy and overbreadth. However, Plaintiffs do not believe oral argument is necessary to address Defendants' claims. Defendants contradict controlling precedent, create rules that no other court has suggested, and advocate distinctions that have been expressly rejected.

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Respectfully submitted,

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X. ADDENDUM OF STATUTORY TEXT.

N.C. Gen. Stat § 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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the February 22, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

DATED this February 22, 2021.

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