No. 23-

In the Supreme Court of the United States

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Petitioner,

v.

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

North Carolina's Property Protection Act aims to protect businesses from trespass and disloyalty by employees whose loyalties lie elsewhere, often with activist groups that have planted them to collect information. The Act creates a cause of action for damages against an employee who "intentionally gains access to the nonpublic areas of [the employer's] property" and engages there "in an act that exceeds the person's authority to enter." Those acts are defined as, without bona fide intent of employment, stealing the employer's information or recording images or sounds, and using the gathered material to breach the duty of loyalty to the employer; or using an unattended device to record images or sounds.

People for the Ethical Treatment of Animals and other animal rights groups challenged the Act as a violation of the First Amendment. The Fourth Circuit, over the dissent of Judge Rushing, enjoined North Carolina from applying the law to PETA's spying activities, holding that a planted employee's "recording in the non-public areas" of the employer's property "as part of newsgathering constitutes protected speech." The question presented is:

Whether a worker planted in a business to collect information for their true employer, and who does so in nonpublic areas of the business, is immunized by the First Amendment from an action for trespass and breach of loyalty created by a content-neutral statute of general applicability.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner here, intervenor-defendant-appellant below, is the North Carolina Farm Bureau Federation, Inc. (NCFB). NCFB is a trade association representing North Carolina farmers, with more than 600,000 member families. NCFB does not have any parent corporation, and no publicly held corporation owns 10% or more of NCFB.

Plaintiffs-appellees below were the People for the Ethical Treatment of Animals, Inc. (PETA); Animal Legal Defense Fund (ALDF); Center for Food Safety; Food & Water Watch; Farm Sanctuary; Government Accountability Project; American Society for the Prevention of Cruelty to Animals (ASPCA); and Farm Forward (together, respondent organizations).

Defendants-appellees below were Attorney General Joshua Stein, Attorney General of the State of North Carolina; and Kevin Guskiewicz, in his official capacity as Chancellor of the University of North Carolina-Chapel Hill.

RELATED PROCEEDINGS

The State of North Carolina is separately petitioning for certiorari from the same judgment below.

No other case is directly related to the case in this Court within the meaning of Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner North Carolina Farm Bureau Federation, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 60 F.4th 815 (4th Cir. 2023), and is reproduced at App., *infra*, 1a-60a. The district court's order is reported at 466 F. Supp. 3d 547 (M.D.N.C. 2020) and is reproduced at App., *infra*, 65a-127a.

JURISDICTION

The Fourth Circuit entered judgment on February 23, 2023. App., *infra*, 61a-64a. This Court has jurisdiction under 29 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution states that "Congress shall make no law * * * abridging the freedom of speech, or of the press." U.S. Const. amend. I. North Carolina's Property Protection Act, N.C. Gen. Stat. § 99A-2, is reproduced at App., *infra*, 158a-160a.

STATEMENT

PETA and other respondent organizations are activist groups that have ideologically driven missions to advocate for certain lifestyle choices. To advance those missions, the organizations hire individuals who will obtain employment with other businesses that respondent organizations wish to investigate. Once hired, those planted employees carry out undercover activities such as videotaping, recording, and

gathering documents and information, from the nonpublic areas of their second employer for the benefit of respondent organizations.

To combat serious problems associated with trespass, theft, surreptitious surveillance, and breaches of loyalty confronting private businesses in the State, the North Carolina General Assembly passed the Property Protection Act, which provides a civil remedy for enumerated conduct carried out without authorization in the nonpublic areas of private premises. The Act applies to all businesses in the State and imposes generally applicable prohibitions on unauthorized unattended surveillance, recording of information, theft, and breaches of loyalty that apply to all employees.

Respondent organizations brought a pre-enforcement challenge to the Act, claiming among other things that their employees are entitled First Amendment protection of their efforts to trespass, secretly record, steal information, and breach the duty of loyalty in the name of "newsgathering."

NCFB and North Carolina defended the Act, arguing in part that respondent organizations' challenge fails at the outset because the Act is not subject to First Amendment scrutiny for two primary reasons. First, the Act applies exclusively to unauthorized conduct undertaken in the nonpublic areas of private premises. The First Amendment does not provide a license for any individual to engage in conduct in those areas, so respondent organizations cannot establish First Amendment protection for their undercover operations that violate the Act. Second, application of generally applicable laws, such as the Act, which do not single out speech or the press and have only an incidental effect on speech does not implicate the First

Amendment. Relatedly, individuals engaged in "newsgathering" have no right to gather information in areas that are not open to the public and must find their information lawfully. No First Amendment right is implicated when an individual seeks to access nonpublic areas to gather news.

NCFB and North Carolina also argued that, even if First Amendment scrutiny does apply to the Act, it passes muster under intermediate scrutiny. To begin with, the Act is content- and viewpoint-neutral. For instance, the statute applies to *all* unattended recordings in the nonpublic areas of premises regardless of who records the information or what is recorded. Additionally, prohibiting use of information to breach a duty of loyalty is not a regulation that classifies based on the content of speech, but rather on the tortious outcome of the action. Further, the Act advances the significant government interest of protecting private property, is narrowly drawn to prohibit enumerated conduct undertaken in specific areas with the requisite intent, and allows other channels of communication.

A majority of the Fourth Circuit panel disagreed, holding that the Act is subject to First Amendment scrutiny. In so ruling, the majority improperly extended the protections of the First Amendment to unauthorized conduct in the nonpublic areas of private businesses. Additionally, the court ignored well-settled law that the First Amendment does not permit individuals to violate generally applicable proscriptions for the sake of newsgathering. This decision effectively rewrites the balance between the rights of private property owners and individuals seeking to engage in speech or speech-related activity and casts

doubt on the viability of numerous statutory or common law civil actions that property owners otherwise could bring against individuals for violating their property rights and committing tortious acts against them. As Judge Rushing correctly recognized in dissent, the Act is a "classic statement of the law of trespass" and the "employment tort" of breach of the duty of loyalty that "is generally applicable and does not merit heightened First Amendment scrutiny simply because it may be enforced equally against an investigative reporter and a business competitor." App., *infra*, 52a-54a.

A. The Act prohibits enumerated conduct undertaken without authorization in the nonpublic areas of private property

To combat the increasing problems faced by North Carolina's businesses resulting from harmful conduct perpetrated by individuals in the nonpublic areas of their premises, the North Carolina General Assembly enacted the broad and universally applicable Act to protect all businesses in the State. Effective January 1, 2016, the Act codified a longstanding Fourth Circuit decision, *Food Lion* v. *Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), which held that the First Amendment did not apply to shield from suit for fraud and breach of the duty of loyalty individuals who gained employment with one employer for the purpose of operating undercover to record their unsuspecting employer's business practices for a different employer. In the Act, North Carolina also codified prohibitions against trespass, retail theft, interference with property, and invasion of privacy carried out in the nonpublic areas of another's premises.

The Act states that "[a]ny person who intentionally gains access to the nonpublic areas of another's

premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator for any damages sustained." N.C. Gen. Stat. § 99A-2(a), App., *infra* 158a-160a. The statute defines "nonpublic areas" as "areas not accessible to or not intended to be accessed by the general public." *Ibid*.

The Act defines "an act that exceeds a person's authority to enter the nonpublic areas of another's premises" to include five enumerated circumstances. N.C. Gen. Stat. § 99A-2(b). *First*, the Act applies to "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 once in that nonpublic area with that intent "without authorization captures or removes the employer's data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer." *Id*., § 99A-2(b)(1).

Second, the Act applies to an employee who enters the nonpublic areas of his employer's premises without a bona fide intent and "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." N.C. Gen. Stat. § 99A-2(b)(2).

Third, the Act applies to any individual who "[k]knowingly or intentionally plac[es] on the employer's premises an unattended camera or electronic surveillance device and us[es] that device to record images or data." N.C. Gen. Stat. § 99A-2(b)(3).

Fourth, the Act prohibits "[c]onspiring in organized retail theft," as that crime is defined elsewhere

in the North Carolina code. N.C. Gen. Stat. § 99A-2(b)(4).

Fifth, the Act prohibits "[a]n act that substantially interferes with the ownership or possession of real property." N.C. Gen. Stat. § 99A-2(b)(5).

The Act also prohibits any person from intentionally directing, assisting, compensating, or inducing others to violate the statute. N.C. Gen. Stat. § 99A-2(c). The Act permits the court to award a prevailing plaintiff equitable relief, compensatory damages, costs and fees, and exemplary damages of $5,000 per day that the defendant has acted in violation of the statute. *Id.*, § 99A-2(d).

The Act exempts governmental agencies and law enforcement officers engaged in lawful investigations and further provides that it does not diminish North Carolina's statutory whistleblower protections. N.C. Gen. Stat. § 99A-2(e)-(f).

B. Respondent organizations intend to hire individuals to pose as fake employees for the purpose of trespassing and gathering information about businesses

Respondent organizations unabashedly use undercover operatives to advance their ideological purposes and seek First Amendment protection for that conduct. For example, PETA's General Counsel Jeffrey S. Kerr explained that his organization "has a long history of using undercover investigations" aimed at encouraging people to "choose a lifestyle" that fits with PETA's goals. App., *infra*, 129a-130a (Kerr Decl. ¶¶ 5-6). PETA has conducted "dozens" of such "investigations over the past three decades, maintains investigators" on its staff, and is ready to direct its employees to go into the nonpublic areas of

North Carolina facilities. App., *infra*, 130a (Kerr Decl. ¶¶ 7-9). PETA's investigators have posed as bona fide employees and gained access to public university laboratory facilities and private agricultural operations, and once in those facilities PETA's employees "gather employment-related documents, including application forms, employee handbooks, and policy manuals." App., *infra*, 131a-133a (Kerr Decl. ¶¶ 12-16). PETA's employees also use "hidden recording equipment" to document what they deem to be "matters of public importance" to their mission. App., *infra*, 131a (Kerr Decl. ¶ 13).

Similarly, Mark Walden, Chief Programs Officer at the ALDF, stated that his organization attempts to fulfill its mission of advocating on behalf of animals by gaining "first-hand looks inside animal use industries and institutions nationwide, including factory farms that produce meat, dairy products, and eggs, and research facilities that experiment on animals." App., infra, 138a-139a (Walden Decl. ¶¶ 2-4). ALDF also retains investigators on its staff and has developed a target list of industries, hospitals, and universities in which it intends to conduct covert operations. App., *infra*, 140a-141a (Walden Decl. ¶ 8).

To perform these undercover operations, ALDF pays individuals to obtain employment with an entity that ALDF wishes to investigate. App., *infra*, 141a (Walden Decl. ¶ 9). Those individuals present their work experience to their would-be employer, "only omitting their investigatory goals." App., *infra*, 142a (Walden Decl. ¶ 11). In the nonpublic areas of that employer's premises, the fake employee "gathers information," including by making "audio or visual recordings regarding the facility's conduct." App., *infra*,

141a (Walden Decl. ¶ 9). The fake employees "typically wear a minute camera, operating with little to no effort" or "leave recording devices unattended to capture images and sound over a longer duration." App., *infra*, 141a (Walden Decl. ¶ 10).

Daisy Freund, Senior Director of Farm Animal Welfare at the ASPCA, similarly explained that the ASPCA advocates for animals by undertaking "employment-based undercover investigations." App., *infra*, 146a-147a (Freund Decl. ¶¶ 1, 8). According to Freund, this is necessary because "industrial animal agriculture is a highly secretive industry" and agricultural facilities "are largely concealed from public view." App., *infra*, 147a (Freund Decl. ¶ 8). To subvert those businesses' privacy, the ASPCA relies on "photographs and videos" taken by planted undercover employees. App., *infra*, 147a (Freund Decl. ¶ 8).

C. The Rulings Below

Respondent organizations challenged subsections (b)(1), (2), (3), and (5) of the Act on First Amendment, vagueness, and equal protection grounds. On the parties' cross-motions for summary judgment, the district court granted judgment to respondent organizations on their First Amendment claims, holding that subsections (b)(1) and (b)(2) were subject to strict scrutiny, subsections (b)(3) and (b)(5) were subject to intermediate scrutiny, and that all four provisions failed under either level of scrutiny. App., *infra*, 111a. The court held that subsections (b)(1) and (b)(5) are unconstitutional as applied to the respondent organizations, and subsections (b)(2) and (b)(3) are facially invalid. App., *infra*, 126a.

On de novo review, a divided Fourth Circuit panel affirmed in part, holding that subsections (b)(1), (2),

(3), and (5) are unconstitutional under the First Amendment as applied to the "newsgathering activities PETA wishes to conduct." App., *infra*, 41a. The panel majority first rejected NCFB and North Carolina's argument that the First Amendment does not protect undercover investigations by private parties in nonpublic areas of premises. The court acknowledged that this Court "'has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned.'" App., *infra*, 10a (quoting *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 568 (1972)). But, the court opined, *Lloyd* did not "permit[] the government to proscribe speech in nonpublic areas." App., *infra*, 10a. Citing *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150, 154 (2002), the majority noted that this Court "has struck down an ordinance that 'prohibits canvassers and others from going in and upon private residential property for the purpose of promoting any cause without first having obtained a permit.'" App., *infra*, 10a. The court concluded that "[w]e find no cogent principle that would permit us to apply the First Amendment to the government's attempts to stifle speech on 'private residential property' yet eschew it when it comes to restrictions on 'nonpublic' employer premises." *Ibid*.

The majority further concluded that, even if undercover investigations in the nonpublic areas of private property were unprotected under the First Amendment, the Act would still be subject to First Amendment scrutiny because it discriminates based on speaker and viewpoint. App., *infra*, 11a-12a. The majority concluded that the Act is discriminatory because it punishes only "unauthorized recording or capture of documents done with the intent to breach the

duty of loyalty or cause damage to the facility" and not all unauthorized recordings. App., *infra*, 12a.

The majority also rejected defendants' argument that the Act is a generally applicable law, from which the First Amendment offers no protection. App., *infra*, 15a-19a. The court acknowledged that "a journalist cannot invoke the First Amendment to shield herself from charges of illegal wiretaps, breaking and entering, or document theft." App., *infra*, 12a. And it further agreed that "[a] law prohibiting breaking and entering, for example, may well restrict the right to gather news, but protecting the sanctity of a home presents a compelling government interest that override's a journalist's (and society's) right to a story." App., *infra*, 13a. But, the court continued, these rules hold true because the laws "comport[] with First Amendment strictures, not because the First Amendment plays no role at all." *Ibid.*

The majority also rejected the defendants' reliance on *Food Lion*, stating that the Act "does not codify tried-and-true common law principles, only the legislature's only conceptions about disloyal undercover investigations." App., *infra*, 14a. According to the court, if PETA's actions constitute a trespass, it can be charged with that violation, but the State cannot "craft a law targeting PETA's protected right to speak." App., *infra*, 14a n.3.

In its First Amendment analysis, the majority determined that subsections (b)(1), (2), and (5) discriminate based on the content of the speech because they punish "speech critical of the employer—a laudatory publication, after all, is unlikely to breach the duty of loyalty or interfere with possession of real property." App., *infra*, 23a-24a. The court then applied intermediate scrutiny, reasoning that the provisions "fail even

intermediate scrutiny" because they "chill an alarming amount of speech without any 'actual evidence' in the legislative record that lesser restrictions will not do—a nonnegotiable requirement in this Circuit." App., *infra*, 26a (quoting *Reynolds* v. *Middleton*, 779 F.3d 222, 229 (4th Cir. 2015)). Additionally, the court continued, subsections (b)(1), (2), and (3) "are not equipped to further any permissible interests in safeguarding employer privacy or property." App., *infra*, 26a-27a.

Judge Rushing dissented, concluding that "our precedent forecloses the conclusion that it offends the First Amendment to apply generally applicable tort law prohibiting trespass and breach of duty to PETA's proposed conduct" of "conduct[ing] undercover investigations by sending [their] employees to gain secondary employment at places like animal laboratories, where they will secretly record, including by placing unattended cameras, and then publicize their findings to the detriment of the duped employers and for the benefit of their primary employer." App., *infra*, 47a, 50a.

Citing *Food Lion* and this Court's decision in *Cohen* v. *Cowles Media Co.*, 501 U.S 663, 669 (1991), Judge Rushing reasoned that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on the ability of the press to gather and report the news." App, *infra*, 51a (internal quotation marks omitted). Therefore, "[a]s applied to the activities PETA desires to undertake, each of the contested provisions of the North Carolina Property Protection Act accords with the generally applicable regulations" upheld in *Food Lion* and *Cowles* and therefore those

provisions of the Act are not subject to First Amendment scrutiny. App., *infra*, 52a.

Examining each of the challenged provisions in turn, Judge Rushing explained that all were generally applicable prohibitions that codified tort principles. Subsections (b)(1) and (2) prohibit employees from breaching their duty of loyalty "by using information from documents captured or removed or recordings made in nonpublic areas of the employer's premises without authorization." App., *infra*, 53a (cleaned up). These provisions "correlate with the generally applicable employment tort" that was recognized in *Food Lion*. *Ibid*. Subsection (b)(3), which prohibits placing an unattended camera or electronic surveillance device in the nonpublic areas of premises and using the device to record images or data "is a generally applicable prohibition on trespass." App., *infra*, 52a. Subsection (b)(5), prohibiting an individual from entering the nonpublic area of a premises and substantially interfering "with the ownership or possession of land" "is a classic statement of the law of trespass." App., *infra*, 52a-53a.

Judge Rushing noted that the Act "targets trespass and breach of duty, which * * * do not necessarily involve expression or impose a unique burden on the press." App., *infra*, 53a-54a. Therefore, the Act "is generally applicable and does not merit heightened First Amendment scrutiny simply because it may be enforced equally against an investigative reporter and a business competitor." App., *infra*, 54a.

Judge Rushing also discussed several "foundational problems" with the majority's decision. App., *infra*, 54a-59a. "First, an interest in newsworthy information does not confer a First Amendment right to enter private property (or a right to exceed the bounds

of one's authority to enter) and secretly record." App., *infra*, 55a. True, "recording matters of public interest in public spaces" may be protected by the First Amendment, but the majority failed to address the key distinction "between recording in public spaces and unauthorized recording on private property." *Ibid.* Indeed, "'the right to speak and publish does not carry with it the unrestrained right to gather information' in violation of the rights of others." App., *infra*, 55a (quoting *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965)). Under the majority's rule, a household employee who places a hidden camera in the parlor "looking for a juicy news story to sell" would be insulated from liability by the First Amendment. App., *infra*, 56a.

Second, the majority mischaracterized the Act as a speech regulation because there are many circumstances by which an individual can violate the statute's provisions without engaging in any speech. App., *infra*, 56a. For instance, a person can use captured data or recorded images to breach their duty of loyalty "to launch a competing product, to steal customers, or to blackmail management." *Ibid.* Further, the Act "targets using stolen information to facilitate a tortious act: breaching the duty of loyalty to an employer. That is not a regulation on speech, even if some acts of disloyalty may be accomplished with words." App., *infra*, 57a.

Third, the distinctions drawn in the Act are "between trespassers and non-trespassers, between documents taken from another without permission and documents taken with permission, between those who violate their duty of loyalty to an employer and those who do not." Those distinctions are not based on speaker or viewpoint. App., *infra*, 57a-58a.

REASONS FOR GRANTING THE PETITION

This petition squarely presents an important question at the intersection of two core American constitutional values: the right of private property owners to exclude others from their premises and the extent to which the First Amendment protects individuals' unauthorized undercover activities carried out in the name of "newsgathering."

The Fourth Circuit's decision upends the carefully crafted balance of those rights set forth in this Court's decisions such as *Lloyd*, *Zemel*, and *Cowles*, under which the First Amendment has never been held to license unauthorized intrusion by spies into the nonpublic areas of businesses. Instead, the Court has balanced the competing interests and held that the right to engage in unwanted speech on another's property stops at the front door or the mailbox and does not extend deep within the nonpublic areas of that property. And the Court has conducted the balance of property rights with the free speech interests of the press, in particular, holding that newsgatherers must follow the same rules as everyone else in society and have no constitutionally protected right to gather information in areas that the general public has no right to access. These principles lead to the unmistakable conclusion that the First Amendment does not apply to the undercover operations conducted by respondent organizations' planted fake employees.

The Fourth Circuit's decision fundamentally alters the balance between those rights. By granting First Amendment rights to trespassing corporate spies, the Fourth Circuit extends the First Amendment to physical locations where it was previously unknown and insulates newsgathering activities from laws that apply equally to everyone.

Not only does the Fourth Circuit decision conflict with long-settled precedent of this Court, but it is also irreconcilable with decisions from other Circuits. Other courts of appeals have held that First Amendment interests are not implicated when unauthorized speech occurs in the nonpublic areas of private property and the speakers are subject to restrictions under generally applicable laws.

The consequences of this decision are severe and far-reaching. Private property owners are now potentially left without any civil remedy against invasions by individuals so long as the invaders claim they were attempting to gather news. Would be newsgatherers are emboldened to trespass and conduct surveillance in the guise of finding a newsworthy story. And States are left uncertain whether and how they can enact legislation to address specific trespass harms faced by resident property owners. Indeed, in recent years several other States have passed laws addressing trespass or invasions of property interests as a matter of general application like North Carolina's.[1] The Fourth Circuit's rewriting of the balance between private property rights and the general interest in free speech threatens to cast all such laws in doubt.

This petition offers the perfect vehicle to resolve the tension between private property rights and First Amendment interests with regard to speech in nonpublic areas of private property. There are no factual questions, respondent organizations have made clear

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[1] See, *e.g.*, Ark. Code Ann. § 16-118-113 (Arkansas law prohibiting accessing private property to record images or sounds that damage property owner); Cal. Civil Code § 1708.8(a) (California law providing for enhanced penalties for individuals who invade privacy of others); 720 Ill. Comp. Stat. Ann. 5/21-7(a) (Illinois law prohibiting trespass in sensitive, crowded spaces);

the actions they intend to take on private property, and the case was resolved on cross-motions for summary judgment. This Court should grant the Petition to answer the critical question it presents.

I. THE FOURTH CIRCUIT'S DECISION REWRITES THE BALANCE BETWEEN PRIVATE PROPERTY RIGHTS AND FIRST AMENDMENT SPEECH

The Fourth Circuit's decision upends long-held understandings of the limits of the First Amendment's reach and the fundamental right of property owners to exclude others from their land. In so doing, the court's decision licenses individuals to trespass, wiretap, steal, secretly record, and breach their employment duties with impunity. This Court has never held that the First Amendment authorizes individuals to trespass on nonpublic areas of private property; nor has it held that generally applicable proscriptions that do not single out the press and have only an incidental effect on speech are subject to First Amendment scrutiny. Those rules have been developed over decades of this Court's jurisprudence balancing the rights of a property owner with the general interest in free speech.

But in this case, the Fourth Circuit has cast aside those basic principles and re-written the balance between private property rights and First Amendment protections. In violation of this Court's precedent, the appellate decision extends a person's First Amendment rights beyond the doorstep and into the nonpublic areas of another's property. The decision also applies First Amendment scrutiny to laws barring such non-controversial tort claims such as trespass and breach of loyalty, despite clear rules that the First Amendment does not authorize lawless conduct.

The reach of the Fourth Circuit's reasoning calls into question application of property protections and well-worn tort concepts not just in North Carolina, but in other States that have adopted similar laws and in every State where private individuals intend to engage in undercover activity in the nonpublic areas of private property in the name of newsgathering.

A. The Fourth Circuit's Decision Rewrites The Balance Between Private Property Rights And First Amendment Protections

This Court has never extended First Amendment protection to individuals seeking to enter into the nonpublic areas of private property for purposes of "newsgathering" or engaging in other types of speech. The Act *only* applies when an individual enters the nonpublic areas of a premises without authorization and undertakes some sort of tortious activity. N.C. Gen. Stat. § 99A-2. Therefore, the Act does not bar conduct that has any First Amendment protection. The Fourth Circuit's decision topples that rule and subordinates a property owner's rights of ownership, to exclude others, and to privacy to interests that this Court has repeatedly held are not of constitutional magnitude.

"The right to exclude is 'one of the most treasured rights of property ownership.'" *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). This right "is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Ibid*. (quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176, 179–80 (1979)); see also *Cedar Point*, 141 S. Ct. at 2073

(citing Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 752 (1998) (characterizing the right to exclude as the "*sine qua non*" of property)).

A consequence of this fundamental tenet is that individuals do not have a right to access the private spaces of other people's property to undertake undercover newsgathering operations. Indeed, this Court has balanced private property rights and First Amendment protections and rejected the idea that an individual has the right to access nonpublic areas of private property to engage in speech, explaining that "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Lloyd*, 407 U.S. at 568. *Lloyd* acknowledged that there may be instances where it will be difficult to accommodate the constitutional rights of private property owners and the First Amendment rights of the general citizenry, but when the question is whether an individual has a right to enter onto private property without permission to engage in speech, "the answer is clear." *Id.* at 570; cf. *Cedar Point*, 141 S. Ct. at 2077 ("[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public").

Similarly, in *Hudgens* v. *N.L.R.B.*, 424 U.S. 507, 521 (1976), the Court weighed a private property owner's rights against the asserted rights of others to picket on the private property and held "the constitutional guarantee of free expression has no part to play in a case such as this." Thus, "[t]he Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech

and speakers on their property." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1931 (2019).

The Fourth Circuit ignored this rule, asserting that this Court "has never exempted speech [from First Amendment protection] because of its location." App., *infra*, 9a (citing *New York* v. *Ferber*, 458 U.S. 747, 763 (1982)).[2] But that is plainly incorrect, for *Lloyd* and *Hudgens* did just that. In *Lloyd*, an individual asserted a First Amendment right to go onto private property and distribute handbills protesting the Vietnam War—core political speech that would unquestionably receive constitutional protection if the individual intended to engage in that speech in a public area. But because the location of the handbilling was on private commercial property, the owner's property interests prevailed and the speech was not protected by the First Amendment. Likewise, in *Hudgens* the issue was whether individuals had a protected First Amendment interest in picketing on private property. Because the location of the picketing was on private property, the owner's property interests prevailed and there was no First Amendment protection for the intended speech.

[2] In *Ferber*, the Court held that child pornography was categorically excluded from First Amendment protection. 458 U.S. at 763. In reaching this decision, the Court noted that "'[t]he question whether speech is, or is not protected by the First Amendment *often* depends on the content of the speech.'" *Ibid.* (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) (Stevens, J.) (emphasis added). *Ferber* did not discuss the relevance of location to the speech in question and the Court plainly did not rule out a categorical exclusion from First Amendment protection based on location, as opposed to content, of speech. Nor could it without overruling *Lloyd* and *Hudgens*.

The Fourth Circuit rejected the idea that speech in the nonpublic areas of private property may be the subject of a civil action with no First Amendment violation, relying on this Court's decision in *Watchtower Bible & Tract Soc'y of New York* v. *Village of Stratton*, 536 U.S. 150, which invalidated an ordinance that burdened door-to-door canvassers. But *Watchtower* did not concern a First Amendment right to enter the nonpublic areas of private property. Instead, the Court recognized the importance of "door-to-door canvassing and pamphleteering" which categorically does not involve unauthorized entrance past the front door of a premises. See *id*. at 160-161. This understanding of *Watchtower* is consistent with this Court's balancing of property rights with other rights, for instance when it recognized that "'the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds'" and "[t]his implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Florida* v. *Jardines*, 569 U.S. 1, 8 (2013). As *Watchtower* recognized, an individual may prevent canvassers approaching their front door by posting a "no solicitation" sign." 536 U.S. at 165. The posting of such a sign would have the effect of revoking the invitation to approach the premises implied by the knocker on the front door, and if that sign was disobeyed, the property owner would presumably be able to sue for trespass.

This Court weighed the property interests of a premises owner against asserted First Amendment rights of others in *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728 (1970). There, the Court explained

that a property owner's right to bar individuals seeking to engage in speech on their property has been "traditionally respected" so that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-737. Taken together, *Rowan* and *Watchtower* stand for the proposition that there is no First Amendment right to engage in speech in the *nonpublic areas* of a private property; any right to attempt to engage in speech ends at the front door or mailbox. "To hold less would tend to license a form of trespass." *Rowan*, 397 U.S. at 737.

The Fourth Circuit's decision eviscerates the balancing of rights guiding these decisions by finding a First Amendment right to ignore a property owner's wishes and intrude further into the property than allowed by just a short stop at the front door. The decision effectively rewrites this carefully crafted balancing of competing rights and creates First Amendment protections for individuals to trespass, steal, surveil, and commit other torts by creating a constitutional right of access to the nonpublic areas of private property where none has previously existed in this Court's jurisprudence. The appellate court's decision thus casts doubt on whether statutory and traditional tort remedies may apply at all to trespassers engaged in "newsgathering" and leaves property owners and States hopelessly confused as to what they may do to protect their property rights. This Court's intervention is urgently needed to clarify these critically important areas of the law.

B. Contrary To This Court's Precedent, The Fourth Circuit's Decision Provides A License To Violate The Law In The Name Of Newsgathering

It has long been the rule that a member of the press "is not immune from regulation" and "has no special immunity from the application of general laws." *Associated Press* v. *N.L.R.B.*, 301 U.S. 103, 132 (1937). Members of the press thus have "no special privilege to invade the rights and liberties of others." *Id.* at 132-133. Consistent with this basic principle, "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel*, 381 U.S. at 17. Therefore, individuals "may not with impunity break and enter an office or dwelling to gather news." *Cowles*, 501 U.S. at 669.

Reporters are "free to seek news from any source by means within the law." *Branzburg* v. *Hayes*, 408 U.S. 665, 681-682 (1972); see also *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (information sought to be published must be lawfully acquired). But "[t]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg*, 408 U.S. at 684. Thus, "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." *Id.* at 684-685; see also *Pell* v. *Procunier*, 417 U.S. 817, 834 (1974) (individuals seeking to gather information "have no constitutional right of access" to locations "beyond that afforded the general public"). For these reasons, members of the press, or others engaged in "newsgathering" as respondents intend to undertake it, are subject to laws of general applicability barring trespass and other tortious conduct. *Cowles*, 501 U.S.

at 669 ("generally applicable laws do not offend the First Amendment simply because their enforcement" may have "incidental effects on [the] ability to gather and report the news").

The Fourth Circuit's decision ignores these principles: it instead creates a First Amendment right of access to nonpublic areas off-limits to the general public in the name of newsgathering. The general public, by definition, is excluded from the nonpublic areas to which the provisions of the Act apply. N.C. Gen. Stat. § 99A-2(a) (defining "nonpublic areas" to mean "those areas not accessible to or not intended to be accessed by the general public"). Under this Court's longstanding rules, the Acts is not subject to First Amendment scrutiny because respondent organizations do not have a First Amendment right to access those nonpublic areas to gather information, and the Act is a law of general applicability that applies to all citizens, not just members of the press. The Fourth Circuit's decision creates confusion about this important aspect of First Amendment law that this Court should address.

The appellate court acknowledged that a "journalist cannot invoke the First Amendment to shield herself from charges of illegal wiretaps, breaking and entering, or document theft." App., *infra*, 12a. But that is precisely what the court allowed respondent organizations to do in this case to challenge the Act. The Fourth Circuit further acknowledged that "[a] law prohibiting breaking and entering, for example, may well restrict the right to gather news, but protecting the sanctity of a home presents a compelling government interest that overrides a journalist's (and society's) right to a story." App., *infra*, 13a. But the court went on to conclude that "[a]ll of that is to say, we must go through the exercise of determining whether

the [Act] clears the First Amendment bar." *Ibid*. That is incorrect: the weighing of competing private property interests and speech rights does not determine whether the law survives First Amendment scrutiny in these circumstances, but rather whether it is subject to First Amendment scrutiny at all. *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) (holding that courts must first decide whether speech or speech-related activity is "protected by the First Amendment, for, if it is not, [the court] need go no further").

This fundamental error throws a critical area of the law into confusion. It undermines private property rights, and immunizes unlawful and disruptive encroachment on businesses and researchers by activists like PETA and the other respondent organizations. This Court should grant review to confirm that the First Amendment does not trump private property rights in this context.

II. THE FOURTH CIRCUIT'S DECISION CREATES A SPLIT IN THE CIRCUITS OVER THE APPLICABILITY OF THE FIRST AMENDMENT TO TORTS COMMITTED IN NONPUBLIC AREAS OF PRIVATE PROPERTY

The Fourth Circuit's decision cannot be reconciled with decisions of other Circuits that reject application of First Amendment scrutiny to torts committed in the nonpublic areas of private property.

For instance, the Ninth Circuit has held that the First Amendment does not protect newsgatherers from an invasion-of-privacy claim because "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering." *Dietemann* v. *Time,*

Inc., 449 F.2d 245, 249 (9th Cir. 1971). At issue in *Dietemann* was the plaintiff's action for invasion of privacy against Time, which sent undercover reporters into plaintiff's house to secretly record him. The court had "little difficulty in concluding that clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent" was an actionable invasion of plaintiff's privacy. *Id.* at 248. In rejecting Time's argument that "the First Amendment immunizes it from liability for invading plaintiff's den with a hidden camera and its concealed electronic instruments because its employees were gathering news," the court held that the "First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office" and the First Amendment "does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime." *Id.* at 249. The court continued that "[n]o interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired." *Id.* at 250.

The Ninth Circuit recently reaffirmed *Dietemann* in *Planned Parenthood Federation of America, Inc.* v. *Newman*, 51 F.4th 1125 (9th Cir. 2022). There, the defendants infiltrated conferences that were not open to the public, made recordings without the consent of the plaintiff's staff, and released the recordings on the internet. *Id.* at 1130. In rejecting the defendants' argument that the First Amendment immunized them from the award of damages for, among other things, trespass, unlawful business practices, and violating wiretapping laws, the court "repeat[s] today that jour-

nalists must obey laws of general applicability. Invoking journalism and the First Amendment does not shield individuals from liability for violations of laws applicable to all members of society." *Id.* at 1134.

Thus, in *Planned Parenthood* and *Dietemann*, the Ninth Circuit held that the First Amendment did not apply to protect undercover journalists from laws that apply to all people. As discussed above and as Judge Rushing reasoned in her dissent, the Property Protection Act by its terms applies to all individuals entering the nonpublic areas of a premises, not just undercover journalists. Take subsection (b)(3), for instance. That provision prohibits "any person who intentionally gains access to the nonpublic areas of another's premises" and "[k]knowingly or intentionally plac[es] on the employer's premises an unattended camera or electronic surveillance device and us[es] that device to record images or data." N.C. Gen. Stat. §§ 99A-2(a), (b)(3). That provision applies equally to everyone in North Carolina and is therefore a law of general applicability. In applying First Amendment scrutiny to the application of Act against undercover investigations, the Fourth Circuit's decision is in square conflict with the Ninth Circuit's decisions.

As another example, the Seventh Circuit has faithfully followed *Lloyd* and *Hudgens* and held that picketing on private property has no constitutional protection. *520 S. Mich. Ave. Assocs., Ltd.* v. *Unite Here Local 1*, 760 F.3d 708, 723 (7th Cir. 2014). That court explained that "[t]he leading case on the clash between the First Amendment and the property right to exclude trespassers is [*Lloyd*]." *Ibid.* Under the principles of *Lloyd* and *Hudgens*, which applied *Lloyd* in the labor picketing context, the court held that no constitutional interest was threatened by restrictions

on secondary labor activity on private property. *Ibid.* Although in a different context, the underlying principles espoused by the Seventh Circuit in *520 S. Michigan* are irreconcilable with the Fourth Circuit's determination a First Amendment right is implicated by respondent organizations' efforts to gather information on private property.

* * *

This Court's review is needed to clarify the "clash between the First Amendment and the property right to exclude trespassers." *520 S. Michigan*, 760 F.3d at 723. The Fourth Circuit's decision leaves States and business owners uncertain over what steps, either through common law actions or legislative enactments to reinforce private property rights, are viable. This problem is recurring for countless property owners subject to unauthorized activity by others in the nonpublic areas of their premises and the States that have adopted laws aimed at specific problems associated with different kinds of trespass. This petition presents the ideal vehicle to resolve the extent to which the First Amendment applies to unauthorized conduct taken in the nonpublic areas of private property and to application of laws of general applicability the enforcement of which has an incidental effect on speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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