APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 20-1776

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

Plaintiffs – Appellees,

v.

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Intervenor/Defendant – Appellant,

and

ATTORNEY GENERAL JOSH STEIN, Attorney General of the State of North Carolina; KEVIN GUSKIEWICZ, in his official capacity as Chancellor of the University of North Carolina-Chapel Hill,

Defendants.

LAW PROFESSORS; UNITED FARM WORKERS OF AMERICA; REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS AND 17 MEDIA ORGANIZATIONS

Amici Supporting Appellees.

No. 20-1777

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

Plaintiffs – Appellees,

v.

ATTORNEY GENERAL JOSH STEIN, Attorney General of the State of North Carolina; KEVIN GUSKIEWICZ, in his official capacity as Chancellor of the University of North Carolina-Chapel Hill,

Defendants – Appellants,

and

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Intervenor/Defendant.

LAW PROFESSORS; UNITED FARM WORKERS OF AMERICA; REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS AND 17 MEDIA ORGANIZATIONS

Amici Supporting Appellees.

No. 20-1807

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

Plaintiffs – Appellants,

v.

ATTORNEY GENERAL JOSH STEIN, Attorney General of the State of North Carolina; KEVIN GUSKIEWICZ, in his official capacity as Chancellor of the University of North Carolina-Chapel Hill,

Defendants – Appellees,

and

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Intervenor/Defendant – Appellee.

LAW PROFESSORS; UNITED FARM WORKERS OF AMERICA; REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS AND 17 MEDIA ORGANIZATIONS

Amici Supporting Appellees.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. Thomas D. Schroeder, Chief District Judge. (1:16-cv-00025-TDS-JEP)

Argued: October 27, 2021 Decided: February 23, 2023

Before DIAZ, RUSHING, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed in part and reversed in part by published opinion. Senior Judge Floyd wrote the opinion in which Judge Diaz joined. Judge Rushing wrote a separate dissenting opinion.

ARGUED: Nicholas Scott Brod, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants/Cross-Appellees. David Samuel Muraskin, PUBLIC JUSTICE, PC, Washington, D.C., for Appellees/Cross-Appellants. **ON BRIEF**: Joshua H. Stein, Attorney General, Ryan Y. Park, Solicitor General, Matthew Tulchin, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants/Cross-Appellees Josh Stein and Kevin Guskiewicz. Timothy S. Bishop, Brett E. Legner, Chicago, Illinois, John S. Hahn, MAYER BROWN LLP, Washington, D.C.; Phillip Jacob Parker, Jr., Secretary and General Counsel, NORTH

CAROLINA FARM BUREAU FEDERATION, INC., Raleigh, North Carolina, for Appellant/Cross-Appellee North Carolina Farm Bureau Federation, Inc. Daniel K. Bryson, Jeremy Williams, WHITFIELD BRYSON, Raleigh, North Carolina, for Appellees/Cross-Appellants. Gabriel Walters, Washington, D.C., Matthew Strugar, PETA FOUNDATION, Los Angeles, California, for Appellee/Cross-Appellant People for the Ethical Treatment of Animals, Inc. Cristina Stella, Kelsey Eberly, ANIMAL LEGAL DEFENSE FUND, Cotati, California, for Appellee/Cross-Appellant Animal Legal Defense Fund. Clare R. Norins, First Amendment Clinic, UNIVERSITY OF GEORGIA SCHOOL OF LAW, Athens, Georgia, for Amici Law Professors. Mario Martinez, MARTÍNEZ AGUILASOCHO & LYNCH, APLC, Bakersfield, California; Chris Lim, LAW OFFICE OF R. CHRIS LIM, Los Angeles, California, for Amicus United Farm Workers of America. Bruce D. Brown, Katie Townsend, Lin Weeks, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Washington, D.C., for Amici The Reporters Committee for Freedom of the Press and 17 Media Organizations.

FLOYD, Senior Circuit Judge:

Seeking to follow in the well-trodden footsteps of Upton Sinclair, People for the Ethical Treatment of Animals (PETA) [1] wishes to conduct undercover

[1] Plaintiffs-Appellees and Cross-Appellants, which we collectively term PETA, are: People for the Ethical Treatment of Animals, Inc., Center for Food Safety, Animal Legal Defense

animal-cruelty investigations and publicize what they uncover. But it faces a formidable obstacle: North Carolina's Property Protection Act (the Act), passed to punish "[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." N.C. Gen. Stat. § 99A-2(a). The Act goes on to explain what actions "exceed" authority. Some provisions cover wide swaths of activities, such as "substantially interfer[ing] with the ownership or possession of real property." *Id.* § 99A-2(b)(5). Others appear more narrowly focused, prohibiting capturing, removing, or photographing employer data—but only when the employee uses the data "to breach the person's duty of loyalty to the employer." *Id.* § 99A-2(b)(1)–(2). Even these more specific provisions, however, potentially reach anything from stealing sensitive client information to ferreting out trade secrets in hopes of starting a competing business.

The parties spill much ink debating the repercussions of all these potential applications. PETA contends the Act is nothing more than a discriminatory speech restriction dressed up in property-protection garb. It urges us to put aside any legitimate protections the Act may offer and concentrate on what it believes the North Carolina General Assembly really meant to accomplish: end all undercover and whistleblowing investigations. North

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Fund, Farm Sanctuary, Food & Water Watch, Government Accountability Project, Farm Forward, and American Society for the Prevention of Cruelty to Animals.

Carolina[2] casts the Act as generally applicable. Any incidental restrictions on speech, it counters, come only as unavoidable side effects of the Act's strong remedies against trespass and disloyalty.

The need to confront the Act's potentially legitimate applications indeed makes our task difficult, especially on the sparse, pre-enforcement record before us, which renders all applications theoretical. But the First Amendment "give[s] the benefit of any doubt to protecting rather than stifling speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 327, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (citation omitted). So, cautiously, we forge ahead to ensure those protections endure for "more than just the individual on a soapbox and the lonely pamphleteer." *Id.* at 373, 130 S.Ct. 876 (Roberts, C.J., concurring). But we decide no more than we must. We enjoin the Act insofar as it applies to bar protected newsgathering activities PETA wishes to conduct. But we leave for another day all other applications of the Act.

I.

The facts of this pre-enforcement challenge are uncontested and relatively straightforward. In 2015, the North Carolina General Assembly prohibited "intentionally gain[ing] access to the nonpublic areas

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[2] Defendants-Appellants and Cross-Appellees (collectively, North Carolina) are: the North Carolina Attorney General, University of North Carolina-Chapel Hill, and Intervenor North Carolina Farm Bureau Federation, Inc.

of another's premises and engag[ing] in an act that exceeds the person's authority to enter." N.C. Gen. Stat. § 99A-2(a). The legislature allegedly passed the Act to codify this Court's decision in *Food Lion, Inc. v. Cap. Cities/ABC Inc.*, 194 F.3d 505 (4th Cir. 1999), which allowed an employer to sue a double-agent employee for trespass and disloyalty. *See* J.A. 203–04, 282. The codification meant to accomplish two things. For one, North Carolina no longer had an employee-disloyalty cause of action: Although *Food Lion* predicted, under *Erie*, that the State would allow such a cause of action, 194 F.3d at 512, 515–16, the North Carolina Supreme Court soon held otherwise, *Dalton v. Camp*, 353 N.C. 647, 653, 548 S.E.2d 704 (2001). For another, *Food Lion* rejected all but nominal damages, reasoning that any damages flowing from the publication of the undercover investigation would violate the First Amendment. 194 F.3d at 522. Thus, the Act's "[e]xemplary damages" provision: It offers $5,000 per each day of violation as well as attorney's fees in addition to any traditional compensatory damages "otherwise allowed." N.C. Gen. Stat. § 99A-2(c).

PETA believes the Act unconstitutionally curbs its protected investigative activities. Specifically, PETA takes issue with subsections (b)(1)–(3) and (5), which define "an act that exceeds a person's authority to enter" to encompass:

> (1) 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 and thereafter without authorization captur[ing] or remov[ing] the employer's data, paper, records, or any other documents and us[ing] the information to breach the person's duty of loyalty to the employer.
>
> (2) 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 and thereafter without authorization record[ing] images or sound occurring within an employer's premises and us[ing] the information 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.
>
> . . .
>
> (5) [Committing a]n act that substantially interferes with the ownership or possession of real property.

Id. § 99A-2(b)(1)–(3), (5). PETA challenges these provisions as applied and on their face.

On cross-motions for summary judgment, the district court held all four provisions violate the First Amendment. As a threshold matter, the district court

ruled the Act directly implicates speech. Subsections (b)(1)–(3) restrict recordings, the court explained, which per se constitute speech. *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547, 569–71 (M.D.N.C. 2020). And (b)(5), though it does not "target" speech, "necessarily ensnares First Amendment protected activity because the act that 'substantially interferes' with the ownership or possession of real property is the recording and image capture itself." *Id.* at 574.

Next, in deciding what level of scrutiny to apply, the court observed that (b)(1) and (2) discriminate against a particular viewpoint as they prohibit only recordings "use[d]" contrary to an employer's interests. *Id.* at 573. And because North Carolina never contended the Act can pass strict scrutiny, the court easily found (b)(1) and (2) unconstitutional. *Id.* at 575–76. Conversely, the court applied only intermediate scrutiny to (b)(3) and (5) because whatever speech they restrict, they do so without reference to content. *Id.* at 576–79. Still, the court held those subsections violate even intermediate scrutiny because the legislature did not tailor them to advance any substantial interest and did not "show" with record evidence that it "seriously undertook to address the problem with less intrusive tools." *Id.* at 577 (citation omitted).

As a final step, the court considered whether to enjoin the challenged provisions as applied to PETA or in all their applications. It concluded (b)(2) and (3) fail on their face because they hinge on recordings,

meaning they always implicate speech. *Id.* at 571. But it enjoined subsections (b)(1) and (5) only as applied, because it could not "ignore the[ir] possible myriad legitimate applications." *Id.* at 570–71.

The parties now cross-appeal. PETA asks us to facially invalidate all four challenged provisions; North Carolina insists the entire Act passes constitutional muster. We review cross-motions for summary judgment with fresh eyes. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

II.

PETA seeks to conduct undercover investigations. It wishes to speak to employees, record documents found in nonpublic (but not necessarily private) areas, and carry out surveillance. The Act prohibits all of these. Still, North Carolina insists the Act does not implicate the First Amendment at all. It forwards four arguments, but none persuades.

A.

North Carolina first offers that undercover investigations in nonpublic areas, as a class, constitute unprotected speech. That is a dangerous proposition that would wipe the Constitution's most treasured protections from large tranches of our daily lives. Fortunately, it has no basis in law. "From 1791 to the present," the Supreme Court has placed only a "few limited areas" of speech outside the First Amendment's protections and has never suggested "a freedom to disregard these traditional limitations."

R.A.V. v. St. Paul, 505 U.S. 377, 382–83, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). These "historic and traditional categories long familiar to the bar" include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (citations omitted). But no comparable tradition withholds protections from nonpublic speech. Even more fundamentally, the Court excluded those categories "*because of their constitutionally proscribable content*," *R.A.V.*, 505 U.S. at 383, 112 S.Ct. 2538; it has never exempted speech because of its *location*. *See New York v. Ferber*, 458 U.S. 747, 763, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) ("It is the content of an utterance that determines whether it is a protected epithet or an unprotected fighting comment." (internal quotation marks, brackets, and citation omitted)). That history must control, for it ensures that the First Amendment's shield falls away only from those narrow categories of speech for which the Constitution never intended protection, not from those forms of speech that the legislative majority just prefers not to protect.

North Carolina holds out *Lloyd Corp., Ltd. v. Tanner*, where the Court noted that it "has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned." 407 U.S. 551, 568, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972). But *Lloyd* concerned a mall owner's right to exclude persons distributing handbills, and the analysis focused solely on whether the mall has

become a quasi-public space requiring the owner to "dedicat[e his] private property to public use." *Id.* at 569, 92 S.Ct. 2219. Nothing in that case permitted the government to proscribe speech in nonpublic areas. *See Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1238 (10th Cir. 2021) (observing that this line of reasoning "confuses two related but distinct concepts: a landowner's ability to exclude from her property someone who wishes to speak, and the government's ability to jail the person for that speech" (citation omitted)). Quite the opposite, in at least one case, the 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." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 154, 166–69, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) (internal quotation marks omitted).

We 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. *See Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 983 (10th Cir. 2020) (rejecting an argument, based in Lloyd, that a curfew on commercial door-to-door solicitation "does not implicate the First Amendment"); *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 561–62 (6th Cir. 2007) (scrutinizing whether the government's closure of a public park during deer-culling operations, which prohibited

animal activists from filming those operations, conforms to the First Amendment). So while we agree that an employer could freely choose to deny entry to journalists who seek to secretly record its inner workings, it does not follow that a State can create "new categories of unprotected speech" to punish those journalists. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791–92, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011). The First Amendment limits the government; the government does not limit the First Amendment.

Even granting that whole categories of speech can go unprotected, the challenged subsections would nonetheless implicate the First Amendment because they discriminate based on speaker and viewpoint. *See infra*, Part III. Even within a First-Amendment-free zone, "[t]he government may not regulate . . . based on hostility—or favoritism—towards the underlying message expressed." *R.A.V.*, 505 U.S. at 386, 112 S.Ct. 2538 (striking down an ordinance prohibiting bias-motivated fighting words even though fighting words as a category do not have a claim on the First Amendment). That is why the government may only restrict "access to a nonpublic forum" by way of regulating the subject matter; it may not ban speakers "because officials oppose the[ir] view." *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 573, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987) (quoting *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

Circuit courts, including our own, have relied on this line of cases to invalidate analogous statutes. *Fusaro v. Cogan*, for example, acknowledged "the general principle that there is no First Amendment right to" government information but nonetheless remanded to apply the First Amendment because the statute "restrict[ed] access to and use of [a list of registered voters] based on the identity of the speaker requesting the List and the content of the speaker's message." 930 F.3d 241, 252–53 (4th Cir. 2019); *see also Chaker v. Crogan*, 428 F.3d 1215, 1223, 1225 (9th Cir. 2005); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1281 (11th Cir. 2004). Just so here. Assuming North Carolina can punish all unauthorized recording or capture of documents, it cannot punish only unauthorized recording or capture of documents done with the intent to breach the duty of loyalty or cause damage to the facility. *See Kelly*, 9 F.4th at 1233 (reaching the same conclusion as to the Kansas Farm Animal and Field Crop and Research Facilities Protection Act, which criminalized documenting animal abuse when undercover investigators acted "with intent to damage the enterprise").

B.

As its second line of defense, North Carolina insists the First Amendment does not confer a license to break the law. *E.g.*, *Zemel v. Rusk*, 381 U.S. 1, 16–17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965) (the right "to publish does not carry with it" the right to break Congress's travel restrictions to Cuba). And because

the Act merely codifies *Food Lion's* protections against a "particular type of employment-related trespass," PETA should not be allowed to wield the First Amendment to escape damages under the Act. Opening Br. 3.

Quite obviously, a journalist cannot invoke the First Amendment to shield herself from charges of illegal wiretaps, breaking and entering, or document theft. Just as obviously, however, a journalist cannot be charged under a law that prohibits criticism of all government activities or a law that punishes all protests on a city's streets. These intuitive outcomes hold true because the first set of laws *comports* with First Amendment strictures, not because the First Amendment plays no role at all. 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.

All of that is to say, we must go through the exercise of determining whether the Act clears the First Amendment bar; we cannot presume it constitutional and then deny PETA relief because the First Amendment confers no special privileges. See *Virginia v. Hicks*, 539 U.S. 113, 123, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (recognizing that a State can restrict a person from taking part in a political demonstration in a public park if that person has previously been banned from the park for vandalism "pursuant to a *lawful* regulation" (emphasis added)).

For the reasons spelled out below, we conclude the four provisions of the Act cannot survive this scrutiny. But we pause now to observe that North Carolina places more weight on *Food Lion* than it can bear.

Food Lion held that certain actions undercover investigators commit, like entering into areas "not open to the public and secretly videotap[ing]," could amount to "an act that was directly adverse to the interests of their second employer," "thereby" constituting trespass. 194 F.3d at 519. Critical to the Court's conclusion was its *Erie* guess that North Carolina would extend the traditional duty of loyalty to food-counter clerks, for it supplied the chain link between taping and trespass. *Id.* at 516. But *Food Lion* guessed wrong. Shortly after the decision came out, the North Carolina Supreme Court held the State recognizes no such "broad" cause of action for disloyalty. *See Dalton*, 353 N.C. at 653, 548 S.E.2d 704. The Act, then, does not codify any tried-and-true common law principles, only the legislature's novel conceptions about disloyal undercover investigation. *Those* we must measure firsthand against the First Amendment to ensure disloyalty does not become a proxy for discriminating against employees voicing criticism of their employer. *See W. Watersheds Project v. Michael*, 869 F.3d 1189, 1197 (10th Cir. 2017) (suggesting *Zemel* would have come out differently had the government "implement[ed] a law banning travel to Cuba for the purpose of writing about or filming what they observe.").[3]

[3] Long ago, speaking about the related right to peaceable

C.

As a variation on its second argument, North Carolina insists that the Act is a "generally applicable law[ ]" and such laws "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." Opening Br. 26

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assembly, the Supreme Court warned against precisely this kind of confusion: "If the persons assembling have committed crimes . . ., they may be prosecuted for their . . . violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255, 81 L.Ed. 278 (1937). So it is here. If PETA's actions truly violate some lawful prohibition (like trespass), PETA may be charged for that violation. What North Carolina may not do, however, is craft a law targeting PETA's protected right to speak.

That said, *Food Lion* clarified that merely entering an employer's nonpublic area after being hired under false pretenses does not add up to trespass because it does *not* invade "any of the specific interests relating to peaceable possession of land the tort of trespass seeks to protect." 194 F.3d at 518 (quoting *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995) (brackets omitted)). Under existing law, then, PETA can lawfully occupy nonpublic areas. And mere recording "what there is the right for the eye to see or the ear to hear" "falls squarely within the First Amendment right of access to information." *Fields v. City of Phila.*, 862 F.3d 353, 359 (3d Cir. 2017); *accord Kelly*, 9 F.4th at 1233–34 (holding a similar statute unconstitutional because "the Act focuse[d] not on the alleged legally cognizable harm from trespass, but on the subsequent harm from the intent to harm the facility once on property").

(quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991)). That is true, as far as that goes. The media must, for example, obey antitrust laws. *Cowles*, 501 U.S. at 669, 111 S.Ct. 2513 (citing *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945)). It must pay taxes. *Id.* (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)). It must answer subpoenas. *Id.* (citing *Branzburg v. Hayes*, 408 U.S. 665, 684, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)). But those cases hold only that neutral laws apply to the press as well as to the general public.

North Carolina intends "generally applicable" in a different sense: Laws that implicate a variety of conduct, it insists, need not pass First Amendment scrutiny even when applied to speech. Neither *Cowles* nor the cases it cites bear out that conclusion. While *Associated Press*, for example, held that newspapers cannot use their press status as defense to antitrust law, *Eastern Railroad Presidents Conf. v. Noerr Motor Freight Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), clarified that speakers—press or not—can raise as defense the fact that antitrust laws are being applied to them *because of their speech*. Take also *Cohen v. California*, which involved a generally applicable regulation barring breaches of the peace. 403 U.S. 15, 16, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). When Cohen was convicted for wearing a jacket bearing an epithet, the Court applied First Amendment scrutiny,

reasoning that "the generally applicable law was directed at Cohen because of what his speech communicated." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010) (discussing *Cohen*). Same with *Holder* itself, where the Court deemed irrelevant that the law "may be described as directed at conduct" where plaintiffs triggered the statute by "communicating a message." *Id.* Other examples abound. *Cantwell v. Connecticut*, 310 U.S. 296, 308–09, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (reversing a breach-of-the-peace conviction under a generally applicable statute because the conviction was predicated on "the effect of [the speaker's] communication upon his hearers"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909–10, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (finding speech constituting tortious interference with business relations protected where interference flows from the persuasive effect of speech); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (reasoning that tort of intentional infliction of emotional distress cannot be used to impose liability for publishing cruel and vulgar satire); *Billups v. City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020) ("[A] law aimed at regulating businesses can be subject to First Amendment scrutiny even though it does not directly regulate speech."); *Kelly*, 9 F.4th at 1228 ("When a criminal prohibition includes multiple elements, some of which are unquestionably conduct (such as trespassing), the statute may still fall under the First Amendment if other elements target speech."); Eugene Volokh, *Speech as Conduct, Generally Applicable Laws, Illegal Courses of*

Conduct, "Situation-Altering Utterances," and the Uncharted Zones, 90 Cornell L. Rev. 1277, 1278–93 (2005) (advancing this proposition).

Not to worry, North Carolina contends. *Food Lion* read *Cowles* to mean that generally applicable laws may escape the First Amendment, and that reading controls in this Circuit.[4] That is not quite right, even

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[4] To be sure, North Carolina correctly observes that *Cowles* allowed a plaintiff to sue newspapers for disclosing his name on theory of promissory estoppel without First Amendment analysis. But the Court gave a specific reason: "Minnesota law simply requires those making promises to keep them. The parties themselves . . . determine[d] the scope of their legal obligations, and any restrictions which may be placed on the publication . . . are self-imposed." 501 U.S. at 671, 111 S.Ct. 2513. So the Court balked at the free-speech argument because the newspapers waived their right to free speech, not because generally applicable laws by definition escape First Amendment scrutiny. Volokh, *supra*, at 1297; *see also IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020) (reading *Cowles* to espouse the "limited" principle that "[p]rivate parties may freely bargain with each other to restrict their own speech" but declining to extend that principle to "state-created restriction[s]" that "exist independently of, and prior to, any interaction between the speaker and another" (internal quotation marks and citation omitted)).

And the same term it decided *Cowles*, the Court subjected Indiana's generally applicable public-indecency statute to First Amendment scrutiny when applied to establishments that offer nude dancing, without any reference to *Cowles*. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Several years later, the Third Circuit criticized the court below for reading *Cowles* "too broadly" and could find no jurisprudence to "support the surprising proposition that a statute that governs both pure speech and conduct merits less First Amendment scrutiny than one that regulates speech

assuming we could set *Humanitarian Law Project* aside. *Food Lion* posited that *Cowles* involved only "the breach of promise and not some form of expression" and itself concerned only the non-expressive act: undercover employees working for two competing employers at once. 194 F.3d at 522. Consistent with that understanding, the Court allowed only nominal damages because Food Lion failed to prove damages stemming from the disloyal act. It then *rejected* damages flowing from any reporting as "an end-run around" *Hustler's* prohibition that plaintiffs "may not recover for [violation of generally applicable torts] by reason of publications." *Id.* at 522–23 (quoting *Hustler*, 485 U.S. at 56, 108 S.Ct. 876). *Food Lion* thus properly recognized that a State may not harness generally applicable laws to abridge speech without first ensuring the First Amendment would allow it. *Accord ACLU of Ill. v. Alvarez*, 679 F.3d 583, 602 (7th Cir. 2012) (citing *Food Lion's* interpretation of *Hustler* to hold that generally applicable laws trigger strict scrutiny when their "effect on First Amendment interests is far from incidental").

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alone." *Bartnicki v. Vopper*, 200 F.3d 109, 118, 121 (3d Cir. 1999). The Supreme Court affirmed, yet again without mentioning *Cowles*. *Bartnicki v. Vopper*, 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001). The last time the Court cited *Cowles* was in 1994, offering only that "a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 640, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). *Cowles* thus cannot support North Carolina's unqualified rule that generally applicable laws never trigger the First Amendment.

That makes good sense. Laws cast in broad terms can restrict speech as much as laws that single it out. Consider three statutes that regulate public-park behavior. One obligates speakers to obtain a license before using a megaphone. The second prohibits noise above a certain decibel level without a license. The third requires a license to (1) walk a dog, (2) play group sports, or (3) speak with a megaphone. The first statute readily calls for First Amendment review (and likely fails it). *See Saia v. People of State of New York*, 334 U.S. 558, 559–60, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) (striking down a statute that forbade the use of sound amplification devices without prior authorization from the chief of police). But the other two curtail the same speech right and to the same degree and should therefore similarly occasion First Amendment scrutiny.

Applying the First Amendment, of course, does not necessarily translate into invalidating a statute; it only triggers the balancing inquiry. And the way a legislature writes a statute matters a great deal to its ultimate constitutionality. The second, broadest hypothetical, for example, will most easily pass scrutiny because it is most likely to fit the legitimate, non-discriminatory government interests urged as its justification. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 496 (1996) ("The breadth of these laws makes them poor vehicles for censorial designs; they are instruments too blunt for effecting, or even reflecting, ideological disapproval."). The statute's general applicability also

"goes to the breadth of the remedy"—whether the statute violates the First Amendment on its face or whether certain offending provisions can be severed. *Citizens United*, 558 U.S. at 331, 130 S.Ct. 876; *see infra*, Part IV.A. But legislatures do not write themselves out of the First Amendment analysis simply by extending a statute's reach. General or not, the First Amendment applies when the Act is used to silence protected speech.

D.

North Carolina offers one last defense, specific to subsections (b)(1) and (2). These subsections, it protests, punish not speech but intent to be disloyal, speech merely providing one way to *prove* disloyalty—and the First Amendment does not bar such evidentiary use of speech. That is certainly true of some statutes. When deciding whether to hold an employee liable for intentionally recruiting colleagues into a competing enterprise, a court can constitutionally consider the employee's conversations as proof of intent. But this is not that case. Here, the publication of an unfavorable article *is* the act of disloyalty. A more faithful analogy would be cancelling public debates on contentious topics under a statute that prohibits intentional breaches of the peace on the theory that holding such debates evidences intent to breach the peace. Such wordplay plainly cannot transmute an unconstitutional statute into one of constitutional merit. *See Hustler*, 485 U.S. at 53, 108 S.Ct. 876 (denying publication damages to a target of a scathing political cartoon even though

"intent to cause injury is . . . the gravamen of the tort"); *Kelly*, 9 F.4th at 1242 (reasoning, persuasively, that "a law prohibiting making any utterance with the intention to criticize an agriculture facility" functions "identical[ly]" to a law that directly prohibits criticizing the facility). The First Amendment cannot so easily be evaded.

E.

Because we find no categorical reason to sidestep the First Amendment, we are left with the question whether the speech PETA seeks to undertake is "speech" the First Amendment protects. We have no doubt that it is. Both on their face and in their "practical operation," all four challenged provisions burden newsgathering and publishing activities. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011). Subsection (b)(1)'s prohibition on using "captur[ed]" data in a disloyal manner prevents an undercover employee from publishing a critical article based on any notes she takes of documents or policies laid out in a breakroom. N.C. Gen. Stat. § 99A-2(b)(1). [5] Subsection (b)(2) forbids including a photograph of the same documents

[5] The Oxford English Dictionary defines "to capture" as, among others, to "represent, catch, or record (something elusive, as a quality) in speech [or] writing." Oxford English Dictionary Online, https://www.oed.com/view/Entry/27660?rskey=ls7NSW&result=2#eid. Subsection (b)(1) thus reaches beyond mere "record[ing of] images or sound" that (b)(2) already proscribes. *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) (directing courts to give effect to each statutory provision).

in the article. N.C. Gen. Stat. § 99A-2(b)(2). Subsection (b)(3) then punishes the undercover employee for placing an unattended camera on the factory floor while she works. *Id.* § 99A-2(b)(3). And the "catch-all" (b)(5), Opening Br. 8, may reach even mere reporting of a conversation had with other employees—to a newspaper, a union, a state agency—if the reporting leads the State to shut down the facility. *See id.* § 99A-2(b)(5) (prohibiting acts "that substantially interfere[ ] with the ownership or possession of real property").

If the First Amendment has any force, such "creation" of information demands as much protection as its "dissemination." *Sorrell*, 564 U.S. at 570, 131 S.Ct. 2653. "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." *Id.* And the right to publish a recording would be "largely ineffective, if the antecedent act of *making* the recording is wholly unprotected." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). No surprise, then, that scores of Supreme Court and circuit cases apply the First Amendment to safeguard the right to gather information as a predicate to speech. *E.g.*, *Sorrell*, 564 U.S. at 571, 131 S.Ct. 2653 (equating "content-and speaker-based restrictions on the availability" of prescriber-identifying information "with a law prohibiting trade magazines from purchasing or using ink" (citing *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983))); *Citizens United*, 558 U.S. at 339, 130 S.Ct. 876 (invalidating

ban on political-speech spending because the government may not "repress speech by silencing certain voices at any of the various points in the speech process"); *McConnell v. FEC*, 540 U.S. 93, 252, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (Scalia, J., concurring in part and dissenting in part) ("The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise."); *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017) ("[T]he Amendment must . . . protect the act of creating" photos and videos where those photos and videos are themselves protected); *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("[T]he First Amendment protects the act of making film, as there is no fixed First Amendment line between the act of creating speech and the speech itself." (quotation omitted)); *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) (First Amendment harm results from "proceed[ing] upstream and dam[ming] the source" of speech); *Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995) ("the production of the broadcast" warrants the same First Amendment attentions as "the content of the broadcast").

The right to gather information plays a distinctly acute role in journalism. First-hand accounts, buttressed by video evidence, enhance accuracy and credibility in reporting and increase transparency and reader trust, allowing the press "to tell more complete and powerful stories." See Br. of Amici Curiae the Reporters Committee for Freedom of the Press in Support of Pls.-Appellees 17–18 (citing *The*

Hierarchy of Information and Concentric Circles of Sources, American Press Institute (last visited Feb. 4, 2021), https://perma/cc/NX8V-Q2UT; Deron Lee, *"Ag-gag" Reflex*, Columbia Journalism Review (Aug. 6, 2013), https://perma.cc/Z5D5-GSJZ). It is this "depth of . . . exploration," *Citizens United*, 558 U.S. at 339, 130 S.Ct. 876, that brings reporting to life, demanding our attention and allowing us to appreciate the full scope of the societal issues related.

These general newsgathering considerations aside, subsections (b)(1), (2), and (5) on their face single out speech. They would permit a journalist to procure employment under false pretenses, copy employer documents, and record backstage footage—so long as she keeps those findings to herself. Yet a journalist who *conducts* herself in the exact same manner but *speaks out against* the employer would face heavy penalties. *See* N.C. Gen. Stat. § 99A-2(b)(1), (2) (conditioning liability on employee's "us[ing] the information to breach the person's duty of loyalty"); *id.* at § 99A-2(b)(5) (punishing speech if it "substantially interferes with" possession of real property). This regulatory mechanism, based on speech, triggers the First Amendment, and we proceed to inquire whether it can pass the appropriate level of scrutiny.

III.

Apparent from our hypothetical immediately above, subsections (b)(1), (2), and (5) do not merely target speech, but 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. Whether this discrimination occurs "by design or inadvertence," these provisions merit strict scrutiny. *Citizens United*, 558 U.S. at 340, 130 S.Ct. 876. North Carolina does not agree. Subsections (b)(1), (2), and (5), it argues, regulate speech function, not content. But that fosters the same problem—and the same First Amendment violation. As *Reed v. Town of Gilbert* counseled, to give full force to the First Amendment, strict scrutiny must apply as much to "obvious" as to "more subtle" content distinctions, "defining regulated speech by its function or purpose." 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). North Carolina responds that *Reed* is but one Supreme Court decision standing for this proposition. But recently, the Court reaffirmed *Reed's* "straightforward" conclusion that "a regulation of speech cannot escape classification as facially content based" (or, presumably, viewpoint-discriminatory) "simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, --- U.S. ---, 142 S. Ct. 1464, 1474, 212 L.Ed.2d 418 (2022) (favorably citing *Reed*, 576 U.S. at 159, 160, 163–64, 135 S.Ct. 2218).[6]

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[6] North Carolina argues *Austin* supports *its* argument, because the Court there declined to hold that a "classification that considers function or purpose is *always* content based." 142 S. Ct. at 1474. But no one argues for such a capacious principle here. PETA simply points out that *these* subsections function to eradicate speech critical of the employer—just as the ordinance in *Reed* functioned to single out certain signs for favorable treatment. And that *Reed*—and now *Austin*—allow us to look

And besides, the Court has long been wary of legislative attempts to evade First Amendment review through formalistic "labels." *NAACP v. Button*, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (striking down a Virginia law regulating attorney "solicitation" because, "[i]n the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment"); *accord Kelly*, 9 F.4th at 1233 (applying strict scrutiny to a statute "viewpoint discriminatory in operation").[7]

Subsection (b)(3) appears different, at first blush. It punishes the mere "placing" of an unattended camera without any reference to the content recorded. N.C. Gen. Stat. § 99A-2(b)(3). Recall, however, that (b)(3) prohibits filming "on the employer's premises." *Id.* We take that language to intentionally extend to *employee* activity only, following the "sound rule of construction that where a word has a clear and definite meaning when used in one part of a . . . document, but has not when used in another, the presumption is that the word is intended to have the

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beyond "overt" descriptions to decipher that function. *Id.*

[7] North Carolina further objects that subsection (b)(5) does not reference speech on its face, much less a particular viewpoint. That merely reprises its generally-applicable-laws argument. That "all sorts of non-speech acts can trigger" (b)(5), Opening Br. 64, does nothing for the instances where speech actually triggers the provision. And in *those* instances, (b)(5) applies only to speech that "substantially interferes with the ownership or possession" of the employer's property. N.C. Gen. Stat. § 99A-2(b)(5).

same meaning in the latter as in the former part." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012) (citation omitted). Subsections (b)(1) and (2)—which directly precede (b)(3)—concern "employee" actions on "employer" property. N.C. Gen. Stat. § 99A-2(b)(1)–(2). As does subsection (e), which addresses exemptions for certain whistleblower "employees." *Id.* § 99A-2(e). Other subsections, by contrast, apply broadly to "[a]ny person" operating on "another's premises." *Id.* § 99A-2(a), *see also id.* § 99A-2(c).

Drawing on those distinctions, we might reasonably conclude that subsection (b)(3) applies to an undercover employee working on "employer's premises" but not to an outside journalist invited to profile a company (who would more likely write a positive review). Nor a representative from a state enforcement agency (who would be much less likely to leak anything to the press). And such "restrictions distinguishing among different speakers, allowing speech by some but not others" are as repugnant to the First Amendment as are restrictions distinguishing among viewpoints. *Citizens United*, 558 U.S. at 340, 130 S.Ct. 876. "As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.*; *see also First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–85, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("the legislature is constitutionally disqualified from dictating" which speakers "may address a public issue"). Read this way, all four challenged subsections

must accordingly clear strict scrutiny. And because North Carolina has conceded—here and, previously, before the district court—that the Act cannot satisfy this highest bar, we might well end our inquiry here.

But the challenged provisions fail even intermediate scrutiny, for two reasons. First off, all four challenged provisions 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. *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015). Even setting the evidentiary obligations aside, however, subsections (b)(1)–(3) are not equipped to further any permissible interests in safeguarding employer privacy or property. We take these considerations in turn.

A.

As discussed, the Act outlaws all recordings, N.C. Gen. Stat. § 99A-2(b)(2), (3), and restricts capturing the contents of any document, even by hand, *id.* § 99A-2(b)(1). Together, those provisions halt all meaningful undercover investigations. And (b)(5), when coupled with the Act's joint-liability provision, reaches further still, punishing bona fide employees turned whistleblowers, the unions, the press, and anyone in between, if their actions eventually "interfere[ ] with the ownership or possession" of the employer's property. *Id.* § 99A-2(b)(5); *see also id.* § 99A-2(c) (extending liability to "[a]ny person who intentionally directs, assists, compensates, or induces another person to violate" the Act). Here consider a watchdog's

publication of PETA's investigation, a worker who spots Occupational Safety and Health Administration (OSHA) violations and reports them to the federal government, or a union that exposes child labor violations to the State. If any of those lead to (even a temporary) shut down of the employer's operations, (b)(5) would allow the employer to collect $5,000 per day from anyone involved. The scope of this outright ban cannot be overstated.

North Carolina protests that other provisions in the Act curb liability. Subsection (e), it claims, ensures the Act may not 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," protecting whistleblowers. *See* N.C. Gen. Stat. § 99A-2(e). But these turn out to be narrow protections indeed. Article 21 protects only employees engaged in formal whistleblowing of retaliatory employment discrimination to state agencies, N.C. Gen. Stat. §§ 95-241 to 95-242, and Article 14 reaches solely state employees who offer legislative testimony on matters of public concern, N.C. Gen. Stat. §§ 126-84 to 126-85. North Carolina also offers that traditional principles of agency would allow employees to reveal "that the principal is committing or is about to commit a crime" without breaching the duty of loyalty—and thus without breaching subsections (b)(1) or (2). Resp.-Reply Br. 58 (quoting Restatement (Third) of Agency § 8.05(c)). And that, in any event, an employee breaches the duty of loyalty only where, like in *Food Lion*, she uses information with the "intent to harm one employer to benefit

another" rather than all speech critical of the employer. Opening Br. 38, 43, 45. The Act's text, however, guarantees none of that restraint. If anything, the Act's (scant) whistleblower protections imply the Act otherwise covers bona fide employees who do not report to any other employers.

Before a State may pass such expansive speech restrictions, this Circuit's precedent requires it "to produce evidence demonstrating that it seriously undertook to utilize" existing laws or "attempted to use less intrusive tools readily available to it" to achieve the proffered aims. *Billups*, 961 F.3d at 689–90 (emphasis added) (internal quotation marks and citation omitted); *see also Reynolds*, 779 F.3d at 229 ("argument unsupported by th[at] evidence will not suffice to carry the government's burden"); *McCullen v. Coakley*, 573 U.S. 464, 496, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) ("Given the vital First Amendment interests at stake, it is not enough for [the government] simply to say that other approaches have not worked."). North Carolina concedes the State produced no such evidence but distinguishes *Billups*, *Reynolds*, and *McCullen*, arguing they involved "unprecedented" laws whereas "[t]he Act merely provides an enhanced damages remedy for conduct that the common law has long deemed tortious." Resp.-Reply Br. 46. That mistakes both the facts and the law. We have never said the evidentiary rule applies only to novel speech regulations. And the Act is literally *un*precedented in common or statutory North Carolina law. We have already discussed why the Act does not merely codify the "particular type of

employment-related trespass" sanctioned in *Food Lion*. *See supra*, Part II.B. Nor does it reflect the more traditional trespass or privacy principles. Subsections (b)(1)–(3) likely punish only employees and only when they exceed their authorization in a particular manner: by capturing documents, recording images, or placing unattended cameras. As for disloyalty, the Act makes it at most *an element* of (b)(1) and (2); it does not define acts that breach the duty or specify a class of employees who owe it. North Carolina can point to no historical precedents that conceptualize employee loyalty in that cookie-cutter way.

Because the legislature cannot meet its evidentiary burden, the Act cannot satisfy intermediate scrutiny.

B.

But the problem with these subsections is not just that they enact novel restrictions on newsgathering. It is that those restrictions do not fit any of the State's professed interests in passing the Act. Start with (b)(1) and (2). North Carolina offers they protect private property against trespass. As a rule, however, "trespassory interests" concern how the information is *obtained*. *Desnick*, 44 F.3d at 1353. Yet liability under (b)(1) and (2) does not attach until the information is *used* to breach the duty of loyalty. Subsections (b)(1) and (2) thus, at best, punish only a subset of trespassory conduct. The same goes for privacy: On their face, (b)(1) and (2) apply only to certain types of employees and certain modes of deception. *See* N.C. Gen. Stat. § 99A-2(b)(1)–(2)

(punishing only "employee[s] who enter[ ] the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment"). But privacy interests are no less compromised when a bona fide employee performing genuine employment activities overhears and tapes a private conversation. In the same vein, (b)(1) and (2) punish certain types of disloyal speech: disclosure of recordings. Yet a critical interview can be just as disloyal. And just as damaging.

Similar concerns plague (b)(3), in that recording devices placed through breaking and entering (rather than trickery) impair privacy and property just the same. Such "facial underinclusiveness" "raises serious doubts about whether [the State] is, in fact, serving, with this statute, the significant interests" invoked. *The Fla. Star v. B.J.F.*, 491 U.S. 524, 540, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989).

As for (b)(5), the district court was right the subsection has many permissible applications. It prohibits, for example, physical destruction of property that substantially interferes with employer operations. But North Carolina concedes that (b)(5), like (b)(3), also applies to employees installing hidden cameras. And to that extent, it must suffer the same fate.

On the other side of the token, the four subsections are also overinclusive. Perhaps most tellingly, they do not distinguish between nonpublic and private spaces. Yet privacy interests intimated in these spaces are different in kind. A journalist capturing

documents laid out in the breakroom, (b)(1), recording her own conversations with other employees, (b)(2), or even propping an unattended camera on the factory floor, (b)(3) and (5), implicates fundamentally different interests from one recording private calls in a manager's office. *See Desnick*, 44 F.3d at 1353 (undercover patients who surreptitiously taped and then published their doctor's visits did not infringe the doctor's right to privacy because they did not reveal "intimate personal facts" or "intru[de] into legitimately private activities, such as phone conversations").

The challenged subsections thus fail intermediate scrutiny both because the legislature produced no record evidence justifying its expansive restrictions on newsgathering speech and because their newsgathering prohibitions are not tailored to any substantial government interest.

IV.

Having determined that the challenged provisions cannot satisfy First Amendment scrutiny, we must select a proportionate remedy. PETA asks us to invalidate the four provisions on their face; North Carolina objects, believing facial invalidation appropriate only when "no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). PETA retorts that "the dicta in Salerno does not accurately characterize the standard for deciding facial challenges." *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S.

1174, 1175, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996) (Stevens, J., respecting the denial of certiorari). Instead, a long line of cases invalidates statutes by simply applying the relevant constitutional test—here, strict or intermediate scrutiny. See Resp. Br. 58–60 (collecting cases); Br. of Amici Curiae Law Professors in Support of Pls.-Appellees 10–11. We agree with North Carolina, though not for the reasons it advances.

A.

On the narrow issue of *Salerno*, PETA has the better argument. In the words of the Supreme Court, *Salerno* is not "a speech case," *Stevens*, 559 U.S. at 472, 130 S.Ct. 1577, and "the Court has allowed [facial] challenges to proceed under a diverse array of constitutional provisions," *Los Angeles v. Patel*, 576 U.S. 409, 415, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015). E.g., Sorrell, 564 U.S. at 580, 131 S.Ct. 2653; *Packingham v. North Carolina*, 582 U.S. 98, 137 S. Ct. 1730, 1736, 198 L.Ed.2d 273 (2017); *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011); *Citizens United*, 558 U.S. at 365–66, 130 S.Ct. 876 (all applying the relevant constitutional standard, not *Salerno's* no-set-of-circumstances test). So has this Circuit. *See Billups*, 961 F.3d at 690; *Fusaro*, 930 F.3d at 263–64; *Kolbe v. Hogan*, 849 F.3d 114, 148 n.19 (4th Cir. 2017); *Liverman v. City of Petersburg*, 844 F.3d 400, 407–09 (4th Cir. 2016); *Legend Night Club v. Miller*, 637 F.3d 291, 299–300 (4th Cir. 2011). And still others. *See Bruni v. Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016);

Doe v. City of Albuquerque, 667 F.3d 1111, 1127 (10th Cir. 2012); *Ezell v. City of Chic.*, 651 F.3d 684, 698–99 (7th Cir. 2011); *Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1337–38 (Fed. Cir. 2005). As it appears, if courts have ever "articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of th[e] Court, including *Salerno* itself." *City of Chic. v. Morales*, 527 U.S. 41, 55 n.22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality op.).

But the *Salerno* debate largely reflects mistaken assumptions about what it means for a federal court to "invalidate" a state statute. Because state courts and lower federal courts stand in a coordinate, not a hierarchical, relationship, the binding effect of the federal judgment extends no further than the parties to the lawsuit; against nonparties, civil and criminal actions can go forward. *E.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). And state courts must ultimately decide what "invalidated" statutes mean. *E.g.*, *Gooding v. Wilson*, 405 U.S. 518, 520, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). To the extent that our decision is forward-looking at all, then, that is because "the *reasoning* of a decision may suggest that there is no permissible application of a particular statute." *Patel*, 576 U.S. at 429, 135 S.Ct. 2443 (Scalia, J., dissenting).

Traditional constitutional and institutional principles point in the same direction. Article III teaches that we must always begin with the case and controversy before us, U.S. Const. art. III, so as not to

"anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," *Citizens United*, 558 U.S. at 933 (Stevens, J., concurring in part and dissenting in part) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)). So broader "[c]onstitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 611, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *see Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009) (finding a facial challenge appropriate where "the constitutional problems cannot meaningfully be severed"); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324, 1328 (2000) ("There is no single distinctive category of facial, as opposed to as-applied, litigation;" "determinations that statutes are facially invalid properly occur only as logical outgrowths of rulings on whether statutes may be applied to particular litigants on particular facts."); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L. Rev. 873, 876 (2005) ("The debate regarding the availability of facial challenges" is "really a debate about statutory severability.").

Distilled to practice, those principles mean that, in some cases, resolving the specific question before the court ends the matter. *United States v. Grace*, for example, considered the constitutionality of a statute

prohibiting the display of any flag, banner, or device that spotlights any party, organization, or movement on the Supreme Court grounds. 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). The statute covered the building, the plaza, the surrounding promenade, and the sidewalks surrounding the Court. The challenged activity, however—distributing leaflets and displaying signs—occurred only on the sidewalks. The Court correspondingly "address[ed] only whether the [statute was] constitutional as applied to the public sidewalks," in the end holding the ban not "necessary for the maintenance of peace and tranquility," the main purpose behind the statute. *Id.* at 175, 182, 103 S.Ct. 1702. But the Court saw no reason to analyze whether such a ban may permissively further the statute's aim when applied to the Court's plaza, steps, or the building itself. *See id.* at 183, 103 S.Ct. 1702; *see also Marsh v. Alabama*, 326 U.S. 501, 509, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (striking down a state trespass law only "[i]nsofar as the State has attempted to impose criminal punishment" on those distributing literature on the streets of a company town); *Time, Inc. v. Hill*, 385 U.S. 374, 388, 397, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (faulting a state court for applying a privacy statute to sanction a publication absent a finding of the magazine's "knowledge of its falsity" but declining to invalidate the statute in toto where the court otherwise "has been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (invalidating a statute "only

insofar as the word 'lust' is to be understood as reaching protected materials"); *Humanitarian Law Project*, 561 U.S. at 8, 130 S.Ct. 2705 (considering whether a statute prohibiting material support to terrorist groups violates the First Amendment "as applied to the particular activities plaintiffs . . . wish to pursue" but declining to "address the resolution of more difficult cases that may arise under the statute in the future"). Put simply, when "it is not necessary to decide more, it is necessary not to decide more." *Citizens United*, 558 U.S. at 375, 130 S.Ct. 876 (Roberts, C.J., concurring) (citation omitted).

B.

With these principles in mind, we decline to enjoin any potential applications of the Act outside the newsgathering context. *See Connection Distrib.*, 557 F.3d at 342 (reminding that courts need not "sever an offending portion of the text from the rest of the statute," they may instead "enjoin the unconstitutional applications of the law while preserving the other valid applications of the law" (citing *Brockett*, 472 U.S. at 504–05, 105 S.Ct. 2794; *Grace*, 461 U.S. at 180–83, 103 S.Ct. 1702)). We thus reverse the district court's invalidation of subsections (b)(2) and (3) in their entirety.

Our main point of disagreement centers around the court's belief that all "recording is protected speech." *People for the Ethical Treatment of Animals*, 466 F. Supp. 3d at 571. We do not think it wise to go that far where the case itself does not call for a categorical pronouncement and where the briefing is,

understandably, agnostic on the potential implications of such an absolute decision. Should posting a hidden camera in a CEO's office—or her home—per se constitute protected expression? How about photographing proprietary documents to tap into trade secrets, with no intent of creating a work of art? Recording private telephone conversations? *See Miller v. Brooks*, 123 N.C.App. 20, 472 S.E.2d 350, 354 (1996) (First Amendment "not implicate[d]" where defendants infiltrated a plaintiff's "bedroom, and placed a hidden video camera in his room which recorded pictures of him undressing, showering, and going to bed"). For our purposes, it suffices to hold only that recording in the employer's nonpublic areas *as part of* newsgathering constitutes protected speech.[8]

Similarly circumscribed decisions by our sister circuits further convince us that a narrow decision is most appropriate today. *Fields*, for example, held that recordings of police activity constitute protected conduct—but only because "[t]here is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them." 862 F.3d at 358.

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[8] This approach is hardly unique. The Supreme Court has often rejected "categorical rule[s]" that a certain type of speech is always deserving of First Amendment protection. *E.g.*, *United States v. Alvarez*, 567 U.S. 709, 719, 723, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (declining to hold broadly that all "false statements receive no First Amendment protection" and denying protection only to those claims that were "made to effect a fraud or secure moneys or other valuable considerations").

That is, the Third Circuit found recordings to be protected because the information recorded was the type of information we usually consider "important" to share with the society to encourage "discourse on public issues, 'the highest rung of the hierarchy of First Amendment values.'" *Id.* at 359 (quoting *Snyder v. Phelps*, 562 U.S. 443, 452, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011)). But the court prudently declined to "say that all recording is protected or desirable" and declined to engage with plaintiffs' arguments that the "act of recording is 'inherently expressive conduct,' like painting, writing a diary, dancing, or marching in a parade." *Id.* at 359–60.

The Tenth Circuit took a similarly careful approach in *W. Watersheds Project*, 869 F.3d at 1197. It held recordings of animals and habitat conditions protected speech-creation because "[a]n individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter" and then "use[s] the speech-creating activities at issue to further public debate." *Id.* at 1196–97 (leaning on long-held understandings that "a major purpose of the First Amendment was to protect the free discussion of governmental affairs" (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011))).

The Seventh Circuit offers more of the same. "The act of *making* an audio or audiovisual recording," the court reasons, "is necessarily included within the

First Amendment's guarantee of speech and press rights" because it flows from "the right to disseminate the resulting recording." *Alvarez*, 679 F.3d at 595.[9] We follow these circuits and decline to answer today whether all manner of recording deserves First Amendment protection.

Invalidating the challenged provisions in their entirety poses a yet more fundamental problem. It should go without saying that, before a court can invalidate a statute on its face, it should understand what the statute "actually authorizes." *Patel*, 576 U.S. at 418, 135 S.Ct. 2443 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). *Patel* helpfully tees up the problem. The case involved a Los Angeles ordinance compelling hotels to disclose guest records to the police. After determining that the ordinance violated the Fourth Amendment's warrant requirement in many of its applications, the Court, as here, had to decide whether to sever those offending applications or invalidate the entire ordinance. The Court

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[9] We recognize that at least one court has gone further. In *Animal Legal Defense Fund v. Wasden*, the Ninth Circuit found "the recording process" itself "inherently expressive" because it necessitates "decisions about content, composition, lighting, volume, and angles." 878 F.3d 1184, 1203 (9th Cir. 2018). But we are persuaded by the Third Circuit's reasoning in *Fields*, that PETA's core aim here is to record newsworthy content, not "create art." 862 F.3d at 359. Nor has the Ninth Circuit been able to stress-test the outer limits of its expansive ruling—*Wasden* itself concerned only recordings of "the conduct of an agricultural production facility's operations." 878 F.3d at 1204 (quoting Idaho Code § 18–7042(1)(d)).

acknowledged some constitutional "applications" remained—the ordinance could be applied in exigent circumstances, when a warrant has been issued, or by consent—but explained those searches were permissible even without the ordinance and as such "irrelevant" to the analysis. *Id.* at 419, 135 S.Ct. 2443. The Court was thus able to strike down the statute in full. *Id.*; *see also City of Houston v. Hill*, 482 U.S. 451, 460–61, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (considering only "the enforceable portion of the ordinance," not potential applications that were in fact "pre-empted by the Texas Penal Code").

The sober appraisal of this limited pre-enforcement record precludes a definite resolution of this point. North Carolina contends the Act has many applications beyond newsgathering: it "[c]ould stop an enterprising campaign intern from going undercover to record a rival political party's election strategy"; "could stand in the way of a hate group's efforts to infiltrate a house of worship"; "could provide a damages remedy to a medical clinic whose patient information is exposed to the public." Opening Br. 5. But the State already has common-law trespass prohibitions, trade secret laws, and statutes authorizing non-disclosure agreements. *E.g.*, N.C. Gen. Stat. § 66-154 (setting out trade-secrets protections); *Hartman v. W.H. Odell & Assocs., Inc.*, 117 N.C.App. 307, 450 S.E.2d 912, 916 (1994) (approving of certain non-compete agreements); *Chemimetals Processing, Inc. v. McEneny*, 124 N.C.App. 194, 476 S.E.2d 374, 376–77 (1996)

(acknowledging validity of non-disclosure agreements).

Even then, North Carolina insists, the Act has tangible value beyond prohibiting newsgathering because it provides a meaningful damages remedy. As proof, it cites three cases brought under (b)(5) for misappropriation of consumer information and fraud. *See* Resp.-Reply Br. 49–50. But those citations are to complaints, two of which have been dismissed and the other stayed. *See Tucker Auto-Mation of N.C., LLC v. Rutledge*, No. 1:15-CV-893, 2016 WL 11003637 (M.D.N.C. Sep. 26, 2016); *Budler v. MacGregor*, No. 18 CVS 1153, 2018 WL 9539078 (N.C. Super. Ct. Feb. 16, 2018); *Harris v. Peters*, No. 18 CVS 1646, 2018 WL 9903428 (N.C. Super. Ct. Feb. 27, 2018). So, six years in, any applications of the Act to non-speech activities remain hypothetical. And regardless, *Patel* teaches that "[a]n otherwise facially unconstitutional statute cannot be saved from invalidation based solely on the existence of a penalty provision that applies when [conduct is] not actually authorized by the statute." 576 U.S. at 418, 419 n.1, 135 S.Ct. 2443.

Whatever the Act's real applications beyond newsgathering, the material point today is that these questions remain unanswered, lurking in the background and warning us away from prejudging the entire Act in a pre-enforcement challenge. And so we "follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations." *Ferber*, 458 U.S. at 780–

81, 102 S.Ct. 3348 (1982) (Stevens, J., concurring in the judgment).

C.

All of that discussion presumes, of course, that we *can* sever newsgathering applications from the Act without "rewriting state law" or "circumvent[ing] the intent of the legislature." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–30, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (internal quotation marks, brackets, and citations omitted). We think yes. Although the Act does not contain a severability clause, its text professes broad goals: to provide "damages for exceeding the scope of authorized access to property." N.C. Gen. Stat. § 99A-2. And the parties from the start have presumed severance appropriate: PETA has asked us to declare only four of the Act's provisions unconstitutional and North Carolina never objected to that request. On the contrary, as discussed, North Carolina advanced many conceivable applications of the Act beyond newsgathering. It has also cited legislative history signaling the Act covers more than just undercover investigations: it "passed by overwhelming, bipartisan margins in both chambers" and several legislators have expressed their support for the Act because it "protect[s] private property." Resp.-Reply Br. at 42–43 (citing J.A. 174–75, 236–37, 202, 244, 261–62, 279, 304, 313).[10] Under these circumstances,

[10] We do not mean to suggest that legislative history speaks authoritatively to severability, only that North Carolina's reference to that history demonstrates North Carolina's

we find no evidence that the "remainder of the statute" cannot "retain[ ] its effectiveness." *Brockett*, 472 U.S. at 507, 105 S.Ct. 2794; *State v. Fredell*, 283 N.C. 242, 195 S.E.2d 300, 303 (1973) (holding a statute divisible even though it did not contain a severability clause).

We accordingly hold the Act unconstitutional when applied to bar newsgathering activities PETA wishes to conduct and sever that application from the remainder of the Act. Our analysis likely means the same result must follow for most (if not all) who engage in conduct analogous to PETA's. But we leave it to the district courts to make such findings in the first instance.

V.

PETA alternatively asks us to invalidate the challenged provisions on their face as overbroad because "a substantial number of [their] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473, 130 S.Ct. 1577 (quoting *Wash. State Grange*, 552 U.S. at 449, n.6, 128 S.Ct. 1184). Adding to the hypotheticals already discussed throughout this opinion, PETA contends the four challenged provisions would further prohibit "newspapers from publishing articles on public whistleblowers," punish bona fide "employees who gather and report evidence of environmental pollution or harm to endangered

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agreement that we can sever certain applications of the Act.

species, as federal law encourages," as well as employees who, "outside their duties, gather evidence of contracting fraud to the federal government under the federal False Claims Act." Resp. Br. 62 (citing 16 U.S.C. § 1533(b)(3)(A); 40 C.F.R. § 1506.6(d); 31 U.S.C. §§ 3729–33). And PETA's amici press that the Act creates liability for employees reporting under a wide variety of workplace safety statutes, including the Occupational Safety and Health Act, 29 U.S.C. § 660(c); the Fair Labor Standards Act, *id.* § 218c; the Federal Railroad Safety Act, 49 U.S.C. § 20109(b); and North Carolina's Burt's Law, which prohibits abuse or harm to mentally ill persons, N.C. Gen. Stat. Ann. § 122C-66. *See* Br. of Law Professors Amici 29; *see also* Br. of the Reporters Committee Amici 15 (insisting the Act chills "all manner of constitutionally protected newsgathering activities and reporter-source communications"); Br. of Amici Curiae United Farm Workers of America in Support of Pls.-Appellees 10–15, 18–21 (explaining that the Act disincentivizes farmworker's "investigation and documentation" of workplace conditions as well as their unions' assistance in "documenting and reporting" of OSHA violations, among others). By all accounts, the sheer breadth of these restrictions raises red flags. That is why we faulted the legislature for failing to produce evidence that it considered less-abridging alternatives and found them nonviable. But PETA misapprehends what these restrictions cash out to mean in the overbreadth context.

The overbreadth doctrine offers prophylactic medicine to combat a statute's "chilling" of

constitutionally valuable expression. *Massachusetts v. Oakes*, 491 U.S. 576, 584, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989) (plurality op.). Reflecting our long-held understanding that "the First Amendment needs breathing space," the doctrine allows litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 611–12, 93 S.Ct. 2908. As a corollary of those doctrinal roots, overbreadth challenges typically arise when a litigant wishes to avoid sanction for *un*protected conduct, using the overbreadth vehicle to get around the customary standing barriers. *Id.* at 612, 93 S.Ct. 2908.

On the flip side, courts usually do not entertain overbreadth challenges where, as here, "the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish," *Brockett*, 472 U.S. at 503, 105 S.Ct. 2794—not because courts read some technical requirement into the doctrine, but because they can easily adjudicate such a challenge head-on. In *Brockett*, for example, the Court examined a Washington statute that declared a "moral nuisance" any place "where lewd films are publicly exhibited as a regular course of business." *Id.* at 493, 105 S.Ct. 2794 (citation omitted). The problem was the statute's open-ended definition of "lewd," which "reached material that aroused only a normal, healthy interest

in sex." *Id.* at 494, 105 S.Ct. 2794. The Court agreed that definition could be characterized as overbroad, but observed any such overbreadth was not "incurable" and would not "taint all possible applications of the statute." *Id.* at 504, 105 S.Ct. 2794. Employing the "normal" severability analysis, the Court simply invalidated the statute "insofar as ['lewd'] is to be understood as reaching protected materials." *Id.* Taking the same tack in *Oakes*, the Court declined to consider an overbreadth challenge where "the defendant's conviction could have been—and indeed was—reversed on a narrower and alternative ground, *i.e.*, that the statute was unconstitutional as applied" and there was therefore "no need for any comment on the overbreadth challenge." 491 U.S. at 582, 109 S.Ct. 2633 (plurality op.) (citing *Bigelow v. Virginia*, 421 U.S. 809, 829, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975)).

Those cases reflect a common-sense principle that where as-applied challenges are available to the litigant, where the litigant has no need to argue that the statute abridges other persons' rights but can stand on her own footing, overbreadth should not be used to short-circuit the "normal" severability analysis. *See Brockett*, 472 U.S. at 504, 105 S.Ct. 2794. Instead, the statute should "be declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.*

Admittedly, a few cases resort to overbreadth even where litigants' own conduct falls under the First Amendment shield. But those cases offer good reasons

to consider situations beyond the "flesh-and-blood" legal issues directly before the courts, *Ferber*, 458 U.S. at 768, 102 S.Ct. 3348 (citation omitted)—such as, for example, when "as applied method of review [would] involve[ ] a prolonged and costly process of reshaping an overbroad statute." Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 882 (1970). *Jews for Jesus*, for example, involved a resolution purporting to ban all First Amendment activity at the Los Angeles airport. 482 U.S. at 575, 107 S.Ct. 2568. Although the Court contemplated case-by-case adjudication, it ultimately rejected such an approach because the resolution, which prohibited "*all* protected expression" in all areas of the terminal, could not "be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable." *Id.* at 574, 576, 107 S.Ct. 2568; *cf. Citizens United*, 558 U.S. at 333, 130 S.Ct. 876 (invalidating the entire statute to avoid "prolong[ing] the substantial, nationwide chilling effect," albeit without ruling directly on overbreadth principles because petitioners did not make an overbreadth challenge).

The critical take-away here is that overbreadth provides a "second type of facial challenge" meant to address a specific problem. *Stevens*, 559 U.S. at 473, 130 S.Ct. 1577 (citation omitted). If the usual inquiry considers whether an as-applied ruling makes sense in terms of the decision's internal logic and the legislature's intent, *see supra*, Part IV.A, the overbreadth doctrine asks whether a court can resolve

a case on narrower ground without chilling cherished expression. *See Hicks*, 539 U.S. at 122, 123 S.Ct. 2191 (that courts may invalidate entire statutes because the legislature meant them to "stand or fall together" does not mean courts can "properly decree that they fall by reason of the overbreadth doctrine").

Here, the Act (subject to the *Patel* analysis) regulates at least some non-expressive, unprotected conduct, like "remov[ing] the employer's data," "interfer[ing] with the ownership or possession of real property," and perhaps even "placing . . . an unattended camera" in the CEO's office. N.C. Gen. Stat. § 99A-2(b)(1), (3), (5). We discussed at length above how these more general regulations of conduct do not insulate the Act from the First Amendment's wringer when the Act bars speech. And we mirrored that approach on the back end under the "normal" severability analysis by enjoining only the applications that pare protected newsgathering activities. Absent any indication that the Act "as a whole" chills First Amendment freedoms, we follow the same principles under overbreadth. *Hicks*, 539 U.S. at 122, 123 S.Ct. 2191 (2003); *see Broadrick*, 413 U.S. at 615, 93 S.Ct. 2908 (declining to enjoin the entire statute because the court's authority under the overbreadth doctrine, "a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct" a State has legitimate power to regulate); *Button*, 371 U.S. at 415, 83 S.Ct. 328 (1963) (holding that Virginia failed to "justify the broad prohibitions" imposed through a barratry law,

but enjoining the statute only as applied to the politically oriented litigating efforts of the NAACP).

We enjoin North Carolina from applying the Act to PETA's newsgathering activities but sever and reserve all other applications for future case-by-case adjudication.

VI.

For the foregoing reasons, the district court's judgment is

AFFIRMED IN PART AND REVERSED IN PART.

RUSHING, Circuit Judge, dissenting:

The North Carolina Property Protection Act authorizes "the owner or operator of [a] premises" to sue for "damages sustained" as a result of certain trespasses into "nonpublic areas" of the premises. N.C. Gen. Stat. § 99A-2(a). The majority concludes that the First Amendment protects the right to surreptitiously record in an "employer's nonpublic areas as part of newsgathering" and holds the Act unconstitutional "when applied to bar [the undercover] newsgathering activities PETA wishes to conduct" on private property. Maj. Op. at 836, 838 (emphasis omitted). I must dissent because 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.

I.

A.

The Property Protection Act provides that "[a]ny person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained." N.C. Gen. Stat. § 99A-2(a). The statute identifies five acts that "exceed[ ] a person's authority to enter the nonpublic areas of another's premises" as follows:

> (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.

Id. § 99A-2(b). The Act creates joint liability for "[a]ny person who intentionally directs, assists, compensates, or induces another person to violate this section." *Id.* § 99A-2(c). A successful plaintiff may receive equitable relief, costs and fees, compensatory damages "as otherwise allowed by State or federal law," and exemplary damages of $5,000 per day "as otherwise allowed by State or federal law." *Id.* § 99A-2(d). The Act explicitly preserves existing protections for employees reporting wrongdoing under a laundry list of state statutes incorporated by reference and exempts from liability parties who are covered by those statutes.[1] *Id.* § 99A-2(e). It also does not apply

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[1] Specifically, subsection (e) lists "Article 14 of Chapter 126," which protects state employees who report improper activities, *see* N.C. Gen. Stat. § 126-84 *et seq.*, and "Article 21 of Chapter 95," which protects employees who initiate inquiries or take part in investigations of any kind (or threaten to do so) with respect to the Workers' Compensation Act, the Wage and Hour Act, the

to law enforcement or governmental agency investigations. *Id.* § 99A-2(f).

PETA has not been sued under the Act. In fact, the parties have not identified any case in which a plaintiff has sued under the Act based on investigative reporting, speech, or any expressive activity. "So, six years in, any applications of the Act to [ ]speech activities remain hypothetical." Maj. Op. at 838. Some suits have been filed for fraud and misappropriation of consumer information and trade secrets. *See* Maj. Op. at 837-38 (citing complaints). But North Carolina courts have not yet interpreted the Act in any pertinent respect. Given the absence of interpretation or application of the Act by state courts, we should be cautious in construing its terms in the first instance and opining about the constitutionality of hypothetical future applications of it. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 79, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act

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Occupational Safety and Health Act of North Carolina, the Mine Safety and Health Act, laws prohibiting discrimination based on blood disorders or genetics, the law on National Guard Reemployment Rights, regulations on pesticides, the Drug Paraphernalia Control Act of 2009, and laws prohibiting discrimination against an employee for attending court-ordered activities for parents of delinquent juveniles, *see* N.C. Gen. Stat. § 95-241(a).

not yet reviewed by the State's highest court."); *cf. INS v. St. Cyr*, 533 U.S. 289, 300, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) ("[W]e are obligated to construe the statute to avoid [constitutional] problems" where "an alternative interpretation of the statute is fairly possible." (internal quotation marks omitted)).

B.

I would focus on PETA's challenge to the Act as applied to the specific activity in which it wishes to engage. PETA wants to conduct undercover investigations by sending its 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, PETA. PETA contends that the Act prohibits this conduct and therefore violates the First Amendment.

Our Court has already considered this exact mode of operation and held that North Carolina tort law may enforce a damages remedy without running afoul of the First Amendment. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, undercover reporters working for ABC took jobs at Food Lion grocery stores, where they spent their work hours secretly filming meat-handling practices. 194 F.3d 505, 510–511 (4th Cir. 1999). ABC then used some of the recorded footage in a news broadcast that was sharply critical of Food Lion. Food Lion sued—not for defamation but for breach of the duty of loyalty and trespass, among

other things. *Id.* at 511. We affirmed the verdict in favor of Food Lion on those claims. *Id.* at 510. As to "the tort of disloyalty," we concluded the reporters could be liable under North Carolina law because they "served ABC's interest, at the expense of Food Lion, by engaging in the taping for ABC while they were on Food Lion's payroll." *Id.* at 516. In other words, they acted "adversely to the second employer for the benefit of the first." *Id.* As to trespass, we similarly concluded the reporters could be liable under North Carolina law because they committed "a wrongful act in excess of [their] authority to enter Food Lion's premises as employees" when they "videotaped in non-public areas of the store and worked against the interests of [their] second employer, Food Lion, in doing so." *Id.* at 518–519.

Importantly, we rejected ABC's First Amendment objection and affirmed the district court's refusal "to subject Food Lion's claims to any level of First Amendment scrutiny." *Id.* at 520. Although we acknowledged "First Amendment interests in newsgathering," *id.* (internal quotation marks omitted), we also recognized, based on the Supreme Court's decision in *Cowles*, that " 'generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news,'" *id.* (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991)). We reasoned that "[t]he torts [the reporters] committed, breach of the duty of loyalty and trespass, fit neatly into the *Cowles* framework. Neither tort

targets or singles out the press. Each applies to the daily transactions of the citizens" of North Carolina. *Id.* at 521. We considered and distinguished *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994), and *Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). *See Food Lion*, 194 F.3d at 521–522. And we ultimately concluded that "[h]ere, as in *Cowles*, heightened scrutiny does not apply because the tort laws (breach of duty of loyalty and trespass) do not single out the press or have more than an incidental effect upon its work." *Id.* at 522.[2]

Our decision in *Food Lion* controls this case. As 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 conduct regulations this Court upheld against a First Amendment challenge in *Food Lion*.

To begin with the most obvious, paragraph (b)(3) forbids exceeding one's authority to enter the "nonpublic areas of another's premises" by

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[2] At the same time, we rejected Food Lion's request for publication damages as an "end-run around First Amendment strictures" forbidden by *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). *Food Lion*, 194 F.3d at 522. As we explained, Food Lion could not "recover defamation-type damages under non-reputational tort claims[ ] without satisfying the stricter (First Amendment) standards of a defamation claim." *Id.* The Property Protection Act limits compensatory and exemplary damages to those "otherwise allowed by State or federal law," which would include these First Amendment strictures. N.C. Gen. Stat. § 99A-2(d)(2), (4).

"[k]nowingly or intentionally" placing an "unattended camera or electronic surveillance device and using that device to record images or data." N.C. Gen. Stat. § 99A-2(a), (b)(3). As we acknowledged in *Food Lion*, this is a generally applicable prohibition on trespass. *See Food Lion*, 194 F.3d at 518–519 (discussing *Miller v. Brooks*, 123 N.C.App. 20, 472 S.E.2d 350, 352, 355 (1996), in which the court held that "[e]ven an authorized entry can be trespass if a wrongful act is done in excess of and in abuse of authorized entry," such as "install[ing] a hidden videotape camera" and using it to record); *see also Keyzer v. Amerlink, Ltd.*, 173 N.C.App. 284, 618 S.E.2d 768, 772 (2005) (affirming that *Miller* stands for this proposition).

Similarly, paragraph (b)(5) is a classic statement of the law of trespass. That paragraph prohibits exceeding one's authority to enter a nonpublic area of another's premises by committing an "act that substantially interferes with the ownership or possession of real property." N.C. Gen. Stat. § 99A-2(b)(5). As we recognized in *Food Lion*, generally applicable trespass law protects against unauthorized "'interference with the ownership or possession of land.'" 194 F.3d at 518 (quoting *Desnick v. Am. Broad. Co.*, 44 F.3d 1345, 1353 (7th Cir. 1995)); *see also id.* (describing "the interest underlying the tort of trespass" as "the ownership and peaceable possession of land" (citing, *inter alia*, *Matthews v. Forrest*, 235 N.C. 281, 69 S.E.2d 553, 555 (1952)).

Paragraphs (b)(1) and (2) forbid employees "to breach the . . . duty of loyalty" by "us[ing]" information

from documents "capture[d] or remove[d]" or "recording[s]" made in "nonpublic areas" of the employer's premises "without authorization." N.C. Gen. Stat. § 99A-2(b)(1)–(2). As applied to PETA, those paragraphs correlate with the generally applicable employment tort we upheld against constitutional challenge in *Food Lion*. *See Food Lion*, 194 F.3d at 521 ("If, for example, an employee of a competing grocery chain hired on with Food Lion and videotaped damaging information in Food Lion's non-public areas for later disclosure to the public, these tort laws would apply with the same force as they do against [the reporters] here.").

Food Lion acknowledged that laws that "single out the press," have "more than an incidental effect upon its work," or directly regulate an act that "necessarily involve[s] expression" would be subject to First Amendment scrutiny. *Food Lion*, 194 F.3d at 522. But the Act targets trespass and breach of the duty of loyalty, which—just like the torts in *Food Lion*—do not necessarily involve expression or impose a unique burden on the press. Applying our precedent, then, 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. *See id.* at 521–522; *see also, e.g.*, *Planned Parenthood Fed'n of Am., Inc. v. Newman*, 51 F.4th 1125, 1135 (9th Cir. 2022) (rejecting First Amendment challenge and affirming damages for trespass, fraud, and state wiretapping violations awarded against defendants who disclosed secretly recorded videos of Planned

Parenthood staff because "the pursuit of journalism does not give a license to break laws of general applicability").

C.

Without attempting to distinguish *Food Lion*, the majority simply asserts that decision does not control here. The majority correctly observes that the Supreme Court of North Carolina subsequently held that the State does not recognize an independent claim for breach of the duty of loyalty. *See Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704, 709 (2001); Maj. Op. at 824-25. But by passing the Act, the General Assembly codified that cause of action, so this Court's previous constitutional analysis of that tort—not to mention the law of trespass—continues to apply here. The state court's decision did not, and could not, undermine this Court's First Amendment analysis.

D.

Moving beyond its disregard of *Food Lion*, the underpinnings of the majority's decision are unpersuasive. I highlight just a few of its foundational problems.

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. Newsgathering enjoys some constitutional protection because of its connection to speech and the press, *see Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S.Ct. 2646,

33 L.Ed.2d 626 (1972), but the mere act of recording by itself is not categorically protected speech. The majority therefore rightly rejects the Ninth Circuit's decision in *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). *See* Maj. Op. at 837 n.9. Other circuits to consider restrictions on recording have extended First Amendment protection to recording matters of public interest in public spaces because of its connection with speech of public concern. *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688–690 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 & n.4, 600 (7th Cir. 2012); *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195–1196 (10th Cir. 2017); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). We have done the same, holding the First Amendment protects "livestreaming a police traffic stop." *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 681 (4th Cir. Feb. 7, 2023). The majority does not grapple with this distinction between recording in public spaces and unauthorized recording on private property. *See* Maj. Op. at 836-37 (discussing some of these cases).

As the Supreme Court has explained, "[t]he right to speak and publish does not carry with it the unrestrained right to gather information" in violation of the rights of others. *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965) (observing, as an example, that entry into the White House is not a First Amendment right, even if exclusion diminishes the citizen's opportunity to gather information); *see*

also Cowles, 501 U.S. at 669, 111 S.Ct. 2513 ("The press may not with impunity break and enter an office or dwelling to gather news."); *Branzburg*, 408 U.S. at 691, 92 S.Ct. 2646 ("Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."). But under the majority's rule, if the estranged wife who placed the hidden camera in *Miller* had instead been a household employee looking for a juicy news story to sell (and, perhaps, had placed the camera in the parlor rather than the bedroom), the First Amendment would have insulated her from liability. *See Miller*, 472 S.E.2d at 354; Maj. Op. at 836 ("[I]t suffices to hold only that recording in the employer's nonpublic areas as part of newsgathering constitutes protected speech."). Why tort law should bend to the trespasser in one instance but not the other is, at best, unclear.

Second, the majority seriously misconstrues the Act to characterize it as a speech regulation. For example, the majority reasons at various points that paragraphs (b)(1) and (2) reach only "*speak[ing] out against* the employer," Maj. Op. at 829, or only "certain types of disloyal speech: disclosure of recordings," Maj. Op. at 833. That is simply not true. A person can "use" captured data or recorded images to breach the duty of loyalty without ever disclosing the recording or speaking against the employer. Using recorded information to launch a competing product, to steal customers, or to blackmail management come to mind. This is because *using*

information is not the same as *speaking*. *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 526–527, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) ("[T]he prohibition against the 'use' of the contents of an illegal interception . . . is . . . a regulation of conduct," unlike a "naked prohibition against disclosures" which "is fairly characterized as a regulation of pure speech.").

Laws can undoubtedly prohibit "using" information to harm another person or breach an obligation without raising any First Amendment concern. The Act targets using stolen information or secret recordings 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, such as persuading a former colleague to work for a competing company or revealing a trade secret. *See* Maj. Op. at 828.

Similarly for paragraph (b)(5), the majority conjures outlandish hypothetical applications far beyond the provision's prohibition on entering nonpublic areas of another's premises and substantially interfering with "the ownership or possession of real property." N.C. Gen. Stat. § 99A-2(b)(5); *see, e.g.*, Maj. Op. at 828 (reporting a conversation with a colleague that ultimately "leads the State to shut down the facility"), 831-32 (reporting violations of laws or regulations that lead to a temporary closure). Those imaginary applications stretch this traditional trespass rule far beyond its ordinary scope. And in the process, the majority ignores basic legal principles like federal preemption

and the requirement to read state laws—including whistleblower protections—in harmony with one another.

Lastly, the majority's alternative rationale—content discrimination—does not hold water. *See* Maj. Op. at 823-24, 830-31. The Act distinguishes 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. The majority stretches *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015), past its breaking point and then some in saying these are impermissible categories of discrimination based on speaker and viewpoint. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, --- U.S. ---, 142 S. Ct. 1464, 1474, 212 L.Ed.2d 418 (2022) (cautioning against overreading *Reed's* "function or purpose" language). The crux of paragraphs (b)(1) and (2) is disloyal behavior. Those paragraphs do not draw "facial distinctions based on a message," and they are easily "justified without reference to the content of" any affected speech. *Reed*, 576 U.S. at 163–164, 135 S.Ct. 2218 (internal quotation marks omitted). In particular, those paragraphs authorize an enhanced tort remedy for a heightened privacy invasion—one that is intentionally harmful by breaching an employee's duty of loyalty and causing actual damage to an employer.

As for paragraph (b)(3), the majority opines that it applies only to employees and therefore discriminates among speakers. *See* Maj. Op. 830-31. But the majority's effort to read a content-based purpose into paragraph (b)(3) goes nowhere because the provision targets trespassory conduct, not speech. A "journalist invited to profile a company" is not a trespasser, regardless of the content of her ultimate review, because she has the employer's permission to record in nonpublic areas, and "a state enforcement agency" is explicitly exempted by subsection (f), regardless of the content of the enforcement officer's report. Maj. Op. at 831.

Moreover, it is far from clear that paragraph (b)(3) is limited to employees as the majority suggests. Although paragraph (b)(3) applies to placing an unattended recording device on "the employer's premises," it does not specify who places that device. As the majority points out, the reference to the employer's premises could suggest paragraph (b)(3) applies only to employee activity, consistent with (b)(1) and (b)(2). But the canon of consistent usage on which the majority relies cuts the other way too: unlike (b)(1) and (2), paragraphs (b)(3), (4), and (5) do not explicitly limit themselves to employees but would presumably apply to "[a]ny person," as stated in subsection (a). *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[A] material variation in terms suggests a variation in meaning."). After all, subsection (b) defines the conduct for which subsection (a) provides a remedy—the two operate in tandem and must be read as such.

Whatever the meaning of paragraph (b)(3), these interpretive possibilities demonstrate that the provision is less concerned with *who* the bad actor is than with *what* the bad actor is doing—namely, trespassing by acting in excess of his authority to be on the premises.

III. [sic]

Because I would hold the Act constitutional as applied to PETA's undercover reporting tactics, I would proceed to address its overbreadth argument. In the First Amendment context, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, --- U.S. ---, 141 S. Ct. 2373, 2387, 210 L.Ed.2d 716 (2021) (internal quotation marks omitted). PETA "bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (internal quotation marks and brackets omitted).

PETA has not carried its burden. Its facial challenge rests entirely on speculation and hypotheticals that ignore the Act's textual limits and whistleblower protections laws. And when it comes to assessing the Act's scope, PETA refuses to acknowledge the possibility of even a single constitutional application of the Act. Because PETA denies the Act's vast legitimate sweep—including preventing and compensating misappropriation,

sabotage, espionage, extortion, unfair competition, and theft of trade secrets, to name a few—it fails to explain how unconstitutional applications of the Act could be substantial by comparison, a requirement we must apply "vigorously." *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

PEOPLE FOR THE ETHICAL TREATMENT OF ANMIALS, 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, v. JOSH STEIN, in his official capacity as Attorney General of North Carolina, and DR. KEVIN GUSKIEWICZ, in his	1:16CV25

official capacity as Chancellor the University of North Carolina-Chapel Hill,

Defendants,

And

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Intervenor-Defendant.

MEMORANDUM OPINION AND ORDER

THOMAS D. SCHROEDER, Chief District Judge.

Plaintiffs People for the Ethical Treatment of Animals, Inc. ("PETA"), Center for Food Safety ("CFS"), Animal Legal Defense Fund ("ALDF"), Farm Sanctuary, Food & Water Watch ("FWW"), Government Accountability Project ("GAP"), Farm Forward, and the American Society for the Prevention of Cruelty to Animals ("ASPCA") seek to permanently enjoin North Carolina Attorney General, Josh Stein, and University of North Carolina-Chapel Hill Chancellor, Dr. Kevin Guskiewicz, from enforcing subsections of North Carolina General Statute § 99A-2 as unconstitutional under the First and Fourteenth Amendments to the United States Constitution. (Doc. 21 ¶ 142.)

Before the court are cross-motions for summary judgment filed by Plaintiffs (Doc. 98) and Defendants (Doc. 107), as well as Intervenor-Defendant North Carolina Farm Bureau Federation, Inc. ("Intervenor") (Doc. 109). With leave of court, amici Reporters Committee for Freedom of the Press and twenty-one other organizations[1] have filed a brief in support of Plaintiffs' motion for summary judgment. (Doc. 106.) The motions have been fully briefed, and the court held oral argument on February 6, 2020. For the reasons set forth below, the court will grant in part and deny in part the parties' motions for summary judgment, finding that the challenged provisions of the law fail to pass muster under the First Amendment—two provisions fail facially, and the remaining two provisions fail as applied to Plaintiffs.

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[1] *Amici* are as follows: American Society of News Editors; The Associated Press Media Editors; Association of Alternative Newsmedia; Capitol Broadcasting Company, Inc.; First Look Media Works, Inc.; Forbes Media LLC; Freedom of the Press Foundation; Gannett Co., Inc.; GateHouse Media; The International Documentary Association; The Investigative Reporting Workshop; The National Press Club; The National Press Club Journalism Institute; The National Press Photographers Association; The North Carolina Press Association; The Online News Association; POLITICO; Radio Television Digital News Association; Reporters Without Borders; Society of Professional Journalists; and The Tully Center for Free Speech. (Doc. 106 at 25-30.)

I. BACKGROUND

A. Facts

The facts, either not in dispute or viewed in the light most favorable to the non-moving parties in the cross-motions for summary judgment, establish the following:

On June 3, 2015, over then-Governor Patrick McCrory's veto, [2] the North Carolina General Assembly passed the North Carolina Property Protection Act, 2015 N.C. Sess. Laws 50, codified at N.C. Gen. Stat. § 99A-2 ("Property Protection Act" or "Act"). (Doc. 21 ¶ 1; Doc. 108 at 4.) The Act amended current law that provides a civil remedy for interference with certain property rights by creating a civil cause of action for the owner or operator of a premises as follows:

> (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

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[2] In his veto statement, Governor McCrory stated: "While I support the purpose of this bill, I believe it does not adequately protect or give clear guidance to honest employees who uncover criminal activity. I am concerned that subjecting these employees to potential civil penalties will create an environment that discourages them from reporting illegal activities." (Doc. 99-8 at 4.)

> areas not accessible to or not intended to be accessed by the general public.

N.C. Gen. Stat. § 99A-2(a). Under the law, "an act that exceeds the person's authority" within the meaning of section (a) "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[; or,]
>
> (5) An act that substantially interferes with the ownership or possession of real property.

Id. § 99A-2(b). "Any person who intentionally directs, assists, compensates, or induces another person to violate this section" can be held jointly liable with the employee or actor. *Id.* § 99A-2(c).

Any party who prevails in an action brought under the Act can recover equitable relief, compensatory damages, costs and attorneys' fees, as well as "[e]xemplary 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)." *Id.* § 99A-2(d). The Act further provides that nothing in it shall be construed to "diminish the protections provided to employees under Article 21 of Chapter 95 [Retaliatory Employment Discrimination] or Article 14 of Chapter 126 [Protection for Reporting Improper Government Activities] of the General Statutes" or "limit any other remedy available at common law or provided by the general Statutes." *Id.* § 99A-2(e), (g).

Plaintiffs are eight organizations who either "engage in employment-based undercover investigations to document and expose animal abuse" (Doc. 99 at 2) or "use[ ] information from whistleblowers and investigators in their advocacy" (*id.* at 7). PETA says it has identified animal testing

laboratories at the University of North Carolina-Chapel Hill that it would like to investigate through the use of an undercover investigator, but it has refrained from doing so out of fear and the "threat of exemplary damages and other civil penalties under [the Act]." (Doc. 100-1 ¶¶ 17-18, 24.) Similarly, ALDF says it is prepared to conduct undercover investigations at state-owned facilities in North Carolina, but those preparations were "thwarted when the [Act] passed." (Doc. 100-2 ¶ 8.) Both PETA and ALDF represent that if the Act were held unconstitutional, they would resume their undercover investigations. The remaining Plaintiffs have each indicated that the Act's effect on PETA and ALDF has negatively impacted the mission and goals of their organizations. Plaintiffs charge that the Act was passed specifically to ward off undercover investigations of facilities and farms in which animal testing or processing takes place. By creating a strong disincentive for PETA and ALDF to conduct undercover investigations, the remaining Plaintiffs claim, the Act has obstructed their information stream and prevents them from publishing photographs and reports that are central to their missions. (Docs. 101-1 ¶¶ 6, 8, 17-18; 101-2 ¶¶ 4-5, 10-11; 101-3 ¶¶ 5-6, 13-14; 101-4 ¶¶ 5-6, 8, 11-12; 101-5 ¶¶ 5-6, 8, 10-11; 101-6 ¶¶ 7-8, 13-14.)

B. Procedural History

Plaintiffs initiated this pre-enforcement action on January 13, 2016 (Doc. 1) and filed an amended complaint on February 25, 2016 (Doc. 21). Raising

both facial and as-applied challenges, they claim the Act stifles their ability to investigate North Carolina employers for illegal or unethical conduct and restricts the flow of information those investigations provide, in violation of the First (Count I) and Fourteenth (Count II) Amendments to the United States Constitution and provisions of the North Carolina Constitution (Free Speech under Art. I, § 14 (Count III); Right to Petition under Art. I, § 12 (Count IV); and Equal Protection under Art. 1, § 19 (Count V)). On April 4, 2016, Defendants moved to dismiss the amended complaint on three grounds: Eleventh Amendment State sovereign immunity, standing, and on the merits. (Doc. 30.) In a memorandum opinion, this court found that Plaintiffs failed to allege sufficient facts to demonstrate standing and granted Defendants' motion to dismiss. (Doc. 49 at 37.)

Plaintiffs appealed this court's judgment, and in a June 5, 2018 opinion the Fourth Circuit held that Plaintiffs "sufficiently alleged, at least at [the motion to dismiss] stage of the litigation, an injury-in-fact sufficient to meet the first prong of the First Amendment standing framework" and reversed this court's judgment. *PETA v. Stein*, 737 F. App'x 122, 131 (4th Cir. 2018) (per curiam). On remand, this court held argument on the remainder of Defendants' motion to dismiss, granting it in part and denying it in part, leaving only Plaintiffs' claims under the First Amendment (Count I) and Fourteenth Amendment (Count II) to the United States Constitution. (Doc. 73.)

Thereafter, North Carolina Farm Bureau Federation, Inc.—a nonprofit organization dedicated to representing the interests of North Carolina farmers—moved to intervene as a Defendant pursuant to Federal Rule of Civil Procedure 24 and Local Rule 7.3 (Doc. 82), and Plaintiffs filed an unopposed motion to join the UNC System president and the UNC Board of Governors as Defendants (Doc. 87). The court granted North Carolina Farm Bureau Federation's motion but denied Plaintiffs' motion for joinder. (Doc. 92 at 11.)

Plaintiffs, Defendants, and Intervenor each moved for summary judgment on September 3, 2019, based on a record developed largely of affidavits, and the court heard argument on February 6, 2020. The motions are thus ready for decision.

II. ANALYSIS

Defendants first renew their challenge to this court's subject matter jurisdiction. (Docs. 108 at 9 n.2; 115 at 3-6.) Plaintiffs assert that the court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 (Doc. 21 ¶ 9) and that venue is proper (*id.* ¶ 14).

A. Standing

Plaintiffs, relying on the Fourth Circuit's prior opinion in this case, *PETA*, 737 F. App'x 122, contend that they have set out sufficient facts, supported by affidavits, to establish standing. (Doc. 99 at 8-10.) Defendants disagree. (Doc. 115 at 3.)

Article III of the United States Constitution limits the jurisdiction of federal courts to deciding cases or controversies. U.S. Const. art. III, § 2, cl. 1. To satisfy this case-or-controversy requirement, a plaintiff must establish that its claim meets three requirements of Article III standing:

> (1) An injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Beck v. McDonald, 848 F.3d 262, 269 (4th Cir. 2017) (quoting *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013)).

"[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 270 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). At the summary judgment stage, a plaintiff must "set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (quoting *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130).

Plaintiffs have met this burden, having set forth by affidavit, the veracity of which has not been challenged, specific facts which, taken as true, establish Article III standing.

1. Injury-in-Fact

Defendants contend that Plaintiffs' basis for a chill on the exercise of their rights is "objectively unreasonable based on the record" and that their fears are "purely hypothetical, speculative, and conjectural, and do not rise to an injury-in-fact." (Doc. 115 at 4.) Plaintiffs argue that following the Fourth Circuit's ruling, to show injury-in-fact they must merely establish that they have conducted undercover investigations in the past to uncover unethical or illegal treatment of animals and disseminate that information and that they are prepared to proceed with further investigations but are chilled from doing so because they fear liability under the Act. (Doc. 99 at 9.)

"To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Beck*, 848 F.3d at 270 (internal quotation marks omitted) (quoting *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540, 1548, 194 L.Ed.2d 635 (2016)). In the First Amendment context, the "standing requirements are somewhat relaxed," *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013), and plaintiffs can satisfy the injury-in-fact requirement by "showing that [the challenged

statute] ha[s] an objectively reasonable chilling effect on the exercise of their rights." *PETA*, 737 F. App'x at 129 (internal quotation marks omitted) (quoting *Cooksey*, 721 F.3d at 229). "To decide the objective reasonableness of the claimed chilling effect from the Act, the court evaluates whether there is a credible threat of enforcement against the plaintiff." *Id.* "Government action will be sufficiently chilling when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights. *Id.* (quoting *Cooksey*, 721 F.3d at 236).

In addressing the issue of injury-in-fact on appeal, the Fourth Circuit held that Plaintiffs "sufficiently allege[d] an injury-in-fact," stating:

> Plaintiffs' alleged injury is not just the imminent threat of a civil lawsuit, which would only occur if they go forward with their plans to investigate in the nonpublic areas of a state employer's premises *and* Defendants choose to file suit against them. Rather, Plaintiffs['] alleged injury for standing purposes is that they have refrained from carrying out their planned investigations based on their reasonable and well-founded fear that they will be subjected to significant exemplary damages under the Act if they move forward at all.

Id. at 129, 131 (emphasis in original) (internal quotation marks omitted). In reaching its holding, the court explained that Plaintiffs alleged (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) "a credible

threat that the Act will be enforced against them if they proceed with their plans," and (3) "that they have refrained from proceeding for fear of being subjected to the severe civil remedies provided for in the Act." *Id.* at 129-130 (internal quotation marks omitted).

By its terms, the Act appears to prohibit Plaintiffs from conducting undercover investigations and "subject them to civil liability, including severe exemplary damages." *Id.* at 130. The actions in which Plaintiffs wish to engage, which are the same as those before enactment of the Act, could be targeted by the Defendants. Because a civil action could be brought under the Act to target not only the investigations in which Plaintiffs wish to engage, but also the use of the information gathered from these investigations, the Fourth Circuit found there is a credible threat the Act will be enforced against them. *Id.* Therefore, to show injury-in-fact, Plaintiffs must establish that (1) they have engaged in or supported undercover investigations in the past for the purpose of gathering and disseminating information or have relied on undercover investigations to disseminate information, and (2) that they have refrained from doing so out of fear of liability under the Act.

At this stage of the litigation, Plaintiffs cannot rely on "mere allegations" but must establish specific facts by evidence. *Beck*, 848 F.3d at 270 (citation and internal quotation marks omitted). A declaration from an individual authorized to make statements on behalf of the organization has been filed by each of

the eight Plaintiffs. (Docs. 100-1 [PETA], 100-2 [ALDF], 101-1 [ASPCA], 101-2 [CFS], 101-3 [Farm Forward], 101-4 [Farm Sanctuary], 101-5 [FWW], 101-6 [GAP].) Both PETA and ALDF have declared that they have engaged in undercover investigations at facilities in North Carolina in the past and are not willing to proceed with their planned investigations out of fear of liability under the Act. (Docs. 100-1 ¶¶ 4, 6-18, 21-25; 100-2 ¶¶ 7-10, 12-15.) The ASPCA has declared that the Act has both stopped investigations, which prevents the production of materials they rely on, and discouraged them from funding investigations in North Carolina out of fear of liability. (Doc. 101-1 ¶¶ 6, 8, 17-19.) Finally, CFS, Farm Forward, Farm Sanctuary, FWW, and GAP have all declared that they rely on information from whistleblowers and undercover investigators to produce content central to their organizations' missions, and the Act is preventing that information from reaching them. (Docs. 101-2 ¶¶ 4-5, 10-11; 101-3 ¶¶ 5-6, 13-14; 101-4 ¶¶ 5-6, 8, 11-12; 101-5 ¶¶ 5-6, 8, 10-11; 101-6 ¶¶ 7-8, 13-14.)

Plaintiffs have set out specific facts to establish an injury in fact.

2. Causation and Redressability

Defendants argue that Plaintiffs "have not presented, nor can they, any evidence showing that the Defendants have threatened any kind of action against Plaintiffs or that they are likely to enforce the Act against them." (Doc. 115 at 5.) Plaintiffs argue that in the interlocutory appeal the Fourth

Circuit found that "these Defendants must either initiate or prosecute [a suit], making [Plaintiffs'] chill traceable to and redress[a]ble against Defendants." (Doc. 99 at 9.)

The burden on Plaintiffs is to show (1) "a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the defendant's actions" and (2) "a likelihood that the injury will be redressed by a favorable decision." *PETA*, 737 F. App'x. at 128 (citation and internal quotation marks omitted). As the Fourth Circuit noted, the injury here is that Plaintiffs "have refrained from carrying out their planned investigations based on their reasonable and well-founded fear that they will be subjected to significant exemplary damages under the Act if they move forward" with their plans to investigate in areas prohibited by the Act. *Id.* at 131. In its opinion, the Fourth Circuit stated that Plaintiffs "plausibly alleged that Defendants are the officials who are empowered to initiate or file suits under the Act if Plaintiffs carry out their investigations, and neither the UNC Chancellor nor the Attorney General have disavowed enforcement if Plaintiffs proceed with their plans." *Id.* at 130-31 (citation and internal quotation marks omitted).[3] They further found that "an order preventing these Defendants from

[3] This court had disagreed, noting that it was some 13 to 15 years ago that PETA last conducted an undercover investigation of a UNC facility and that the State never threatened or instituted any legal action in connection with it. (Doc. 49 at 5-6, 28.)

exercising their powers to initiate or bring a lawsuit under the Act would seem to be sufficient to quell Plaintiffs' fear of liability." *Id.* at 132.

As set forth in Plaintiffs' declarations, the ability of Defendants to bring a civil action under the Act and subject Plaintiffs to civil liability and exemplary damages is the cause of Plaintiffs' injury—the prevention from moving forward with undercover investigations and disseminating information. As the Fourth Circuit found already, barring Defendants from bringing suit would redress the injury. *Id.* Thus, Plaintiffs have set forth sufficient facts to establish both causation and redressability and consequently have standing.

B. First Amendment Claims

Plaintiffs move for summary judgment on their remaining claims, arguing that subsections (b)(1), (b)(2), (b)(3) and (b)(5) of the Act violate the First Amendment because they fail the requisite scrutiny and are unconstitutionally overbroad.[4] (Doc. 98 at 1-2.) Plaintiffs seek to strike the Act both facially and as applied to them. Defendants and Intervenor dispute both assertions, arguing that the Act

[4] At oral argument, Plaintiffs acknowledged that N.C. Gen. Stat. § 99A-2(c) is not unconstitutional unless, in their view, it is used to create joint liability for violations of the challenged provisions, subsections (b)(1) through (b)(3) or (b)(5). Plaintiffs do not challenge § 99A-2(e) but instead argue that subsection (e) is further evidence that the Act is directed at First Amendment protected interests. (Doc. 99 at 11-13.)

regulates wrongful conduct and is not overbroad, and that any prohibited speech is not *protected* speech. (Docs. 115 at 6, 16-18; 121 at 7-8, 17-19.) Further, they contend that if found to regulate protected speech, the Act is content- and viewpoint-neutral and can withstand intermediate scrutiny. (Docs. 115 at 13-15; 121 at 14-17.)

1. Standard of Review

Summary judgment is appropriate where the pleadings, affidavits, and other proper discovery materials demonstrate that no genuine dispute as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The party seeking summary judgment bears the burden of initially demonstrating the absence of a genuine dispute as to any material fact. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

"When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (citation and internal quotation marks omitted). In considering each motion, the court must "resolve all factual disputes and any competing, rational inferences in the light most favorable to the party opposing that motion." *Id.* (citation and internal quotation marks omitted). There is no issue for trial unless sufficient evidence favoring the non-

moving party exists for a reasonable factfinder to return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The court is faced with cross-motions for summary judgment. No party contends that there are material facts in dispute, and all agreed at oral argument that summary judgment is an appropriate disposition in this case.

2. State Action

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. When considering an action brought under the First Amendment, "it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972) (emphasis added). But while the Free Speech Clause prohibits only state action, "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). In fact, "sometimes the state can censor just as effectively through legal forms that are private as it can through ones that are public."[5]

[5] It is for this reason that libel laws, although enforced by

Overbey v. Mayor of Baltimore, 930 F.3d 215, 224 (4th Cir. 2019) (quoting Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 Colum. L. Rev. 1650, 1668 (2009)).

Defendants rightly note that the present case differs from numerous other similar lawsuits across the country that challenge restrictions on undercover investigations, particularly of agricultural operations.[6] As far as the court can discern, nearly all other similar laws impose criminal liability while the Property Protection Act provides a civil cause of action for damages. But while the Act operates in the private sphere, it is state action to the extent the

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private parties, remain subject to First Amendment scrutiny. *See, e.g.*, *N.Y. Times*, 376 U.S. at 268-69, 84 S.Ct. 710.

[6] Litigation against so-called "Ag-Gag" laws have been pursued nationwide, including in Arkansas, *ALDF v. Vaught*, No. 4:19-cv-00442-JM, Doc. 51 (E.D. Ark. Feb. 14, 2020) (granting the defendants' motion to dismiss where plaintiffs did not allege facts sufficient to establish injury in fact), Idaho, *ALDF v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (holding that Idaho's statute prohibiting a person from making an unauthorized audio or video recording of an agricultural facility's operations violated the First Amendment), Iowa, *ALDF v. Reynolds*, 353 F. Supp. 3d 812 (S.D. Iowa 2019) (finding Iowa's "Ag-Gag" law facially unconstitutional and granting plaintiffs' motion for summary judgment), Kansas, *ALDF v. Kelly*, 434 F.Supp.3d 974, 982–83 (D. Kan. 2020) (finding that the challenged provisions of the Kansas law violated the First Amendment and granting in part plaintiffs' motion for summary judgment), and Utah, *ALDF v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017) (finding Utah's law unconstitutional under the First Amendment and granting plaintiffs' motion for summary judgment).

State has identified speech (or in some cases, conduct which can include speech) it wishes to allow to be proscribed and has empowered private parties to enforce the prohibition. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991) (finding in breach of contract dispute that "the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment"). "Calling a speech restriction a 'property right' . . . doesn't make it any less a speech restriction, and it doesn't make it constitutionally permissible." Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1063 (2000).

In the present case, moreover, Plaintiffs have strategically targeted a State entity that would enforce the Act through State actors. As the Fourth Circuit stated:

> It appears that [the] Chancellor . . . would be the state official tasked with either initiating or requesting approval for a lawsuit under the Act if PETA carried out its planned investigation of UNC-Chapel Hill. And Attorney General Stein would, at a minimum, be the state official charged with representing any targeted state agency that chose to sue under the Act.

PETA, 737 F. App'x at 132. State action is therefore present through the actions of the UNC Chancellor and the North Carolina Attorney General. This provides a sufficient basis to challenge the Property Protection Act under the First Amendment as applied to the States through the Fourteenth Amendment.

3. Facial versus As-Applied Challenges

Plaintiffs challenge the Act both facially and as applied to them. "[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). Rather, "[t]he difference between a facial challenge and an as-applied challenge lies in the scope of the constitutional inquiry." *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 298 n.5 (4th Cir. 2013). In distinguishing between facial and as-applied challenges, the Fourth Circuit has noted:

> Under a facial challenge, a plaintiff may sustain its burden in one of two ways. First, a plaintiff asserting a facial challenge may demonstrate that no set of circumstances exists under which the law would be valid, or that the law lacks any plainly legitimate sweep. Second, a plaintiff asserting a facial challenge may also prevail if he or she show[s] that the law is overbroad because a substantial number of its

> applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. Under either scenario, a court considering a facial challenge is to assess the constitutionality of the challenged law without regard to its impact on the plaintiff asserting the facial challenge. In contrast, an as-applied challenge is based on a developed factual record and the application of a statute to a specific person[.]

Id. (internal citations and quotation marks omitted). Further, facial challenges "are disfavored for several reasons." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). First, facial challenges "often rest on speculation." *Id.* Additionally, they "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 450-51, 128 S.Ct. 1184 (citation and internal quotation marks omitted). Finally, facial challenges may prevent laws "embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451, 128 S.Ct. 1184.

With these principles in mind, the court turns to Plaintiffs' specific challenges.

4. Free Speech Analysis

The parties agree that the First Amendment Free Speech analysis proceeds in three stages. (Docs. 99 at 10-15; 108 at 10; 110 at 21-24.) First, the court must determine whether the Act regulates speech or conduct. Second, if the Act regulates speech, the court must determine what level of scrutiny applies by considering whether the Act is content- and viewpoint-neutral. Finally, applying the appropriate level of scrutiny, the court must determine whether the party with the burden has made the requisite showing. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). *See, e.g.*, *ALDF v. Wasden*, 878 F.3d 1184, 1193-94 (9th Cir. 2018); *ALDF v. Kelly*, 434 F.Supp.3d 974, 998–99 (D. Kan. 2020); *ALDF v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

a. Speech or Conduct

Defendants and Intervenor argue that the challenged provisions of the Act are not subject to First Amendment scrutiny because they proscribe unprotected speech, that is, speech made in connection with a trespass. (Docs. 115 at 10-12; 116 at 15-17.) Further, they argue that the law is one of general applicability, and thus incidental effects on speech do not require scrutiny. (Docs. 115 at 6-12; 116 at 10-14.) Plaintiffs contend that the Act targets protected speech and is not one of general application because speech is what triggers liability, proving that speech is the Act's true aim. (Doc. 114 at 13.)

Speech is protected under the First Amendment, but the protection is not absolute. *United States v. Stevens,* 559 U.S. 460, 468-69, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (noting permissible restrictions for obscenity, defamation, fraud, incitement, and speech integral to criminal conduct). Some categories of speech can be regulated not because they are "invisible to the Constitution," but "because of their constitutionally proscribable content." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The Government cannot use these categories of speech as "vehicles for content discrimination unrelated to their distinctively proscribable content," and restrictions based on particular viewpoints cannot stand under the First Amendment. *Id.* at 383-85, 112 S.Ct. 2538.

While the Supreme Court has held that motion pictures fall within the scope of the First Amendment, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), the Court has not definitively addressed whether recording itself is protected speech. However, several courts have recognized recording as either expressive conduct warranting First Amendment protection, *Wasden*, 878 F.3d at 1203-04 (finding the creation of an audiovisual recording to be speech because "[t]he act of recording is itself an inherently expressive activity"), or conduct essentially preparatory to speech, *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (emphasis in original) ("The act of *making* an audio or audiovisual recording is necessarily included within the First

Amendment's guarantee of speech . . . as a corollary of the right to disseminate the resulting recording."). The same is true for the act of taking or capturing a picture. *See Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) ("The First Amendment protects actual photos . . . and for this protection to have meaning the Amendment must also protect the act of creating that material."). The act of disseminating a recording is of course speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (citation and internal quotation marks omitted) ("An 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.").

Defendants' and Intervenor's attempt to categorize image capture and recording following a trespass under the Act as unprotected speech rests on a misreading of the law. It is true that free speech cannot be used to justify violation of laws of general application that operate independent of speech, such as trespass, copyright, labor, antitrust, and tax laws. *See, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999) (rejecting free speech defense to trespass law). But while the press enjoys no special status to avoid such laws, it does not mean the category of speech is thus unprotected. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791-92, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (reaffirming that "new categories of unprotected speech may not be added to the list by a legislature

that concludes certain speech is too harmful to be tolerated"). The Property Protection Act therefore does not escape First Amendment scrutiny altogether on the ground that the speech is not protected.

Similarly, Defendants' and Intervenor's argument that the Act avoids scrutiny because it is generally applicable is incorrect. Generally applicable laws are those that affect speech in a neutral way, and such laws with only an incidental effect on speech do not usually draw First Amendment scrutiny. *Cohen*, 501 U.S. at 669, 111 S.Ct. 2513 (rejecting First Amendment exception to breach of contract claim, noting that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) ("[T]he enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment . . . ."). However, where a law has more than an incidental effect on speech or where liability is triggered by engaging in First Amendment protected activity, the law is subject to First Amendment scrutiny. *Alvarez*, 679 F.3d at 602-03 ("When the expressive element of an expressive activity triggers the application of a general law, First Amendment interests are in play."). And even a generally applicable law can be subject to First Amendment scrutiny as applied to speech that falls within its terms. *See Billups v. City of Charleston*, 961 F.3d 673,

683–84 (4th Cir. 2020) (finding that laws regulating conduct can be subject to First Amendment scrutiny even though they do not directly regulate speech) (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010)); *Capital Assoc. Indus., Inc. v. Stein*, 922 F.3d 198, 209 (4th Cir. 2019).

These distinctions are seen in *Food Lion*, which Defendants and Intervenor claim justifies the Act. They contend that the Act merely codifies the case's holding that the torts of trespass and duty of loyalty are generally applicable laws and that undercover video recordings made by employees in the course of those torts were therefore not protected by the First Amendment. (Docs. 115 at 7; 116 at 12.) Plaintiffs argue that this misreads the case, especially as applied to the Property Protection Act, and that the court's statements regarding the breach of duty of loyalty were subsequently abrogated by the North Carolina Supreme Court and are therefore of no value. (Doc. 114 at 15.)

Defendants' and Intervenor's reliance on *Food Lion* is largely misplaced. The case involved a grocery chain's lawsuit over an investigation of its food handling practices by the television network American Broadcasting Company, whose employees obtained jobs with the chain that enabled the taking of videos with hidden cameras. Food Lion asserted several claims, including trespass and breach of its employees' duty of loyalty. A jury found for Food Lion, and the Fourth Circuit affirmed in part. On

appeal, the defendants contended that their recording was newsgathering that was protected by the First Amendment. The court rejected this argument, finding the torts of breach of duty of loyalty and trespass to be generally applicable, and thus not subject to First Amendment scrutiny, because they do not "target[ ] or single[ ] out" the press or have more than an incidental effect on it. 194 F.3d at 521-22. The court concluded that because the employees "went into areas of the stores that were not open to the public and secretly videotaped, an act that was directly adverse to the interests of their . . . employer, Food Lion," they trespassed and "breached the duty of loyalty, thereby committing a wrongful act in abuse of their authority to be on Food Lion's property." *Id.* at 519.

Subsequently, in *Dalton v. Camp*, the Supreme Court of North Carolina specifically addressed the Fourth Circuit's *Food Lion* opinion and concluded that the court "incorrectly interpreted [ ] state case law." 353 N.C. 647, 548 S.E.2d 704, 709 (2001). The court held that while North Carolina courts "recognize the existence of an employee's duty of loyalty, [they] do not recognize its breach as an independent claim." *Id.* Instead, it is only a justification for terminating an employee. *Id.* Moreover, the court found no indication a fiduciary duty would apply to a lower-level grocery store employee. *Id.* Plaintiffs contend this disposes of Defendants' argument. Defendants respond that the General Assembly remedied this by creating a cause of action in the Property Protection Act for a breach

of duty of loyalty. (Doc. 115 at 10, 13, 14.) It is not entirely clear, however, that the General Assembly has done so. The PPA does not define acts that breach the duty of loyalty or the class of employees who would owe such a duty—issues addressed in *Dalton v. Camp*. Rather, it creates a cause of action against one who enters the nonpublic areas of an employer's premises and engages in conduct with the purpose of breaching the employee's duty of loyalty, thus making the breach of an employee's duty of loyalty an element of a (b)(1) or (b)(2) claim, not a standalone cause of action.

In a related fashion, Defendants and Intervenor also rely generally on a line of cases that upheld claims for trespass and invasion of privacy where surreptitious videotaping or electronic surveillance occurred. *See, e.g.*, *Miller v. Brooks*, 123 N.C.App. 20, 472 S.E.2d 350 (1996) (estranged wife trespassed into husband's home and installed video camera in bedroom); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (invasion of privacy under California law where Life Magazine published picture taken of plaintiff in his home without his consent). They argue that these cases demonstrate that "[e]ven an authorized entry can be trespass if a wrongful act [such as a recording or photograph] is done in excess of and in abuse of authorized entry." (Doc. 110 at 14-15 (quoting *Miller*, 472 S.E.2d at 355).)

This last contention is true. But in each of these cases, the claims were based on laws of general application—such as trespass and invasion of

privacy—which do not require speech as an element of proof. The courts rejected arguments that the offender could seek the protection of the First Amendment simply because he engaged in speech while committing these torts. But where the law itself proscribes a form of expression, it differs from these laws of general application and is subject to heightened scrutiny. Here, the Property Protection Act appears to set out a law of general application in paragraph (a)—indeed, no Plaintiff has challenged the language of that subsection. But the General Assembly went on in subsections (b)(1) through (b)(5) to define the specific conduct that, if proven, would constitute a violation. Subsections (b)(1) through (b)(5) have been treated by the parties as elements of a Property Protection Act claim, and the court reads them the same way. Thus, to the extent the (b) subsections include speech as an element of proof or have more than an incidental effect on it, they implicate the First Amendment.[7]

i. Subsection (b)(1)

Under subsection (b)(1) of the Act, a person can be held liable if he intentionally accesses the nonpublic areas of an employer's premises without a bona fide intent, and "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

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[7] In this respect, the Property Protection Act may differ from the similar Arkansas statute that sets out a non-exclusive list of ways a person can exceed their authority to enter a non-public area. *See* Ark. Code Ann. § 16-118-113 (2017).

the employer." N.C. Gen. Stat. § 99A-2(b)(1). Plaintiffs argue that (b)(1)'s prohibition on capturing information implicates the First Amendment, contending that the First Amendment protects against restrictions on the creation of material for speech. They further argue that "us[ing]" information implicates the First Amendment and cite *Sorrell*, 564 U.S. at 568, 131 S.Ct. 2653, for the proposition that " '[a]n individual's right to speak is implicated when information he or she possesses is subjected to restraints on' its 'disseminat[ion].'" (Doc. 99 at 10.) To Defendants and Intervenor, proscribing "use" prohibits conduct, not speech, because it "affects what a person 'must *do* . . . not what they may or may not *say*.'" (Doc. 115 at 7 (quoting *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 60, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (emphasis in original)).) They argue that "captures" generally does not involve speech but concede it could. (Doc. 110 at 28.) Plaintiffs respond that "there is no requirement a statute be perfectly crafted to only encompass speech before it will be understood to be aimed at First Amendment rights." (Doc. 114 at 14.)

The terms "uses" and "captures" are not defined in the Act. When statutory words lack a technical meaning and are not defined in the text, "they are construed in accordance with their ordinary meaning" and "[c]ourts may and often do consult dictionaries for such meanings." *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159, 162 (1981). *See Johnson v. Zimmer*, 686 F.3d 224, 232 (4th Cir. 2012) (citation and internal quotation marks omitted) ("The Court

customarily turn[s] to dictionaries for help in determining whether a word in a statute has a plain or common meaning."). "Use" means generally "[t]he act of putting something to work, or employing or applying a thing, for any (esp. a beneficial or productive) purpose." Oxford English Dictionary Online, https://www.oed.com/view/Entry/220635?rskey=JQRSrL & result=1 & isAdvanced=false#eid. It is also defined as "[t]he application or employment of something." *Use*, *Black's Law Dictionary* (9th ed. 2009). While "use" as set out in subsection (b)(1) need not involve speech; for example, an individual who removes an employer's data and relies on it to start his own competitive business, the term itself can apply to speech. One could "use" the information gathered from the nonpublic areas of an employer's premises by publishing it or creating an expressive work based on its contents, making the prohibited action "speech." The prohibition on "captur[ing]" more plainly generates First Amendment concern. "Capture" is defined variously as "to take prisoner; to catch by force," "[t]o take (an opposing piece) [as in chess]," and "[t]o represent, catch, or record (something elusive, as a quality) in speech, writing, etc." Oxford English Dictionary Online, https://www.oed.com/view/Entry/27660?rskey=Hy121K & result=2#eid. It also means "to record in a permanent file." Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/capture. Thus, capturing can be read in (b)(1) to prohibit physically obtaining an employer's data or information, but it can also prohibit the capturing of images via camera or other similar

devices. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 387-392 (2011) (reasoning that laws constraining image capture are not generally applicable and are not free from First Amendment scrutiny). Intervenor has conceded as much. (Doc. 110 at 28 ("[S]ubsection (b)(1) prohibits 'captur[ing] or remov[ing] the employer's data,' and to 'capture' data reasonably includes taking an image of it.").)

Absent a narrowing construction from North Carolina state courts, federal courts are without power to adopt one "unless such a construction is reasonable and readily apparent." *Boos v. Barry*, 485 U.S. 312, 330, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). While Defendants and Intervenor view subsection (b)(1) as exclusively regulating conduct, it is clear (indeed, conceded) that "capture" can cover speech. Whether or not subsection (b)(1) is generally applicable, at a minimum its prohibition on speech is more than incidental. Image capture, a speech act in which Plaintiffs wish to engage, constitutes an element of a (b)(1) claim. Unlike in *Food Lion* where the torts of trespass and breach of the duty of loyalty operated independently of speech, the inclusion of speech as an element of a (b)(1) claim goes beyond an incidental effect, and subsection (b)(1)'s burden on speech is direct and requires First Amendment scrutiny.

That said, the court also cannot ignore the possible myriad legitimate applications of subsection

(b)(1). The Act applies to one who captures or removes and uses an employer's "data, paper, records, or any other documents." A person who captures, by taking, and removes data or information and uses it in a non-speech manner (e.g., by reading it, acting on its information, etc.) falls within this subsection, and the First Amendment would be of no concern. To succeed on a facial challenge, Plaintiffs must demonstrate that there are "no set of circumstances" in which subsection (b)(1) can be validly applied or that it lacks any plainly legitimate sweep. *See Educ. Media Co.*, 731 F.3d at 298 n.5.[8] Plaintiffs cannot do so here. Therefore, their First Amendment challenge to (b)(1) can only be brought as-applied to their particular circumstances.

ii. Subsections (b)(2) and (b)(3)

Subsections (b)(2) and (b)(3) both create liability for individuals who, in some form, record images. Subsection (b)(2) describes an act that exceeds a person's authority, in relevant part, as "record[ing] images or sound occurring within an employer's premises." N.C. Gen. Stat. § 99A-2(b)(2). Subsection (b)(3) defines exceeding one's authority as placing an unattended camera or surveillance device on an employer's premises and "using that device to record images or data." *Id.* § 99A-2(b)(3). As discussed above, recording is protected speech, and these provisions will proceed to the next step of the First

[8] Plaintiffs may also raise facial challenges to a statute by showing that is it overbroad. A separate overbreadth analysis is set out in Part B.5 below.

Amendment analysis. *Food Lion* does not immunize these subsections because, unlike the claims in that case, these subsections expressly single out speech. They are not generally applicable laws and will be reviewed with the appropriate level of scrutiny.

iii. Subsection (b)(5)

Subsection (b)(5) creates liability for acts that "substantially interfere[ ] with the ownership or possession of real property." N.C. Gen. Stat. § 99A-2(b)(5). Plaintiffs argue that because the Act "is aimed at stopping communications, particularly communications to 'the media,' and especially communications by 'private special interest organizations'" like theirs, subsection (b)(5) should be read to restrict both the gathering of information and use of that information. (Doc. 99 at 11.) In essence, Plaintiffs argue, because subsections (b)(1), (b)(2), and (b)(3) are all directly aimed at speech and subsection (b)(5) has been categorized as a catch-all provision, (b)(5) must be understood to cover any speech that is not encompassed by (b)(1) through (3). (Doc. 114 at 17.) Defendants argue that this ignores the plain reading of the statute, citing *State v. Beck*, 359 N.C. 611, 614 S.E.2d 274, 277 (N.C. 2005), for the proposition that "[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." (Doc. 115 at 12.) They further argue that subsection (b)(5) is directed at conduct as opposed to speech, again relying on *Rumsfeld*. 547 U.S. at 60, 126 S.Ct. 1297. Intervenor describes

subsection (b)(5) as a catch-all provision consistent with *Food Lion*'s trespass holding. (Doc. 110 at 17.)

"[U]nless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language . . . ." *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004) (citation and internal quotation marks omitted). In contrast to previous subsections which specifically describe prohibited speech acts, subsection (b)(5) regulates conduct, prohibiting substantial interference. Speech is not singled out. Facially, the law applies to speech and nonspeech in a neutral manner. Moreover, as with subsection (b)(1), Plaintiffs fail to show that there are no set of circumstances in which (b)(5) can be validly applied. All sorts of non-speech acts can "substantially interfere[ ] with the ownership or possession of real property," such as erecting a barrier or opening a gate to let livestock out. Plaintiffs also fail to show that subsection (b)(5) lacks any plainly legitimate sweep. *See Educ. Media Co.*, 731 F.3d at 298 n.5. Plaintiffs' First Amendment challenge to subsection (b)(5) will therefore proceed on an as-applied basis.

b. Level of Scrutiny

The next step of the First Amendment analysis is to determine the proper level of scrutiny to apply to each subsection. Plaintiffs argue that the Act restricts speech based on its content and purpose, and even more significantly, the viewpoint expressed. They argue that the Act's exceptions in subsection (e) "define its character, and establish it

is content-based" because it restricts speech based on its function and shows that the Act is meant to punish those who wish to disclose information outside of specific government-approved channels. (Doc. 114 at 20.) As to subsections (b)(1) and (b)(2), Plaintiffs argue that "[a] court could not determine whether a communication was 'disloyal' except by knowing what words were spoken" and that " 'breaching the duty of loyalty' depends on the specifics of what is communicated." (*Id.* at 22.) Defendants argue that the Act is content-neutral because it merely regulates "the manner in which information is obtained" and liability "does not depend on the type of information obtained." (Doc. 115 at 13-14.) Intervenor argues that the Act is content-neutral because "it applies to all impermissibly obtained information, all unauthorized recordings made by unattended electronic surveillance devices, and all recordings used to breach the employee's duty of loyalty, regardless of the content of the information or the videos." (Doc. 116 at 20.) Both Defendants and Intervenor contend that because the Act does not single out any subset of messages and applies equally to all uses of information and all recordings used to breach an employee's duty of loyalty, it is viewpoint-neutral. (Docs. 115 at 14; 116 at 18.)

Restrictions on speech are subject to either strict scrutiny or intermediate scrutiny under the First Amendment. *Turner Broad. Sys.*, 512 U.S. at 640-41, 114 S.Ct. 2445. Both content- and viewpoint-based restrictions are subject to strict scrutiny. *Ysursa v.*

Pocatello Educ. Ass'n., 555 U.S. 353, 358, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009) ("Restrictions on speech based on its content are presumptively invalid and subject to strict scrutiny.") (internal quotation marks omitted) (citing *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007); *R.A.V.*, 505 U.S. at 382, 112 S.Ct. 2538). Content-based restrictions on speech "target speech based on its communicative content" and are presumptively invalid. *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 2226, 192 L.Ed.2d 236 (2015). Before a law can be deemed content-neutral, the court must first consider whether the law is content-based on its face, and then consider whether the purpose and justification for the law are content-based. *Id.* at 2228. In describing this two-pronged inquiry, the Supreme Court stated:

> Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose . . . . Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message [the speech] conveys.

Id. at 2227 (internal citation and quotation marks omitted). *See Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 165-67 (4th Cir. 2019), *cert. granted sub nom. Barr v. Am. Ass'n of Political Consultants, Inc.*, --- U.S. ---, 140 S. Ct. 812, 205 L.Ed.2d 449 (2020) (applying *Reed*'s two-pronged inquiry). In the same vein, viewpoint-based restrictions on speech are "'an egregious form of content discrimination,' and '[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.'" *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 443 (4th Cir. 2013) (quoting *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)).

While content- or viewpoint-based restrictions on speech are subject to strict scrutiny, a law that is "neither content nor viewpoint based . . . need not be analyzed under strict scrutiny." *McCullen v. Coakley*, 573 U.S. 464, 485, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014). But a content-neutral law does not escape scrutiny altogether. *Am. Ass'n of Political Consultants,* 923 F.3d at 165. Content- and viewpoint-neutral laws are reviewed under an intermediate scrutiny standard. *Turner Broad. Sys.*, 512 U.S. at 642, 114 S.Ct. 2445.

i. Subsections (b)(1) and (b)(2)

As discussed above, subsection (b)(1) creates liability for an employee who "captures or removes [an] employer's data, paper, records, or any other

documents and uses the information to breach the person's duty of loyalty to the employer." N.C. Gen. Stat. § 99A-2(b)(1). Without deciding whether this subsection is a law of general application, the court found that (b)(1) as applied to Plaintiffs has more than an incidental impact on speech, and as such is subject to at least intermediate scrutiny. *Capital Assoc. Indus.*, 922 F.3d at 209 ("[I]ntermediate scrutiny is the appropriate standard for reviewing conduct regulations that incidentally impact speech . . . ."). However, subsections (b)(1) and (b)(2) create liability for employees who use information or recordings to "breach [their] duty of loyalty to [their] employer." N.C. Gen. Stat. § 99A-2(b)(1) and (b)(2). As to the content- and viewpoint- analysis, Defendants' and Intervenor's arguments, as well as those of Plaintiffs, primarily concern whether reviewing the content of the recording is necessary. But this is not the only way a law can be content-based. Here, liability under these subsections is triggered by the purpose of speech, that is, to breach a duty of loyalty. While a more subtle form of content-based distinction, regulating speech based on its function or purpose is still a content-based restriction on speech. *Reed*, 135 S. Ct. at 2227.

Defendants' argument that the Act regulates conduct as opposed to speech was addressed and rejected above. Defendants further argue that the Act allows anyone to use the recordings gathered from an employer's premises so long as they are not used to breach a duty of loyalty. (Doc. 115 at 13.) But the condition imposed is based on the purpose of the

speech. Intervenor argues that "[w]hile the subsection (b)(2) prohibition applies only when the employee uses the video to breach his duty of loyalty, that does not require an examination of the content of the video but rather of the *purpose* for which the recording is used." (Doc. 110 at 22) (emphasis added). The same can be said for subsection (b)(1).

The parties take differing views on whether the content of the speech must be reviewed to determine whether it breaches a duty of loyalty. But because the court finds that these provisions of the Act regulate speech by its purpose, the court need not address this argument. Subsections (b)(1) and (b)(2) are content-based and will be subject to strict scrutiny. *See Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 879 F.3d 101 (4th Cir. 2018) (applying heightened scrutiny to an ordinance challenged as-applied); *Wash. Post v. McManus*, 355 F. Supp. 3d 272 (D. Md.), *aff'd*, 944 F.3d 506 (4th Cir. 2019) (applying strict scrutiny to a Maryland statute challenged on a First Amendment as-applied basis).

ii. Subsection (b)(3)

Subsection (b)(3) prohibits placing an unattended camera or recording device on an employer's premises and "using that device to record images or data." N.C. Gen. Stat. § 99A-2(b)(3). Plaintiffs' argument that subsection (b)(3) is content-based rests on their belief that subsection (e) of the Act establishes that the entire law is content-based. (Doc. 114 at 20.) Defendants argue that subsection (b)(3)

"applies to all unauthorized recordings made in nonpublic areas of an owner's premises" and that the content of the recordings is "irrelevant and immaterial." (Doc. 115 at 14.) Intervenor agrees, arguing that (b)(3) is "a blanket prohibition that applies without the need to examine the message of the video." (Doc. 116 at 20.)

A review of the provision shows that it is neither content-nor viewpoint-based and is thus subject to intermediate scrutiny. Liability for using an unattended camera to record images or data does not define the regulated speech by subject matter. The Act does not prohibit the recording of agricultural facilities or research labs, but instead prohibits all unauthorized recording. Similarly, the regulated speech is not defined by its function or purpose. And as Defendants and Intervenor argue, there is no need to review the recording or consider its contents to find that someone has engaged in what the subsection proscribes. Subsection (b)(3) could just as easily be used to prohibit the recording of an employee birthday gathering as it could to prohibit the recording of practices at an agricultural facility. The content and viewpoint of the recordings captured by unattended cameras and recording devices play no role in the applications of subsection (b)(3).

Because subsection (b)(3) is content- and viewpoint-neutral, it is subject to intermediate scrutiny.

iii. Subsection (b)(5)

As discussed above, subsection (b)(5) prohibits "act[s] that substantially interfere[ ] with the ownership or possession of real property." N.C. Gen. Stat. § 99A-2(b)(5). It does not target speech. As applied to Plaintiffs, however, it necessarily ensnares First Amendment protected activity because the act that "substantially interferes" with the ownership or possession of real property is the recording and image capture itself. In this respect, it differs from the torts in *Food Lion*.[9] In this context, subsection (b)(5) is subject to intermediate scrutiny. *See Capital Assoc. Indus.*, 922 F.3d at 209 ("[I]ntermediate scrutiny is the appropriate standard for reviewing conduct regulations that incidentally impact speech . . . . For laws with only an incidental impact on speech, intermediate scrutiny strikes the appropriate balance between the states' police powers and individual rights."); *see also Ross v. Early*, 746 F.3d 546, 554 (4th Cir. 2014) (applying intermediate scrutiny where "the parties . . . stipulated that the Policy [designating areas where protests could be made] is 'generally applicable'").

c. Application of Scrutiny

As noted above, subsections (b)(1) and (b)(2) are subject to strict scrutiny; and subsections (b)(3), and

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[9] In *Food Lion*, the trespass occurred independent of the recording, and the breach of duty of loyalty required conduct adverse to the employer's interests. Subsection (b)(5), in contrast, could be breached merely by making the recording.

(b)(5) are subject to intermediate scrutiny. Throughout their briefing, Defendants and Intervenor failed to defend the Act on strict scrutiny grounds, instead arguing that at best intermediate scrutiny applies. (Docs. 115 at 14; 116 at 22.) Thus, they have failed to carry their burden as to subsections (b)(1) and (b)(2). However, as detailed below, even under intermediate scrutiny each of the challenged provisions fails.

i. Strict Scrutiny

As content-based restrictions on speech, subsections (b)(1) and (b)(2) require review under the exacting strict scrutiny standard. As to Plaintiffs' as-applied challenge to subsection (b)(1), the court has no detailed account of how, or even whether, the Property Protection Act would be enforced against Plaintiffs, because the Act was challenged prior to enforcement. *Educ. Media Co.*, 731 F.3d at 298 n.5. (citation and internal quotation marks omitted) ("[A]n as-applied challenge is based on a developed factual record and the application of a statute . . . ."). This court is limited to a largely undeveloped record regarding enforcement. However, Plaintiffs have "alleged an intention to engage in . . . conduct arguably affected with a constitutional interest, a credible threat that the Act will be enforced against them if they proceed with their plans, and that they have refrained from proceeding for fear of being subjected to the [Act's] severe civil remedies." *PETA*, 737 F. App'x at 130 (citation and internal quotation marks omitted). The court will look to Plaintiffs'

declarations of the acts they would engage in if not for their fear of being subjected to the Act. (Docs. 100-1, 100-2, 101-1, 101-2, 101-3, 101-4, 101-5, 101-6.) *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 n.7, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010) (finding that in the absence of exhibits or other evidence to ground the analysis of a pre-enforcement as-applied challenge, the court would rely on the party's general claims). Specifically, Plaintiff ALDF has detailed its use of photographs during undercover investigations (Doc. 100-2 at 4), and both PETA and ALDF have asserted their intention to disseminate the information they collect during their undercover investigations (Docs. 100-1 at 9-10; 100-2 at 8-9). Rather than argue that the Act impacts differently situated Plaintiffs in differing ways, Plaintiffs ASPCA, CFS, Farm Forward, Farm Sanctuary, FWW, and GAP, who claim to merely disseminate the information that others obtain from such investigations, have not averred an intention to engage in acts prohibited by subsection (b)(1). Consequently, they have not articulated a basis for challenging this provision as-applied.

To survive strict scrutiny, the State bears the burden of proving that a law's restriction on speech "furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340, 130 S.Ct. 876 (citation and internal quotation marks omitted); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (placing the burden on the government). To be narrowly tailored, a law must be

"the least restrictive means of achieving a compelling state interest." *McCullen*, 573 U.S. at 478, 134 S.Ct. 2518 (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000)). "Moreover, the restriction cannot be overinclusive by unnecessarily circumscrib[ing] protected expression, or underinclusive by leav[ing] appreciable damage to [the government's] interest unprohibited." *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (internal citations and quotation marks omitted) (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 775, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (restriction cannot be overinclusive); *Reed*, 135 S. Ct. at 2232 (restriction cannot be underinclusive)).

Defendants and Intervenor have not put forward any compelling interest, and in fact did not attempt to defend the Act under a strict scrutiny analysis. (Doc. 115 at 14; Doc. 116 at 22.) While strict scrutiny must not be "strict in theory, but fatal in fact," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (citation omitted), where the government posits no compelling interest and does not attempt to show that a law is narrowly tailored, as is its burden, it cannot succeed.

Defendants and Intervenor have not shown that subsection (b)(1) or (b)(2) are narrowly tailored to further a compelling state interest. These provisions are therefore unconstitutional under the First Amendment to the United States Constitution.

ii. Intermediate Scrutiny

The remaining subsections, (b)(3) and (b)(5), are subject to intermediate scrutiny. Plaintiffs argue that these provisions fail because they are under-inclusive and because intermediate scrutiny requires "actual evidence supporting [the] assertion that a speech restriction does not burden substantially more speech than necessary." (Doc. 114 at 25 (quoting *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015)).) They note that both the legislative record as well as Defendants' and Intervenor's briefs are devoid of evidence showing the Act is narrowly tailored. Further still, they argue, the State must prove that it tried unsuccessfully to achieve its stated interest through other methods, such as the enforcement of existing laws, which was not done. (*Id.* at 26.) Finally, Plaintiffs argue there is no scienter requirement connected with the prohibited speech, which is the use of information or a recording. (*Id.* at 27.) Defendants disagree, arguing that the Act's express purpose is to protect property rights, a legitimate interest, and that it is narrowly tailored to further that interest. In support, they offer two points: first, the inclusion of a scienter requirement, which they argue "substantially limits [the Act's] scope and application;" and second, the contention that the Act "only regulates specific instances of conduct that result in a legally cognizable harm to the property owner." (Doc. 115 at 15.) They, and Intervenor, further argue that the Act leaves open ample alternative channels of communication. (*Id.*; Doc. 116 at 23.)

Plaintiffs' challenge to subsection (b)(5) is proceeding as-applied. Although the record is not as robust as in an enforcement action, there is ample evidence in the form of sworn declarations discussing the undercover investigations and associated acts that Plaintiffs would engage in but for fear of liability under the Property Protection Act. (Docs. 100-1, 100-2, 101-1, 101-2, 101-3, 101-4, 101-5, 101-6.) While all Plaintiffs adopt the same arguments, the court will consider each Plaintiff's specific declarations in construing the as-applied challenge. The acts that Plaintiffs PETA and ALDF have disclosed include obtaining employment with various facilities and laboratories and disclosing the lawful and unlawful actions of their employers and co-workers to other entities who release that information. (Docs. 100-1 at 9-10; 100-2 at 8-9.) In construing the as-applied challenge to subsection (b)(5), these are the prohibited "act[s]." As to Plaintiffs ASPCA, CFS, Farm Forward, Farm Sanctuary, FWW, and GAP, they have not alleged any intention to gain access to the nonpublic areas of an employer's premises, but instead have indicated their desire to use the information acquired by PETA and ALDF. The challenge to (b)(5) is proceeding as-applied, but given the declarations of these Plaintiffs, their actions do not fall within the subsection's prohibitions.

Under intermediate scrutiny, the State bears the burden of proving that the law is "narrowly tailored to serve a significant government interest and leave[s] open ample alternative channels of communication." *Reynolds*, 779 F.3d at 225-26

(quoting *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013), *abrogated on other grounds by Reed*, 135 S. Ct. at 2228-29). A law is narrowly tailored if it "does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 226 (quoting *McCullen*, 573 U.S. at 486, 134 S.Ct. 2518). The law cannot be overinclusive and "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). However, "so long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 109 S.Ct. 2746. Defendants and Intervenor argue that the purpose of the Property Protection Act is to protect property rights, and they cite to statements made by the Act's sponsors while debating the legislation.[10] (Doc. 121 at 16-17.)

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[10] Statements from legislators include: "[P]roperty protections [sic] is a serious issue that North Carolina companies of all sizes and all industries face on a daily basis" (Doc. 107-5 at 3); "[C]urrently, North Carolina's weak property protection laws put businesses as well as the privacy of their customers at serious risk" (*id.*); "North Carolina employers need stronger measures to protect their data and merchandise against corporate espionage, organized retail theft, and internal data breaches" (*id.*); the Property Protection Act "codifies and strengthens North Carolina trespass law to better protect

The Supreme Court in *McCullen* recognized that protecting property rights is a legitimate government interest. 573 U.S. at 486-87, 134 S.Ct. 2518 (citation and internal quotation marks omitted) ("We have, moreover, previously recognized the legitimacy of the government's interest[ ] in . . . protecting property rights . . . ."). And the government need not typically provide evidence of it. *Billups*, 961 F.3d at 685. Defendants and Intervenor have therefore satisfied that requirement.

That does not end the inquiry, however. Defendants and Intervenor "must demonstrate the [Act] 'materially advances an important or substantial interest by redressing past harms or preventing future ones.'" *Ross*, 746 F.3d at 556 (quoting *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 356 (4th Cir. 2001)). While a "panoply of empirical evidence" is not required, Defendants and Intervenor "must nonetheless make some evidentiary showing that the recited harms are real, not merely conjectural, and that the [Act] alleviate[s] these harms in a direct and material way." *Id.* (internal quotation marks omitted) (quoting *Satellite Broad.*, 275 F.3d at 356). Further, to demonstrate narrow tailoring, they must present "actual evidence supporting [their] assertion that [the] speech restriction[s] [do] not burden substantially more speech than necessary." *Reynolds*, 779 F.3d at 228-29. Beyond that, Defendants and Intervenor must "*prove* that [the government] actually *tried* other

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property owners' rights" (*id.* at 3-4).

methods to address the problem." *Id.* at 231 (emphasis in original). *See McCullen*, 573 U.S. at 496, 134 S.Ct. 2518 ("Given the vital First Amendment interests at stake, it is not enough for [the Government] simply to say that other approaches have not worked."). "[T]he government must *show* [ ] that it seriously undertook to address the problem with less intrusive tools readily available to it, and must *demonstrate* that [such] alternative measures . . . would fail to achieve the government's interests, not simply that the chosen route is easier." *Reynolds*, 779 F.3d at 231-32 (emphasis in original) (internal citations and quotation marks omitted).

Defendants and Intervenor point to legislators' floor statements discussing the Act. (Doc. 121 at 16.) They argue that legislators "spoke about the need for the law and their efforts to narrowly tailor it so that it would not burden more speech than necessary." (*Id.*) Statements made from the floor during the April 22, 2015 debate, and partially cited by Defendants and Intervenor, include the following:

> So first, why is this bill needed? Well, property protections [sic] is a serious issue that North Carolina companies of all sizes and all industries face on a daily basis . . . . North Carolina employers need stronger measures to protect their data and merchandise against corporate espionage, organized retail theft, and internal data breaches. And this act puts greater protection in place to safeguard

> businesses' property from unlawful access and provide appropriate recourse against individuals that engage in unauthorized activities in non-public areas of business. So what's the bill really do? Well, first of all, it codifies and strengthens North Carolina trespass law to better protect property owners' rights. And it puts teeth into North Carolina trespass law by providing up to $5000 per day penalty for a violation.[11]

(Doc. 107-5 at 3-4.)

These statements do in fact identify a problem and set forth a solution to curtail it in the future. However, the evidence Defendants and Intervenor cite does not rise to the level dictated by *Ross*, particularly that the "recited harms are real, not merely conjectural, and that the [Act] alleviate[s] these harms in a direct and material way." 746 F.3d at 556 (citation and internal quotation marks omitted). And while the statements above suggest that the Act strengthens North Carolina trespass law, there is no indication in the record that property protection under North Carolina's existing trespass law was unsuccessful. Without engaging in a review of all North Carolina statutes available to address property protection, obvious candidates are North Carolina General Statute § 99A-1, entitled "Recovery

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[11] The Act actually provides $5,000 per day in exemplary damages, not "up to" $5,000. N.C. Gen. Stat. § 99A-2(d)(4).

of damages for interference with property rights,"[12] and the North Carolina tort of trespass (upheld in Food Lion, where videotaping was involved)[13] as

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[12] N.C. Gen. Stat. § 99A-1 provides:

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

> Notwithstanding any other provisions of the General Statutes of North Carolina, when personal property is wrongfully taken and carried away from the owner or person in lawful possession of such property without his consent and with the intent to permanently deprive him of the use, possession and enjoyment of said property, a right of action arises for recovery of actual and punitive damages from any person who has or has had, possession of said property knowing the property to be stolen.
>
> An agent having possession, actual or constructive, of property lawfully owned by his principal, shall have a right of action in behalf of his principal for any unlawful interference with that possession by a third person.
>
> In cases of bailments where the possession is in the bailee, a trespass committed during the existence of the bailment shall give a right of action to the bailee for the interference with his special property and a concurrent right of action to the bailor for the interference with his general property.
>
> Any abuse of, or damage done to, the personal property of another or one who is in possession thereof, unlawfully, is a trespass for which damages may be recovered.

[13] "The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass." *Keyzer v. Amerlink, Ltd.*, 173 N.C.App. 284, 618 S.E.2d 768, 772 (2005) (citation and internal quotation marks omitted). A trespasser is liable for all

examples of existing laws that Defendants and Intervenor have not shown to be ineffective in protecting property rights.

While Defendants and Intervenor have identified a legitimate governmental interest in protecting private property, they have failed to demonstrate through evidence that the Property Protection Act is narrowly tailored to further that interest or that existing laws, such as trespass, are insufficient to address the problem. *See Billups*, 961 F.3d at 690 (finding city failed to provide evidence before enacting ordinance that it attempted less restrictive means). Because subsections (b)(3) and (b)(5) are not narrowly tailored, the court "need not consider whether the Act leaves open ample alternative channels of communication." *McCullen*, 573 U.S. at 496 n.9, 134 S.Ct. 2518. And because subsections (b)(1) and (b)(2) suffer from the same lack of showing, were they similarly subject to intermediate scrutiny they would suffer the same fate.

* * *

In summary, Defendants and Intervenor have not met their burden under the strict scrutiny analysis as to subsections (b)(1) and (b)(2) of the Act, nor have they met it under the intermediate scrutiny analysis as to any of the challenged subsections. Given the

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damages proximately caused by his or her wrongful entry. *Smith v. VonCannon*, 283 N.C. 656, 197 S.E.2d 524, 528 (N.C. 1973). As held in *Food Lion*, the making of surreptitious videotapes would not provide a defense under the First Amendment.

plans of Plaintiffs PETA and ALDF to conduct undercover investigations of potential employers, the prohibitions in subsections (b)(1) and (b)(5) are unconstitutional as applied to the speech they regularly engage in, as detailed in their sworn declarations. As to subsections (b)(2) and (b)(3), these provisions will always target speech, and speech will always be the activity that triggers liability. No set of circumstances changes the fact that these subsections, as written, are unconstitutional under the First Amendment, and as such, are facially invalid. Where a statute is unconstitutional in every scenario, the appropriate remedy is to strike down the law on its face. *See Citizens United*, 558 U.S. at 331, 130 S.Ct. 876 (finding that the distinction between facial and as-applied challenges informs only the choice of remedy and not what must be alleged in the complaint).

The court therefore finds that subsections (b)(1) and (b)(5) of the Act are unconstitutional as-applied and subsections (b)(2) and (b)(3) are unconstitutional both facially and as-applied. *See Edwards v. Dist. of Columbia*, 755 F.3d 996, 1009 (D.C. Cir. 2014) (finding a law that lacked narrow tailoring was not unique to the challengers and invalidating it both facially and as-applied). Because subsections (b)(2) and (b)(3) do not survive a facial challenge, Plaintiffs' remaining challenges are moot and need not be addressed. However, Plaintiffs also raise a facial challenge to subsections (b)(1) and (b)(5) on both overbreadth and Fourteenth Amendment grounds, and those challenges will be addressed below.

5. Overbreadth Analysis

Plaintiffs further challenge subsections (b)(1) and (b)(5) facially as unconstitutionally overbroad. They argue that the Act "reaches numerous other First Amendment protected activities in addition to Plaintiffs' undercover investigations," such as the reporting of crimes. (Doc. 114 at 27-29.) They further argue that there is a realistic danger that the Act will compromise the First Amendment rights of parties not before the court and that "[b]alancing the Law's 'legitimate' applications against its unconstitutional ones also tilts decidedly in Plaintiffs' favor." (*Id.* at 29.) Defendants argue that Plaintiffs fail to identify the alleged variety of First Amendment protected activity that the Act penalizes, but instead "merely offer a couple of extreme hypothetical situations in which they theorize someone could be found liable under the statute." (Doc. 115 at 15-16.) They contend that the Act can be applied in "many ways that are constitutional—including many applications that do not involve protected speech at all." (*Id.* at 16.) Further, Defendants assert that "Plaintiffs cannot meet their burden of demonstrating 'a substantial number' of unconstitutional applications, both 'in an absolute sense' and 'relative to the statutes plainly legitimate sweep.'" (*Id.* at 18 (citing *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)).)

The overbreadth doctrine allows litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial

prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). "[A] plaintiff asserting a facial challenge may . . . prevail if he or she show[s] that the law is overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Educ. Media Co.*, 731 F.3d at 298 n.5 (citation and internal quotation marks omitted). If a plaintiff makes this showing, then the law is "invalid 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" *Doe v. Cooper*, 842 F.3d 833, 845 (4th Cir. 2016) (quoting *Virginia v. Hicks*, 539 U.S. 113, 118-19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003)). "Although substantial overbreadth is not readily reduced to a mathematical formula, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.* (internal quotation marks omitted) (citing *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800–01, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). "The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Williams*, 553 U.S. at 303, 128 S.Ct. 1830 (quoting *Taxpayers for Vincent*, 466 U.S. at 800, 104 S.Ct. 2118).

"Facial challenges are disfavored," *Grange*, 552 U.S. at 450, 128 S.Ct. 1184, and "[d]eclaring a statute unconstitutionally overbroad 'is, manifestly, strong medicine,' and should be 'employed . . . sparingly and only as a last resort.'" *Am. Entertainers, LLC v. City of Rocky Mount*, 888 F.3d 707, 715 (4th Cir. 2018) (quoting *Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908). Further, "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 553 U.S. at 293, 128 S.Ct. 1830. The court has found subsections (b)(1) and (b)(5) of the Act unconstitutional as applied to Plaintiffs. Where Plaintiffs "capture" an employer's data through image capture or "use" information they have acquired by engaging in protected speech, the First Amendment is implicated and subsection (b)(1) is unconstitutional as to those acts. And the "substantial[ ] interfere[nce]" prohibited in subsection (b)(5) does not extend facially to cover the speech in which Plaintiffs engage. Considering the plainly legitimate sweep of subsections (b)(1) and (b)(5), and given where the statute *does not reach*, the court finds that the Act does not cover a substantial amount of protected activity to render it overbroad.

C. Fourteenth Amendment

Plaintiffs also argue that subsections (b)(1) and (b)(5) are unconstitutionally vague and violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (Doc. 98 at 1-2.) Defendants and Intervenor argue that the Act is not vague and was enacted to protect property rights, not out of

animus for any particular group. (Docs. 115 at 18-24; 116 at 24-27.)

1. Vagueness Analysis

Plaintiffs argue that subsections (b)(1) and (b)(5) fail to provide a person of ordinary intelligence fair notice of what is prohibited, in violation of the Due Process clause of the Fourteenth Amendment. (Doc. 99 at 18.) As to subsection (b)(1), they argue that "duty of loyalty" has no definition and that North Carolina courts only recognize the duty in fiduciary relationships, not the employer-employee relationship contemplated in the Act. (*Id.* at 18-19.) To Plaintiffs, "there is no standard for what conduct falls within subsection[ ] (b)(1) . . . , enabling employers to invoke the provision[ ] for any covered activity they deem disloyal." (*Id.* at 19.) As to subsection (b)(5), which covers activities that "substantially interfere with the ownership or possession" of property, Plaintiffs contend that the Act does not define those terms. Moreover, they argue, subsection (b)(5) does not set forth what type of interference falls within its grasp and does not speak to who determines whether that interference is "substantial." (*Id.*) Defendants and Intervenor argue the Act provides adequate notice of what conduct is prohibited. (Doc. 121 at 19.) They urge that North Carolina courts have given meaning to the phrase "duty of loyalty," but regardless, the applicable test is whether the allegedly vague terms "have an ordinary and common sense meaning." (*Id.*) To that end, they assert that "'duty of loyalty' simply

means that an employee has an obligation not to act in a manner adverse to his employer's interest" and that "'substantially interfere' means to hinder or impede to a great or significant extent." (*Id.* at 20.)

"The void for vagueness doctrine is rooted in the Due Process Clause of the Fifth and Fourteenth Amendments." *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 272 (4th Cir. 2019) (en banc). Laws that "fail[ ] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or [are] so indefinite that [they] encourage[ ] arbitrary and erratic [enforcement]" are void under the Due Process Clause of the Fourteenth Amendment. *Colautti v. Franklin*, 439 U.S. 379, 390, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (internal citations and quotation marks omitted). However, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash v. United States*, 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232 (1913). *See also Doe*, 842 F.3d at 842 ("When applying the constitutional vagueness doctrine, the Supreme Court distinguishes between statutes that 'require[ ] a person to conform his conduct to an imprecise but comprehensible normative standard' and those that specify 'no standard of conduct.'") (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)). Addressing vagueness, the Supreme Court has said "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression

sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Parker v. Levy*, 417 U.S. 733, 752, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (quoting *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)). In addition, while a greater degree of specificity is needed in the First Amendment context, civil statutes require less clarity than those imposing criminal penalties. *Manning*, 930 F.3d at 272. Statutes that impose quasi-criminal penalties, however, are subject to a stricter test for vagueness. *Id.* at 273.

Here, the Property Protection Act is a civil statute that provides, in addition to compensatory damages, a $5,000 per-day penalty for violations as well as an award of attorneys' fees. *Cf. Mobil Oil Corp. v. Att'y Gen. of Va.*, 940 F.2d 73, 75 (4th Cir. 1991) (in pre-enforcement challenge to the Virginia Petroleum Products Franchise Act, noting its "stiff civil remedy" of $2,500 in liquidated damages, actual damages, and attorneys' fees). The less demanding test of vagueness ordinarily accorded a civil statute must therefore take into account the substantial exemplary damages associated with a violation of the Act.

As written, subsection (b)(1) prohibits using gathered information "to breach [one's] duty of loyalty to the employer." N.C. Gen. Stat. § 99A-2(b)(1). Defendants argue that duty of loyalty means "an employee has an obligation not to act in a manner adverse to his employer's interest." (Doc. 121 at 20.)

They also suggest that North Carolina courts have "described the concept generally in several cases." (Doc. 110 at 27.) In *Dalton v. Camp*, the North Carolina Supreme Court intimated that the duty of loyalty exists in the fiduciary context, stating "[a]s for any claim asserted . . . for breach of a duty of loyalty (in an employment-related circumstance) outside the purview of a fiduciary relationship, we note from the outset that: (1) no case cited by plaintiff recognizes or supports the existence of such an independent claim, and (2) no pattern jury instruction exists for any such separate action." 548 S.E.2d at 708. In discussing two cases a litigant relied on, specifically *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C.App. 451, 358 S.E.2d 107 (1987), and *In re Burris*, 263 N.C. 793, 140 S.E.2d 408 (1965) (per curiam), the court stated, "if *McKnight* and *Burris* indeed serve to define an employee's duty of loyalty to his employer, the net effect of their respective holdings is limited to providing an employer with a defense to a claim of wrongful termination." *Dalton*, 548 S.E.2d at 709, 353 N.C. 647. While the existence of an independent cause of action for breach of duty of loyalty was not at issue in *McKnight* and *Burris*, taken together they may define what the duty of loyalty means in an employment context. *See Burris*, 140 S.E.2d at 410, 263 N.C. 793 (stating "[w]here an employee deliberately acquires an interest adverse to his employer, he is disloyal"); *McKnight*, 358 S.E.2d at 109 (stating every employee must "serve his employer faithfully and discharge his duties with reasonable diligence, care and attention"). As the breach of such duty has historically been sufficient to

serve as a defense to a wrongful termination action, it cannot be said to have an historical basis of vagueness.

Subsection (b)(1) is explicit in what is prohibited. Whether the proper definition stems from the common meaning advanced by Defendants or the synthesized definition from the North Carolina state courts, the "duty of loyalty" is what may not be breached. As stated above, "what renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306, 128 S.Ct. 1830. It is clear what fact creates liability under the Act, the breach of the duty of loyalty. Any subsequent difficulties or close calls in deciding whether a breach has in fact occurred does not amount to a vagueness issue. While construing the Act to have one defined meaning might add clarity, "federal courts are without power to adopt a narrowing construction of a *state* statute unless such a construction is reasonable and readily apparent." *Virginia Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 270 (4th Cir. 1998) (emphasis in original) (citation and internal quotation marks omitted). *See also United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971) (stating federal courts "lack jurisdiction authoritatively to construe state legislation"). But the lack of a precise definition of a prohibited act does not render a law void for vagueness. *See United States v. Shrader*, 675 F.3d

300, 310 (4th Cir. 2012) (internal citations and quotation marks omitted) (describing vagueness tests to be "practical rather than hypertechnical . . . and when a statute fails to provide an explicit definition, [courts] may resort to ordinary meaning and common sense, considering whether the statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.").

As the court has noted, subsection (b)(5) does not facially target First Amendment-protected activity. Subsection (b)(5)'s prohibition on "substantial" interference is a matter of degree. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306, 128 S.Ct. 1830. Interference itself is not a term or concept that fails to give fair notice of what is prohibited. Moreover, the subsection requires more—*substantial* interference—with such ownership or possession; mere interference is insufficient. Subsection (b)(5) provides a comprehensive normative standard, regardless of its relative imprecision.

Plaintiffs further argue that the Act does not specify who determines whether the interference is substantial. But this is not an issue of vagueness. The Act establishes a civil remedy against individuals who engage in certain acts that exceed their authority. And while the initial determination

of whether there has been substantial interference is made by the owner of the premises (who may decide whether to sue), it is ultimately a factfinder, whether judge or jury, that will determine whether a particular act satisfies the requirements under the law. On balance, the court concludes that subsection (b)(5) is not facially void for vagueness, as a host of trespass activity could fall within its terms. [14] Further couching the application and aiding in the interpretation of subsection (b)(5) is subsection (a)'s requirement that acts done in excess of one's authority be committed following the intentional accessing of the nonpublic areas of another's premises. This intent requirement will aid Plaintiffs in determining whether their actions fall within the scope of the statute.

In sum, the challenged provisions, subsections (b)(1) and (b)(5), are not impermissibly vague as a facial matter, and Plaintiffs' motion for summary judgment will be denied.

2. Equal Protection Analysis

Plaintiffs challenge the Act on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment. Relying heavily on *United States v. Windsor*, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), they argue that the legislative

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[14] Other laws have broad elements of proof, such as North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, which provides for treble damages and attorneys' fees for "unfair" and "deceptive" conduct.

history and veto statement of the Act make it clear that it was enacted to punish animal rights advocacy organizations. (Doc. 99 at 19.) In Plaintiffs' view, the Act was not necessary, given the laws on the books, and was designed to target organizations like those of Plaintiffs. To support their position that the Act was passed out of animus, Plaintiffs highlight certain statements by its sponsors. Defendants argue that the Act does not violate the Equal Protection Clause because it does not burden a fundamental right, applies equally to all individuals, and is rationally related to a legitimate governmental interest. (Doc. 121 at 20.) In contrast to the statements identified by Plaintiffs, Defendants point to statements by the Act's sponsors indicating a desire to protect private property. (*Id.* at 20-21.) Finally, Defendants argue the text of the Act does not create classifications but instead applies evenhandedly to every individual.

The Equal Protection Clause of the United States Constitution dictates that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *King v. Rubenstein*, 825 F.3d 206, 220 (4th Cir. 2016) (quoting *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001)). The vast majority of Equal Protection challenges are subject to a rational basis review, that is, whether the law is rationally related

to some legitimate government interest. *Manning v. Caldwell*, 900 F.3d 139, 152 (4th Cir. 2018), *rev'd en banc*, 930 F.3d 264 (4th Cir. 2019) (reversed on other grounds). "Only those laws that implicate a fundamental constitutional right or employ a suspect classification—typically some immutable characteristic such as race or sex—receive heightened scrutiny." *Id.* (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.")). However, "[t]he Constitution's guarantee of equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group." *Windsor*, 570 U.S. at 770, 133 S.Ct. 2675 (citation and internal quotation marks omitted). A law motivated by animus or by a desire to harm a politically unpopular group is reviewed under "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring).

Plaintiffs do not suggest they are members of a protected class but instead argue that the Property Protection Act was enacted out of animus toward groups like theirs. But they have failed to show that the Act was passed with animus toward them.

Highlighting statements made by the Act's sponsors sheds light on some of the justifications for the Act, but those same sponsors professed other justifications for the Act wholly unrelated to Plaintiffs. And as it relates to voiding a statute that, on its face, creates no unconstitutional classifications, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [the court] to eschew guesswork." *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). When considering the legislative record before the court, animus and discrimination are not apparent. Furthermore, Defendants are correct that the text of the law matters. *See Romer v. Evans*, 517 U.S. 620, 632-33, 635, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (emphasis added) (finding that the text of an amendment to the Constitution of the State of Colorado imposed "a broad and undifferentiated disability on a *single named group*" and was motivated by animus). Plaintiffs support their argument with reference to Windsor, but unlike in Windsor where the Defense of Marriage Act text, and its name, made it clear that a subset of the population was being targeted, the Act before the court creates no category or disfavored subset of the population. In fact, the ratified bill was entitled "An Act to Protect Property Owners from Damages Resulting from Individuals Acting in Excess of the Scope of Permissible Access and Conduct Granted to Them." (Doc. 99-8.) Just as the Act applies to Plaintiffs' animal rights efforts, subsection (b)(1)

could apply equally to a corporate executive seeking to steal documents from her employer to sell to a competitor, or subsection (b)(5) to an actor who enters another's property and removes or destroys production equipment. Compare the Property Protection Act with the challenged statute in *U. S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 533-34, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), which distinguished between households of related people and households of unrelated people to prevent hippies from participating in food stamp programs. The statute in *Moreno* created statutory classifications which were "clearly irrelevant to the stated purposes of the Act." *Id.* at 534, 93 S.Ct. 2821. In contrast, the Property Protection Act applies equally to all people and all organizations and is rationally related to a legitimate governmental interest. Consequently, Plaintiffs have not shown that the alleged animus motivated the passage of the Act.

As to the Equal Protection Clause challenge to subsections (b)(1) and (b)(5) of the Act, therefore, Plaintiffs' motion for summary judgment will be denied and Defendants' and Intervenor's motions for summary judgment will be granted.

D. Subsection (c)

Plaintiffs challenge N.C. Gen. Stat. § 99A-2(c) as it relates to the unconstitutional provisions addressed above. Subsection (c) creates joint liability for any person who "intentionally directs, assists, compensates, or induces another person to violate"

the Property Protection Act. Plaintiffs' main arguments are that "direct[ing]" and "induc[ing]" directly involve speech (Doc. 99 at 11), and that subsection (c) should be struck down in connection with subsections (b)(1)-(3) and (5). Each Plaintiff adopts the above arguments, although there is a clear distinction between Plaintiffs who wish to conduct undercover investigations, and those who wish to publish the information collected through those investigations. In response, Intervenors argue that Plaintiffs "provide no authority for the proposition that the First Amendment protects individuals who encourage others to violate generally applicable privacy and trespass laws to gather information." (Doc. 116 at 16.)

"[T]he First Amendment poses no bar to the imposition of civil (or criminal) liability for speech acts which the plaintiff (or the prosecution) can establish were undertaken with specific, if not criminal, intent." *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 248 (4th Cir. 1997). If a person is targeted under the Act for intentionally inducing or directing another to violate a valid provision of subsection (b), the First Amendment would not protect them from liability. However, the court has found that subsections (b)(2) and (b)(3) are facially unconstitutional and subsections (b)(1) and (b)(5) are unconstitutional as-applied to Plaintiffs. Where the underlying act cannot form the basis for civil liability, then liability cannot be imposed for "direct[ing], assist[ing], compensat[ing], or induc[ing]" someone to engage in that act. *See*

Champion Pro Consulting Grp., LLC v. Impact Sports Football, LLC, 116 F. Supp. 3d 644, 652, 664 (M.D.N.C. 2015), *aff'd sub nom. Champion Pro Consulting Grp., Inc. v. Impact Sports Football, LLC*, 845 F.3d 104 (4th Cir. 2016) (finding no liability where defendants allegedly induced another to engage in activity that was, itself, lawful). *See also* 54 Causes of Action 2d 603 *Cause of Action for Civil Conspiracy*, § 2 (2012). Therefore, subsection (c) cannot create joint liability for any Plaintiff who encourages or assists either the prohibited acts in subsections (b)(2) and (b)(3), or PETA and ALDF's specific acts prohibited in (b)(1) and (b)(5).

E. Severability

No party has spoken to the severability of the Act, an issue necessarily raised by the challenges. When a court finds that only part of a law is unconstitutional, it may sever the unconstitutional provisions and leave the valid provisions of the law in place. *Leavitt v. Jane L.*, 518 U.S. 137, 139-40, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996). This severability analysis is governed by state law. *Id.* at 139-40, 116 S.Ct. 2068. In North Carolina, the question of severability turns on whether provisions of a statute are "so interrelated and mutually dependent" on others that they "cannot be enforced without reference to another." *Fulton Corp. v. Faulkner*, 345 N.C. 419, 481 S.E.2d 8, 9 (1997). The intent of the state legislature also serves a guiding principle. *Pope v. Easley*, 354 N.C. 544, 556 S.E.2d 265, 268 (2001).

While the existence of a severability clause would be a "clear statement of legislative intent," *Appeal of Springmoor, Inc.*, 348 N.C. 1, 498 S.E.2d 177, 184-85 (1998), its presence is not required for this court to find that the Act can be enforced absent its unconstitutional provisions. Subsections (b)(1) through (b)(5) of the Property Protection Act give a complete account of what acts "exceed[ ] a person's authority to enter the nonpublic areas of another's premises." N.C. Gen. Stat. § 99A-2(b). This disjunctive list of discrete acts indicates that the legislature intended that each separate provision be enforceable on its own, if implicated, regardless of the neighboring provisions. As such, subsections (b)(1), (b)(2), (b)(3), and (b)(5) operate independently and can be enforced without reference to another. The court finds, consistent with North Carolina state law, that the challenged provisions of the Property Protection Act were intended to be severable and they are not mutually dependent on one another. The law is severable, and the facially unconstitutional provisions of subsections (b)(2) and (b)(3) will be severed from the Act.[15]

III. Conclusion

For the reasons set forth above, the court finds that subsections (b)(1) and (b)(5) of the Property Protection Act are unconstitutional as applied to

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[15] This conclusion is consistent with the fact that Plaintiffs did not challenge other portions of the Act.

Plaintiffs and subsections (b)(2) and (b)(3) are unconstitutional both facially and as applied.

IT IS THEREFORE ORDERED that Plaintiffs' motion for summary judgment (Doc. 98) is GRANTED IN PART and DENIED IN PART and Defendants' and Intervenor's motions for summary judgment (Docs. 107, 109) are GRANTED IN PART and DENIED IN PART as follows:

As to N.C. Gen. Stat. §§ 99A-2(b)(1) and (b)(5), Plaintiffs' motion for summary judgment based on their First Amendment challenge (Count I) is GRANTED and the law is declared unconstitutional as applied to them in their exercise of speech. Defendants, as well as their officers, agents, employees, attorneys, and all other persons in active concert or participation with them, are therefore permanently enjoined from attempting to enforce subsections (b)(1) and (b)(5) against Plaintiffs in their stated exercise of speech. Plaintiffs' motion is otherwise DENIED as to these subsections. Defendants' and Intervenor's motion for summary judgment is GRANTED as to any facial challenge to these subsections but is otherwise DENIED.

As to N.C. Gen. Stat. §§ 99A-2(b)(2) and (b)(3), Plaintiffs' motion for summary judgment based on their First Amendment challenge (Count I) is GRANTED and the law is declared unconstitutional both facially and as applied to them in their exercise of speech. Subsections (b)(2) and (b)(3) are therefore struck down as unconstitutional. Defendants, as well as their officers, agents, employees, attorneys, and all

other persons in active concert or participation with them, are permanently enjoined from attempting to enforce subsections (b)(2) and (b)(3) against Plaintiffs. Defendants' and Intervenor's motions for summary judgment on Plaintiffs' facial challenge are DENIED. The parties' remaining challenges are MOOT.

A judgment in conformance with this Memorandum Opinion and Order will be issued.

/s/ Thomas D. Schroeder
United States District Judge

June 12, 2020

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

North Carolina General Statutes

Chapter 99A

Civil Remedies for Interference with Property

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

(a) Any person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained. For the purposes of this section, "nonpublic areas" shall mean those areas not accessible to or not intended to be accessed by the general public.

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

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

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

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

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

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

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

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

(1) Equitable relief.

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

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

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

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

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

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