No. 22-1150

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The North Carolina Property Protection Act combines longstanding property and tort rules: It prohibits double-agent employees from stealing or secretly recording in the nonpublic areas of their employer's property and then using the information they gather to harm the employer. A divided Fourth Circuit panel held that the Act is unconstitutional, but only when the double-agent employee has a "newsgathering" aim. Pet. App. 49a, 55a. This decision implicates a circuit conflict over whether, and in what circumstances, unauthorized recording on private property is protected speech. Pet. 12-14. And it arises against the backdrop of broader confusion over the rules that States must follow when they seek to reinforce private property rights consistent with the First Amendment. Pet. 14-16. As a coalition of 16 States rightly notes, this uncertainty "makes drafting statutes more difficult for States, increases litigation, and leads to inconsistent results across the country." Utah Amicus Br. 21. This Court's review would therefore provide sorely needed guidance to the States across the nation that actively legislate in this area of the law.

Respondents argue that the lower courts are in "complete harmony" on the contested issues here. BIO 16. That claim is difficult to square with the decision below, in which the majority and dissent both acknowledged that the panel opinion creates a circuit conflict. Pet. App. 45a n.9 (majority opinion); Pet. App. 65a (Rushing, J., dissenting).

Respondents attempt to sidestep this conflict by citing vehicle problems, but their arguments only bolster the case for this Court's review. They confirm that this case provides the Court with an appropriately discrete and straightforward context in which to address the important and recurring question presented here.

On the merits, Respondents claim that the Act "targets protected speech," BIO 25, and therefore triggers heightened First Amendment scrutiny. But this bare assertion fails to grapple with the actual text of the relevant statutory provisions. Because any restriction on speech is incidental to the Act's legitimate tort-based aims, heightened scrutiny does not apply. Indeed, Respondents cannot show that trespassing and breaching a duty of loyalty—even when those torts might be accomplished in part through speech—have ever received First Amendment protection.

Thus, Respondents are wrong to claim that the Court would be required to create "a new exception to the First Amendment" to uphold the Act. BIO 21. This Court "has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 568 (1972). Rather, the "fundamental" right to exclude has long been understood to allow property owners to limit speech on their private property. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). States may therefore give employers a civil cause of action

against double-agent employees who steal documents from or secretly record their employer's premises and then use that information to harm their employer.

Because the Fourth Circuit's contrary decision limits the authority of States to protect private property rights while implicating a circuit conflict, this Court should grant the petition.

ARGUMENT

I. The Circuit Split Is Clear And Acknowledged.

Respondents argue that there is no split between the Fourth Circuit's decision below and the Ninth Circuit's decision in *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). BIO 12-13. They are incorrect.

Respondents concede that in *Wasden*, the Ninth Circuit held that *all* recordings are constitutionally protected speech. BIO 12. Here, by contrast, the majority limited its constitutional ruling to recordings made with the "core aim" of gathering "newsworthy content." Pet. App. 45a n.9. That carveout encompasses only a subset of the recordings that the Ninth Circuit in *Wasden* held were protected. *See* Pet. App. 45a n.9.

In fact, all three members of the panel below openly acknowledged their disagreement with *Wasden*. The majority expressly declined to follow the Ninth Circuit's "expansive ruling," observing that *Wasden* "go[es] further" than its opinion. Pet. App. 45a n.9. And in her dissent, Judge Rushing agreed that the majority "rightly rejects the Ninth Circuit's

decision in *Animal Legal Defense Fund v. Wasden*." Pet. App. 65a. But Judge Rushing would have departed from the Ninth Circuit even further. In her view, audio-visual recordings are not constitutionally protected speech when they take place on private property without the owner's consent. Pet. App. 64a-65a. Respondents are therefore incorrect to claim that her dissent stands for the proposition that "recording matters of public interest" generally receives First Amendment protection. BIO 11. To the contrary, that is the question on which both the majority and the dissent below acknowledged a circuit split.

Respondents argue that the Ninth Circuit's recent decision in *Project Veritas v. Schmidt*, 72 F.4th 1043 (9th Cir. 2023), confirms the lack of a circuit split here. BIO 13. In fact, *Project Veritas* further entrenches the existing split. Unlike the Fourth Circuit below, the Ninth Circuit in *Project Veritas* did not hold that secret recordings are constitutionally protected only when they are made for the purpose of gathering news. Instead, the court confirmed that, under *Wasden*, *all* audio-visual recordings are constitutionally protected speech in the Ninth Circuit, regardless of where or why the recording takes place. *Project Veritas*, 72 F.4th at 1054-55. It is therefore hard to see how Ninth Circuit precedent could possibly be "consistent with" the decision below, as the court in *Project Veritas* claimed. *Id.* at 1055 n.10.

This circuit conflict arises against the backdrop of contradictory messages that the courts of appeals have sent States about how to bolster private property rights without running afoul of the First Amendment.

For example, the circuits have given States differing guidance on whether laws that prohibit unauthorized conduct on private property, including secret recordings, may have an intent-to-harm element. *See* Pet. 14-16. Respondents do not dispute this doctrinal confusion. BIO 22-23. Instead, they argue that it has no "connection" to the issues here. BIO 23. But that claim ignores the question presented. The petition asks whether States may, consistent with the First Amendment, bar employees from using secret recordings and other means to breach a duty of loyalty to their employer. Pet. i. Because the courts of appeals have provided inconsistent guidance on this important question of constitutional law, this Court's review is warranted.

II. Respondents' Vehicle Arguments Only Confirm That Review Is Warranted.

Respondents next claim that this case is a poor vehicle for considering the question presented. But Respondents' vehicle arguments actually show the opposite.

First, Respondents contend that the question presented should percolate further in the lower courts. BIO 24. Yet the question has already percolated extensively. The decision below marks the fourth sharply divided federal appellate decision in the last five years to address how States can appropriately balance private property rights and the First Amendment in this context. *See* Pet. 17 n.4. In fact, just a year ago, some of the *same Respondents* opposed another State's petition for certiorari by pointing to *this case* as an example of why further

percolation was needed. BIO 20, *Kelly v. Animal Legal Def. Fund*, No. 21-760.

Now that this case is ripe for review, Respondents ask the Court to wait even longer, to allow resolution of two more cases "working their way through the lower courts." BIO 24. But as Respondents concede, the district court has already dismissed one of those cases for lack of state action, which has nothing to do with the question presented. BIO 24; *see Animal Legal Def. Fund. v. Peco Foods, Inc.*, No. 19-cv-442, 2023 WL 2743238, at *5-*7 (E.D. Ark. Mar. 31, 2023). No party appealed from that judgment. Thus, that case is not working its way through the lower courts at all.

The other case that Respondents cite is a pending Eighth Circuit appeal involving a free-speech challenge to an Iowa law that bars recording during or after a criminal trespass. BIO 24; *see Animal Legal Def. Fund. v. Reynolds*, No. 22-3464 (8th Cir.). Waiting for that decision would not aid this Court's ultimate review. Unlike the law at issue here, the Iowa law is a criminal statute that can apply to a trespass that takes place on public or private property. *See* Iowa Code §§ 716.7, 727.8A. The Eighth Circuit's decision therefore will not shed further light on the critical question that this case raises: how States may strengthen *private* property rights against tortious conduct without violating the First Amendment. Pet. i. Thus, further percolation is not needed.

Second, Respondents argue that deciding this case would not provide States with meaningful guidance because the Act, unlike some other state laws, does

not criminalize false or misleading speech. BIO 21-23. It is true that the Act provides for only civil remedies. But that feature actually makes this case a better vehicle for defining the appropriate balance between private property rights and the First Amendment. Because this case involves only civil claims, it does not require the Court to confront the additional First Amendment implications of using criminal laws to police false statements. Pet. 18; *cf. United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion).

Respondents' focus on distinguishing the Act from other state laws that expressly prohibit false or misleading speech is also misplaced. After all, the tort of breaching the duty of loyalty often may be accomplished through false or misleading speech by double-agent employees. In fact, Respondents themselves admit that they intend to violate the Act in part through deception and false statements. *See* Pet. App. 77a-78a. Thus, conduct that violates the Act could also violate many other state laws. Any analysis of the Act's First Amendment implications will therefore help inform the constitutionality of other similar state statutes as well. Given the many States that have sought to legislate in this area, States sorely need uniform guidance on how to carry out their historic police powers to protect private property rights while respecting the First Amendment. Pet. 16-17 & nn.3-4.

Third, Respondents suggest that this case is a poor vehicle because the Fourth Circuit's holding is narrow and "measured," as the panel affirmed the district court's order enjoining the Act only as applied to

Respondents. BIO 1. But in so doing, the Fourth Circuit effectively invalidated the Act as applied to an entire category of tortfeasors: those who steal documents or secretly record on private property while having an underlying newsgathering aim. Indeed, that is how the Fourth Circuit itself understood the scope of its opinion. Pet. App. 49a ("Our analysis likely means" that the Act is unconstitutional as applied to "most (if not all) who engage in conduct analogous to PETA's."). A ruling of that scope—invalidating a state statute in an area where many States are actively legislating—is worthy of this Court's review.

III. The Decision Below Is Incorrect.

Respondents also argue that the Court should deny review because the panel's decision is correct. BIO 19-21, 25-31. But Respondents' defense of the panel decision only begs the key question: Respondents assume, rather than show, that the challenged provisions regulate constitutionally protected speech. *See, e.g.*, BIO 1, 25-26. They repeatedly claim that the Act "targets" and "punishes" speech, without any attempt to grapple with what the statute actually says. *See, e.g.*, BIO 25-26, 29-30.

As the petition explained, any effect that the Act might have on speech is merely incidental to the law's legitimate tort- and property-based aims. Pet. 18-24. The challenged provisions apply only to employees who secretly record or steal documents from nonpublic property and then use that information to commit a tort (breaching the duty of loyalty). N.C. Gen. Stat. § 99A-2(b)(1), (b)(2). Respondents fail to explain why

the First Amendment would protect speech that might facilitate this course of tortious conduct.

Respondents instead contend that the Act is "novel" and lacks a common-law foundation. BIO 1. Specifically, they argue that the duty-of-loyalty tort codified in the Act was only "*first* articulated" in the Fourth Circuit's earlier decision in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999). BIO 3. Yet *Food Lion* itself relied on earlier North Carolina cases recognizing this duty. *Id.* at 515-16. Although the North Carolina Supreme Court later disagreed with the Fourth Circuit about the *scope* of the duty, it did not purport to unsettle the historical agency principles that underpin the existence of loyalty obligations between employers and employees. *See Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001); Pet. 19-21. In any event, States undoubtedly have the authority to pass laws that further strengthen private property rights guaranteed under common law.

Respondents also claim that the Act is "novel" because it is not limited to prohibiting unauthorized *entry* on nonpublic property. BIO 20-21. Instead, the Act applies when employees exceed the scope of their permission to enter. It is well established, however, that property owners who allow individuals onto their property "for a particular purpose" do not confer a "privilege to be on the land for any other purpose." Restatement (Second) of Torts § 168 cmt. b; *see Florida v. Jardines*, 569 U.S. 1, 9 (2013) ("The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose."). And contrary to Respondents' startling assertion that

businesses have "no expectation of privacy" in the nonpublic areas of their property, BIO 20, this Court's precedents have repeatedly held that "[a]n owner or operator of a business . . . has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable." *New York v. Burger*, 482 U.S. 691, 699 (1987); *see also, e.g.*, *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

In the alternative, Respondents argue that the challenged provisions are viewpoint discriminatory, because they only prohibit speech that is used to breach the duty of loyalty. BIO 30-31. As Judge Rushing explained in her dissent, however, the Act merely "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." Pet. App. 68a. The Act prohibits disloyal conduct by an employee. It is therefore viewpoint-neutral, because it does not favor certain messages over others.

Respondents insist that Petitioners have "waived" any challenge to the panel's viewpoint-discrimination holding. BIO 31. But that is plainly incorrect—Petitioners have always maintained that the Act does not implicate "questions about viewpoint or content discrimination" because it imposes "generally applicable, neutral rules that reflect longstanding property and tort doctrines." Pet 1, 18; *see also* Pet. i, 14-16; Response/Reply Br. of Defendants-Appellants 38-40, No. 20-1776 (4th Cir.).

Respondents are also wrong that Petitioners have conceded that the Act cannot pass intermediate scrutiny. BIO 11. Whether the Act passes that scrutiny is fairly included within the question presented. S. Ct. R. 14.1(a); Pet. i. And the parties exhaustively briefed the issue below. Pet. App. 28a-37a. Because the challenged provisions are both content- and viewpoint-neutral, they should at most receive intermediate scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). Under that standard, the provisions are constitutional because they advance a significant state interest in reinforcing private property rights and do so in a narrowly tailored fashion: The Act's restrictions apply *only* to intentional, double-agent acts taken on an employer's private property that cause harm. *See* Pet. 22-23.

Respondents' remaining arguments are meritless. Respondents contend that the Act is "aimed at speech about a specific industry." BIO 31. But the text of the statute does not restrict the law's application to any particular type of business. It gives a civil cause of action to all employers throughout the State.

Respondents offer the strange claim that Petitioners made an "admission" in the district court that the Act's goal is "to prohibit public communications by certain actors about a particular industry." BIO 30; *see also* BIO 6. In support, Respondents cite a 2019 interrogatory response in which Petitioners identified the government interests that the Act advances, including "discourag[ing] those bad actors who seek employment with the intent to engage in corporate espionage or act as an undercover

investigator," "a particular problem for [the State's] agricultural industry." CA4 J.A. 111-12. That discovery response does not come close to conceding that the goal of the Act is to prohibit speech, much less speech about a specific industry. To the contrary, the Act seeks to prevent harmful tortious conduct by double-agent employees. *See Food Lion*, 194 F.3d at 516, 519; CA4 J.A. 204, 282 (legislative statements confirming that the Act was meant to "codify" the *Food Lion* case).

Respondents also argue that the Act "singles out" federally protected whistleblower activity. BIO 1. The Act says nothing of the kind. And because a state law cannot make illegal conduct that federal law protects, Petitioners readily acknowledge that individuals could not be sued under the Act for engaging in federally protected whistleblower activity. *See Arizona v. United States*, 567 U.S. 387, 406-07 (2012).

Respondents further claim that the Act bars speech to government agencies and legislative testimony. BIO 1, 26. Again, the Act says no such thing. Reporting criminal activity to a prosecutor, speaking to a government agency about unlawful workplace conduct, or testifying before a legislative body, *see* BIO 1, 5, cannot possibly violate the challenged provisions here, which require an employee to breach a duty of loyalty to an employer. N.C. Gen. Stat. § 99A-2(b)(1), (2). And it is well established that illegal conduct is not a protected right for which an employer can demand loyalty. *See, e.g.*, Restatement (Third) of Agency § 8.05 cmt. c. Even the panel below did not accept Respondents' extreme

reading of the Act as "end[ing] all undercover and whistleblowing investigations." *See* Pet. App. 6a-7a.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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