No. 22-1148

In the Supreme Court of the United States

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The Rule 29.6 statement in the petition remains accurate.

The amicus briefs of 16 States and of national and local business and agricultural associations attest to the importance of the question presented. Respondents PETA, ALDF and similar animal rights activists place their own employees in jobs at medical research facilities and private agricultural operations so that they can steal "employment-related documents" and use "hidden recording equipment," such as "wear[ing] a minute camera" or "leav[ing] recording devices unattended" in what they concede are private areas of the business "largely concealed from public view." See Pet. 6-8 (quoting respondent declarations). As the States explain (at 1), given the proliferation of legislative activity in this area, States and targeted businesses "need to know" now whether these fake employees and their true employers are entitled to First Amendment protection because they claim that their trespasses, secret recordings, thefts of information, and breaches of the duty of loyalty are "newsgathering." They are not. As Judge Rushing recognized, North Carolina was entitled in the Property Protection Act to create "generally applicable" causes of action for "trespass" and the "employment tort" of breach of duty of loyalty that reach such conduct, which "does not merit heightened First Amendment scrutiny simply because it may be enforced equally against an investigative reporter and a business competitor." Pet. App. 52a-54a.

This Court "has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned." *Lloyd*, 407 U.S. at 568. The Fourth Circuit's conclusion to the contrary prioritizes Respondents' deceptive and invidious activities over the property rights of family farms and other businesses. This case presents an ideal opportunity for the Court to clarify the interaction of

private property protections and the First Amendment in an area of pressing practical concern and intense legislative activity. Respondents' arguments to the contrary are easily addressed.

I. This Court's Intervention Is Needed Because The Fourth Circuit's Decision Creates New First Amendment Protections For Unlawful Activity

The Fourth Circuit's decision immunizes unlawful conduct such as trespass, theft, invasions of privacy, and breach of an employee's duty of loyalty by double-agents and corporate spies so long as those activities were undertaken in the name of newsgathering, however that vague term may be defined. In creating this rule, the Fourth Circuit ignored an unbroken line of this Court's authority establishing that the First Amendment does not protect conduct undertaken without permission in the non-public areas of private property, regardless of whether that conduct has an expressive element or is in the name of so-called newsgathering. Respondents virtually ignore this Court's precedent and when they do dismissively address the relevant cases, they completely miscast them and ignore their actual holdings. In any event, Respondents cannot escape that this case presents an important issue at the intersection of two foundational constitutional rights.

A. The Fourth Circuit's Elevation Of Speech Interests Over Private Property Rights Is Irreconcilable With This Court's Jurisprudence

As Judge Rushing recognized in her dissent, the majority's decision failed to address the key distinction between newsgathering activity in public spaces

and unauthorized activity on private property. Pet. App. 55a-56a. Respondents make the same mistake, ignoring this Court's precedent drawing exactly that line.

In *Lloyd*, this Court held an individual did not have any right protected by the First Amendment to enter onto private property without permission and once there engage in speech, such as handing out pamphlets protesting the Vietnam War. The Court explained that "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." 407 U.S. at 567. The Court rejected the argument "that people who want to propagandize protests or views have a constitutional right to do so whenever and wherever they please." *Id.* at 568.

Respondents characterize *Lloyd* as simply enforcing a property owner's "right to exclude" and assert that enforcing Portland's anti-trespassing ordinance "solely restrict[ed] non-expressive conduct." Opp. 14, 27. But their arguments ignore the context of the decision. First, *Lloyd* was about a property owner's right to exclude as *weighed against* protestors' claimed right to enter private property to engage in expressive conduct. This Court explicitly held that any speech interest gave way to the superior right of the property owner to exclude. *Lloyd*, 407 U.S. at 567-568. In other words, the First Amendment was not implicated when the anti-trespassing ordinance was applied to the protestors because they had no right to speak on private property. Second, Respondents ignore that the trespass ordinance in *Lloyd* was being applied to expressive conduct. The protestors were otherwise allowed

to be in the shopping mall, and their political speech was the only reason that they were subject to the ordinance. Still, in those circumstances, the First Amendment did not protect that expressive conduct from the application of the ordinance. Applied here—even assuming that Respondents' newsgathering efforts are expressive activities—*Lloyd* means that the First Amendment does not apply because Respondents seek to act on private property without permission. The Fourth Circuit's decision is in square conflict with *Lloyd* on this important issue.

Similarly, in *Hudgens* the Court relied on *Lloyd*, holding that "if the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center [and] distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co." 424 U.S. at 520-521. As in *Lloyd*, the reason the protestors were subject to restriction had nothing to do with their right to enter the shopping center generally; instead, the restriction was based on what they intended to do there—engage in expressive conduct. Thus, *Hudgens* was not about the right to exclude in general. Instead, it was about the right to prevent unauthorized expressive conduct on private property in particular. There is no daylight between these holdings and what Respondents want to do in the name of newsgathering.

And in *Rowan*, this Court held that "[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality," therefore, a speaker's right to communicate ends at the doorstep or mailbox. 397 U.S. at 737. The corollary to that rule is that if someone ventures beyond

the doorstep, the First Amendment does not protect whatever unauthorized expressive activity takes place in that private or non-public area. *Lloyd* and *Hudgens* are two examples of that principle in action, which the Fourth Circuit's decision wholly ignores.

Respondents try to distinguish *Manhattan Community Access Corporation* because "that case was about state action." Opp. 29 n.9. But that is the point: because there was no state action, the private property owner was entitled "exercise editorial discretion over the speech and speakers" on its property free from "First Amendment constraints." *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1930-1931. That power logically includes the right to sue an unauthorized speaker for the torts committed by the speaker on the property free from "First Amendment constraints."

Respondents' sole authority from this Court for their argument that the First Amendment applies to unauthorized speech in the non-public areas of private property is *Watchtower*. Opp. 28-29. But as NCFB explained, the conduct at issue in *Watchtower* did not extend beyond the front door. Pet. 20. Thus, *Watchtower* does not justify the Fourth Circuit's rejection of the *Lloyd* line of cases.

Respondents unpersuasively seek to square contrary circuit authority, such as the Seventh Circuit's decision in *520 S. Michigan*, with the Fourth Circuit's decision. According to Respondents, the Seventh Circuit applied First Amendment scrutiny to some of the union picketers' conduct at issue. Opp. 15. The court, however, relied on *Lloyd* and *Hudgens* to hold that union picketers did not have a right to enter private property and picket there. 760 F.3d at 723. This part of the decision is in direct conflict with the Fourth

Circuit's decision below. Pet. 26-27. That the court separately addressed *other* conduct, such as harassment in the form of calling individuals at their home or following one individual "from one comic book store to the next," is irrelevant to the issue presented here.

Respondents also seek to explain away contrary Ninth Circuit authority, arguing that *Planned Parenthood* and *Dietemann* allowed tort actions against individuals for "non-expressive conduct." Opp. 15-16. In *Dietemann*, an undercover reporter engaged in "clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without consent," and that conduct was actionable as an invasion of privacy. 449 F.2d at 248-249. *Planned Parenthood* also involved secret recordings that were actionable. 51 F.4th at 1130. Therefore, *Dietemann* and *Planned Parenthood* permitted application of generally applicable tort laws against the same sort of conduct the Fourth Circuit has immunized.

Respondents' arguments parroting the Fourth Circuit's flawed analysis only underscore the need for this Court's intervention to clarify that this Court meant what it said in *Lloyd* and *Hudgens* that the First Amendment does not provide a right to enter private property for expressive purposes.

B. The Fourth Circuit's Decision Provides A License To Trespass In The Name Of Newsgathering

Respondents resort to general, broad pronouncements that "the First Amendment extends to prohibitions on gathering information to facilitate speech, the sole purpose of Respondents' activities at issue." Opp. 25. But that is not categorically true as numerous cases such as *Cowles*, *Associated Press*, and *Zemel*

have held. See Pet. 22-24. Those cases make clear that the First Amendment does not apply when a law of general application is enforced against individuals who are "gathering information to facilitate speech." The Court in *Zemel* contradicted Respondents' assertion that all information gathering is protected by the First Amendment, holding that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." 381 U.S. at 17. *Cowles* reiterated that individuals in Respondents' position "may not with impunity break and enter an office or dwelling to gather news." 501 U.S. at 669. *Branzburg* made clear that newsgatherers may gather information to facilitate speech only "from any source by means within the law." 408 U.S. at 681-682. Thus, Respondents' spies have *no* right to access private information in non-public areas by fraud and deceit. *Id.* at 684.

The cases Respondents rely on do not condone newsgathering on private property or in areas where the spies are not supposed to be. *Citizens United* v. *Federal Election Commission* stated only that the First Amendment may in some circumstances apply to laws that affect "different points in the speech process." 558 U.S. 310, 336 (2010). That decision must be read alongside *Branzburg*, *Zemel*, and *Cowles*, which provide that the First Amendment does not apply at a "point in the speech process" that involves newsgathering by trespassing or accessing areas that are not publicly accessible. In *Brown* v. *Entertainment Merchants Association*, the Court held that "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference." 564 U.S. 786, 792 n.1 (2011). But that says nothing about activities conducted in nonpublic areas. Similarly, the Court in *Sorrell* v. *IMS Health Inc.*, noted that "the

creation or dissemination of information are speech within the meaning of the First Amendment." 564 U.S. 552, 570 (2011). But that general rule gives way based on the location of the speech. Indeed, no one would argue that protesting a war is not speech generally protected by the First Amendment, but that speech was not protected by the First Amendment when the protestors were on private property without authorization to speak in *Lloyd*.

C. The Fourth Circuit's Decision Conflicts With This Court's Precedent Holding That Generally Applicable Laws May Be Enforced Against Individuals Purportedly Engaged In Speech-Related Activities

The Fourth Circuit's decision also runs counter to this Court's cases holding that the enforcement of laws of general applicability against the press does not offend the First Amendment so long as the press is not singled out. Pet. 22-23.

Respondents contend that the Act exceeds previous limits of certain common law doctrines in North Carolina. Opp. 19-21. For instance, Respondents say the Act cannot codify a duty of loyalty because "that duty is not within North Carolina's traditions." Opp. 19. But, as Judge Rushing recognized, what matters is that the Act's duty of loyalty provisions in subsections (b)(1) and (b)(2) are, by the statute's plain terms, applicable to *all* individuals, including unscrupulous business competitors, disgruntled employees, or industrial saboteurs—not only to members of the press or others purporting to engage in newsgathering. Similarly, subsection (b)(3) applies to all unauthorized surreptitious recording in nonpublic areas of private property, regardless of who is doing the recording or

for what purpose. And subsection (b)(5)'s prohibition on acts that interfere with property rights also applies to all individuals, not only newsgatherers. These provisions squarely fall within the definition of generally applicable rules imposed on all members of society regardless of whether they are engaged in speech-related activity. See Pet. App. 52a-54a.

II. This Case Presents An Excellent Vehicle To Address The Intersection Of Private Property Rights And The First Amendment

Respondents can offer no rebuttal to the point that this case squarely presents an issue of critical legal and practical importance: whether the First Amendment protects unauthorized activity in the non-public areas of someone's private property. Respondents' lengthy and contorted efforts to explain why the Fourth Circuit's majority decision was correct only reinforce the need for this Court's intervention.

1. Trying to conjure a vehicle issue, Respondents incorrectly claim that NCFB lacks standing to seek review of the Fourth Circuit's decision. According to Respondents, NCFB "is the only Petitioner who asks this Court to review the Fourth Circuit's holding that subsections (b)(3) and (b)(5) violate the First Amendment as applied to Respondents' speech" and NCFB asks the Court to "consider different aspects" of subsections (b)(1) and (b)(2) than North Carolina does in its petition. Opp. 17.

Respondents do not claim that North Carolina lacks standing to seek review of the Fourth Circuit's decision. The Court is not to inquire about the independent standing of an intervenor such as NCFB when the intervenor does not seek broader relief than a party with standing. *Little Sisters of the Poor Saints*

Peter & Paul Home v. *Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020). Here, both NCFB and the State seek *certiorari* review of the Fourth Circuit's decision invalidating the Act. Indeed, NCFB and North Carolina have been aligned throughout this litigation in asking that the courts uphold the Act. NCFB and the State even filed joint briefing before the Fourth Circuit. As in the district and intermediate appellate courts, NCFB and the State remain aligned and seek the same relief in the form of rejection of the constitutional claims against the Act.

And though Respondents claim that NCFB lacks standing because they challenge "other aspects" of the Act than the State, NCFB and the State seek the same *relief*—reversal of the Fourth Circuit's decision—even if their articulated reasoning is not identical.

In any event, NCFB has sufficient interest in this litigation to have standing on its own. To establish standing to defend the Act, an organization like NCFB must establish that its members have a real stake in the litigation, those members' participation in the litigation is not necessary, and the interests NCFB seeks to protect are germane to its purpose. See *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2158 (2023). Here, the Act provides a private right of action to businesses such as NCFB's members. Additionally, Respondents ignore that their own declarants state their intention to engage in conduct that is prohibited under all of the challenged subsections in private agricultural facilities such as those operated by NCFB's members. Pet. 6-8. The participation of individual farmers is not necessary to defend the statute, and the undisputed factual record is that defense of the Act is germane to NCFB's purpose. See Decl. of Peter Travers Daniel,

PETA v. *Stein*, No. 16-cv-00025 (M.D.N.C. Feb. 1, 2019), Dkt. 83-1. Unquestionably, then, NCFB has standing to defend the law.[1]

2. Respondents also argue that Petitioners have waived any argument against the Fourth Circuit's decision that the Act is viewpoint discriminatory. Opp. 31. Not true. NCFB maintains that the Act is not subject to First Amendment scrutiny because the statute is a generally applicable law governing conduct where individuals have no protected right to speak. Whether the Act is viewpoint discriminatory and therefore subject to heightened First Amendment scrutiny is a subsidiary question that is fairly included within NCFB's Question Presented. See *Unicolors, Inc.* v. *H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 949 (2022); S. Ct. R. 14.1(a).

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[1] Respondents incorrectly argue that NCFB "abandoned" its argument that it has organizational standing in the appellate court and instead "claimed it had standing to represent the interest of two of its members." Opp. 18. However, NCFB argued to the appellate court that it had independent standing because its members are precisely the types of businesses that Respondents expressly state they intend to invade. NCFB Opp. to Pls.' Mot. to Dismiss Intervenor Appeal at 6-10, *PETA* v. *Stein*, No. 20-1776 (4th Cir. Aug. 24, 2020), Dkt. 24. Further, while Respondents cite two of the individual farmers' declarations that NCFB attached in support of its intervention motion, they ignore the third declaration from an NCFB official stating that the organization's membership is at risk if the Act is invalidated and explaining NCFB's advocacy efforts on behalf of all those farmers' interests. Decl. of Peter Travers Daniel, *supra*. NCFB relied on this affidavit in the Fourth Circuit. NCFB Opp., *supra*, at 8. At no point did NCFB claim to only represent the interests of two farmers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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