No. 20-1776 (L)

In the
United States Court of Appeals
for the Fourth Circuit

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

v.

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

and

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

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

BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMATION IN PART AND REVERSAL IN PART

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*Counsel would like to thank law students Mark Bailey and Michael Sloman for their significant contributions to this brief.

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INTEREST OF *AMICI CURIAE*

By consent of all the parties, *amici curiae* law professors submit this brief in support of the Plaintiffs-Appellees/Cross-Appellants. *Amici* are legal scholars whose teaching and scholarship focus on the First Amendment and who have an interest in safeguarding freedoms of speech and press against laws that unconstitutionally regulate expressive activity.[1] Respectfully offering their expertise in aid of the Court's resolution of this case, *amici* urge this Court to declare N.C. Gen. Stat. § 99A-2 facially unconstitutional because it fails strict and intermediate scrutiny and because the statute is substantially overbroad.

SUMMARY OF ARGUMENT

In 2015, over the governor's veto, the North Carolina legislature passed the Property Protection Act, N.C. Gen. Stat. § 99A-2, which prohibits vast swaths of protected speech based on information obtained from the nonpublic premises of a property owner. Extending far beyond similar laws passed in other states that apply only to agricultural enterprises (so called "ag-gag" statutes) and which have been struck down, 99A-2 broadly empowers *all* property owners *of any kind* to sue for compensatory damages, attorneys' fees, and civil penalties any person who

[1] *Amici* law professors are individually named in Appendix A.

"exceeds [their] authority to enter the nonpublic areas of another's premises" by doing any of the following:

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

N.C. Gen. Stat. § 99A-2(b)(1) - (5).

Effectively, the statute shields all property owners in North Carolina from third-party documentation and disclosure of misconduct, abuse, or illegality occurring on their nonpublic premises. This restriction applies to whistleblowers, undercover reporters, employees petitioning the government or the courts for redress of workplace grievances, and anyone seeking to report malfeasance pursuant to numerous state and federal regulatory statutes. Meanwhile, 99A-2 also

imposes joint liability on any party who intentionally directs, assists, compensates, or induces another to violate the Act. *See* N.C. Gen. Stat. § 99A-2(c). This means that media companies and advocacy groups who report on misconduct and malfeasance also risk liability if their employees, agents, or other human sources of information could be civilly prosecuted under 99A-2. In sum, the scope and breadth of 99A-2 is simply jaw-dropping.

The government, in defending the statute, argues that it does no more than codify the generally applicable common law tort of trespass, claiming there is no First Amendment right to engage in speech or expressive activity while trespassing (i.e., while exceeding one's authority to enter nonpublic areas of another's premises). *See* Opening Br. of Defs.-Appellants 3-4, 21. This argument fails for two reasons.

First, 99A-2 does not mirror the elements of common law trespass but instead defines the prohibited conduct, in novel fashion, as unauthorized-presence + speech-activity. The speech activity, which is a codified element of the prohibited conduct, consists of: (1) capturing information (e.g., photographing or note-taking) and then using it against the interest of the property owner; (2) recording images or sounds and then using the recording against the interest of the property owner; (3) recording images or data via an unattended camera or electronic surveillance device; or (4) any act that "substantially interferes with the

ownership or possession of real property," which as the district court notes, necessarily "ensnares" speech. J.A. 451; N.C. Gen. Stat. § 99A-2(b)(1) - (3) & (5). By virtue of incorporating speech as an element of each of its enumerated offenses, 99A-2 in no way resembles a generally applicable trespass law. Rather, 99A-2 is a civil liability statute that directly targets speech and is therefore subject to heightened scrutiny. Because the statute fails to meet this rigorous constitutional standard, it must be struck down.

The Government's defense of 99A-2 further fails for the second reason that exceeding one's authority to enter nonpublic premises (i.e., what the Government refers to as trespass) does not render all resulting speech activity unprotected. Indeed, undercover journalism has a long and venerable history in our democracy—still being written today—of shedding much-needed light on matters of public concern that would otherwise go undetected and without accountability.[2] Courts have therefore recognized that undercover investigations give rise to high-value, protected speech. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1184 (9th Cir. 2018); *Animal Legal Def. Fund v. Reynolds*, 297 F.Supp.3d 901, 909-10 (S.D. Iowa 2018); *Animal Legal Def. Fund v. Otter*, 44 F.Supp.3d 1009, 1023 (D. Idaho 2014). Yet, if allowed to stand, 99A-2 will greatly muffle, if not silence, the

[2] *See, e.g.*, Nicholas Kristof, *The Ugly Secrets Behind the Costco Chicken,* N.Y. TIMES (Feb. 6, 2021), https://www.nytimes.com/2021/02/06/opinion/sunday/Costco-chicken-animal-welfare.html.

sunshine-producing speech of undercover investigators, whistleblowers, concerned employees, and persons seeking to comply with statutory reporting schemes, while allowing all manner of abuses – e.g., animal welfare, labor, environmental, to name a few – to persist with greatly reduced fear of public exposure. This is a disastrous, upside-down result for First Amendment freedoms as well as for general public policy. It is therefore imperative that this Court affirm the district court's holding that 99A-2(b)(2) and (b)(3) are facially invalid; correctly apply heightened scrutiny to similarly strike down 99A-2(b)(1) and (b)(5) as applied to anyone; and declare 99A-2 substantially overbroad in its entirety or else remand to the district court to conduct the proper overbreadth analysis.

The district court correctly reached some of these same conclusions, but fell critically short on others. It properly applied strict scrutiny to facially invalidate 99A-2(b)(2) & (b)(3) because those two provisions explicitly prohibit making recordings, which is a recognized form of protected speech. *See, e.g., Wasden*, 878 F.3d at 1203; *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017). As the Government failed to argue any compelling reason for (b)(2) and (b)(3)'s direct speech restrictions, the district court properly struck down both provisions on their face.

However, the district court incorrectly used the so-called "no set of circumstances" test to determine that 99A-2(b)(1) & (b)(5) were not likewise

facially invalid, but only invalid as applied to Plaintiffs-Appellees. *See* J.A. 442, 444-45. This was error because the Supreme Court has moved away from "no set of circumstances" as the proper diagnostic for statutory facial challenges. *City of L.A. v. Patel*, 576 U.S. 409, 415 (2015); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996). Properly understood, "no set of circumstances" describes, not the test to be applied, but the outcome when a statute fails to meet the relevant constitutional standard – in this case, First Amendment heightened scrutiny – and as a result cannot be constitutionally applied in any circumstance. *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1123 (10th Cir. 2012).

Here, the district court properly determined that subsections (b)(1) and (b)(5) are subject to heightened scrutiny because they target and burden speech: (b)(1) because it prohibits capturing (e.g., photographing or note-taking) and then using information, and (b)(5) because it prohibits any act, including speech or expression, that "substantially interferes with the ownership or possession of real property." The district court also correctly held that (b)(1) and (b)(5) fail heightened scrutiny due to, without limitation, lack of narrow tailoring. Thus, as neither subsection survives constitutional scrutiny, there is no set of circumstances under which either subsection could be lawfully applied. The subsections are

therefore facially invalid in any application, and not just as concerns Plaintiffs-Appellees.

Finally, the district court failed to properly consider the substantial overbreadth of 99A-2. On an overbreadth challenge, a statute may be struck down if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). The district court correctly referenced the *Stevens* standard, but then did not apply it. Namely, the court ignored that enforcing 99A-2 would create risk of civil liability for huge expanses of high-value speech including news reporting, whistleblowing, petitioning the government or the courts for grievances, and reporting of misconduct pursuant to multiple state and federal regulatory statutes. The court further neglected to weigh this vast amount of protected speech that is burdened by 99A-2 against the statute's purportedly legitimate sweep. It is therefore appropriate for this Court to either conduct the proper overbreadth analysis to strike down 99A-2 or to remand to the district court to do so.

ARGUMENT

I. "No Set of Circumstances" Describes an Outcome, Not a Test

The district court erred in holding that Property Protection Act, N.C. Gen. Stat. §§ 99A-2(b)(1) & (b)(5), are unconstitutional only as-applied to Plaintiffs-Appellees when, in fact, the provisions fail to survive heightened scrutiny, rendering

them facially invalid in any application. In rejecting the facial challenge, the lower court applied what it referred to as the "no set of circumstances" test. *See* J.A. 442, 444-45. The "no set of circumstances" language has caused confusion among the lower courts when deciding facial, as-applied, and overbreadth challenges. *See* Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto*, 98 VA. L. REV. 301, 312-314 (2012) (discussing the array of approaches courts have taken to applying the "no set of circumstances" language). However, "no set of circumstances" is best understood, not as a test for facial validity, but rather as a description of the outcome when a statute fails the relevant constitutional standard—in this case intermediate and strict scrutiny—and therefore can no longer lawfully be applied in any circumstance. *See City of Albuquerque*, 667 F.3d at 1124. Because the district court properly found that (b)(1) does not satisfy strict scrutiny,[3] and that neither (b)(1) nor (b)(5) satisfy intermediate scrutiny, the provisions should be struck down as facially invalid.

A. The Supreme Court eschews "no set of circumstances" when adjudicating facial challenges

The Supreme Court has moved away from using "no set of circumstances" as a test of facial validity, instead using the appropriate constitutional standard to invalidate a law in its totality. The phrase "no set of circumstances" originates from

[3]As discussed in Section II, strict scrutiny should also apply to (b)(5).

U.S. v. Salerno, where the Court described "[a] facial challenge to a legislative Act [as], of course, the most difficult to challenge successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987). However, the Supreme Court has since clarified, most pointedly in *Janklow v. Planned Parenthood, Sioux Falls Clinic*, that "the dicta in *Salerno* does not accurately characterize the standard for deciding facial challenges." 517 U.S. at 1175 (internal quotations omitted); *see also Patel*, 576 U.S. at 415 (rejecting *Salerno* as the only test for facial invalidity and recognizing that "the Court has allowed [facial] challenges to proceed under a diverse array of constitutional provisions"); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself.").

Rather, the *Salerno* declaration was a "rhetorical flourish . . . unsupported by citation or precedent." *Janklow*, 517 U.S. at 1175. Noting that "*Salerno*'s rigid and unwise dictum has been properly ignored in subsequent cases," the Supreme Court subsequently warned lower courts against "ignor[ing] the appropriate principle and appl[ying] the draconian 'no circumstance' dictum to deny relief in a case in which a facial challenge would otherwise be successful." *Id.* at 1175-76.

Consistent with the reasoning in *Janklow*, the Supreme Court has repeatedly decided statutory facial challenges post-*Salerno* by applying the relevant constitutional standard, not the so-called "no set of circumstances" test. *See Patel*, 576 U.S. at 415 (collecting cases that apply the appropriate constitutional standard to strike down a challenged statute rather than "no set of circumstances"); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011) (applying First Amendment heightened scrutiny to facially invalidate a state statute without reference to "no set of circumstances"); *see also City of Albuquerque*, 667 F.3d at 1124 ("the idea that the Supreme Court applies the 'no set of circumstances' test to every facial challenge is simply a fiction.").

Indeed, in the context of First Amendment challenges, the Court has repeatedly applied the relevant constitutional standard to determine whether a law is facially valid. *See, e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (finding statute that prohibited registered sex offenders from accessing commercial social networks failed to meet intermediate scrutiny and thus was constitutionally invalid); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny."); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (applying strict scrutiny to hold part of the Bipartisan Campaign Reform Act of 2002 facially unconstitutional).

Similarly, the Fourth Circuit mirrors the Supreme Court's application of the appropriate constitutional standard when considering facial challenges, rather than using the so-called "no set of circumstances" test. *See, e.g.*, *Billups v. City of Charleston*, 961 F.3d 673, 690 (4th Cir. 2020) (holding an ordinance that prescribed tour guide licensing requirements was unconstitutional for failure to survive intermediate scrutiny); *Fusaro v. Cogan*, 930 F.3d 241, 263-64 (4th Cir. 2019) (analyzing a facial challenge to a Maryland law restricting access to voter information under the constitutional framework for balancing the interests of state election laws); *Liverman v. City of Petersburg*, 844 F.3d 400, 407-09 (4th Cir. 2016) (holding that a police department's social media policy was unconstitutional for failure to survive the constitutional balancing standard for protected employee speech); *Legend Night Club v. Miller*, 637 F.3d 291, 299-300 (4th Cir. 2011) (applying intermediate scrutiny to find that a Maryland law prohibiting clubs with nude dancers from selling alcohol did not pass constitutional muster). Simply put, Fourth Circuit precedent supports the application of the appropriate constitutional standard to determine facial validity rather than exclusively relying on the "no set of circumstances" test. *Accord Kolbe v. Hogan*, 849 F.3d 114, 148 n.19 (4th Cir. 2017) (declining to apply *Salerno*'s "no set of circumstances" test and instead applying the constitutional vagueness standard to facially invalidate a Maryland firearms

provision despite there being "some conduct that clearly falls within the provision's grasp") (quoting *Johnson v. U.S.*, 576 U.S. 591, 602 (2015)).

B. A statute's failure to survive the appropriate constitutional standard means there are "no set of circumstances" under which the statute can constitutionally be applied

Because, as demonstrated above, courts properly adjudicate facial challenges by applying the relevant constitutional standard, the "no set of circumstances" language employed by the district court is best understood as describing "the outcome" of the constitutional analysis, not the test itself. *See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 n.6 (1993) ("If [the regulation] were to be held unreasonable, it could be held facially invalid, that is, it might be held that the rule could in no circumstances be applied . . ."); *City of Albuquerque*, 667 F.3d at 1127 ("[W]here a statute fails the relevant constitutional test . . . it can no longer be applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid."); *Ezell v. City of Chicago*, 651 F.3d 684, 698-99 (7th Cir. 2011) ("[A] successful facial attack means the statute is wholly invalid and cannot be applied to *anyone*. Chicago's law, if unconstitutional, is unconstitutional *without regard* to its application—or *in all* its applications, as *Salerno* requires.") (emphasis in original); *Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1337-38 (Fed. Cir. 2005) ("Because . . . the strict scrutiny doctrine sets forth the test for determining facial unconstitutionality in this case, *Salerno* is of

limited relevance here, at most describing a conclusion that could result from the application of the strict scrutiny test.").

Moreover, once a challenged statute has failed the applicable constitutional standard of strict or intermediate scrutiny a court need not "engage in hypothetical musings" to try to rehabilitate the facial flaw. *See City of Albuquerque*, 667 F.3d at 1122 ("[t]he proper framework to apply in a facial challenge is not to require the challenger to disprove every possible hypothetical situation in which the restriction might be validly applied, but rather to apply the appropriate constitutional test"); *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016) ("The Court has often considered facial challenges simply by applying the relevant constitutional test to the challenged statute, without trying to dream up whether or not there exists some hypothetical situation in which application of the statute might be valid.").[4]

The so-called "no set of circumstances" test, if applied as the district court interpreted, would allow even a limited number of "permissible applications" to salvage a statute that otherwise did not meet the relevant constitutional standard. Such an outcome is not consistent with long-standing constitutional jurisprudence. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) ("We recognize, of course, that reference to these [few] permissible applications would

[4] In contrast, the constitutional overbreadth standard, discussed in Section III below, considers hypothetical applications of the challenged statute to parties not currently before the court.

not alone be sufficient to sustain the statute against respondents' First Amendment challenge."); *see* Keller & Tseytlin, *supra* at 353 (explaining how any statute which covers both constitutionally protected and unprotected speech could never be invalidated using "no set of circumstances" as the standard, despite a statute's obvious infringement of First Amendment rights). In this case, heightened scrutiny—strict and intermediate—is the proper vehicle through which to analyze facial challenges to 99A-2. Because, as examined in Section II below, 99A-2 fails to meet these constitutional standards, the district court's use of "no set of circumstances" to reject the facial challenge to (b)(1) and (b)(5) should be reversed.

II. Sections (b)(1), (b)(2), (b)(3) & (b)(5) Fail Strict and Intermediate Scrutiny and Therefore are All Facially Invalid

The district court correctly held that 99A-2(b)(2) and (b)(3) respectively fail the relevant standards of strict and intermediate scrutiny and are therefore facially unconstitutional. *See* J.A.455, 462, 464. Similarly, the district court correctly held that 99A-2(b)(1) and (b)(5) respectively fail to satisfy heightened scrutiny. *See* J.A.455, 462. But the lower court erred in the final step of its analysis when it used the "no set of circumstances" test to invalidate (b)(1) and (b)(5) only as applied to the Plaintiffs-Appellees because, as explained in Section I above, failure to survive heightened scrutiny renders these two provisions invalid as applied to anyone.

A. Sections (b)(1), (b)(2) & (b)(5) fail strict scrutiny for lack of compelling interest

The district court correctly found that strict scrutiny is the appropriate standard under which to analyze sections (b)(1) and (b)(2) because they both prohibit speech activity based on whether it "breach[es] the person's duty of loyalty to the employer." N.C. Gen. Stat. §§ 99A-2(b)(1) & (b)(2). *See Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) (strict scrutiny is the relevant constitutional standard for any statute that regulates speech "by its function or purpose").[5] The district court also correctly held that neither (b)(1) nor (b)(2) survives strict scrutiny due to the Government's failure to articulate any compelling interest. *See* J.A.449, 455. Both (b)(1) and (b)(2) are therefore facially invalid. *See City of Albuquerque*, 667 F.3d at 1127 ("[W]here a statute fails the relevant constitutional test . . . it can no longer be constitutionally applied to anyone.").

Further unpacking the district court's analysis, (b)(1) and (b)(2) each regulate speech, first, by prohibiting the capture of information and making of image or sound

[5] The Government's claim that 99A-2 is merely an attempt to codify generally applicable trespass law does not hold water. *See* Opening Br. of Defs.-Appellants 3-4, No. 34. First, 99A-2 does not incorporate the North Carolina common law elements of trespass. *See* J.A.462 n.13. *Compare Keyzer v. Amerlink, Ltd.*, 618 S.E.2d 768, 772 (N.C. Ct. App. 2005) (elements of trespass include land holder's possession of real property, unauthorized entry by the alleged trespasser, and damage to the land holder arising from the alleged trespass), *with* N.C. Gen. Stat. § 99-A2 (cause of action does not require any actual damage to the property owner). Moreover, 99A-2 makes speech a required element of each of the challenged offenses, sharply differentiating them from common law trespass.

recordings by employees. N.C. Gen. Stat. §§ 99A-2(b)(1) & (b)(2). As the district court rightly recognized, forbidding "capture" (e.g., photographing or note-taking) of information and the making of recordings "plainly generates First Amendment concern" because these activities are necessary prerequisites to speech. J.A.440-41. *See W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196–97 (10th Cir. 2017) (recognizing that speech-creation activities such as recording or taking notes "operate at the front end of the speech process" and are covered by the First Amendment) (internal citations omitted); *see also Wasden*, 878 F.3d at 1203 ("Audiovisual recordings are protected by the First Amendment as recognized 'organ[s] of public opinion' and as a 'significant medium for the communication of ideas.'") (internal citations omitted); *Fields*, 862 F.3d at 358 ("The First Amendment protects actual photos, videos, and recordings, [citation omitted] and for this protection to have meaning the Amendment must also protect the act of creating that material.").

But neither (b)(1) nor (b)(2) stop at prohibiting speech-creation activities. Instead, they go on to prohibit "use" of the captured information or the recording "to breach the person's duty of loyalty to the employer." Prohibiting "use" adverse to the property owner—but not "use" that is neutral or beneficial to the property owner—amounts to impermissible regulation of speech based on content and viewpoint. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819,

828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 1000-01 (D. Kan. 2020) (holding a statute to be viewpoint-discriminatory because the law only proscribed conduct intended to harm animal facilities, but not "such conduct if the person has the intent to *benefit* . . . the animal facility") (emphasis in original).[6]

Content and viewpoint-based speech regulations are subject to strict scrutiny. *See Reed*, 576 U.S. at 163; *Sons of Confederate Veterans, Inc. v. Comm'r of Virginia Dep't of Motor Vehicles*, 288 F.3d 610, 616 (4th Cir. 2002). For such regulations to survive, "the Government must prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340. Here, however, the Government neither asserted nor provided evidence of a compelling interest. *See* J.A.455. Sections (b)(1) and (b)(2) therefore fail the applicable constitutional test, rendering them facially invalid. *See* J.A.455; c*f.*

[6] If 99A-2 is struck down as *amici* encourage, property owners' interest in safeguarding their proprietary information would still be protected under statutes and common law that prohibit theft of trade secrets and violation of contractual provisions such as non-disclosure agreements and non-compete clauses. *See, e.g.*, N.C. Gen. Stat.§ 66-154 (protecting trade secrets); *Hartman v. W. H. Odell & Assocs.*, 450 S.E.2d 912 (N.C. App. 1994) (outlining the elements of a valid non-compete clause in North Carolina); *Chemimetals Processing, Inc. v. McEneny*, 476 S.E.2d 374, 376-77 (N.C. App. 1996) (upholding the legitimacy of non-disclosure agreements). These laws, already in place, highlight why 99A-2 is needlessly duplicative of already existing laws that provide remedies for many of the same ills the Government cites in defense of 99A-2. *See infra* Part. III.A.

Thompson v. W. States Med. Ctr., 535 U.S. 357, 373 (2002) (finding a statute failed strict scrutiny when the government "has not provided sufficient justification.").

Section (b)(5), which generally prohibits "an act that substantially interferes with the ownership or possession of real property," suffers a similar fate to (b)(1) and (b)(2) in that it does not survive strict scrutiny. When read in the context of the rest of 99A-2, the (b)(5) "catch-all" provision not only "ensnares" speech, J.A. 451, but directly targets it by filling any gaps left by the speech-centric provisions of (b)(1), (b)(2) and (b)(3).[7] *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (internal quotations omitted).

For example, a watchdog group's publication of the findings from a media company's undercover investigation of an enterprise would fall outside of the prohibitions in 99A-2(b)(1), (b)(2), and (b)(3), but could still be civilly prosecuted under (b)(5) if the publication resulted in permanent or temporary closure of the investigated enterprise, thereby "substantially interfer[ing]" with ownership or possession of real property. Moreover, because (b)(5) punishes speech based on its

[7] Less discussed up to now, (b)(3) prohibits using unattended devices to record in nonpublic areas of a property owner's premises. Recording is a protected form of speech. *See Wasden*, 878 F.3d at 1203; *Fields*, 862 F.3d at 358.

function or purpose of interfering with property interests, (b)(5) is also content and viewpoint-based and therefore subject to strict scrutiny. *Reed*, 576 U.S. at 163-164; *Sons of Confederate Veterans, Inc.*, 288 F.3d at 616. Yet as with (b)(1) and (b)(2), the Government has put forth no compelling interest for (b)(5). This section is therefore facially invalid for failure to survive strict scrutiny.

B. Sections (b)(1), (b)(2), (b)(3) & (b)(5) fail intermediate scrutiny for lack of narrow tailoring

Having established that 99A-2(b)(1), (b)(2) and (b)(5) regulate speech based on content and viewpoint, and with (b)(3) also directly targeting speech in the form of recordings made by unattended devices —albeit irrespective of the recordings' content—we turn to why all four provisions fail intermediate scrutiny for lack of narrow tailoring. *See* J.A.463 ("[N]or have [the Defendants and Intervenor] met [their burden] under intermediate scrutiny analysis as to any of the challenged subsections.").

Under intermediate scrutiny, the Government must prove that restrictions on speech are "narrowly tailored to serve a significant government interest." *Reynolds v. Middleton*, 779 F.3d 222, 225-26 (4th Cir. 2015). Here, the Government argues that 99A-2 serves the significant interest of protecting property. Assuming that to be true, 99A-2 is not narrowly tailored to serve that end.

To demonstrate narrow tailoring, the Government must present "actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary; argument unsupported by the evidence will not suffice to carry the government's burden." *Id*. at 229. This requires the Government to "*prove* that it actually *tried* other methods to address the problem" before resorting to a law that punishes protected expression. *Id.* at 231 (emphasis in original); *see also McCullen v. Coakley*, 573 U.S. 464, 496 (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.").

Here, the district court correctly noted that the Government provides no evidence that North Carolina's existing laws are ineffective at protecting the identified property interests. *See* J.A.461-62; *see also McCullen*, 573 U.S. at 494 (striking down statute that infringed First Amendment activity because "although respondents claim that Massachusetts 'tried other laws already on the books,' they identify not a single prosecution brought under those laws within at least the last 17 years") (internal citations omitted); *Billups*, 961 F.3d at 687 (holding an ordinance was not narrowly tailored when the city could not demonstrate it had tried less speech-restrictive means of achieving the same policy goals as the ordinance). Because the Government has not carried its burden to show that existing laws have proved ineffective, the Government fails to establish that the challenged provisions

of 99A-2 are narrowly tailored and they therefore fail intermediate scrutiny. Having failed immediate scrutiny, subsections (b)(1), (b)(2), (b)(3), and (b)(5) are facially invalid and can no longer be constitutionally applied, under any set of circumstances. *See City of Albuquerque*, 667 F.3d at 1123.

III. Section 99A-2 is Unconstitutionally Overbroad

In addition to being facially invalid under a strict and intermediate scrutiny analysis, 99A-2 is invalid on account of its substantial overbreadth. The overbreadth doctrine is a type of facial challenge unique to the First Amendment context. It provides that a statute may be struck down if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473.[8] This includes consideration of "hypothetical applications of the law to nonparties" that would be unlawful. *United States v. Miselis*, 972 F.3d 518, 530 (4th Cir. 2020).

The scope of 99A-2 is exceedingly broad as it affords all property owners the ability to sue for damages, attorneys' fees, and civil penalties any person who "intentionally gains access to the nonpublic areas of [the owner's] premises and

[8] The very words of the *Stevens* "substantial overbreadth" standard anticipate that while there may be some constitutional applications of the challenged statute, the statute will still be facially invalid if those permissible applications are substantially outnumbered by all of the possible unlawful applications of the statute. This further weighs against "no set of circumstances" as the appropriate test for facial validity.

engages in an act that exceeds the person's authority to enter those premises." N.C. Gen. Stat. § 99A-2(a). Courts around the country have struck down on First Amendment grounds much narrower laws than this that purport to protect similar property interests. For example, the Ninth Circuit invalidated an Idaho law that increased property protections solely for owners of agriculture facilities. *Wasden*, 878 F.3d at 1205. The Southern District of Iowa struck down a similar law that criminalized access to agricultural facilities obtained through false statements or pretenses. *Animal Legal Def. Fund v. Reynolds*, 353 F.Supp.3d 812, 826-27 (S.D. Iowa 2019). And the District of Utah ruled a statute facially unconstitutional that criminalized bugging or filming an agricultural operation. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017). All three of these invalidated statutes were more narrowly tailored than 99A-2 because they limited their speech-infringing property protections to a specific industry. *See* Idaho Code § 18-7042; Iowa Code § 717A.3A; Utah Code Ann. § 76-6-112. In comparison, 99A-2 creates civil liability for the capture, recording, and use of information obtained while on *any* nonpublic premises. The statute encompasses all industries, all commercial and non-commercial property, and all privately-owned and government property. The breadth of 99A-2 is unparalleled.

Yet the district court failed to take the enormous scope of 99A-2 into account, or to consider its numerous unlawful applications when weighed against

the statute's purportedly legitimate purpose. Thus, the court erroneously refused to strike 99A-2 as substantially overbroad. That error must now be corrected.

A. It is dubious whether 99A-2 has a plainly legitimate sweep

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *U.S. v. Williams*, 553 U.S. 285, 293 (2008). While the Government claims that 99A-2 strengthens protections for property owners, the district court expressed appropriate skepticism about the existence of any actual danger or harm justifying the creation of the new law. *See* J.A.461 (finding insufficient evidence "that the cited harms [to property owners] are real, not merely conjectural") (internal quotation omitted).

The district court further found 99A-2 to be needlessly duplicative of existing trespass law in North Carolina. Indeed, the adjacent section of the very same Property Protection Act already addresses the harms the Government seeks to invoke in its defense of 99A-2. *See* N.C. Gen. Stat. § 99A-1 ("Recovery of damages for interference with property rights"); J.A.461 ("there is no indication in the record that property protection under North Carolina's existing trespass law was unsuccessful"). Thus, without proof of a problem in need of fixing, and without proof that existing, non-speech-infringing laws fall short of such a fix, the Government has not established that 99A-2 enjoys any plainly legitimate sweep.

B. In an overbreadth challenge, the court may properly consider the potential unlawful applications of the statute to parties not currently before it

Despite the Government having failed to identify a legitimate sweep of 99A-2, we will assume for purposes of argument that one exists. "We must then determine whether, so construed, the statute [prohibits] a substantial amount of protected expressive activity." *Miselis*, 972 F.3d at 531 (internal quotations omitted). This standard requires the court to consider the range of liability potentially created by the statute, looking to whether there is a realistic danger that the statute infringes a substantial amount of protected speech. *Doe v. Cooper*, 842 F.3d 833, 845 (4th Cir. 2016). This may include consideration of "hypothetical applications of the law to nonparties" that would be unconstitutional. *Miselis*, 972 F.3d at 530.

Jettisoning this inquiry and balancing test, the district court failed to the consider the panoply of First Amendment activity prohibited and chilled by 99A-2. The court instead summarily concluded that "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." J.A.467. This was error because, as the following sections illuminate, 99A-2 creates liability for an impermissibly substantial amount of protected speech.

C. Section 99A-2 penalizes a wealth of protected speech

By penalizing the capture, recording, and use of information obtained from a property owners' nonpublic premises, 99A-2 chills undercover investigations and whistleblowing, including reporting misconduct pursuant to state and federal regulatory statutes. The statute also suppresses the speech of employees seeking to petition the government or the courts for redress of workplace grievances.

1. Undercover investigations and dissemination of their findings will be squelched by 99A-2

The Government attempts to deflect attention from, but does not contest, that a primary aim of 99A-2 is to prohibit undercover investigations by activists and members of the media. *See* Opening Br. of Defs-Appellants at 21, 49-50. This purpose is underscored by the Government's misplaced, but ubiquitous, reliance on *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999). This case, the holding of which has been significantly limited by *Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001), involved undercover news reporting by Food Lion employees, who also worked for ABC news, about the grocery stores' food handling practices.[9] Motivated by the facts in *Food Lion*, the N.C. legislature

[9] Defendants argue that *Food Lion* recognized breach-of-loyalty as a tort under North Carolina law. However, in *Dalton*, the North Carolina Supreme Court abrogated the Fourth Circuit's interpretation, holding that state law does not support an independent cause of action against an employee who engages in conduct adverse to the fiduciary interests of her employer. *Dalton*, 548 S.E.2d at 709. This would include if an employee covertly investigates and then reports on

enacted 99A-2 to penalize, not merely the act of trespass as the Government claims, but the core speech activity of undercover investigators: capture/recording and use of information obtained from nonpublic premises against the interest of the property owner.[10]

However, far from being constitutionally unprotected, undercover investigations have an established, well-respected history of bringing to light matters of public concern that would otherwise be difficult or impossible to expose. *See generally* Brooke Kroeger, *Undercover Reporting: The Truth About Deception* (2012); Brooke Kroeger, *Deception for Journalism's Sake: A Database*, NYU Libraries, http://undercoverreporting.org. Dating back to Upton Sinclair's 1906 publication of *The Jungle* and continuing to the present day,[11] "[u]ndercover investigations have long been an important tool used by journalists and advocacy

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the employer's malfeasance. The employer may fire the disloyal employee for such speech but may not sue her for breach of loyalty.

[10] Contrary to the Government's argument, mere presence for the purpose of conducting an undercover investigation does not constitute trespass. *See, e.g., Food Lion*, 194 F.3d at 518 (resume fraud to obtain a job in order to conduct an undercover investigation does not gives rise to a trespass tort; such an outcome "would not be protecting the interest underlying the tort of trespass—the ownership and peaceable possession of land"); *Desnick v. Am. Broad. Co., Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995) (entry onto private property for purposes of undercover investigation did not "infring[e] the kind of interest . . . the law of trespass protects; it was not an interference with the ownership or possession of land.").

[11] Kristof, *supra*, note 2.

groups . . . [to] document other issues . . . such as unsafe working conditions, improper food safety practices, violations of labor law, or violations of environmental law." *Reynolds*, 297 F.Supp.3d at 908.

Turning to 99A-2's prohibition on capturing, recording, and use of information obtained from nonpublic premises, these restraints clearly target the speech—and predicate conduct for speech—of journalists and activists. *See ACLU v. Alvarez,* 679 F.3d 583, 597 (7th Cir. 2012) ("act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording"); *see also Animal Legal Def. Fund v. Otter*, 44 F.Supp.3d at 1023 ("A law that expressly punished activists for publishing videos of agricultural operations would be considered a regulation of speech.").

By restricting journalists' and activists' speech, 99A-2 largely shuts off the spigot through which factual information flows to the public about matters of concern occurring on nonpublic property. *See Sorrell*, 564 U.S. at 570 ("Facts [ ] are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."); *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) (noting the First Amendment harm that results from "proceed[ing] upstream and dam[ming] the source" of speech).

Additionally, and equally chilling, 99A-2(c) imposes liability not only on individuals who engage in speech activity prohibited under 99A-2(b), but also on "anyone who intentionally directs, assists, compensates, or induces another person to violate" 99A-2(b). This joint liability deters news outlets and activist organizations from reporting on hidden, harmful activity and severely curtails their ability to disseminate information to broader audiences or advocate on issues of public concern. *See Citizens United*, 558 U.S. at 336 ("Laws enacted to control or suppress speech may operate at different points in the speech process."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (laws that establish a "disincentive to create or publish works" are subject to First Amendment scrutiny).

2. Undermining state and federal regulatory schemes, 99A-2 creates civil liability for whistleblowing and speech pursuant to government reporting statutes

Section 99A-2's carve-out for select whistleblower activities is woefully underinclusive. It applies only in a limited number of factual scenarios, such as worker's compensation claims and reports to certain narrowly defined state authorities. *See* N.C. Gen. Stat. § 99A-2(e); § 95-241; § 126-84. As a result, 99A-2 creates civil liability for a host of whistleblower speech as well as speech that is encouraged, or even required, under North Carolina or federal law. For this reason, the governor of North Carolina vetoed 99A-2 (only to be overridden), specifically

citing his concerns about North Carolina's Burt's Law. This law requires employees with knowledge of abuse or harm to mentally ill or developmentally disabled patients to report to various state authorities. J.A.133; N.C. Gen. Stat. Ann. § 122C-66. A report pursuant to Burt's Law does not fall within 99A-2's whistleblower exemption, meaning employees of patient facilities are left in the untenable position of risking civil prosecution should they comply with their mandatory reporting obligation.

As further examples of the conflict between 99A-2 and government-encouraged or mandated reporting, 99A-2 creates liability for individuals who use information or recordings obtained from nonpublic premises to report on activities that defraud the federal government under the False Claims Act. *See* 31 U.S.C. §§ 3729-33. Section 99A-2 also 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, 29 U.S.C. § 218c, and the Federal Railroad Safety Act, 49 U.S.C. § 20109(b). So, for instance, if a University of North Carolina student working on campus enters a nonpublic area, where she witnesses workplace safety violations and reports them to OSHA, the student could potentially have to defend against claims by the University for damages, attorneys' fees and civil penalties.

Additionally, 99A-2 punishes reports made by concerned employees or others under a host of environmental statutes and regulations, including: the National Environmental Policy Act, 40 C.F.R. § 1506.6(d); the Endangered Species Act, 16 U.S.C. § 1533(b)(3)(A); the Clean Water Act, 40 C.F.R. § 130.7(b)(5); the Clean Air Act, 42 U.S.C. § 7622. Lastly, the narrow whistleblower exemption in 99A-2(e) conflicts with the broader protections available under the federal Whistleblower Protection Act. 15 U.S.C. § 2087.

3. Section 99A-2 burdens individuals' right to petition the government or the courts for grievances

Section 99A-2 also creates liability for speech that is protected by the First Amendment's right to petition the government or the courts for redress of grievances. The Supreme Court has ruled that states may not create laws so broad that they restrict an individual's ability to peaceably petition their government for changes in society. *See Whitehill v. Elkins*, 389 U.S. 54, 59, 62 (1967) (ruling that the state of Maryland could not proscribe a teacher's oath that restricted certain political affiliations). Yet, multiple sections of 99A-2(b) authorize an employer to file suit against an employee who, for example, lobbies her federal or state legislators for increased safety protocols at work using images or data obtained from a nonpublic location on her employer's premises. If the employee were to share with her legislators a photograph of an inter-office memo that stated there had been a workplace accident onsite, her employer could sue her under section

(b)(1). If this same employee were to use an unattended device to video-record unsafe work conditions that fall outside of 99A-2's whistleblower carve-out and bring that recording to her legislators, she could be sued under (b)(2) and (b)(3). Lastly, if sharing the photograph of the memo or the video-recording led to the jobsite being audited, fined, or shut down, the employee could be sued under (b)(5) for substantially interfering with the employer's ownership or possession of real property. Exposure to such an array of civil charges is sufficient to chill any employee of ordinary firmness from petitioning their government for positive workplace changes.

Section 99A-2 also burdens the right to petition the courts by deterring employees' use of information or recordings obtained from their employer's nonpublic premises in bringing a lawsuit against the employer. For example, if an employee has access to company salary information stored in her supervisor's nonpublic office, and she takes notes or photographs documents showing that women and minorities are paid significantly less than their white male counterparts, and uses this as evidence in bringing a Title VII employment discrimination lawsuit, the employee could be sued under 99A-2(b)(1). The employee could also be subject to liability under (b)(2) if she uses her cell phone to record her supervisor making sexist and racist remarks about employees during a meeting in a nonpublic conference room and later introduces the recording as

evidence in her discrimination lawsuit. The fact that 99A-2 is so broad that it chills enforcement of workplace anti-discrimination laws speaks loudly to the statute's lack of narrow tailoring.

In total, 99A-2 deters, chills, and otherwise heavily burdens broad swaths of speech, press, and petition activity protected under the First Amendment. This includes journalists and activists' speech aimed at uncovering important matters hidden from the public. This also includes employees and others' speech on a host of topics about which state and federal law encourages, or even mandates, reporting. By failing to narrowly tailor 99A-2, the North Carolina legislature has created a law so broad that its unconstitutional applications substantially outweigh any colorable legitimate sweep. Accordingly, 99A-2 should be facially invalidated as overbroad.

CONCLUSION

N.C. Gen. Stat. § 99A-2 is a uniquely expansive and dangerous law because it deters disclosure of misconduct, abuse, and illegality occurring on all nonpublic premises, regardless of the type of property or type of property owner. At the expense of free speech and good public policy, the statute arms North Carolina property owners with powerful weapons for chilling speech -- civil liability and monetary damages/penalties -- to brandish against anyone who might document and disclose the property owner's malfeasance. Around the country, similar so-

called "ag-gag" laws with kindred goals but much narrower sweeps, have repeatedly been facially struck down as violating First Amendment freedoms. This must also be the outcome for the much-farther reaching 99A-2. *Amici Curiae* therefore respectfully request that this Court declare N.C. Gen. Stat. § 99A-2(b)(1), (b)(2), (b)(3), and (b)(5) unconstitutional as applied to anyone, both because they fail to satisfy strict and intermediate scrutiny and because 99A-2 is substantially overbroad.

Respectfully submitted this 1st day of March 2021.

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CERTIFICATE OF COMPLIANCE

Counsel for Amici Curiae hereby certifies that:

1. This Brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and Local Rules 28.1(e)(2)(B) and 29(a)(5). The Brief contains less than 7,650 words (as calculated by the word processing system used to prepare this brief), excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure and Local Rule 32(f).

2. This Brief complies with the type face requirements of Federal Rule of Appellate Procedure and Local Rule 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure and Local Rule 32(a)(6). The Brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style font.

3. I further certify pursuant to Local Rule 29(a)(4)(E) that this Brief was not authored in whole or in part by counsel of the parties; was not funded by a party or party's counsel; and was not funded by any person other than the *amici curiae*.

Date: March 1, 2021

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this the 1st day of March 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF System.

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