In The United States District Court
For The Middle District of North Carolina
Greensboro Division

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,

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,

And

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Intervenor-Defendant.

Case No.: 1:16-cv-25

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' AND INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT

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I. Statement of the Case

Not only do Defendants' and Intervenor's motions for summary judgment fail on their own terms, but they actually establish Plaintiffs must prevail on their facial challenge to N.C. Gen. Stat. § 99A-2(b)(1)-(3), (5) ("the Anti-Sunshine Law" or "Law"). Neither motion cites a shred of evidence demonstrating North Carolina needed to enact the Anti-Sunshine Law, or that the legislature considered alternatives before enacting it. Defs. Br., Dkt. No. 108, at 20-21; Int. Br., Dkt. No. 110, at 17-18. Even under intermediate scrutiny—the lowest scrutiny any party contends applies to Plaintiffs' First Amendment claims—"[a]rgument unsupported by evidence will not suffice to carry the government's burden" to show the Law is narrowly tailored. *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015) (Defendants' and Intervenor's authority).

Because they cannot prevail under the First Amendment, Defendants and Intervenor insist the Law falls within a nonexistent exception to the Constitution for "generally applicable laws." Its text and legislative history, however, establish the Law is *not* "generally applicable" because it specifically targets First Amendment protected activities. Thus, the Court must evaluate whether it is content-based or content-neutral and apply the resulting scrutiny. The Law is content-based, requiring strict scrutiny, which neither Defendants nor Intervenor claim it survives. Further, even "generally applicable laws" that can be used against "speech and nonspeech"—as is true here—must pass intermediate scrutiny, which the Law fails. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 376 (1968). Defendants' and Intervenor's arguments related to "generally applicable laws" are nothing more than a distraction. The term has neither the meaning nor consequence they ascribe to it, and because they cannot justify the Law, it cannot survive.

While the Court need proceed no further, Defendants' and Intervenor's attacks on Plaintiffs' overbreadth, vagueness, and equal protection claims are equally baseless. In fact, their arguments against overbreadth confirm the Law can be used against speech,

mandating First Amendment review, Defs. Br. 9 (acknowledging the Law can be applied in "ways" that "implicate protected speech"), and do nothing to diminish the Law's reach, failing to grapple with key aspects of its text. Similarly, they contend the Law is not unconstitutionally vague by pointing to a "scienter requirement" that does not apply to the relevant terms. Their equal protection argument asks this Court to ignore the Law's legislative history, which the Supreme Court has held is outcome determinative.

When the Anti-Sunshine Law and the doctrine are properly laid out, the Law must fall.[1]

II. Statement of Facts

As required by Local Rule 56.1(e), Plaintiffs briefly state the facts on which they rely to respond to Defendants' and Intervenor's arguments. Plaintiffs also note their cross-motion for summary judgment contains further discussion of these same facts. Plfs. Br. 2-8.

Plaintiffs bring facial and as-applied challenges to subsections (b)(1)-(3) and (5) of the Anti-Sunshine Law. First Amended Complaint, Dkt. No. 21, ¶ 142(a). The Law creates a cause of action for an "owner or operator" "damage[d]" by "[a]ny person who intentionally gains access to the nonpublic areas of [the owner's or operator's] premises and engages in an act that exceeds the person's authority." N.C. Gen. Stat. § 99A-2(a).

Subsection (b) defines the "act[s] that exceed[] the person's authority." As relevant here, those definitions are:

[1] Defendants purport to challenge Plaintiffs' standing by "incorporat[ing] by reference their standing arguments" from their earlier briefing, which they acknowledge were rejected by the Fourth Circuit. Defs. Br. 9 n.2. Such a passing nod to arguments elsewhere is insufficient to raise those issues again. *See* L.R. 7.2(a)(4) (briefs must "refer to all statutes, rules and authorities relied upon" to make an argument). Thus, Plaintiffs do not address them in this Opposition. Plaintiffs have established their standing in their brief in support of their motion and related exhibits. *See, e.g.*, Plfs. Br., Dkt. No. 99-0, at 7-10.

> (1) An employee who enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer's data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer.
>
> (2) An employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer.
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> (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.
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> (5) An act that substantially interferes with the ownership or possession of real property.

Id. § 99A-2(b). A violator, and "[a]ny person who intentionally directs, assists, compensates, or induces" their activities, *id.* § 99A-2(c), is liable for "[c]ompensatory damages," "[e]xemplary damages," and "[c]osts and fees," *id.* § 99A-2(d).

The Law exempts people from its reach if they fall within the "protections provided to employees under Article 21 of Chapter 95 or Article 14 of Chapter 126 of the General Statutes." *Id.* § 99A-2(e). Article 21 of Chapter 95 applies to all employees, but only protects them if they proceed under one of the eleven enumerated laws. *Id.* § 95-241(a). To be covered by § 95-241, an employee must use the formal procedures provided for under those statutes. *See, e.g.*, *Whiting v. Wolfson Casing Corp.*, 618 S.E.2d 750, 753 (N.C. Ct. App. 2005). Article 14 of Chapter 126 applies to "State employees" and protects them if they report to an "appropriate authority" evidence of an "activity by a State agency or State employee" that constitutes (1) "violation of … law"; (2) "[f]raud";

(3) "[m]isappropriation of State resources"; (4) "[s]ubstantial and specific danger to the public health and safety"; or (5) "[g]ross mismanagement." *Id.* § 126-84(a). It also authorizes state employees to testify on "matters of public concern" before legislative panels. *Id.* § 126-84(b).

The sponsors of the Anti-Sunshine Law repeatedly stated during its legislative proceedings that it was designed to stop undercover investigations used by animal rights groups in their public advocacy, and by the media. One stated the Law sought to prevent activities like an "offensive" undercover investigation by "Mercy for Animals" and its promotion in the media. Plfs. Ex. C, Dkt. No. 99-5, at 18:11-19:22. Others stated that the Law was designed to stop employers' information getting to "the media and [] private special interest organizations," Plfs. Ex. B, Dkt. No. 99-4, at 4:14-19, "to go after people who intentionally hire onto a [business] … to do an exposé for ABC News," *id*. at 15:22-16:2, and to punish people who go "running off to a news outlet," Plfs. Ex. D, Dkt. No. 99-6, at 13:48; *see also id.* at 11:44; Plfs. Ex. C. 6:10-21, 14:17-24.

The Governor's veto statement likewise stated that the Law sought to "discourage" "undercover investigat[ions,]" particularly of "our agricultural industry." Plfs. Ex. F, Dkt. No. 99-8, at 3. In explaining the veto, the Governor also warned that the Law is written so broadly it will stop people from reporting "criminal activity." *Id.*

Plaintiffs People for the Ethical Treatment of Animals ("PETA") and the Animal Legal Defense Fund ("ALDF") confirm the Law targets their undercover investigations. PETA and ALDF send investigators to facilities to obtain employment, and with that access gather information, including taking photos and making video and audio recordings, so that they can expose illegal and unethical conduct to the public. Specifically, the organizations use the information and recordings they collect through their investigations to develop publications, and provide the information to the media and other groups for the express purpose of revealing the employer's dangerous, unsanitary, and/or inhumane practices. Plfs. Exs. O, Dkt. No. 100-1 ¶¶ 4, 6-8, 10-18, 21-25 (PETA

declaration); P, Dkt. No. 100-2 ¶¶ 4-10, 12-15 (ALDF declaration). In other words, the Anti-Sunshine Law's restrictions on employees' activities that result in the release of information outside official channels mirror the plaintiff groups' advocacy.

The legislative and discovery records offer no constitutional explanations for the Law. The legislature did not submit into its record a single document explaining why it regulated in this manner. Post-hoc discovery collected by Defendants that they claim could have justified the challenged provisions contains, in its entirety, a single news story regarding a prosecution for corporate espionage that occurred in Iowa, Plfs. Ex. I, Dkt. No. 99-11, and an article calling for a federal trade secrets statute, Plfs. Ex. H, Dkt. No. 99-10. North Carolina already possesses a trade secrets statute that provides for civil remedies, N.C. Gen Stat. §§ 66-152 to -157, and Defendants produced no evidence suggesting it has proven inadequate.[2]

III. Statement of the Issues

1. Whether the challenged provisions of the Anti-Sunshine Law, which, all parties agree, based on their plain text can be used to target speech, are subject to the First Amendment.

2. Whether the challenged provisions of the Law can survive the requisite level of First Amendment scrutiny, particularly given the absence of justifications for the Law in the legislative record (and Defendants' discovery).

3. Whether the term "duty of loyalty," which is a recognized term of art, but is undefined, is unconstitutionally vague, and whether subsection (b)(5), which Defendants and Intervenor do not address, is similarly vague.

4. Whether a law motivated to suppress speech by a particular group its sponsors found "offensive" violates the Equal Protection Clause.

[2] Defendants further produced a variety of documents, also not in the legislative record, that concern "retail theft" that is regulated by subsection (b)(4), which Plaintiffs do not challenge, and numerous documents that post-date the Law by years, and thus could not have informed its passage. Plfs. Exs. G, J-K, Dkt. Nos. 99-9, -12-13.

IV. Argument

a. The Anti-Sunshine Law Is Not A "Generally Applicable Law."

Defendants and Intervenor insist the challenged provisions of the Anti-Sunshine Law are "generally applicable," and claim such laws are not subject to First Amendment review. *See, e.g.*, Int. Br. 10. Neither statement is correct. "Generally applicable laws" *do* require First Amendment review where, as here, they can be used to target speech. But, more importantly, the Anti-Sunshine Law is *not* "generally applicable" because it targets First Amendment protected activities.

To determine whether a law is "generally applicable," courts examine whether, even if the law "regulates conduct to some extent, it also restricts speech." *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 918 (S.D. Iowa 2018); *see also Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018). If so, it is not "generally applicable."[3]

Put another way, "generally applicable" laws are statutes that are "not aimed at the exercise of speech or press rights as such." *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 601 (7th Cir. 2012) (discussing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991), and *Branzburg v. Hayes*, 408 U.S. 665 (1972), authority relied on

[3] Intervenor's effort to present these so-called Ag-Gag cases as inapplicable is peculiar. Int. Br. 11-14 & n.1. While Intervenor is correct the statutes at issue created criminal penalties for "false statements," those facts did not impact much of their analysis, which rejected many of the arguments raised here. Moreover, the Fourth Circuit held the Anti-Sunshine Law's civil penalties have the potential to restrict speech in the same manner as criminal penalties, particularly as the Law provides for punitive damages, which are quasi-criminal. *PETA v. Stein*, 737 Fed. App'x 122, 131 n.4 (4th Cir. 2018) (unpublished). And, the Supreme Court explained statutes regulating false statements like those at issue in the Ag-Gag cases may receive *less* First Amendment protection than laws like the Anti-Sunshine Law, which restricts honest speech; false speech may fall "outside the First Amendment" if the speech is connected with "defamation, fraud or some other legally cognizable harm." *See United States v. Alvarez*, 567 U.S. 709, 719, 723 (2012) (plurality opinion). Hence, as Intervenor notes, the Ag-Gag cases described the scope of the laws in great detail. But, that does nothing to suggest those courts' uniform holdings that the Ag-Gag laws are unconstitutional are inapplicable here.

by the Defendants and Intervenor). Examples include the "doctrine of promissory estoppel," *Am. Civil Liberties Union of Illinois*, 679 F.3d at 601, "copyright, labor, antitrust, and tax" laws, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999) (Defendants' and Intervenor's authority) (citing *Cohen*, 501 U.S. at 669), and a total "ban on travel to Cuba." *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1197 (10th Cir. 2017) (discussing *Zemel v. Rusk*, 381 U.S. 1 (1965), Intervenor's authority). Generally applicable laws might "incidentally burden[]" speech, but their elements indicate they are designed to regulate activities other than speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2010); *see also Food Lion*, 194 F.3d at 521 (generally applicable laws apply to "daily transactions" rather than "target" First Amendment activities).

In other words, a "general trespass statute" is "generally applicable." *W. Watersheds Project*, 869 F.3d at 1197. However, a statute that prohibits trespass and also contains a "speech-creation element"—such as prohibiting trespass to collect "information plaintiffs need to engage in [their] advocacy"—is not generally applicable, as its text reveals it is designed to reach speech. *Id.* Thus, despite Defendants' and Intervenor's attempt to portray the Anti-Sunshine Law as a "generally applicable law [meant] to safeguard private property," Defs. Br. 7; Int. Br. 3, since it does not simply restrict trespass, but selectively restricts access to gather and "use" "information" and "recordings" (speech), it is not generally applicable.

i. Efforts Like Defendants' and Intervenor's To Rewrite the Definition of "Generally Applicable Laws" Have Been Uniformly Rejected.

Defendants and Intervenor attempt to tack on three additions to the definition of "generally applicable laws" to make it fit the Anti-Sunshine Law. None are supported by law or logic. First, they claim that if a law "incorporates" any "principles underlying" "generally applicable laws" it must be "generally applicable." Int. Br. 8-10; *see also* Defs. Br. 11 (if "conduct" is "accompanied by speech" then the activity is "not

protected"). As the case law above demonstrates, this gets things exactly backwards. If any element of a restriction targets speech, the whole provision is subject to full First Amendment review. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 640 (1994) (a statute that "single[s] out" First Amendment protected activities is not generally applicable); *see also W. Watersheds Project*, 869 F.3d at 1197. So, for example, the government cannot evade First Amendment review of a special speed limit for people on the way to political rallies by pointing out that speed limits are generally applicable. Likewise, Defendants and Intervenor cannot claim the Anti-Sunshine Law should stand because it prohibits some "trespass." Int. Br. 7; *see also* Defs. Br. 9, 16. The issue is not whether the Law poses any restriction on trespass, but whether it also restricts speech.

Second, Defendants and Intervenor state that if any part of a regulated activity occurs on private property, the law is "generally applicable." Defs. Br. 12; Int. Br. 8-9. Yet, the claim that "private property rights" determine the scope of First Amendment review "finds no support in the case law." *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1208 (D. Utah 2017); *see also id.* at 1209 ("no authority" supports proposition that law can restrict "speech … on private property" even if a person can "sue for trespass"). The very premise of the First Amendment is that "[o]therwise protected free speech interests" cannot by default be "subordinated" to other societal interests. *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988).

To determine whether a law "prohibiting access" infringes on First Amendment rights, the court should not ask whether there was a "right of access"—that would be a "circular endeavor"—but rather whether the law "prohibits the plaintiffs from access[ing] … information" and also "selectively [] delimit[s]" First Amendment protected activities. *S.H.A.R.K. v. Metro Parks Serving Summit Cty.*, 499 F.3d 553, 560 (6th Cir. 2007). If so, the court must determine whether that "rule blocking access is, itself, constitutional" by applying the appropriate First Amendment scrutiny. *Id.* at 560-61. Indeed, "the Supreme Court [has] applied the First Amendment to a law regulating both access to private

property and speech," striking it down because it facially failed strict scrutiny. *W. Watershed Project*, 869 F.3d at 1195 (discussing *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002)).

The authority on which Defendants and Intervenor rely does not establish all laws concerning activities on private property are "generally applicable." Rather, their authority addresses the use of well-established common law torts courts have recognized are focused on non-expressive activities, not speech. *See, e.g.*, *Cohen*, 501 U.S. at 670 (concerning claim under "doctrine of promissory estoppel" that regulates "daily transactions"); *Food Lion*, 194 F.3d at 518 (addressing torts focused on "wrongful act in excess of … authority"); *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (addressing whether media is "immun[e] from tort or contract liability"); *Miller v. Brooks*, 472 S.E.2d 350, 354 (N.C. Ct. App. 1996) (addressing tort requiring only "intentional[] intrus[ion] … upon … solitude or seclusion").

As Intervenor is forced to admit, the holding of these cases is merely that there is no "special exemption" from common law rules long understood to be aimed at non-expressive conduct and consistent with the First Amendment, if the conduct happens to facilitate First Amendment activities; not that private property lines determine the application of the First Amendment. Int. Br. 5; *see also Herbert*, 263 F. Supp. 3d at 1209 ("If a person's First Amendment rights were extinguished the moment she stepped foot on private property, the State could, for example, criminalize any criticism of the Governor, or any discussion about the opposition party, or any talk of politics whatsoever, if done on private property.").

For instance, in *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976), and *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), the Court explained standard trespass laws could be used to prohibit people who planned, upon entry, to engage in speech, because there is no "First Amendment right to enter." *Hudgens*, 424 U.S. at 520 (discussing *Lloyd*). Likewise, in *Dietemann v. Time, Inc.*, the Court held a magazine could be sued for

"invasion of privacy" because the claimed First Amendment freedom, "publication," was not "an essential element" of that claim. 449 F.2d 245, 249 (9th Cir. 1971). The magazine was seeking "First Amendment immun[ity]" from an established, constitutional common law tort, which was not appropriate. *Id.* These cases do not suggest a newly enacted law is protected from First Amendment review because it happens to apply on private property, but that the First Amendment was not offended by these garden variety torts and thus did not mandate an exemption to such laws aimed at non-expressive conduct.[4]

Third, Defendants and Intervenor state that if a law does not apply to "any particular type of business or industry" it is "generally applicable." Int. Br. 8; *see also* Defs. Br. 15. Again, this confuses the analysis. If a law targets speech "because of the topic discussed" that is one (although not the only) way in which it can be "obvious[ly]" content-based, requiring strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27 (2015). But that is a separate inquiry from whether a law is aimed at speech or "generally applicable."

[4] Several of Defendants' and Intervenor's cases are factually inapplicable. *State v. Hendricks* does not mention the First Amendment, but rather concerns whether electronic surveillance in a criminal investigation was lawful under the Fourth Amendment. 258 S.E.2d 872, 880 (N.C. Ct. App. 1979). *Houchins v. KQED*, 438 U.S. 1 (1978), and *Pell v. Procunier*, 417 U.S. 817 (1994), concern access to prisoners who are subject to "limitation[s] of many privileges and rights." *Pell*, 417 U.S. at 822. Moreover, even in that unique context, the authority is consistent with the discussion above. The Court only upheld the law in *Pell* after conducting a First Amendment analysis, concluding that the challenged regulation was acceptable because of the "available alternative means of communication." *Id.* at 823-24. The Court held the First Amendment was not implicated in *Houchins* because there (unlike here) the plaintiff did not challenge a rule targeted at speech, but rather claimed it was entitled to "a special privilege to" access inmates in a county jail "over and above that of other persons," which the Court held was not mandated by the First Amendment. 438 U.S. at 3, 10.

ii. The Anti-Sunshine Law's Text and History Prove It Is Not "Generally Applicable."

The Anti-Sunshine Law is "aimed at" First Amendment protected activities—it only regulates access when it occurs in conjunction with speech—thus it is not "generally applicable." *See, e.g., Am. Civil Liberties Union of Illinois*, 679 F.3d at 601; *W. Watersheds Project*, 869 F.3d at 1197; Plfs. Br. 10-11.

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

Subsections (b)(1) and (2) define their cause of action as prohibiting access to gather "and use[]" "information" and "recording[s]" "to breach the person's duty of loyalty to the employer"; that is, subsections (b)(1) and (2) only come into force when there is access *and* the deployment of the information that access generates, the information's communication. Indeed, subsections (b)(1) and (2) are analogous to the statute at issue in *Dahlstrom v. Sun-Times Media, LLC*, which the court held was a "direct regulation of speech." 777 F.3d 937 (7th Cir. 2015) (Intervenor's authority). *Dahlstrom* explained a "prohibition on *disclosing* … information" was subject to a facial First Amendment challenge because if disclosure does not "constitute speech, it is hard to image what does fall within that category." *Id.* at 949 (emphasis in original). Therefore, "[t]he appropriate standard of review … hinge[d] on whether the regulation is content based." *Id.*; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (restriction on "disseminating" information restricts speech).[5]

Defendants argue that because they can conceive of a single way in which the subsection (b)(1)—although not (b)(2)—would not involve speech the provisions must be

[5] *Dahlstrom* also confirms Plaintiffs' description of "generally applicable laws." It held a separate prohibition on obtaining drivers' personal identifying information did not facially implicate the First Amendment because unlike "audio and audiovisual recording" and "photography [and] note-taking," "the act of harvesting information from driving records is hardly" a "common … instrument of communication." 777 F.3d at 948. In other words, only when a statute is not facially aimed at speech is the First Amendment analysis altered.

"generally applicable." Defs. Br. 18-19. Not so. First, it is not apparent their example—a person taking "data or information and using that information in a manner adverse to the owner," *id.*—would only consist of non-expressive activities. Defendants fail to explain how information could be "used" in an "adverse" manner without it either being communicated or forming the basis of a communication. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010) ("Laws enacted to control" what speech is produced "abridge the freedom of speech.").

Second, there is no requirement a statute be perfectly crafted to only encompass speech before it will be understood to be aimed at First Amendment rights. The Supreme Court has recognized the First Amendment may need to regulate some non-First Amendment protected activities in order to ensure there is "breathing space" for speech. *See, e.g., Citizens United*, 558 U.S. at 329. Consistent with this, the Fourth Circuit has explained a statute's "predominant purpose" determines its classification for First Amendment purposes. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002). Defendants' own authority treats a "buffer zone" around abortion clinics that could be violated by a person simply "standing" in the zone as a facial attack on speech. *McCullen v. Coakley*, 573 U.S. 464, 481-82 (2014); *see also W. Watersheds Project*, 869 F.3d at 1197 (statute prohibiting collecting "sample of material" with coordinates of where it was collected was a direct restriction on speech because that activity could form the basis of advocacy).

Here, there can be no doubt that the goal of subsections (b)(1) and (2) is to restrict communications, even if the legislature may have accidently swept in other activities. Its sponsors and the Governor repeatedly stated as much. *See, e.g.*, Plfs. Ex. B 15:22-16:25 (Representative Speciale stating Law targeted at "exposé[s] for ABC News"); *see also* Plfs. Exs. D 11:44; F 3. Moreover, there was no need to prohibit all "disloyal" "uses" of any "information"—*e.g.*, anything that could induce public repudiation against the

business, whether warranted or not—if the legislation was focused on protecting legitimate business activities, as Defendants claim.

Defendants and Intervenor also argue subsections (b)(1) and (2) do not implicate First Amendment activities because *Food Lion* upheld a claim for "breach of [the] duty of loyalty" against a First Amendment challenge. Defs. Br. 15-16; Int. Br. 8. This argument is ahistorical. *Food Lion* held that if the state recognizes a "broad" obligation for all employees to be "faithful" to their employers that established common law tort is a "generally applicable law" that can be applied consistent with the First Amendment. 194 F.3d at 515, 520-22. Subsequently, the North Carolina Supreme Court held that such a "broad" tort does not exist in North Carolina law, abrogating *Food Lion*'s statement that North Carolina's "duty of loyalty" was constitutional. *Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001).

With subsections (b)(1) and (2), the state created a new cause of action involving the "breach of … [the] duty of loyalty" that solely arises when that breach is connected with information's "use[]" (speech). Thus, that subsections (b)(1) and (2) include the phrase "duty of loyalty" does nothing to diminish the fact that the provisions are aimed at speech. Indeed, the legislative history confirms subsections (b)(1) and (2) were designed to punish disloyal communications. Plfs. Exs. B 4:1-19 (disloyal employees are those who report information to "the media and [] private special interest organizations"), 15:22-16:25 (similar); C 6:10-21, 14:17-24, 18:11-19:22 (similar).

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

Subsections (b)(2) and (3) also target First Amendment freedoms by restricting "record[ing]," meaning those provisions can only be violated through engaging in First Amendment activities and are not "generally applicable." *Dahlstrom*, 777 F.3d at 948 (recordings are a "common, indeed ubiquitous, instrument of communication"); *Am. Civil Liberties Union*, 679 F.3d at 595 (recording needed for speech and therefore speech); *Herbert*, 263 F. Supp. 3d at 1208 (same). Indeed, subsections (b)(2) and (3) do not simply

limit placing a recording device, which facilitates speech, but recording itself, which is a form of "express[ion]." *Wasden*, 878 F.3d at 1203-04. Defendants and Intervenor have no retort except to repeat their claim that recordings on private property should be viewed differently, Defs. Br. 16; Int. Br. 10, a notion disproven above.[6]

3. Subsection (e).

Defendants' and Intervenor's claim that the Law is "generally applicable" also wholly fails to address subsection (e)—the Law's exceptions—which train the entirety of the Law on speech. A statute's exceptions can demonstrate it is aimed at speech. *See, e.g.*, *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1047 (3d Cir. 1994); *accord Appalachian Power Co. v. Sadler*, 314 F. Supp. 2d 639, 640 (S.D. W.Va. 2004). Subsection (e) prevents liability for any and all of the covered activities so long as it results in a "claim or complaint" or equivalent report under the state's established procedures. N.C. Gen. Stat. § 99A-2(e) (cross-referencing N.C. Gen. Stat. §§ 95-241, 126-84). In other words, subsection (e) demonstrates the Law is not aimed at limiting access to private property or even obtaining information, but with whom that information is shared. The Law seeks to force people to communicate information through formal, state-chosen channels, thereby limiting other types of communication. *See Time Warner Entm't Co., L.P. v. F.C.C.*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) ("restricting the number of" people with whom one can communicate is a restriction targeting First Amendment freedoms). In this manner, subsection (e) does not just seek to narrow the scope of communications, but prevent communications with particular objectives, such as to release information to the public

[6] The Ninth Circuit has also explained that to the extent its nearly fifty-year old precedent, *Dietemann*, 449 F. 2d 245, on which Defendants and Intervenor rely, suggests recordings may not be protected, that is because the balance of interests there favored protecting privacy in the home, not that recordings are not speech, nor that a prohibition on recordings at businesses would survive First Amendment review. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 818 n.6 (9th Cir. 2002).

and to build political campaigns, thereby aiming the Law at the heart of the First Amendment.

Yet again, the legislative history confirms this reading. Plfs. Exs. B 4:1-19 (Representative Szoka, Law is designed to stop communications to "the media and [] private special interest organizations"); D 13:48 (Representative Jordan, "crux" of the Law is it prevents people from "running off to a news outlet").

4. Subsection (b)(5).

In light of the above, subsection (b)(5)—which covers "substantially interfer[ing] with the ownership or possession of real property"—should also be understood to target speech, such as communications of observations gathered in nonpublic areas that result in reputational harm to the business. Intervenor characterizes subsection (b)(5) as a "catch-all provision" aimed at equivalent activities to what is regulated by subsections (b)(1)-(3), but that might not fall within their text. Int. Br. 11. Thus, as subsections (b)(1)-(3), and (e) reveal the Law is targeted at speech, so too must be the "catch-all" subsection (b)(5). *See also* Plfs. Br. 11 n.5.

* * *

Put simply, to determine if a law is "generally applicable" rather than subject to standard First Amendment review, one looks to see if the law seeks to regulate speech. The Anti-Sunshine Law's text explicitly covers expressive activities—recording and using information—and it seeks to narrow the scope of communications. It is aimed at speech, as the legislature repeatedly explained. It is not "generally applicable."

b. Even If The Anti-Sunshine Law Were Generally Applicable, It Would Require First Amendment Scrutiny.

Even were the Court to disagree and hold that the Anti-Sunshine Law is "generally applicable," Defendants and Intervenor further err in suggesting that would end the First Amendment inquiry. A "generally applicable law" whose elements facially can be used to target both speech and non-expressive activities—such as a "prohibition on destroying

draft cards" that prevents them from being discarded to avoid enlistment or burned in protest—is subject to "intermediate scrutiny." *Holder*, 561 U.S. at 26-27 (discussing *O'Brien*, 391 U.S. at 370, 376, 382); *see also Ross v. Early*, 746 F.3d 546, 554 (4th Cir. 2014) (where parties stipulated law was facially "generally applicable" then they have "stipulated to … facts warranting the application of intermediate scrutiny"); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 651 (4th Cir. 1995) ("Intermediate scrutiny is required when a statute potentially regulates conduct that has protected expressive elements."). Thus, the Fourth Circuit held a law that was "justified without reference to the message or viewpoint of anyone who might violate it," and the "plain language" of which revealed "its purpose was not related to suppressing expression," nonetheless had to survive intermediate scrutiny because its prohibition on "obstruct[ion]" could be used against non-expressive conduct or speech. *Am. Life League*, 47 F.3d at 648, 652.

As Defendants' authority *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* explains, Defs. Br. 11, a law is only exempt from the First Amendment if it places *no* "limits [on] what [a person] may say"—as was true of the statute at issue in *Rumsfeld*, which merely required schools to treat military recruiters equally to all others employers, without limiting any expressions regarding the military. 547 U.S. 47, 60 (2006). That such a requirement may lead the schools to send some "scheduling e-mails" does not convert its elements into restrictions on speech, when its elements solely concern non-expressive activities—which is where Defendants get the notion a law can influence "conduct [that is] in part initiated, evidenced, or carried out by means of language" without being subject to the First Amendment. *Id.* at 62. But, laws whose elements encompass speech and nonspeech, and thus can be used to target what "may [be] sa[id]" are always subject to facial First Amendment review. *Id.* at 65. [7]

[7] Defendants cite Justice Scalia's concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)—a case concerning whether nude dancing is protected by the First Amendment—to suggest certain laws regulating speech may not require First Amendment review. Defs. Br. 10. That position was subsequently rejected in *City of Erie*

Here, no party claims subsections (b)(1)-(3) and (5) cannot be wielded to punish speech. Indeed, Intervenor states that if the Anti-Sunshine Law were applied to the facts of this case it would be because Plaintiffs' undercover investigators "gather[ed] information to advance plaintiffs' agendas," Int. Br. 1—*i.e.*, to "use" in Plaintiffs' public political advocacy to call attention to unethical conduct. *See, e.g.*, Plfs. Exs. O ¶¶ 4, 6-8, 10-17, 21-22; P ¶¶ 4-10, 12; Q, Dkt. No. 101-1 ¶ 19 (ASPCA declaration); V, Dkt. No. 101-6 ¶¶ 10-14 (GAP declaration). In other words, if used against Plaintiffs, the Anti-Sunshine Law would be applied based on their speech and messages. Therefore, at a minimum, intermediate scrutiny is required as the Law can be used to target speech. *See Holder*, 561 U.S. at 27-28.[8]

c. The Anti-Sunshine Law Warrants Strict Scrutiny.

Because the Anti-Sunshine Law is aimed at speech, the Court is not limited to intermediate scrutiny, and the next step is to determine whether the Law is content-based and subject to strict scrutiny, or content-neutral, which results in intermediate scrutiny. *See, e.g.*, *Dahlstrom*, 777 F.3d at 949. The Anti-Sunshine Law is content-based and viewpoint discriminatory—an "egregious form of content discrimination"—thus strict scrutiny is required. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

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v. Pap's A.M., 529 U.S. 277 (2000), which concluded such laws must be reviewed under *O'Brien*'s intermediate scrutiny test because they can be used to restrict expressions. *See also Ben's Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702, 718 (7th Cir. 2003) (explaining same).

[8] Since, if applied to Plaintiffs, the Anti-Sunshine Law would be invoked based on Plaintiffs' speech, Plaintiffs would also be entitled to proceed with their as-applied claim even if their facial challenge failed. *See, e.g.*, *Holder*, 561 U.S. at 28 (if "generally applicable law" is used against a person "because of what his speech communicated" strict First Amendment scrutiny is required as-applied). The Supreme Court has indicated that where a statute restricting First Amendment rights is facially invalid it should be struck down as such to avoid "[t]he ongoing chill upon speech." *Citizens United*, 558 U.S. at 336. Nonetheless, this is another way in which Defendants' and Intervenor's arguments are unable to dispose of Plaintiffs' claims.

Although overlooked by Defendants and Intervenor, the Anti-Sunshine Law's exceptions define its character, and establish it is content-based. *See* Defs. Br. 17-21; Int. Br. 15-18. The Supreme Court has explained that while "regulat[ing] speech by its function or purpose" may be "more subtle" than "regulat[ing] speech by particular subject matter," both types of restrictions are content-based and subject to strict scrutiny. *Reed*, 135 S. Ct. at 2227. Examples of regulating speech by its "function" include a "nondisclosure requirement," *In re Nat'l Sec. Letter*, 863 F.3d 1110, 1123 (9th Cir. 2017), and a law that allows information to be used "[s]o long as the [user] do[es] not engage in marketing," *Sorrell*, 564 U.S. at 571.

In light of subsection (e), all of the Anti-Sunshine Law's prohibitions on speech turn on the function of the speech. Subsection (e) provides that information regarding misconduct in the nonpublic areas of a business can be collected, recorded, and even disclosed, so long as it is not disclosed outside the approved channels. *See* Defs. Br. 19 (confirming the Law requires people to speak "within the scope of applicable whistleblower statutes"). Thus, per subsection (e), groups like PETA and ALDF can engage in their undercover investigations and identify animal cruelty or violations of health and safety codes, if they agree to keep it quiet and not use that information for their public advocacy. Subsection (e) is just a form of nondisclosure requirement, restricting speech based on how it will be used, its function.

Indeed, subsection (e) not only establishes the Law is content-based, but also viewpoint discriminatory. By trying to keep speech to state agencies, it focuses the Law on speech with a particular "motivati[on]," to disclose it outside those channels, particularly to the public via the press. *Reed*, 135 S. Ct. at 2230 (law based on "motivati[on]" of the speaker "discriminat[es] among viewpoints"); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581, 585 (1983) (law aimed at media "facially discriminatory"). Lest there be any doubt, as noted above, the Law's sponsors and the Governor explained it is aimed at stopping those communications. Plfs.

Ex. C 18:11-19:9; *see also* Plfs. Exs. B 4:14-19, 15:22-16:25; D 14:10-14:45; F 3. That "content-based purpose" is "sufficient" to subject the law to strict scrutiny on its own. *Reed*, 135 S. Ct. at 2228.

While Intervenor states the Law "*can be* justified without reference to the content of the regulated speech," Int. Br. 16 (emphasis added), that theoretical is irrelevant, *Reed*, 135 S. Ct. at 2228 (look to legislature's "asserted interest" to determine law's purpose). The legislative history Defendants and Intervenor cite confirm the law was designed to limit who can receive information. The single sentence they claim suggests the Law is designed to be "generally applicable" says no such thing. *See* Defs. Br. 7; Int. Br. 3. There, Representative Szoka states "courts have held that [the] [F]irst [A]mendment doesn't entitle reporters to violate generally applicable laws," but he goes on to confess the Anti-Sunshine Law *is* meant to stop "a reporter" from "mak[ing] recordings" in nonpublic areas, thus it is not "generally applicable." Plfs. Ex. C 5:18-6:14. The Law is aimed at suppressing communications that will alert the public.

Further still, subsections (b)(1) and (2)'s restrictions on speech solely if the speech "breach[es] the [employee's] duty of loyalty" separately and independently establish those provisions are content-based. Defendants do not argue otherwise; they just read out this element. Defs. Br. 19 (insisting provisions "merely regulate[] the *manner* in which the information is obtained" (emphasis in original)). Intervenor effectively admits that breaching the "duty of loyalty" is a content-based restriction, stating it turns on "the purpose for which" information is collected or a "recording is used." Int. Br. 16. As noted above, the Supreme Court has held a law that prohibits speech based on its "purpose" is content-based. *Reed*, 135 S. Ct. at 2227. Even more on point, the Ninth Circuit has explained a law that would allow the release of a recording of "an after-hours birthday party among co-workers … but not [of] animal abuse" is content-based. *Wasden*, 878 F.3d at 1204. So too must be a law that allows statements that an employer wishes to be disclosed (that are "loyal"), but not those that discredit an employer (that are "disloyal").

Intervenor claims that to determine "the purpose for which the recording is used," *i.e.*, whether it is to "breach the duty of loyalty," a court need not "examin[e] the content of the video" and therefore subsections (b)(1) and (2) are not content-based, Int. Br. 16; *see also* Defs. Br. 18-19. This is wrong on two levels. First, while the fact that a law requires one to examine the words spoken is one way to show the law is content-based, it is not the only way. For instance, laws that restrict speech based on its "function" or that are "speaker-based" are also content-based. *Reed*, 135 S. Ct. at 2228, 2231.

Second, whether speech "breaches the duty of loyalty" is equivalent to tests courts have held *do* require one to examine the content of the speech rendering them content-based. Defendants' case law explains that if a statute regulates all "protests," the court does not need to "know exactly what words were spoken" to apply that law, rather the court is focused on the nature of the "course of conduct," which at most requires a "cursory examination" of the expressions; thus the law is content-neutral. *Hill v. Colorado*, 530 U.S. 703, 721-22 (2000). But, if the law only applies to "labor" protests, it requires the court to examine the specific statements, rendering the law content-based. *Id.* Like the latter example, the Anti-Sunshine Law does not prohibit all public communications, just "disloyal" public communications. A court could not determine whether a communication was "disloyal" except by knowing what words were spoken. One cannot merely look at the "course of conduct." Information an employer wishes to get to the public (that is "loyal") can still cause a backlash. Thus, "breaching the duty of loyalty" depends on the specifics of what is communicated, and subsections (b)(1) and (2) are content-based.

Intervenor's additional argument that "what constitutes a breach of loyalty to one business may not to a different business" does nothing to salvage the Law from strict scrutiny. Int. Br. 15. Just like a law prohibiting "marketing" is content-based even though marketing varies from industry-to-industry, that the Anti-Sunshine Law turns on the nature and function of the speech is sufficient to make it content-based, even if the

particular expressions may vary. *See Sorrell*, 564 U.S. at 571. Indeed, that one must determine whether the speech aligns with the employer's particular objectives confirms a court needs to know the words spoken before it can apply the Law.

That subsections (b)(1) and (2) turn on whether the communication was objectionable to the employer also makes those provisions ripe for discriminatory abuse, which the Fourth Circuit has held requires them to be treated as viewpoint discriminatory—another fact neither Defendants nor Intervenor address. *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 386-90 (4th Cir. 2006) (collecting cases). When a statute turns on subjective standards—such as whether speech is "political"—and does not "establish[] criteria" for what meets those standards, it does not provide "the necessary safeguards" to ensure it will not be used for "arbitrary and discriminatory enforcement." *White Coat Waste Project v. Greater Richmond Transit Co.*, 2018 WL 4610089, at *7-8 (E.D. Va. Sept. 25, 2018). As a result, the law does not "ensur[e] viewpoint neutrality," and must be treated as viewpoint discriminatory. *Id*. The Anti-Sunshine Law's prohibition on "disloyal" speech, without defining "loyalty," is no different. *See also* Plfs. Br. 13-14.

d. The Anti-Sunshine Law Fails Strict and Intermediate Scrutiny.

i. Strict Scrutiny.

Because the Anti-Sunshine Law is facially content-based and viewpoint discriminatory it is subject to strict scrutiny, which neither Defendants nor Intervenor suggest it can survive. Defs. Br. 20 (proceeding from assumption Law is "content-neutral"); Int. Br. 16 (same). This makes sense, as under strict scrutiny "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). Even the potential to regulate the same activities in a "content-neutral" way is sufficient

to strike down a content-based statute. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).[9]

Here, Defendants and Intervenor point to a short list of legitimate uses for the Anti-Sunshine Law that could obviously be addressed through less restrictive alternatives. Defendants state the Law is meant to protect against unwanted "access." Defs. Br. 20. Intervenor states the Law's aim is to "protect[] private property rights." Int. Br. 17. These objectives could have been accomplished by strengthening the state's existing general trespass law, as Defendants admit, rather than targeting trespass connected with engaging in an undercover investigation. Defs. Br. 11 (goal of Law "to strengthen the State's trespass laws").

Indeed, such a law would actually have better achieved the purported ends. Subsections (b)(1)-(3) *only* apply to employees. Subsection (b)(5) only applies if there is "substantial" interference with the property. Certainly non-employees can gain access and cause property damage that may not be "substantial," which would be covered by a law prohibiting all unauthorized access, but not the Anti-Sunshine Law. Where a law "leaves appreciable damage to the[] supposedly vital interest unprohibited," it is not sufficiently tailored to satisfy strict scrutiny. *Reed*, 135 S. Ct. at 2232; *see also Herbert*, 263 F. Supp. 3d at 1213 ("underinclusive" law failing to address the "same allegedly harmful conduct" by others is not tailored). Thus, it is unconstitutional.

[9] In their standard of review, although not their argument, Defendants incant the so-called "no set of circumstances" requirement, which does not accurately describe the parties' burdens in a facial First Amendment challenge. That "language [] is accurately understood not as setting forth a *test* for facial challenges, but rather as describing the *result* of a facial challenge in which a statute fails to satisfy the appropriate constitutional standard. … [I]t can no longer be constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012). This is because, once a statute is subject to the First Amendment, it is the government's burden to justify the law or the law cannot survive. *E.g.*, *McCullen*, 573 U.S. at 495.

ii. Intermediate Scrutiny.

The Anti-Sunshine Law's under-inclusiveness also means it fails intermediate scrutiny, so that even if the Law were "generally applicable" or content-neutral it would still be unconstitutional. "In the First Amendment context, fit matters," even under intermediate scrutiny. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (plurality opinion). Thus, the Fourth Circuit recently stated that when there is an "underinclusive speech restriction," "intermediate and heightened scrutiny are the same," the law fails both tests. *Ross*, 746 F.3d at 566.

The Anti-Sunshine Law also fails intermediate scrutiny because intermediate scrutiny requires "actual evidence supporting [the] assertion that a speech restriction does not burden substantially more speech than necessary." *Reynolds*, 779 F.3d at 229. For instance, in *McCullen* the Court inquired whether the record in support of a state-wide buffer zone around abortion clinics contained "evidence that individuals regularly gather at … clinics … in sufficiently large groups to obstruct access." 573 U.S. at 493.

Here, the legislative record is devoid of such evidence. It does not contain a single document showing the need for the Law. That should end the analysis. *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) (Gorsuch, J.) ("post-hoc rationalizations aren't the stuff of summary judgment victories" where tailoring is required). Nonetheless, Defendants and Intervenor also offer nothing to support the Law. They do not provide a single citation to the record in support of their assertions that the Law is narrowly tailored. Defs. Br. 20-21; Int. Br. 17-18.[10] As Plaintiffs explain, Br. 6-7, what evidence

[10] Elsewhere in their brief, Defendants and Intervenor cite to Representative Szoka's remarks that North Carolina's property protections are "weak" and North Carolina businesses need "stronger measures." Defs. Br. 4-5; Int. Br. 1-2. They rightly do not suggest this amounts to "evidence" supporting the Law as those claims do not provide a single fact to substantiate their assertions. Plfs. Ex. C 3:5-19. In the same speech, Representative Szoka goes on to admit that the Anti-Sunshine Law is "really similar to" North Carolina's preexisting protections "under the Unfair and Deceptive Trade Practices Act," suggesting the Law was not necessary. *Id.* at 4:6-7. He further admits the goal of

Defendants produced in discovery largely dealt with retail theft, which is covered by subsection (b)(4) that Plaintiffs do not challenge. Plfs. Exs. J & K, Dkt. Nos. 99-12-13. To the highly limited extent discovery suggested the Law could have been justified by corporation espionage, those documents recommended different remedies than the Anti-Sunshine Law that would implicate less speech, such as protecting "trade secrets," not all "information" and "images" that can be collected in private areas. Plfs. Ex. H.

Further still, in addition to coming forward with evidence that the statute is necessary, "the [Supreme] Court explained in *McCullen* [] the burden of proving narrow tailoring requires the [government] to *prove* that it actually *tried* other methods to address the problem." *Reynold*, 779 F.3d at 231 (emphasis in original). This includes demonstrating efforts to enforce existing laws prior to enacting a new statute regulating speech. *McCullen*, 573 U.S. at 494 (government cannot argue that "other approaches … do not work" without evidence that it has recently attempted to use "laws already on the books"). For the reasons stated, the legislative record fails to carry this burden. Further, in discovery, Defendants only identified a single incident of corporate espionage prior to the state enacting the Anti-Sunshine Law, which occurred in Iowa, and was *successfully* pursued using existing laws. None of their discovery shows any failed effort by North Carolina to enforce existing laws. Plfs. Br. 6; Plfs. Ex. I.[11]

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the Law is not to protect property but to ensure people provide information to the "proper authorities," rather than the press or public. Plfs. Ex. B 4:1-19. In the same string cite, Defendants, although not Intervenor, include the random amalgamation of news articles and reports counsel downloaded from the internet to put into the discovery record. Defs. Br. 7. They make no effort to explain why the Court should rely on documents there is no evidence the legislature considered (most of which post-date the Law), or how these documents justify the need for this Law.

[11] Accordingly, beyond the Law not being tailored, the Law does not appear to advance a legitimate governmental interest—another requirement of strict and intermediate scrutiny. *McCullen*, 573 U.S. at 486. Where the record does not establish any need for the Law, one can conclude its purpose is to show "hostility" towards speech, "precisely what the First Amendment forbids." *R.A.V.*, 505 U.S. at 396.

Defendants' and Intervenor's sole attempt to establish the Law is narrowly tailored is to point out its "scienter requirement," Defs. Br. 21; Int. Br. 17, but that does nothing to address the Law's under-inclusiveness or their evidentiary burdens. Moreover, the scienter requirement does little if anything to tailor the Law's restrictions on speech. Under the Anti-Sunshine Law, a person must "intentionally" access a nonpublic area without a "bona fide intent of seeking or holding employment or doing business," and "knowingly" place an unattended recording device, but there is *no* scienter requirement connected with "using" the information or recording "to breach the person's duty of loyalty," interfering with "ownership or possession of real property," or stepping outside the Law's exceptions. N.C. Gen. Stat. § 99A-2(b), (e). There is no effort to narrow these infringements on the First Amendment.

In sum, Defendants and Intervenor do not claim the Law survives strict scrutiny, and their nominal efforts to satisfy intermediate scrutiny fail to address, let alone carry their burdens. Thus, even if their claims that the Anti-Sunshine Law is "generally applicable" or content-neutral were correct, the challenged provisions would still be unconstitutional. *See Doe*, 842 F.3d at 846.

e. The Anti-Sunshine Law Is Overbroad.

Further underscoring the ways in which the Anti-Sunshine Law restricts speech, Defendants and Intervenor are unable to refute that the Law reaches numerous other First Amendment protected activities in addition to Plaintiffs' undercover investigations. This confirms the First Amendment should apply to the Law, and establishes it is unconstitutionally overbroad. *United States v. Stevens*, 559 U.S. 460, 473 (2010) (law is overbroad where "substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep").

Defendants, Br. 21-22, rest on incanting their claim that the Law "regulates conduct, not expressive speech"—although they again acknowledge there are "ways" it can "implicate protected speech"—and asserting the Law should stand because it is

content-neutral—which is a separate test, *Stevens*, 559 U.S. at 473 (explaining overbreadth is a "second type of facial challenge" distinct from whether the law survives scrutiny). To the extent Defendants mean that because they claim there are some constitutional ways in which the Law could be applied it cannot be overbroad, that has been rejected by the Supreme Court. *See, e.g.*, *id.* at 473 (stating overbreadth "hinges on how broadly" the law applies, not whether it has any constitutional applications).

Intervenor focuses on contesting Plaintiffs' statement that the Law interferes with the freedom to petition, stating the Law "preserves whistleblowers' rights," but those positions are not mutually exclusive, as the Law demonstrates. Int. Br. 18. Subsection (e)'s protections for state employees covers people who offer legislative testimony on "matters of public concern," although not their statements to individual legislators. N.C. Gen. Stat. § 126-84(b). Its protections for other employees under N.C. Gen. Stat. § 95-241 only apply when the employees engage in certain types of formal whistleblowing to state agencies. *Whiting*, 618 S.E.2d at 753 ("[T]he filing of a workers' compensation claim" is what "triggers the statutory and common law protection against employer retaliation in violation of public policy" under § 95-241). It provides no protections for employees reporting information to any part of the legislature. *See* N.C. Gen. Stat. § 95-241. In this manner, the Anti-Sunshine Law interferes with the freedom to petition.[12]

Both Defendants and Intervenor also leave entirely unaddressed the fact that the Law creates liability for a variety of other important speech. The Governor vetoed the Law because he accurately recognized it could punish the reporting required by state law, giving the example of Burt's Law, Plfs. Ex. F 3, which requires individuals who "witness" or come into "knowledge" of abuse of people with development disabilities to turn that information over to authorities, but is not included in subsection (e), *see* N.C.

[12] Intervenor also relies on its *ipse dixit* to claim "the press is not singled out by the law." Int. Br. 18. As Plaintiffs detail above, the Law's exceptions target it at communications to and by the media, which the legislative history proves was their design.

Gen. Stat. § 122C-66(b), (b1). People can also be pursued under the Anti-Sunshine Law for reporting a variety of crimes, *e.g.*, arson or murder. Plfs. Br. 16-17. Likewise, reporting encouraged by federal statutes is not protected. *Id.* at 18 (citing the False Claims Act, 31 U.S.C. §§ 3729-33, and environmental laws calling on the public to provide information to the government, 16 U.S.C. § 1533(b)(3)(A); 40 C.F.R. § 1506.6(d)). Thus, Representative Szoka acknowledged a person who brought a claim under the federal False Claims Act could be sued under the Anti-Sunshine Law. *Id.* at 17 (citing Plfs. Ex. D 18:30-19:33).

The requirement that a statute have a "substantial" number of unconstitutional applications in order to be unconstitutionally overbroad "is not readily reduced to a mathematical formula," but it is satisfied where there is "a realistic danger that the statute [] will significantly compromise recognized First Amendment protections of parties not before the Court." *Doe*, 842 F.3d at 845. That is certainly true here.

Balancing the Law's "legitimate" applications against its unconstitutional ones also tilts decidedly in Plaintiffs' favor. Neither Defendants nor Intervenor have offered a single "legitimate" use of the Anti-Sunshine Law that would not be covered by the state's existing statutes. *See, e.g.*, N.C. Gen. Stat. §§ 66-153-57 (North Carolina civil remedy for trade secret theft). And they point to no factual basis for the Law, begging the question what legitimate function it serves. *See R.A.V.*, 505 U.S. at 396.

The law is unconstitutionally overbroad in terms of its number of unconstitutional applications, the importance of that speech, and the relative value in restricting speech to further the Law's ends. Thus, it cannot stand.

f. The Anti-Sunshine Law Is Void For Vagueness.

In addition, subsections (b)(1)-(2) and (5) are unconstitutionally vague. Defendants do not attempt to explain their meaning, Defs. Br. 26, and Intervenor's arguments are baseless largely for the reasons already stated. Intervenor repeats its selective and inaccurate discussion of the Law's provisions to assert the Law does not

reach a substantial amount of speech, making its vagueness of less concern. It also again claims the Law's "scienter" requirement, which does not apply to any of the vague terms, somehow clarifies their meaning. Int. Br. 19-20.

When Intervenor turns to discussing the Law's language, it confirms the text will lead people astray. It claims the Law's prohibition on "breaching the duty of loyalty" should be construed by looking to dictionary definitions, as the Law does not provide one. Int. Br. 21. But, the "duty of loyalty" has been a term of art, which describes a common law tort distinct from the colloquial definitions of "duty" and "loyalty." This is particularly true in North Carolina, which still recognizes a narrow claim for "breach of a duty of loyalty," which does not apply in "employment-related circumstance[s]," only in "fiduciary relationship[s]." *Dalton*, 548 S.E.2d at 708. The North Carolina Supreme Court has also indicated the "duty of loyalty" might be a defense to wrongful termination claims, but it did not "define" the contours of that defense. *Id.* at 709. In other words, "breaching the duty of loyalty" traditionally has had a particular meaning in North Carolina not found by looking to the dictionary, and may still have such a meaning for the employees regulated by the Anti-Sunshine Law, although its scope is unknown. As a result, a "person of ordinary intelligence" cannot be expected to guess what the "duty of loyalty" requires, and the term is unconstitutionally vague. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979).

Intervenor fails to directly address subsection (b)(5), even though Plaintiffs explained in their interrogatory response they considered that provision's lack of clarity to raise constitutional concerns. Def. Ex. 22 (Plaintiffs' Response to Interrogatory No. 5), Dkt. No. 107-22, at 32-33. Intervenor elsewhere claims, however, this provision—concerning "substantially interfering with ownership"—should be read to only regulate "trespass." Int. Br. 11. Yet, the legislative history and the statute's other provisions suggests it regulates reputational harm stemming from the public release of information.

Thus, here too, Intervenor effectively demonstrates why subsection (b)(5) is void for vagueness, as reasonable people can be left in doubt about its meaning.

g. The Anti-Sunshine Law Violates the Equal Protection Clause.

Finally, the Law is also unconstitutional because it was passed out of animus, violating the Equal Protection Clause. Defendants dispute the principle that laws may not be motivated by animus, stating that rule only applies if the law regulates a "protected class." *See* Defs. Br. 25. False. In *United States v. Windsor*, the Court struck down a law prohibiting same-sex marriage without ever considering whether same-sex couples are a protected class or determining the level of scrutiny that would apply to their status. 570 U.S. 744 (2013). Instead, it explained "a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group." *Id.* at 770. Earlier, the Court similarly held a regulation designed to prevent "hippies" from accessing a government program could not stand. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Put another way, where the record shows a law was "motived by an improper animus," that is fatal under the Equal Protection Clause, regardless to whom the animus is directed. *Windsor*, 570 U.S. at 770.

Defendants only defend the Law's motives by insisting Plaintiffs should not be allowed to look to the statements "of individual legislators," Defs. Br. 25, but how else would one evaluate their "desires"? Indeed, the *Windsor* Court looked to legislative history. 570 U.S. at 770. Moreover, Plaintiffs do not rely on random legislative statements, but those of the Law's sponsors, which are "authoritative" for construing the Law, for which there are no committee reports. *Rice v. Rehner*, 463 U.S. 713, 728 (1983) (quoting *Bowsher v. Merck & Co.*, 460 U.S. 824, 832 (1983)); *see also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982). In doing so, Plaintiffs have presented a much more extensive record showing the sponsors were motivated by their distaste for Plaintiffs' speech than Defendants were able to cobble together to show *any other* rationale. *Compare* Plfs. Br. 5, *with* Defs. Br. 25. The sponsors stated they were

proceeding with the Law because they found undercover animal rights investigations "offensive" and wanted to deter that advocacy, and they believed undercover investigations are carried out by "fraud[s]." Plfs. Exs. B 15:22-16:25; C 18:11-19:22. Their goal was to limit the activities of and create special penalties for speakers they disliked, making the Law unconstitutional.[13]

V. Conclusion

For the foregoing reasons, Defendants' and Intervenor's motions for summary judgment should be denied, and this Court should grant Plaintiffs' motion, declare subsections (b)(1)-(3), and (5) unconstitutional, and enjoin Defendants' enforcement of them.

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Respectfully submitted,

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[13] Defendants also contest that if the Law violates the First Amendment it violates the Equal Protection Clause. Plaintiffs did not separately brief this issue in their motion because it is redundant of their First Amendment claims, but Defendants' arguments are incorrect. While they admit the Equal Protection Clause protects fundamental rights, they state First Amendment rights do not qualify. Defs. Br. 23. The Supreme Court has explained the Equal Protection Clause's protection of "fundamental right[s]" includes all "rights guaranteed by the First Amendment." *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 & n.3 (1976).

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(1)

I hereby certify that this brief contains 10,261 words, excluding the caption, signature blocks, and certificate. That word count was calculated using the Microsoft Word program used to write this brief.

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