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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Defendants' and Intervenor's Oppositions, Dkt. Nos. 115 & 116, establish the Anti-Sunshine Law is unconstitutional. They admit the Law can punish speech. Therefore, under controlling precedent, it is *at least* subject to intermediate scrutiny, requiring *evidence* it is tailored. Defendants and Intervenor confirm that evidence does not exist.

Moreover, the Law actually, directly references First Amendment activities. Thus it is aimed at speech, and, because it is content-based, it requires strict scrutiny. Defendants' and Intervenor's primary, self-defeating, counterargument is the Court should overlook that text. Their claims that the Law is not also overbroad, vague, and discriminatory are similar. And, while Defendants nominally challenge Plaintiffs' standing, the Fourth Circuit rejected their arguments in this case, a decision Defendants fail to acknowledge. *PETA v. Stein*, 737 Fed. App'x 122 (4th Cir. 2018) (unpublished). The Law cannot stand.

I. Since the Law Can Punish Speech It Requires Scrutiny and Falls.

Defendants and Intervenor concede the Law's elements can be wielded against speech. Such statutes are subject to First Amendment review, and Defendants and Intervenor have not carried their resulting burdens. Thus, the Law falls.

a. Defendants and Intervenor Confirm Intermediate Scrutiny Is Required.

Defendants and Intervenor admit "someone could be found liable under the statute" for engaging in "First Amendment protected activities." Defs. Opp. 15-16; *see also, e.g.*, Int. Opp. 15 ("communications with the media fall within the statute's reach"); Plfs. Opp., Dkt. No. 114, at 17 (citing additional admission).

Controlling authority provides that where "both speech and non-speech" can fall within the "course of conduct" described by a law, the state can only "justify [the] incidental limitations on First Amendment freedoms" if the law survives intermediate scrutiny. *Hoffman v. Maryland*, 928 F.2d 646, 648 (4th Cir. 1991); Plfs. Opp. 15-16 (providing additional controlling authority stating same).

While Intervenor critiques the fact that intermediate scrutiny applies to laws that can punish speech, complaining the state must be allowed to freely regulate "steal[ing] a trade secret," Int. Opp. 7, that example demonstrates why the First Amendment applies. The First Amendment would pose no restraint on a state punishing stealing, if it did so regardless of what is done with the item; just as the First Amendment would not apply to the Anti-Sunshine Law if it were truly limited to regulating "trespass" or "access." But, if the state chooses to penalize stealing only in certain circumstances, including those that involve communication, that law must be reviewed under the First Amendment—as must the Anti-Sunshine Law. The First Amendment's purpose is to "encourage [the state] to choose" to avoid regulating speech, if possible. *McCullen v. Coakley*, 573 U.S. 464, 482 (2014).

In contending the First Amendment somehow does not apply to laws regulating speech, Defendants and Intervenor use the phrase "generally applicable law" as a talisman, but mostly point to cases upholding laws that *exclusively* reference non-expressive conduct. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66, (2006) (law restricting "conduct itself"); *Houchins v. KQED, Inc.*, 438 U.S. 1, 4 (1978) (prison regulation limiting tour size and path); *Zemel v. Rusk*, 381 U.S. 1, 16 (1965) (prohibiting "travel to Cuba" that was only an "inhibition of action"); *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (concerning child pornography, which is excluded from First Amendment); *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 948 (7th Cir. 2015) (prohibiting "harvesting information," which was not an "instrument of communication" (emphasis removed)); *see also Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (as-applied challenge court concluded did not "involve[] expression"); *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971) (as-applied challenge court concluded solely concerned "intrusive acts"); *Miller v. Brooks*, 472 S.E. 2d 350, 354-55 (N.C. Ct. App. 1996) (same). As Intervenor concedes, this authority merely establishes the First Amendment is not "a shield against the operation"

of such laws. Int. Opp. 6. If the state regulates *solely* by singling out non-expressive activities, that a person might choose to "accompan[y] th[at] conduct with speech" does not raise constitutional concerns. *Rumsfeld*, 547 U.S. at 66. That does not suggest the Anti-Sunshine Law, which the parties *agree* can be used to punish speech, is free from First Amendment review.

The remainder of Defendants' and Intervenor's cases concern the application of laws understood to survive First Amendment review, holding that a person's engagement in speech does not protect them from those laws. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) ("First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforce[able] under state law"); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (prison regulation that provides for sufficient "alternative channels of communication" and properly advanced "security considerations" could be applied to press); *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) (because "[c]itizens generally are not constitutionally immune from grand jury subpoenas" neither is press). In claiming these cases apply here, Defendants and Intervenor have assumed the constitutionality of the Anti-Sunshine Law, which they have not established.[1]

Defendants' and Intervenor's further contention that the First Amendment does not apply if a law protects private property "finds no support in the case law." *ALDF v. Herbert*, 263 F. Supp. 3d 1193, 1208 (D. Utah 2017). The government cannot simply attach a prohibition on speech to a prohibition on trespass and claim that "defeat[s] the need for First Amendment scrutiny." *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195 (10th Cir. 2017). Indeed, in *Watchtower Bible & Tract Society v. Village of Stratton*, the Supreme Court invalidated a regulation that prohibited "going in and upon

[1] Plaintiffs explain in their Opposition, 16 n.7, Defendants' reliance on Justice Scalia's *concurrence* in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), is particularly misplaced, as it has been rejected by subsequent Supreme Court authority.

private residential property" without permission, because that restriction was coupled with the requirement that the entrant have the "purpose of promoting a[] cause" upon entry. 536 U.S. 150, 154 (2002). The Court agreed the law "protect[ed] [] residents' privacy," but concluded it did not survive the requisite First Amendment scrutiny. *Id.* at 165-66. Defendants and Intervenor insist the Anti-Sunshine Law is a prohibition on "trespass, steal[ing], or invad[ing] private spaces." Int. Opp. 12; *see also* Defs. Opp. 10. But, with the Anti-Sunshine Law, North Carolina chose not to simply regulate that non-expressive conduct but to selectively do so *only* when it is connected with other activities that implicate the First Amendment. That distinguishes the Anti-Sunshine Law from a "general trespass statute," and mandates First Amendment review. *W. Watersheds Project*, 869 F.3d at 1197; Plfs. Opp. 8-10.

Because the Anti-Sunshine Law can be used to punish speech, it falls within the reach of the First Amendment and thus, at a minimum, requires intermediate scrutiny.

b. The Law Does Not Satisfy Intermediate Scrutiny.

It is the government's burden to satisfy intermediate scrutiny, *Reynolds v. Middleton*, 779 F.3d 222, 226 (4th Cir. 2015), and neither the legislative nor discovery records come close to carrying that burden here. "[T]he Supreme Court's recent decision in *McCullen v. Coakley* clarifies what is necessary to carry the government's burden of proof under intermediate scrutiny." *Id.* at 228. The government must "present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary." *Id.* at 229; *see also Doe v. Cooper*, 842 F.3d 833, 847 (4th Cir. 2016); *Clatterbuck v. City of Charlottesville*, 92 F. Supp. 3d 478, 493 (W.D. Va. 2015). The evidence must include facts demonstrating the state tried to use "other laws already on the books" and that proved ineffective before it enacted the new law implicating speech. *McCullen*, 573 U.S. at 494; *see also Reynold*, 779 F.3d at 231 (state must "*prove* that it actually *tried* other methods to address the problem" before enacting challenged law (emphases in original)).

Neither Defendants nor Intervenor provide evidence in support of their claim that the Law survives intermediate scrutiny. Defs. Opp. 14-15; Int. Opp. 17-18. This is because neither the legislative nor discovery records contain any evidence that "other laws already on the books" were ineffective at preventing the alleged problem of "corporate espionage," let alone justify North Carolina enacting the Anti-Sunshine Law—which regulates gathering all information—given the only professed need is to protect commercially sensitive information. Plfs. Br., Dkt. No. 99-0, at 4-7. Indeed, the legislative record does not contain any evidence of any problem whatsoever. Defs. Exs. 1-3, Dkt. Nos. 107-1-3. In discovery, Defendants identified three incidents of corporate espionage that occurred in North Carolina; each arose *after* the Law was passed and was *successfully* pursued under existing laws. Plfs. Ex. G, Dkt. No. 99-9, at 2-3, 102-114.[2] The Law is not tailored and cannot stand.

II. The Anti-Sunshine Law Is Subject To, and Fails Strict Scrutiny.

While the Law would be unconstitutional under intermediate scrutiny, when read in full, it is clearly aimed at speech, and speech with a particular content and viewpoint. Thus, the Law truly requires strict scrutiny, *see, e.g.*, *Dahlstrom*, 777 F.3d at 949 (where law contains "direct regulation of speech" scrutiny "hinges" on whether it is content-based), which neither Defendants nor Intervenor contend it can survive, Plfs. Opp. 21-22.

Defendants and Intervenor never explain how subsections (b)(1) and (2)'s prohibitions on "using" information are anything but restrictions on communications, Plfs. Br. 10 (establishing "using" information is First Amendment protected activity), and Intervenor acknowledges that "recording"—which is prohibited under subsections (b)(2)

[2] Related to North Carolina, Defendants also produced an unsubstantiated allegation of corporate espionage, Plfs. Ex. G 15-19, 23-29, 91-94, and minimal evidence regarding retail theft, which is regulated by subsection (b)(4) that Plaintiffs do not challenge. Their citations to legislators' assertions that pre-existing property laws were "weak," Defs. Opp. 23; Int. Opp. 6, 18, are insufficient. *McCullen*, 573 U.S. at 494 ("cannot accept" assertion without evidence).

and (3)—is understood to be "expressive." Int. Opp. 10; Plfs. Br. 10 (providing authority supporting same); *see also* Int. Opp. 11 (failing to contest "inducing or directing" action, which is prohibited by subsection (c), concerns speech).

Instead, they (again) claim that because the Law combines restrictions on speech with prohibitions on "access" and "theft" it cannot be aimed at speech or be content-based. Defs. Opp. 9-11; Int. Opp. 10, 12. As discussed above, that is not the case: "statutes [that] apply specifically to the creation of speech" as well as prohibit tortious conduct need to be analyzed for what "level of scrutiny to [] appl[y] and whether the statute[] survive[s]." *W. Watersheds Project*, 869 F.3d at 1197; *S.H.A.R.K. v. Metro Parks Serving Summit Cty.*, 499 F.3d 553, 560 (6th Cir. 2007) (same); *ALDF v. Reynolds*, 297 F. Supp. 3d 901, 918 (S.D. Iowa 2018) (same). The state could not pass a special fine for anti-government protesters who jaywalk and claim that is not aimed at speech.

Defendants' and Intervenor's attempt to compare the Anti-Sunshine Law to the "duty of loyalty" in *Food Lion* confirms the Anti-Sunshine Law is aimed at speech. In *Food Lion* the Fourth Circuit explained that duty was a "broad" tort that could be violated by any act "inconsistent" with the "interests of the[] employer." 194 F.3d at 515. It could be violated by stealing, nothing more. Here, however, subsections (b)(1)-(3) *only* come into force if conduct is combined with speech. Thus, the Anti-Sunshine Law is unlike the tort at issue in *Food Lion*, it is aimed at speech and requires this Court to examine whether it warrants strict, not just intermediate, scrutiny.

To avoid strict scrutiny, Defendants contend subsections (b)(1) and (2)'s prohibitions on "using" information and recordings if that use "breaches the duty of loyalty" "do[] not single out any subset of messages." Defs. Opp. 14. Intervenor similarly states the provisions are not content-based because different businesses will have different concepts of what is disloyal. *See* Int. Opp. 14. However, a prohibition on "political" speech (regardless of the politics) is content-based and subject to strict scrutiny, thus, so too is a prohibition on disloyal speech, even though the qualifying

statements may vary. *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015); *see also Rigdon v. Perry*, 962 F. Supp. 150, 164 n.14 (D.D.C. 1997) ("anti-lobbying restriction is content- and viewpoint discriminatory" though it "applies regardless of … issue"). Prohibiting "disloyal" speech is targeting anti-employer content, thus it creates a "significant danger of idea or viewpoint discrimination" and is content-based. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 388-89 (1992).

Indeed, Intervenor admits "disloyalty" depends on employers' "viewpoints and interests." Int. Opp. 14. Thus, whether the speech conflicts with those "viewpoints and interests" will determine if the Law applies, meaning the Law requires a court to examine the content of the speech, which Intervenor agrees renders a law content-based. *Id.* at 15. This also confirms the Law is ripe for discriminatory abuse, allowing employers to invoke it based on their whims, so it should be treated as viewpoint discriminatory. *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 386-90 (4th Cir. 2006).

Further, as Plaintiffs have explained, subsection (e)—allowing the regulated speech to occur so long as it occurs through approved channels—restricts speech based on its "function and purpose." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). On this basis too, the Law is "subject to strict scrutiny." *Id.*; Plfs. Br. 11; Plfs. Opp. 18.

Defendants and Intervenor insist the objective of subsection (e) is to protect whistleblowers. Defs. Opp. 15; Int. Opp. 16. Plaintiffs disagree, but, more importantly, an "innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*, 135 S. Ct. at 2228. Subsection (e) operates by prohibiting speech with a particular function: to spread information outside the approved channels.

In sum, the Law targets speech, and speech with a particular content and function. Therefore, it requires strict, not just intermediate, scrutiny. No party suggests it can survive that review.[3]

III. The Law Is Unconstitutional In Multiple Other Ways.

A law also violates the First Amendment if it "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Doe*, 842 F.3d at 845. Consistent with their other admissions, Defendants and Intervenor do not contest that the Law punishes protected speech, rather they claim those unconstitutional applications would be "extreme." Defs. Opp. 16. The record proves otherwise. The Governor vetoed the Law because he was so concerned it would dissuade people from reporting "criminal activity," Plfs. Ex. F, Dkt. No. 99-8, at 3, and Defendants state the Governor's veto statement accurately captures the Law, Plfs. Ex. A 9-13. Defendants also never refute that the Law interferes with other statutorily prescribed reporting, such as under the federal False Claims Act—as the legislature anticipated—and the freedom to petition—as Plaintiffs' declarations explain. Plfs. Br. 16-18; Plfs. Opp. 25-27. Defendants' claim that the Law has "numerous applications … consistent with the First Amendment" rests on their atextual assertion that the Law only "regulates conduct." Defs. Opp. 18. Put simply, they identify no legitimate sweep and admit a plethora of unconstitutional applications, making the Law unconstitutionally overbroad.

Defendants and Intervenor are also unable to explain how a reasonable person would resolve the meaning of "duty of loyalty" in subsections (b)(1) and (2), confirming it is unconstitutionally vague. They argue people should apply their "common[]

[3] As Plaintiffs explained, they have also brought an as-applied claim for which strict scrutiny is required—as the Law would be applied to Plaintiffs for carrying out investigations of Defendants' facilities and using the information obtained to publically critique Defendants' operations. Plfs. Opp. 2, 17 n.8; *see also, e.g.*, Plfs. Ex. O ¶¶ 9, 17-18, 25. Defendants invite this argument, but they do not attempt to establish the Law can survive that review, Defs. Opp. 18 n.3, providing another basis to hold for Plaintiffs.

understand[ing]" to the term. Int. Opp. 20-21; Defs. Opp. 21-22. Yet, they acknowledge "duty of loyalty" is a term of art the North Carolina Supreme Court states does not govern most of the employer-employee relationships regulated by the Anti-Sunshine Law. Int. Opp. 20-21. The legislature is assumed to act "against a background of [such] common law principles." *Artis v. D.C.*, 138 S. Ct. 594, 614 (2018) (cleaned up). In other words, Defendants and Intervenor confirm an objective analysis can arrive at conflicting definitions of the term, thus subsections (b)(1) and (2) are void for vagueness.[4]

Regarding Plaintiffs' equal protection claim, Defendants complain Plaintiffs rely on a "few stray remarks" from the Law's sponsors to show it was motivated by animus. Defs. Opp. 22. But, the alternatives they offer are consistent with Plaintiffs' presentation. Defendants and Intervenor state the sponsors wanted to protect businesses, Defs. Opp. 23; Int. Opp. 17, and Plaintiffs demonstrate that, even in the statements cited, the sponsors contended they were doing so through suppressing the public release of information, particularly by groups and media they disliked. Plfs. Br. 5-6; Plfs. Opp. 18-19.

IV. Plaintiffs Have Standing.

Finally, Defendants' attack on Plaintiffs' standing is not credible. Defs. Opp. 3-5. They claim that to be injured Plaintiffs must first be threatened with suit under the Law. The Fourth Circuit rejected this argument. *PETA*, 737 Fed. App'x at 131 (Plaintiffs' chill is "actual injury"; they need not establish "a claim of a threatened or imminent injury in the form of a civil lawsuit").

Likewise, Defendants assert Plaintiffs lack standing because their chill is not traceable to Defendants, but the Fourth Circuit also rejected this argument. *Id.* at 132 ("[P]reventing these Defendants from exercising their powers to initiate or bring a lawsuit

[4] Defendants and Intervenor state the Anti-Sunshine Law is a civil statute and thus need not be as clear as a criminal law, but its imposition of exemplary damages renders it quasi-criminal. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

under the Act would seem to be sufficient to quell Plaintiffs' fear of liability."); *see also* Plfs. Br. 9.

Lastly, Defendants' contention that Plaintiffs lack standing because they "have not presented any facts" showing the University of North Carolina-Chapel Hill is engaged in animal cruelty is legally and factually wrong. Defs. Opp. 4. The Fourth Circuit explained Plaintiffs' standing derives from the Law chilling them from carrying out their desired investigations, keeping them from gathering those facts. *PETA*, 737 Fed. App'x at 130. Moreover, PETA produced undisputed records establishing the University continues to engage in animal cruelty PETA would like to expose. Plfs. Ex. O, Dkt. No. 100-1 ¶ 17 (citing Exhibit 12).

V. Conclusion.

For the foregoing reasons, Plaintiffs' motion should be granted.

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Respectfully submitted,

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

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