No. 22-_____

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The North Carolina Property Protection Act gives property owners a civil cause of action for certain torts committed in the nonpublic areas of their property. N.C. Gen. Stat. § 99A-2. It specifically bars employees from taking or recording information without authorization and using that information to breach their duty of loyalty to their employer. *Id.* § 99A-2(b)(1), (2). A divided panel of the Fourth Circuit held that these prohibitions violate the First Amendment when applied to employees who have a "newsgathering" aim.

The question presented is whether the First Amendment prohibits applying state tort law against double-agent employees who gather information, including by secretly recording, in the nonpublic areas of an employer's property and who use that information to breach their duty of loyalty to the employer.

PARTIES TO THE PROCEEDING

Petitioners are 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.

Respondents are 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.

North Carolina Farm Bureau Federation, Inc. was an appellant/cross-appellee below and an intervenor-defendant in the trial court.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

People for the Ethical Treatment of Animals, Inc. v. Stein, No. 16-cv-25, United States District Court for the Middle District of North Carolina. Judgment entered June 12, 2020.

People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc., Nos. 20-1776, 20-1777, and 20-1807, United States Court of Appeals for the Fourth Circuit. Judgment entered February 23, 2023.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

The rights of free speech and private property—both "fundamental rights of a free society"—can sometimes conflict in ways "where accommodations between them, and the drawing of lines to assure due protection of both, are not easy." *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 570 (1972). This case raises an important and recurring conflict of that kind.

In 2015, the North Carolina General Assembly passed the Property Protection Act to strengthen the State's existing trespass and employment-tort laws. Among other things, the Act gives employers a civil cause of action against employees who enter the nonpublic areas of their property, take or record information without authorization, and then use that information to breach their duty of loyalty to their employer. N.C. Gen. Stat. § 99A-2(b)(1), (2).

These provisions are generally applicable, neutral rules that reflect longstanding property and tort doctrines. They prohibit a certain kind of trespass: taking or recording information in nonpublic spaces without authorization. And they prohibit using this unlawfully gathered information to commit a certain kind of employment tort: breaching an employee's duty of loyalty to her employer.

In this way, the Act seeks to protect all employers across the State. The Act could, for example, apply to a disgruntled employee who uses her employer's trade secrets to launch a competing business. It could stop an enterprising campaign staffer from acting as a double agent to record a rival political party's election

strategy. It could provide a damages remedy to a medical clinic whose patient information is willfully compromised by an employee. The Act protects these property rights in a tailored fashion—not by enforcement through criminal penalties, but by allowing property owners themselves to sue trespassers for civil remedies. *Id.* § 99A-2(a).

Despite the Act's general application and narrow focus, a divided Fourth Circuit panel held that the Act violates the First Amendment to the extent that it applies to "newsgathering" activities. Pet. App. 49a, 55a. Judge Rushing dissented. She would have held that "an interest in newsworthy information does not confer a First Amendment right to enter private property (or a right to exceed the bounds of one's authority to enter) and secretly record," particularly when that trespass "facilitate[s] a tortious act" of "breaching the duty of loyalty to an employer." Pet. App. 64a, 67a (Rushing, J., dissenting).

The Fourth Circuit's decision deepens a disagreement among the courts of appeals on an important question of First Amendment law. Specifically, the decision below implicates a circuit conflict about whether audio-visual recording always constitutes protected speech or whether recording may be unprotected when it takes place on nonpublic property without the property owner's consent. Resolving this conflict would provide States with needed guidance as they seek to reinforce private property rights consistent with the First Amendment. This case presents an appropriate vehicle to provide this guidance. Unlike some laws in other states, the

Act at issue here creates a civil cause of action, not a criminal prohibition. It provides generally applicable protections to all property owners, not special protections for select kinds of property. And it applies only to double-agent employees, not all persons.

Review is also warranted here because the decision below is wrong. The Fourth Circuit created a "newsgathering" exception under the First Amendment to a state law's generally applicable property and tort rules. For decades, however, this Court has held that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information" by violating the rights of others. *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *accord Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). Because any restriction on speech here is merely incidental to the Act's legitimate tort-based aims, the Act does not violate the First Amendment. The contrary decision below merits this Court's review.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fourth Circuit is reported at 60 F.4th 815. Pet. App. 1a-71a. The decision of the U.S. District Court for the Middle District of North Carolina is reported at 466 F. Supp. 3d 547. Pet. App. 72a-145a.

JURISDICTION

Under 28 U.S.C. § 1254(1), Petitioners respectfully seek a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Fourth Circuit. The court issued its opinion on February 23, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution and the North Carolina Property Protection Act, N.C. Gen. Stat. § 99A-2, are reproduced at Pet. App. 146a-149a.

STATEMENT OF THE CASE

A. The North Carolina General Assembly Passes the Property Protection Act.

In 2015, the North Carolina General Assembly passed the Property Protection Act. N.C. Gen. Stat. § 99A-2. The law seeks to "codif[y] and strengthen[ ] North Carolina trespass law to better protect property owners' rights." CA4 J.A. 237.

Specifically, the Act gives a civil cause of action to all property owners in the State for "damages sustained" as a result of anyone who "intentionally gains access" to the "nonpublic areas" of their property and "exceeds the person's authority to enter those areas." N.C. Gen. Stat. § 99A-2(a). The Act defines five ways in which an individual may "exceed the person's authority to enter" nonpublic areas. *Id.* § 99A-2(b)(1)-(5).

In doing so, the Act prohibits two particular forms of employment-related misconduct that are relevant here. First, subsection (b)(1) of the Act prohibits employees from entering the nonpublic areas of an employer's property without a "bona fide intent" to perform their job; capturing or removing the employer's "data, paper, records, or any other documents"; and using that information to breach the

employee's "duty of loyalty" to the employer. *Id.* § 99A-2(b)(1). Second, subsection (b)(2) of the Act similarly prohibits this same mode of conduct when an employee "records images or sound" on the nonpublic areas of an employer's property "and uses the recording to breach [her] duty of loyalty to the employer." *Id.* § 99A-2(b)(2).

Together, these two subsections provide employers with a meaningful civil remedy for particularly injurious invasions of their property rights. The Act authorizes both equitable relief and compensatory damages. *Id.* § 99A-2(d). A plaintiff may also recover punitive damages "in the amount of" $5,000 "for each day, or portion thereof," that the defendant violated the law. *Id.*

The Act traces its roots to a Fourth Circuit decision, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999). In that case, two ABC news reporters were hired at Food Lion, a grocery-store chain, in an effort to investigate allegedly improper food-handling practices there. *Id.* at 510. The reporters used hidden cameras and microphones to gather footage from the nonpublic areas of the store. *Id.* ABC featured some of the footage in a television exposé. *Id.* at 511.

Food Lion sued the reporters for trespass and breaching a duty of loyalty. *Id.* The Fourth Circuit affirmed a jury verdict for Food Lion on both claims. *Id.* at 515-19. The court held that the reporters trespassed by committing a "wrongful act in excess of [their] authority to enter Food Lion's premises as employees"—namely, "filming in non-public areas."

Id. at 518. Making an *Erie* guess that North Carolina law would recognize the employment-tort of breaching the duty of loyalty, the court also held that the reporters had breached this duty to Food Lion. *Id.* at 516. Specifically, the reporters "served ABC's interest, at the expense of Food Lion, by engaging in the taping for ABC while they were on Food Lion's payroll." *Id.*; *see also id.* at 519 (the reporters intended to benefit one employer, ABC, while "work[ing] against the interests of [their] second employer, Food Lion, in doing so."). The court went on to hold that the First Amendment did not bar imposing tort liability under these circumstances. *Id.* at 520-22.

Two years later, the North Carolina Supreme Court held that the Fourth Circuit had made an incorrect *Erie* guess. The state supreme court held that North Carolina law did not recognize an independent cause of action for breach of the duty of loyalty. *Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001). Instead, the state supreme court limited a duty-of-loyalty claim to employers and employees who have a fiduciary relationship. *Id.*

The General Assembly passed the Property Protection Act to codify the Fourth Circuit's decision in *Food Lion*, thereby supplanting the state supreme court's decision in *Dalton*. As one representative stated in the legislative debates, the Act was meant to be "consistent" with the decision in *Food Lion* "in every way, shape, and form." CA4 J.A. 204. Another legislator explained his view that, by passing the Act, the General Assembly was "agreeing with" and "codify[ing]" the *Food Lion* case. CA4 J.A. 282. And

throughout the debates on the Act, state legislators looked to the Fourth Circuit's decision in *Food Lion* as a lodestar. CA4 J.A. 203, 206, 257, 284-85.

The General Assembly passed the Act by an overwhelming margin and with bipartisan support. *See* N.C. General Assembly, Property Protection Act, https://bit.ly/3rka6Og.

B. A Divided Fourth Circuit Holds That the Act Violates the First Amendment as Applied to Newsgatherers.

Respondents are organizations that intend to engage in undercover animal-cruelty investigations and publicize their findings. Respondents sought a pre-enforcement injunction preventing the University of North Carolina at Chapel Hill—and the Attorney General, who would represent the University in court—from suing them under the Act. Pet. App. 73a. Respondents challenged four of the Act's provisions, including the two provisions at issue here, subsections (b)(1) and (b)(2). Pet. App. 8a-9a. Respondents alleged that these provisions violated the First Amendment, both on their face and as applied. Pet. App. 8a-9a.[1]

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[1] Respondents also challenged subsections (b)(3) and (b)(5) of the Act. Subsection (b)(3) prohibits placing and using "an unattended camera or electronic surveillance device" "on the employer's premises." N.C. Gen. Stat. § 99A-2(b)(3). Subsection (b)(5) prohibits any act that "substantially interferes with the ownership or possession of real property." *Id.* § 99A-2(b)(5). The Fourth Circuit below held that these provisions violate the First Amendment as applied to Respondents' newsgathering activities. Pet. App. 55a.

The district court initially dismissed Respondents' claims for lack of Article III standing. *People for the Ethical Treatment of Animals, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017). The court held that Respondents failed to plausibly allege an imminent threat of harm. *Id.* at 382. The court reasoned that it was too "speculative" and "difficult to predict" whether Respondents would ever face civil liability under the Act. *Id.* at 381-82.

The Fourth Circuit reversed. *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 F. App'x 122 (4th Cir. 2018) (per curiam). The court held that Respondents sufficiently alleged "a credible threat that the Act will be enforced against them" and an "objectively reasonable chill" of their First Amendment rights. *Id.* at 129-30. The court relied in part on Respondents' past efforts to conduct undercover investigations in North Carolina as sufficient to allege an immediate threat of harm that gave rise to Article III standing. *Id.* at 130-31.

On remand, the district court granted North Carolina Farm Bureau Federation's motion to intervene as a defendant. Pet. App. 80a. Following discovery, the court reached the merits of Respondents' First Amendment claims on cross-motions for summary judgment. Pet. App. 80a. The court held that subsections (b)(1) and (b)(2) were content-based speech regulations subject to strict scrutiny. Pet. App. 101a-106a, 110a-112a. The court then held that both provisions failed that scrutiny. Pet. App. 115a-117a. The court enjoined subsection (b)(1) only as applied to Respondents' intended

undercover investigations. It reasoned that the subsection's bar on the secret removal of data or information could be applied in many non-speech-related contexts. Pet. App. 104a-105a. By contrast, the district court held that subsection (b)(2) is facially unconstitutional. It concluded that this subsection "always target[s] speech" by prohibiting the recording of images or sound. Pet. App. 126a.

The parties cross-appealed, and a divided Fourth Circuit panel affirmed in part and reversed in part. The Fourth Circuit held that heightened First Amendment scrutiny applies to subsections (b)(1) and (b)(2). Pet. App. 11a-28a. The court acknowledged that newsgatherers "cannot invoke the First Amendment to shield [themselves] from charges of illegal wiretaps, breaking and entering, or document theft." Pet. App. 16a. But the court reasoned that newsgatherers can "occupy nonpublic areas" and that the First Amendment "right of access to information" ensures that they may record "what there is the right for the eye to see or the ear to hear." Pet. App. 18a n.3 (internal quotation marks omitted).

The Fourth Circuit also held that by prohibiting employees from using information that they unlawfully gather to breach their duty of loyalty to their employer, the Act did not state a generally applicable tort rule. Pet. App. 18a-25a. The court reasoned that the Act's duty-of-loyalty provisions had the effect of targeting only speech critical of employers and therefore warranted heightened First Amendment scrutiny. Pet. App. 15a, 24a-25a. Applying that scrutiny, the court held that

subsections (b)(1) and (b)(2) violate the First Amendment. Pet. App. 37a.

The court then turned to the remedy. It reversed portions of the district court's opinion granting Respondents facial relief. Instead, the court "decline[d] to enjoin any potential applications of the Act outside the newsgathering context." Pet. App. 42a. The court explained that it did not need to decide whether the Act might have constitutional applications to non-newsgatherers and that it would therefore leave those questions "unanswered." Pet. App. 47a. Thus, the court held that subsections (b)(1) and (b)(2) were "unconstitutional when applied to bar the newsgathering activities [Respondents] wish[ ] to conduct." Pet. App. 49a. It also stated that this holding "likely means the same result must follow for most (if not all) who engage in conduct analogous to [Respondents']." Pet. App. 49a.

Judge Rushing dissented. She would have followed the Fourth Circuit's prior decision in *Food Lion*, the decision that the Act codifies into positive law. *See* Pet. App. 59a-64a (Rushing, J., dissenting). In that case, Judge Rushing explained, the Fourth Circuit had "already considered this exact mode of operation"—undercover video recording by double-agent employees—"and held that North Carolina tort law may enforce a damages remedy without running afoul of the First Amendment." Pet. App. 59a (Rushing, J., dissenting).

Even beyond *Food Lion*, moreover, Judge Rushing explained that she still would have held that heightened First Amendment scrutiny does not apply

to the Act. Specifically, although Judge Rushing would have recognized a First Amendment right to record matters of public concern on *public* property, she would not have extended this principle to apply to unauthorized recording on *private* property. Pet. App. 64a-65a (Rushing, J., dissenting). Although newsgathering enjoys constitutional protections, Judge Rushing explained, "an interest in newsworthy information does not confer a First Amendment right to enter private property (or a right to exceed the bounds of one's authority to enter) and secretly record." Pet. App. 64a (Rushing, J., dissenting).

Judge Rushing would also have held that the Act embodies generally applicable property and tort rules. She explained that subsections (b)(1) and (b)(2) prohibit conduct like "[u]sing recorded information to launch a competing product, to steal customers, or to blackmail management." Pet. App. 66a (Rushing, J., dissenting). In these and other ways, the law merely "targets using stolen information or secret recordings to facilitate a tortious act: breaching the duty of loyalty to an employer." Pet. App. 67a (Rushing, J., dissenting). And "[l]aws can undoubtedly prohibit 'using' information to harm another person or breach an obligation without raising any First Amendment concern." Pet. App. 67a (Rushing, J., dissenting). Thus, Judge Rushing would have held that "the Act is generally applicable and does not merit heightened First Amendment scrutiny simply because it may be enforced equally against an investigative reporter and a business competitor." Pet. App. 63a (Rushing, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Resolve A Disagreement Among The Circuit Courts.

This case implicates a circuit conflict over whether unauthorized recording on nonpublic property is constitutionally protected speech. *See* S. Ct. R. 10(a).

To begin, there is a robust circuit consensus that audio-visual recording is constitutionally protected speech that triggers heightened First Amendment scrutiny when it takes place on public property.[2] Petitioners take no issue with this consensus. The question here is whether the same rules apply when an employee engages in recording on her employer's *nonpublic* property without authorization and then uses that recording to breach a duty of loyalty to her employer.

The Ninth Circuit has held that all recordings are constitutionally protected speech—even unauthorized recordings on nonpublic property. In *Animal Legal Defense Fund v. Wasden*, the court reviewed an Idaho law that barred individuals from entering an agricultural production facility and, without express consent from the owner, making a recording of the facility's operations. 878 F.3d 1184, 1203 (9th Cir.

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[2] *See, e.g.*, *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 680-81 (4th Cir. 2023); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688-90 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 & n.4, 600 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

2018) (citing Idaho Code Ann. § 18-7042(1)(d)). The court reasoned that all recordings are inherently expressive, and it drew no distinction based on the location where those recordings take place. *Id.* at 1203-04. Applying heightened First Amendment scrutiny, the court invalidated the law as a content-based speech regulation because the law prohibited "the recording of a defined topic": the operations of an agricultural production facility. *Id.* at 1204-05.

The Fourth Circuit expressly split with the Ninth Circuit on the question of whether and when unauthorized recordings on nonpublic property are constitutionally protected speech. Citing *Wasden*, both the majority and the dissent below rejected the Ninth Circuit's rule that recording is always constitutionally protected speech. Pet. App. 45a n.9 (noting that the Ninth Circuit's "expansive ruling" in *Wasden* "go[es] further" than the majority's ruling); Pet. App. 65a (Rushing, J., dissenting) ("The majority . . . rightly rejects the Ninth Circuit's decision in *Animal Legal Defense Fund v. Wasden*.").

Instead, the majority held that unauthorized recordings on nonpublic property are constitutionally protected speech when the trespasser's "core aim . . . is to record newsworthy content." Pet. App. 45a n.9. Judge Rushing, by contrast, would have held that "an interest in newsworthy information does not confer an automatic First Amendment right to enter private property (or a right to exceed the bounds of one's authority to enter) and secretly record." Pet. App. 64a (Rushing, J., dissenting).

Like the Fourth Circuit, the Tenth Circuit has also declined to hold that all recordings on private property are constitutionally protected speech. In *Animal Legal Defense Fund v. Kelly*, the court examined a Kansas law that prohibited taking "pictures by photograph, video camera or by any other means" without the consent of an animal-facility owner and with the intent to damage the enterprise conducted at the facility. 9 F.4th 1219, 1235-36, 1239-40 (10th Cir. 2021) (citing Kan. Stat. Ann. § 47-1827(c)). The court invalidated the law under the First Amendment because its intent-to-damage requirement "place[d] pro-animal facility viewpoints above anti-animal facility viewpoints." *Id.* at 1233; *id.* at 1236. But the court left open the possibility that recording "may be unprotected because it occurs on the property of another." *Id.* at 1236. And the court specifically acknowledged that "in an appropriate case," it would need to decide whether the First Amendment protects "recording [when it] is performed on private property without consent." *Id.* at 1240 n.19. A dissenting judge would have reached that issue and, like Judge Rushing, would have held that a state law may "vindicate" property owners' "right to prohibit others from taking photographs or videos on their property, even when they allow access to their property," without running afoul of the First Amendment. *Id.* at 1258 (Hartz, J., dissenting).

This split exemplifies the broader doctrinal uncertainty that States face when seeking to reinforce private property rights consistent with the First Amendment. In *Wasden*, for example, the Ninth

Circuit held that an Idaho law barring persons from knowingly obtaining employment at an agricultural production facility through misrepresentation with an intent to harm the employer did not warrant heightened First Amendment scrutiny. 878 F.3d at 1201-02 (citing Idaho Code Ann. § 18-7042(1)(c)). The court reasoned that the law's bar on employees who intend to harm their employer merely targeted "a breach of the covenant of good faith and fair dealing that is implied in all employment agreements." *Id.* at 1201. The court also suggested that Idaho could *fix* the First Amendment problem in a different provision of its property-protection law by adopting a similar intent-to-harm requirement. *See id.* at 1198 (suggesting that this change would allow Idaho to permissibly "narrow the [offending] subsection").

The Tenth Circuit in *Kelly* gave Kansas the opposite advice. It suggested that Kansas *remove* its law's requirement that a trespasser "intend to damage" an animal facility. *Kelly*, 9 F.4th at 1233. That requirement, the court held, impermissibly limited the law's application to those who were critical of the facility. *See id.* It reasoned that a person who made a laudatory video, for example, would not be held liable. *Id.* at 1236. Thus, the court held that the statute was viewpoint discriminatory and violated the First Amendment. *Id.* at 1245.

Here, the Act's narrow focus on double-agent employees in subsections (b)(1) and (b)(2) underscores the uncertainty of current First Amendment doctrine. The Fourth Circuit appeared to follow the Tenth Circuit's approach, holding that the Act's requirement

that an employee breach her duty of loyalty triggers heightened First Amendment scrutiny. Pet. App. 15a, 24a-25a (citing *Kelly*, 9 F.4th at 1233, 1242, as "persuasive[ ]" authority on this point). In reaching that conclusion, the Fourth Circuit invalidated the kind of intent-to-harm requirement that the Ninth Circuit had upheld in *Wasden*. And the Fourth Circuit invalidated the *exact* breach-of-loyalty tort that the Fourth Circuit itself had once upheld in *Food Lion*. 194 F.3d at 520-22. The confusion here is manifest.

In sum, the decision below deepens a disagreement among the courts of appeals over whether, and in what circumstances, unauthorized recording on private property is protected speech.

II. This Case Presents An Important Question Of First Amendment Law.

This circuit conflict arises against the backdrop of States seeking to vindicate their sovereign interests in robustly protecting private property rights without violating the First Amendment. This case therefore presents an important question for this Court to review.

North Carolina is not alone in seeking to protect against particularly injurious forms of trespass. For example, Illinois prohibits trespass in sensitive, crowded spaces like airports, athletic fields, and stages when consent is obtained by presenting false documents, credentials, or identities. 720 Ill. Comp. Stat. § 5/21-7(a); *id.* § 5/21-9(a), (a-5). California provides for enhanced civil penalties for those who "trespass in order to capture any type of visual image,

sound recording, or other physical impression" of another engaging in a "private, personal, or familial activity." Cal. Civil Code § 1708.8(a). Similarly, Arkansas gives commercial property owners a civil cause of action against those who access their nonpublic property to record images or sounds and use that recording to damage the property owner. Ark. Code Ann. § 16-118-113(c)(2). A number of States have also attempted to regulate specific kinds of trespass at animal or agricultural facilities.[3] Many of these state laws have been challenged and enjoined, in whole or in part, by federal courts under the First Amendment.[4]

The doctrinal uncertainty in this area of First Amendment law undermines the ability of States to enact legislation that reinforces private property rights. This uncertainty has significant consequences for state sovereignty. As this Court has recognized, these types of property protections are at the core of the States' police power. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988) (recognizing the "general proposition that the law of real property is,

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[3] *See, e.g.*, Ala. Code §§ 13A-11-150 to -158; Idaho Code Ann. § 18-7042; Iowa Code §§ 717A.3A, 717A.3B, 727.8A; Kan. Stat. Ann. § 47-1827; Mont. Code Ann. §§ 81-30-101 to -105; N.D. Cent. Code Ann. §§ 12.1-21.1-01 to -05; Utah Code Ann. § 76-6-112; Wyo. Stat. Ann. §§ 6-3-414, 40-27-101.

[4] *See, e.g.*, *Kelly*, 9 F.4th at 1246; *Wasden*, 878 F.3d at 1205; *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 788 (8th Cir. 2021); *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1191 (D. Wyo. 2018); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).

under our Constitution, left to the individual States to develop and administer") (internal quotation marks and alterations omitted).

This case presents an appropriate vehicle for this Court to provide needed guidance to the States as they attempt to protect private property rights without running afoul of the First Amendment. Unlike laws in many other States, the law here does not impose criminal penalties. It therefore does not require the Court to consider the unique First Amendment concerns that may arise in the criminal context. In addition, the law here does not apply to a single subject matter. It therefore does not implicate the questions about viewpoint or content discrimination that may arise when States protect only certain kinds of property. And the subsections of the law addressed in this petition are narrowly focused on a particularly egregious violation of property rights. They apply only when a double-agent employee surreptitiously takes information from or records a nonpublic space and uses that recording to breach a duty of loyalty.

For these reasons, this case implicates a recurring and important issue of First Amendment law in an appropriately discrete and straightforward context.

III. The Decision Below Is Incorrect.

Review is also warranted because the decision below incorrectly applies the First Amendment to invalidate a state statute. *See* S. Ct. R. 10(c). The Fourth Circuit was wrong to hold that heightened First Amendment scrutiny applies to the Act's double-agent-employee provisions when the information that

the trespassing employees seek to gather is "newsworthy."

To begin, the Act is consistent with longstanding property rules. It prohibits employees from entering nonpublic areas of their employer's property without a "bona fide intent" to do their jobs and engaging in unauthorized conduct, like stealing documents or secretly recording. N.C. Gen. Stat. § 99A-2(b)(1), (2). In this way, the Act reflects the common-law rule that "[e]ven an authorized entry can be trespass if a wrongful act is done in excess of and in abuse of authorized entry." *Miller v. Brooks*, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996); *accord* Restatement (Second) of Torts § 168. Indeed, North Carolina courts have already held that installing a video camera and using it to record exceeds the scope of an individual's authority to enter nonpublic property. *Miller*, 472 S.E.2d at 355-56; *cf. Food Lion*, 194 F.3d at 518-19 (applying *Miller* to similar facts). That conduct is precisely what the Act prohibits.

The Act is also consistent with common-law tort principles. It prohibits an employee from using the information gathered from an unlawful trespass to commit the employment tort of breaching the "duty of loyalty." N.C. Gen. Stat. § 99A-2(b)(1), (b)(2). In this way, the Act reflects the common-law rule against double-agent employees who intentionally harm one employer to benefit another. *See Long v. Vertical Techs., Inc.*, 439 S.E.2d 797, 802 (N.C. Ct. App. 1994) (an employee who "deliberately acquires an interest adverse to his employer . . . is disloyal"); *accord McKnight v. Simpson's Beauty Supply, Inc.*, 358

S.E.2d 107, 109 (N.C. Ct. App. 1987) ("[T]he law implies a promise on the part of every employee to serve [her] employer faithfully."); Restatement of Employment Law § 8.01.

These double-agent-employee provisions of the Act find further support in history and tradition. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022) (noting that "history and tradition of regulation" inform the First Amendment's scope). When the First Amendment was ratified, it was well established that a private property owner had the right to exclude others from the property. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (describing the right to exclude as "one of the most treasured rights of property ownership"). It was similarly well established that a private property owner could vindicate this exclusionary right by bringing a civil action for damages against the trespasser. *See, e.g.*, 3 William Blackstone, *Commentaries on the Laws of England* *209 ("[E]very entry upon another's lands, (unless by the owner's leave, or in some very particular cases)" is "an injury or wrong, for satisfaction of which an action of trespass will lie."). The right to exclude is so important that common-law trespass may carry "punitive in addition to nominal damages," even when the trespass is "harmless." Restatement (Second) of Torts § 163 cmt. e.

An employee's duty of loyalty to her employer has similarly deep roots in the Nation's common-law tradition. States across the country have recognized that employees may "owe a duty of loyalty to their

employer" that depends on "the scope of the employee's responsibilities and other circumstances of the employment." Restatement of Employment Law § 8.01 cmts. a-b & reporters' notes. State courts have found breaches of this duty when an employee acts as a double-agent, for example, by disclosing the employer's trade secrets to a third party, competing with the employer, misappropriating the employer's property, or otherwise engaging in self-dealing. *Id.*; *see also* Restatement (Third) of Agency §§ 8.04, 8.05 (recognizing similar common-law concepts).

Under this Court's precedents, generally applicable tort and property laws do not trigger heightened First Amendment scrutiny—even when applied to newsgatherers. For example, this Court has held that the "right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Thus, newsgatherers have no First Amendment right to break generally applicable laws. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

In keeping with these precedents, other courts have held that similar laws of general applicability do not trigger heightened First Amendment scrutiny, even when a trespasser or tortfeasor engages in unauthorized recording of allegedly newsworthy information. These cases show that property and tort law provide neutral rules of decision that protect a wide range of property owners with different viewpoints. *See, e.g.*, *Planned Parenthood Fed'n of Am., Inc. v. Newman*, 51 F.4th 1125, 1135 (9th Cir. 2022) (rejecting First Amendment challenge and

affirming damages for trespass, fraud, and state wiretapping violations against defendants who disclosed secretly recorded videos of Planned Parenthood staff because "the pursuit of journalism does not give a license to break laws of general applicability"); *Democracy Partners v. Project Veritas Action Fund*, 285 F. Supp. 3d 109, 125-26 (D.D.C. 2018) (similar, secret recording of political consultant office); *Council on Am.-Islamic Rel. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 330-32 (D.D.C. 2011) (similar, secret recording of Muslim civil liberties organization).

The Fourth Circuit's contrary holding that heightened First Amendment scrutiny applies to generally applicable property and tort laws is wrong. The court held that taking information or secretly making an unauthorized recording on nonpublic property may trigger heightened scrutiny if the "core aim" is "to record newsworthy content." Pet. App. 45a n.9. This holding recognizes a First Amendment exception that allows a double-agent employee to violate generally applicable property and tort rules so long as she does so for newsgathering purposes.

But as Judge Rushing explained in her dissent, generally applicable tort and property laws should not "merit heightened First Amendment scrutiny simply because [they] may be enforced equally against an investigative reporter and a business competitor." Pet. App. 63a (Rushing, J., dissenting). As Judge Rushing pointed out, the panel's opinion inappropriately creates a two-tiered system for state tort law that turns on a trespasser's reason for

violating the law. Under the majority's newsgathering rule, for example, "a household employee looking for a juicy news story to sell" who places a hidden camera in her employer's parlor would be "insulated" from liability under the First Amendment, while an individual who engages in that same conduct without any newsgathering aim could face a damages action. Pet. App. 66a (Rushing, J., dissenting). But why "tort law should bend to the trespasser in one instance but not the other is, at best, unclear." Pet. App. 66a (Rushing, J., dissenting).

Moreover, because the Act applies only when an employee is on nonpublic property and acting without the employer's consent, it does not implicate the important First Amendment interests at play when individuals record matters of public concern on public property. As Judge Rushing explained, the court's opinion fails to "grapple with this distinction between recording in public spaces and unauthorized recording on private property." Pet. App. 65a (Rushing, J., dissenting).

By focusing on whether a trespasser has an underlying newsgathering aim, the decision below upends the generally applicable property and tort rules that the Act embodies. The Act "distinguishes between trespassers and non-trespassers, between documents taken from another without permission and documents taken with permission, between those who violate their duty of loyalty to an employer and those who do not." Pet. App. 68a (Rushing, J., dissenting). The Act is less concerned with "who the bad actor is than with what the bad actor is doing—

namely trespassing by acting in excess of his authority to be on the premises." Pet. App. 70a (Rushing, J., dissenting). It is therefore consistent with the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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