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' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

I. Statement of the Case

North Carolina's "Anti-Sunshine Law," N.C. Gen. Stat. § 99A-2, targets a broad array of First Amendment activities, particularly the speech of whistleblowers whose aim is to warn the public, and especially the whistleblowing of animal rights groups like Plaintiffs People for the Ethical Treatment of Animals ("PETA") and the Animal Legal Defense Fund ("ALDF"), who engage in employment-based undercover investigations to document and expose animal abuse. Indeed, PETA's and ALDF's declarations establish the Law has kept them from carrying out their desired exposés of Defendants' facilities. *PETA v. Stein*, 737 Fed. App'x 122, 130, 132 (4th Cir. 2018) (unpublished) (holding such facts establish standing).

A law like this—the goal of which is to stop speech with particular objectives—is subject to strict scrutiny, and "[i]n the ordinary case [that] is all but dispositive." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011). Moreover, here, the record fails to establish the Anti-Sunshine Law addresses any real problem, let alone that "less restrictive alternatives" would be ineffective in achieving its ends, which means it also fails intermediate scrutiny. *McCullen v. Coakley*, 573 U.S. 464, 494 (2014).

Were that not enough to invalidate the Law (it is), the Anti-Sunshine Law is unconstitutionally overbroad, even restricting the freedom to petition; is void for vagueness, because no reasonable person could discern its meaning; and was passed out of animus, violating the Equal Protection Clause. On numerous bases, the Law falls.

II. Facts

a. *The Anti-Sunshine Law's Text.*

The Anti-Sunshine 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). Anyone found to breach its provisions may be

liable for "[c]ompensatory damages," "[e]xemplary damages," and "[c]osts and fees." *Id.* § 99A-2(d).

As relevant here, the Law defines an "act that exceeds the person's authority" to be:

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

Id. § 99A-2(b).[1] In sum, the Law targets gathering "information" if it is going to be "used," and particularly if it is used in a specific manner—"to breach the person's duty of loyalty"—or collected in a specific manner—via a "device to record images or data." *Id.* § 99A-2(b)(1)-(3). As PETA and ALDF detail—and, as discussed below, North Carolina's legislators fully understood—engaging in employment-based investigations to gather information and make recordings and releasing that material to the public, which typically results in repudiation of the employer, is one of PETA's and ALDF's methods

[1] Subsection (b)(4) restricts "[c]onspiring in organized retail theft." Plaintiffs do not challenge that provision.

of advocacy. Ex. O (PETA declaration) ¶¶ 4, 6-16, 21-22; Ex. P (ALDF declaration) ¶¶ 3-7, 13.

The Anti-Sunshine Law contains exceptions, but they confirm the Law targets public whistleblowing. The Law provides a person is not "liable under this section" 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." N.C. Gen. Stat. § 99A-2(e).[2] The former protects employees who report information using specific North Carolina statutes, such as the Workers Compensation Act. *Id.* § 95-241. The latter protects "State employees" who report to the "appropriate authority[] evidence of" illegality, "substantial" safety risks, or "gross abuse." *Id.* § 126-84. Put another way, the Anti-Sunshine Law frees individuals from liability if they report specific, approved concerns through formal channels, limiting its reach to activities such as the release of information to the media or online.

The Anti-Sunshine Law also extends liability beyond the person who gathers information to any group that "intentionally directs, assists, compensates, or induces" a violation, *id.* § 99A-2(c), as Plaintiff organizations do.

b. *The Anti-Sunshine Law's Legislative History.*

The stated rationales for the Anti-Sunshine Law reiterate its aim is to suppress public communications that can discredit employers, particularly by animal advocacy organizations like Plaintiffs.[3] The lead sponsor of the Law, Representative Szoka, encouraged its passage on the House Floor by explaining the Law is meant to punish people who aren't "good employee[s]," which he defined as employees who report

[2] Subsection (f) also exempts officials "engaged in a lawful investigation" from liability.
[3] The legislature did not create committee reports for the Law. However, the Supreme Court has described sponsors' statements as an "'authoritative guide to the statute's construction.'" *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).

information to "the media and [] private special interest organizations" rather than "the proper authorities." Ex. B (excerpts of transcript of June 3, 2015 House floor statements) 4:2-19; *see also* Ex. C (excerpts of transcript of April 22, 2015 House floor statements) 6:10-21, 14:17-24 (Szoka stating similar); *accord* Exs. M, N (audio files of same).[4] These sentiments were underscored by another sponsor, Representative Dixon, who gave an example of the "offensive" speech he hoped the Law would suppress: A "TV station report[ing] several times that Mercy for Animals"—an organization similar to PETA and ALDF that gathers information through employment-based undercover investigations—"had disturbing and shocking new video of animal cruelty on a [B]utterball farm." Ex. C 18:11-19:22. Representative Speciale, yet another sponsor, stated, "this bill is designed to go after people who intentionally hire onto a [business] … to do an exposé for ABC News," people he labeled "fraud[s]." Ex. B 15:22-16:25. Representative Jordan, a sponsor, stated in testimony before the Senate that the Law's objective is to penalize people whose "first employer was the media outlet," but they gain other employment to produce a segment. Ex. D (Senate Commerce Committee hearing audio file) 11:44; *see also id.* at 13:48 (Jordan testifying the "crux' of the law is it punishes people who go "running out to a news outlet").

The remaining legislative history confirms that these statements reflect the Law's objectives. The minutes from the House and Senate committees that considered the bill explain Representatives Szoka and Jordan were the two primary spokespeople. Ex. E. The minutes indicate few other commenters, and the substance of those statements was not recorded, except to note that two people "spoke against the bill." *Id.*

Moreover, Defendants admit the Governor's veto statement accurately articulates the Law's objectives, Ex. A (Defendants' interrogatory responses) 9-13—as they must

[4] Plaintiffs are submitting the audio recordings of the statements on which they are relying and can submit additional audio files of the debates should that aid the Court's consideration.

because Representative Szoka also stated the veto statement shows "the need for the bill." Ex. B 2:20-3:10. The veto statement, Ex. F 3, explains the Law's aim is to suppress Plaintiffs' speech. It applauds the Law's goal of "discourag[ing] those bad actors who seek employment with the intent to … act as an undercover investigators," particularly in "our agricultural industry." *Id*. It then explains that while the Governor would "encourage" such a law, as drafted the Anti-Sunshine Law also punishes employees from reporting "criminal activity," particularly abuse of "vulnerable population[s]," therefore the Governor vetoed. *Id*. That veto was overridden.

c. *Defendants' Rationalizations for the Law.*

In discovery, Defendants proffered two other justifications for the Law that, even with litigation-motivated hindsight, they failed to substantiate. They stated "corporate espionage and organized retail theft" were concerns motivating the statute. Ex. A 9-13. Yet, Defendants failed to explain how "retail theft" could have motivated subsections (b)(1)-(3) and (5), when subsection (b)(4), which Plaintiffs do not challenge, explicitly addresses that concern. Defendants were also unable to identify a single piece of evidence suggesting espionage or theft were genuine concerns that needed addressing, or that regulating speech was necessary to address these "concerns."

To demonstrate the state passed the Law in response to "corporate espionage," Defendants produced a series of articles written *years* after the law, which appear to have been collected by counsel's internet searches. Ex. G. None are in the legislative record. One of the *two* documents Defendants produced regarding espionage that pre-date the Law recounts how it was successfully pursued under existing statutes. Ex. I. The other recounts a report calling for a federal, not state law, to establish a cause of action for "trade secret theft." Ex. H.

To support their contention that the Anti-Sunshine Law was a response to the "organized retail theft," Defendants again point exclusively to documents outside the legislative record: two reports (and connected press releases and articles) that make no

mention of theft in North Carolina and recommend solutions different than the Anti-Sunshine Law—such as retailers taking more "prevention measures," greater "police assistance," enforcement of existing laws, and new federal remedies, Ex. J; and a North Carolina Department of Public Safety document that suggests retail theft can be addressed through employers taking basic precautions, such as "install[ing] security cameras," Ex. K.

d. *The Anti-Sunshine Law Has Suppressed Speech and Advocacy.*

The Anti-Sunshine Law has had its desired effect of impeding groups who develop and disclose employer misconduct to the public and media. PETA and ALDF detail that they use investigators to engage in employment-based undercover investigations to gather information for their advocacy, and these investigators utilize the *exact* methods targeted by the Anti-Sunshine Law. Ex. O ¶¶ 6-8, 13-17, 21-22; Ex. P ¶¶ 4-7, 9-10, 13-14. Indeed, PETA and ALDF regularly engage in such investigations, including PETA having previously investigated a University of North Carolina-Chapel Hill ("UNC-CH") animal testing lab. Ex. O ¶¶ 4, 6-8, 12, 14-16; Ex. P ¶¶ 7, 12. The videos and facts those investigations generated have formed the foundation for news stories, blog posts, petitions, policy proposals and litigation, which in turn have impacted the public perception of animal rights. Ex. O ¶¶ 10-11, 21; Ex. P ¶¶ 4-7, 12-13. ALDF and PETA have each identified specific state facilities they would like to investigate and expose in North Carolina—including the *same* UNC-CH laboratory PETA previously investigated, because PETA possesses information it is again engaged in unlawful animal cruelty—and they are prepared to send investigators to those facilities. Ex. O ¶¶ 17-18, 22-25; Ex. P ¶¶ 8, 12-15. But, PETA and ALDF have not moved forward because they fear the Law's penalties. *Id*.

The remaining Plaintiffs explain that they have used information from whistleblowers and investigators in their advocacy. Exs. Q-V (remaining Plaintiffs' declarations). For instance, they have relied on animal rights organizations' videos

(including those of PETA and ALDF) and individual whistleblowers' stories to develop media and policy proposals, *id.*—including in North Carolina, such as related to UNC-CH's retaliation against a whistleblower who revealed academic fraud, Ex. V (Government Accountability Project ("GAP") declaration) ¶ 9(b). Plaintiffs wish to continue to develop that speech and plan to continue to rely on animal rights groups' and whistleblowers' information in doing so. *See, e.g.*, Ex. Q (ASPCA declaration) ¶ 15; Ex. V ¶¶ 10-11. PETA and ALDF confirm they would share the results of their North Carolina investigations with Plaintiffs, if they were to go forward. Ex. O ¶ 21; Ex. P ¶¶ 5-6. Yet, because investigations and whistleblowers have been chilled by the Law, Plaintiffs cannot obtain information they would receive absent the Law, and their speech has been stymied. *See, e.g.*, Ex. Q ¶¶ 16-19; Ex. V ¶¶ 12-15.

III. Questions Presented

1. Whether the Anti-Sunshine Law violates the First Amendment because it fails the requisite scrutiny or is overbroad.

2. Whether the Anti-Sunshine Law is unconstitutionally vague because multiple elements are undefined.

3. Whether the Anti-Sunshine Law violates the Equal Protection Clause because it was motivated by animus.

IV. Standard of Review

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

V. Argument

a. *Plaintiffs Have Standing.*

The Fourth Circuit held in this case that it appears the Anti-Sunshine Law "by its terms [] prohibit[s] Plaintiffs' planned" investigations and "Defendants are the officials who are empowered to initiate or file suits under the Act if Plaintiffs carry out" such

investigations. *PETA*, 737 Fed. App'x at 130. Therefore, Plaintiffs can seek prospective relief against these Defendants if they establish: (a) Plaintiffs "have in the past conducted actual undercover investigations in public and private facilities for the purpose of uncovering unethical or illegal treatment of animals and disseminating such information to the public"; and (b) they are "prepared to go forward" with investigations of facilities for which these Defendants could bring suit under the Law, but Plaintiffs are chilled from doing so because they "fear [] liability under the Act." *Id.*

This is exactly what Plaintiffs have done. PETA's and ALDF's declarations establish that: (a) they regularly conduct investigations in the manners targeted by the Law to support their advocacy; and (b) PETA is prepared to direct an investigator on its staff to investigate UNC-CH in this manner, and ALDF is likewise prepared to direct other investigators to additional state facilities. Ex. O ¶¶ 4, 6-18, 21-25; Ex. P ¶¶ 7-10, 12-15. However, they have held off because they fear the Law's penalties. *Id*.

As the Fourth Circuit indicated, *PETA*, 737 Fed. App'x at 132, for such a suit to occur, these Defendants must either initiate or prosecute it, making PETA's and ALDF's chill traceable to and redressible against Defendants. N.C. Gen. Stat. § 114-2(2); Ex. L (UNC policy manual excerpt). PETA and ALDF have standing against these Defendants.

Further still, "it is now well established that the Constitution protects the right to receive information and ideas." *Stephens v. Cty. of Albemarle*, 524 F.3d 485, 491 (4th Cir. 2008) (cleaned up). The remaining Plaintiffs detail they have and wish to continue using information generated by undercover investigations in their advocacy. Ex. Q ¶¶ 17-18; Ex. V ¶ 14; *See also* Exs. R-U. Yet, they are being denied that opportunity in connection with PETA's and ALDF's desired North Carolina investigations, which PETA and ALDF would share with Plaintiffs. Exs. Q-V. Moreover, ASPCA explains it previously funded investigations to generate information, but is no longer doing so in North Carolina for fear of liability, Ex. Q ¶ 19, and GAP details that news outlets and other advocacy groups have refused to work with it to develop information in North

Carolina because they fear the Law. Ex. V ¶¶ 10-13. Plaintiffs are being denied access to information they would obtain but for the Law. Therefore, they have standing.

b. *The Anti-Sunshine Law Violates the First Amendment in Multiple Ways.*

i. The Law Restricts First Amendment Freedoms.

The Anti-Sunshine Law's text makes clear the First Amendment governs its applications. The challenged provisions can only be violated through engaging in First Amendment protected activities.

Individuals can only fall within subsections (b)(1) and (2) through "us[ing]" information they have gathered. "An individual's right to speak is implicated when information he or she possesses is subjected to restraints on" its "disseminat[ion]." *Sorrell*, 564 U.S. at 568. Indeed, the Supreme Court applied this principle to strike down a law where, like here, it restricted both obtaining and then "using the information." *Id.* at 564.

In fact, the prohibitions in subsections (b)(1) and (2) on "captur[ing]" information to be "use[d]" implicate the First Amendment on their own, as the First Amendment protects the "creation" of material for speech. *Id.* at 570; *see also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011). A statute can no more "dam the source" of speech than it can target speaking itself. *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015); *see also W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195-96 (10th Cir. 2017) (collecting cases establishing "collection of resource data" for speech is protected by First Amendment).

The "capturing" of information regulated by subsections (b)(2) and (3)—"record[ing]"—is also protected because recording "is itself an inherently expressive activity," *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018), as well as because recordings are needed to produce speech, *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *see also Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1208 (D. Utah 2017).

Subsection (c)'s creation of liability for "[a]ny person who intentionally directs … or induces another person to violate this section" further attacks free expression. The Ninth Circuit has held that the phrase "encourage or induce" must be read to include "speech," *United States v. Sineneng-Smith*, 910 F.3d 461, 473 (9th Cir. 2018), and "directing" someone is even more clearly speech.

The Anti-Sunshine Law's exceptions also train the statute at First Amendment interests. The exceptions establish the Law can only be breached by disclosing information other than as provided for under the listed statutes. N.C. Gen. Stat. § 99A-2(e). In other words, the exceptions confirm the statute's objective is to direct how and to whom information is communicated, forcing it to the state's desired recipients. "The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988).

This textual reading of the Anti-Sunshine Law as targeting speech is reinforced by its legislative history. The Law's record explains it is aimed at stopping communications, particularly communications to "the media," and especially communications by "private special interest organizations" like Plaintiffs who gather information for public advocacy. The Governor—in a statement Defendants concede articulates the Law's purpose, Ex. A 9-13—reiterated and applauded this goal.[5]

In sum, no matter where the Court looks, the Anti-Sunshine Law operates by attacking First Amendment rights, mandating constitutional scrutiny.

[5] In light of the above, subsection (b)(5)—the catchall restriction on any activity "that substantially interferes with the ownership or possession of real property," without defining those terms—should be read to restrict the gathering of information for use (speech) and/or information's use (speech). For instance, it should be understood to cover surveillance that results in public whistleblowing that did not "record[]," "capture[]" or "remove[]" evidence, as required to fall within (b)(1)-(3).

ii. The Anti-Sunshine Law Warrants Strict Scrutiny.

The Law's text and history also establish it requires strict scrutiny. *See, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (explaining courts should look to the text and then the legislative history to determine level of First Amendment scrutiny). They prove it restricts speech based on its "its communicative content," rendering it content-based, *id.*, and "in large part" based on the goals of the people speaking, making it "content- and speaker-based," (viewpoint discriminatory)—an especially noxious form of content discrimination, *Sorrell*, 564 U.S. at 564. They also demonstrate the Law singles out communications with the media, which alone renders a Law "facially discriminatory," and thus independently mandates strict scrutiny. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581, 585 (1983).

Subsection (e)'s text, which narrows the Law's reach to speech that occurs through unofficial channels—exempting speech that can occur under the listed statutes—establishes all of the provisions at issue target speech with a particular content and purpose, and especially speech to the media. Indeed, *Reed* explains that when a law "defin[es] [the] regulated speech by its function," it is aimed at speech with a particular content. 135 S. Ct. at 2227. This is exactly how subsection (e) operates. It provides the statute only restricts speech that spreads information outside approved channels, particularly to alert the public through the media.

In this way, subsection (e) makes the Anti-Sunshine Law equivalent to the law at issue in *Sorrell*, which the Court held was viewpoint discriminatory and struck down. The Court explained that law allowed "many speakers [to] obtain and use" the regulated information, but prohibited its use "in marketing." *Sorrell*, 564 U.S. at 571. In this manner, it "burden[ed]" particular speech and "speaker[s]," "justify[ing] [the] application of heightened scrutiny" it could not survive. *Id.* at 571. A law, such as the Anti-Sunshine Law, which encumbers the use of information to build political movements, by rewarding

quietly reporting it up the chain, but punishing its release to the public certainly should be treated similarly.

Subsection (e) also establishes the Law targets communications with the media, providing an independent basis to subject it to strict scrutiny. *See Minneapolis Star & Tribune*, 460 U.S. at 585. In *Minneapolis Star & Tribune* the Court held a tax designed to apply to the "ink and paper" used in publications was a special attack on the media, which, on its own, warranted a "heavy burden … to justify" the law. *Id.* at 592-93. So too is a law whose exemptions focus its penalties on people who act to get their information to the public by generating media.

Subsections (b)(1) and (2)'s plain text also independently establishes that the Law targets speech conveying particular content with particular objectives. These provisions only restrict "capturing" information and its "use" if that results in a "breach [of] the person's duty of loyalty to the employer," *i.e.*, if the speech is against an employer's interests. The Supreme Court has explained a law is content-based when one must review "the content of the message that is conveyed to determine whether a violation occurred," *McCullen*, 573 U.S. at 479, as is true to determine whether speech was disloyal. In fact, the Court has suggested laws that turn on "loyalty" are viewpoint discriminatory, as "loyalty" describes speech with a particular purpose. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001).

Further still, the Law's text allows "owners and operators" proceeding under it "unfettered discretion" to decide when the statute will be invoked, which, the Fourth Circuit has held, creates such "a risk" that the law will be used for "viewpoint discrimination" it must 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) (collecting cases). The Anti-Sunshine Law only covers activities if they occur in nonpublic areas *or* areas that the "owner or operator" did "not *intend*[] to be accessed by the general public." N.C. Gen. Stat. § 99A-2(a) (emphasis added). In other words, owners

and operators can state a claim against any covered activity by declaring it occurred in an area they did not "intend" to be open. Moreover, subsections (b)(1) and (b)(2) only apply if the covered speech breaches the "duty of loyalty." Long before the Law was enacted, the North Carolina Supreme Court explained the state does not recognize any such affirmative duty for employees. *Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001). Thus, again, the Law provides employers boundless discretion to invoke the statute for any covered activity by declaring that they deem the speech "disloyal." The Law is ripe for discriminatory abuse.

The legislative history and veto statement confirm the Law was designed to target speakers whose goal is to expose employers' unethical conduct to the public and media. Indeed, the Law's sponsors repeatedly stated its function is to stop "disturbing and shocking" speech employers would not want distributed, Ex. C 18:11-19:9; *see also id.* at 10:23-11:3 (statement by Representative McGrady, another sponsor); and to prevent the speech of those whose aim is to "run[] off to a news outlet" to share information. Ex. D 14:10-14:45; *see also* Ex. B 4:14-19, 15:22-16:25; Ex. C 18:11-19:9. The Governor likewise stated the objective of the Law is to stop "undercover investigat[ions]" of the "agricultural industry," like those conducted by PETA and ALDF to document employers' misconduct and build pressure against it through media campaigns. Ex. F 3. A law's "purpose and justification" alone can establish the law is content-based or viewpoint discriminatory, *see Reed*, 135 S. Ct. at 2228, including if it establishes the law aims to attack the media, *see Minneapolis Star & Tribune Co.*, 460 U.S. at 580. Here, the legislative history confirms the content-based and viewpoint-discriminatory nature of the Law communicated by its text.

iii. The Anti-Sunshine Law Cannot Survive Any Scrutiny.

Yet, even were the Court to disagree that the Law is content-based and viewpoint discriminatory, it would remain Defendants' burden to produce "actual evidence supporting [the] assertion that [the] speech restriction does not burden substantially more

speech than necessary," a burden Defendants have not carried. *Reynolds v. Middleton*, 779 F.3d 222, 228-29 (4th Cir. 2015) (citing *McCullen*, 573 U.S. at 486). Under strict or intermediate scrutiny—the only two levels of scrutiny potentially applicable—the record must establish the government "look[ed] to less intrusive means of addressing its concerns" before it decided to regulate speech, *and* that it possessed "evidence" those alternatives were insufficient to achieve its objectives; otherwise, the law fails. *McCullen*, 573 U.S .at 492-93; *see also Reynold*, 779 F.3d at 231-32.[6] The distinction between strict and intermediate scrutiny is not in who bears the burden, but what is required to carry that burden: for content-based and viewpoint-discriminatory laws the record must establish the restrictions on speech are "the least intrusive" possible to achieve the desired end, whereas under intermediate scrutiny the record must show the law is narrowly tailored to achieve its objectives. *Does v. Cooper*, 2016 WL 1629282, at *6 (M.D.N.C.) (cleaned up), *aff'd*, 842 F.3d 833 (4th Cir. 2016). The Anti-Sunshine Law does not meet either test.

Indeed, Defendants have shown no need for the Law whatsoever. The legislative record lacks *any* suggestion the state was suffering from corporate espionage or retail theft—Defendants' two rationales for the law (other than suppressing Plaintiffs' speech)—and it certainly does not substantiate that North Carolina needed to restrict

[6] Under the First Amendment, lesser scrutiny is only used when a statute applies "only in a specific location," "government … property." *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). In those circumstances, so-called "forum-analysis" is used to provide the government flexibility to act like any other "proprietor," which may, in some fora, result in lesser scrutiny. *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). But, where the government is acting as "lawmaker" rather than landowner, forum analysis is not applicable. *Id.* Thus, in cases such as this, where a statute restricts activities on public and private property, no forum analysis occurs. *Reed* 135 S. Ct. at 2224-25, 2227; *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Indeed, here the government has disclaimed any argument based on "forum analysis" by stating the central function of the Law is *not* to protect government property, but private property. Ex. A 9-11 (emphasizing the Law is meant for use by "all property owners" and that the legislature was specifically focused on protecting "businesses").

speech to address these issues. Defendants' post-hoc research has identified *one* report of corporate espionage (none of retail theft) before the Law was passed, and that was successfully pursued under pre-existing statutes. Ex. I. Indeed, North Carolina has a plethora of pre-existing laws people could use to address espionage or theft. *See, e.g.*, N.C. Gen Stat. §§ 1-538.2, -539.2B, 66-153. No evidence suggests these existing laws proved ineffective and, even if they did, the record certainly does not show why the state could not have enacted a law actually targeted at protecting businesses' trade secrets and goods—such as occurred with subsection (b)(4), which focuses on retail theft, and which Plaintiffs do not challenge.

Because the record here does not establish any problem that needed addressing, the Supreme Court has explained "the only interest" that can be found to be served by the legislature targeting speech is to show "special hostility towards" that speech, "precisely what the First Amendment forbids." *R.A.V.*, 505 U.S. at 396. Such laws can never be constitutionally tailored and cannot stand. *Id.*

Moreover, North Carolina's failure to encourage the use of laws already on its books before passing a new law suppressing speech establishes the state did not "seriously" consider less intrusive means, as was required. *McCullen*, 573 U.S. at 494. And, even if those laws did not exist, the Anti-Sunshine Law plainly could have been written to "achieve [the] stated interest while burdening" significantly less speech, which also proves the Law is not tailored. *Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc).

iv. The Law Is Also Unconstitutionally Overbroad.

An additional basis on which this Court should hold the Anti-Sunshine Law "invalid under the First Amendment" is that it is overbroad. *United States v. Stevens*, 559 U.S. 460, 482 (2010). That is, a "substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *Id.* at 473. That the legislative history fails to show any need for the Law, combined with the fact that

numerous pre-existing laws could have been used to achieve the Law's purported, constitutional ends, suggests it lacks *any* legitimacy. *See R.A.V.*, 505 U.S. at 396. Regardless, the Supreme Court has made clear that where "the Government makes no effort to defend the constitutionality" of a statute beyond a narrow subset of its applications, and the law penalizes a variety of First Amendment protected activities, its unconstitutional applications override any legitimate ones. *Stevens*, 559 U.S. at 481. That is true here.

Defendants offer a single rationale for the provisions at issue (as Plaintiffs do not challenge the retail theft provision): "corporate espionage," but the Law sweeps in a host of speech beyond communications of trade secrets to competitors. It covers gathering information in order to report it on *any* matter that occurs in a nonpublic area. N.C. Gen. Stat. § 99A-2(b)(1)-(3). This includes criminal activity and tortious behavior. Indeed, the Governor vetoed the Law because he was so concerned it would discourage reporting "criminal activity," particularly abuse of "vulnerable population[s]." Ex. F 3.

The Law attempts to save itself by allowing the reporting provided for under the listed statutes, N.C. Gen. Stat. § 99A-2(e), but those exceptions are insufficient; they do not prevent liability for the most common forms of whistleblowing. While subsection (e)'s exceptions for state employees provide them the ability to report violations of law or particular "abuse" to "appropriate authorit[ies]," *e.g.*, a "supervisor, department head," or "legislative panel[]," N.C. Gen. Stat. § 126-84 (cross-referenced in subsection (e)), there is no comparable protection for others—who are only exempt from liability if they can report under certain state statutes, using those procedures, *id.* § 95-241 (same). As a result, a nongovernmental, country, or city employee who reports arson, murder, or various other crimes can be liable under the Anti-Sunshine Law. *See id.* There also is no protection if any of these individuals report fraud under the False Claims Act, 31 U.S.C. §§ 3729-33; *see also* Ex. D 18:30-19:33 (Representative Szoka stating "separate act" would be required to protect whistleblowers under federal law). The Law would even

allow non-state employers to punish employees who lobby their legislators, thereby attacking the freedom to petition.

Further still, numbers of federal laws encourage people to provide information of ongoing conduct so agencies can determine if new rules are required. *See*, *e.g.*, 16 U.S.C. § 1533(b)(3)(A); 40 C.F.R. § 1506.6(d). Such statements do not fall within any of subsection (e)'s exceptions, so all employees—state and otherwise—could be liable for responding to these requests with information they uncovered on the job that worked against their employers' interest.

According to Defendants, the Law has a single legitimate function—one, assuming it was necessary, that the legislature could have easily achieved by limiting the Law's reach to commercially sensitive information. However, the Law punishes a wide range of other speech. It is unconstitutionally overbroad.

c. *The Anti-Sunshine Law Is Void for Vagueness.*

Yet another way in which the Law is unconstitutional—which also confirms its unlawful breadth—is it is void for vagueness: it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and "encourages arbitrary" enforcement. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979). While this doctrine sounds in due process, the Supreme Court has explained that "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Parker v. Levy*, 417 U.S. 733, 752 (1974). On this basis, the Fourth Circuit held applications of a law unconstitutional where standard definitions of its terms did not allow the challenger to understand his conduct fell within the law. *United States v. Lanning*, 723 F.3d 476, 482 (4th Cir. 2013). That outcome is even more appropriate here.

Subsections (b)(1) and (2) proscribe speech that breaches the "duty of loyalty," which has *no* definition whatsoever. The statute does not provide a definition and the

North Carolina courts only recognize such a duty in "fiduciary relationship[s]." *Dalton*, 548 S.E.2d at 708-09. Yet, subsections (b)(1) and (2) apply to all employer-employee relationships. As a result, there is no standard for what conduct falls within subsections (b)(1) and (2), enabling employers to invoke the provisions for any covered activity they deem disloyal. The provisions are unconstitutionally vague. *See Lanning*, 723 F.3d at 482-84.

Further, subsection (b)(5) covers activities that "substantially interfere with the ownership or possession" of property without defining those terms. Thus, it is entirely unclear whether the provision covers reputational damage, including boycotts that typically follow PETA's and ALDF's investigations—as the legislative history suggests—or solely physical damage, or something else. Moreover, subsection (b)(5) contains a "double ambiguity," as it is not only unclear what sort of interference falls within its grasp, but also who determines that interference is "substantial," *i.e.*, whether substantial is measured objectively, or by the owner or operator. *Colautti*, 439 U.S. at 391. "It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights" and should be struck down as unconstitutionally vague. *Id.* at 394.

d. *The Anti-Sunshine Law Violates the Equal Protection Clause.*

Finally, the Law is separately unconstitutional under the Equal Protection Clause because it was motivated by animus. The Supreme Court has held that laws passed based on "a bare congressional desire to harm a politically unpopular group" are unconstitutional. *United States v. Windsor*, 570 U.S. 744, 770 (2013). Here the legislative history and veto statement make clear the Law was passed to penalize animal rights advocacy organizations for their work because the legislature found their speech "offensive." *See* § II(b), *supra*. Particularly when combined with a legislative record that shows no true need for the Law, those statements reflect the Law's function is to show

hostility towards animal rights groups and thus it is an unconstitutional abuse of power. *See R.A.V.*, 505 U.S. at 396.

e. *The Court Should Declare the Law Unconstitutional.*

Based on the above, the Court should: (i) enjoin Defendants' enforcement of subsections (b)(1)-(3), (5), which has stopped Plaintiffs' desired speech, *see Does*, 2016 WL 1629282, at *13 (as a matter of law, all factors favor injunction when law targets and violates First Amendment rights); and (ii) declare all of subsections (b)(1)-(3), (5)'s applications unconstitutional. The Supreme Court has established content-based laws like the provisions at issue here are "presumptively unconstitutional" and they can *only* be salvaged if they satisfy strict scrutiny. *Reed*, 135 S. Ct. at 2228. Thus, because the legislative record and Defendants' post-hoc rationalizations establish the provisions cannot pass strict (or intermediate) scrutiny, they can never be lawfully applied. Likewise, the Court has explained that where a law is unconstitutionally overbroad and no reasonable narrowing construction has been offered (as is true here) that "decides the [] question," the overbroad provisions should be held unconstitutional. *Stevens*, 559 U.S. at 481-82; *see also Windsor*, 570 U.S. at 775 (laws motivated by animus are "invalid"); *Colautti*, 439 U.S. at 396 (similar result based on vagueness).

Indeed, any other outcome would undermine the First Amendment by placing people at the "mercy" of others wielding an unconstitutional statute, chilling speech. *Stevens*, 559 U.S. at 480. The function of declaratory judgments, particularly in First Amendment litigation, is to relieve that chill, even if such a judgment cannot make "an unconstitutional statute disappear." *Steffel v. Thompson*, 415 U.S. 452, 469 (1974). The Court should provide that relief by stating these unconstitutional provisions are unenforceable.

VI. Conclusion.

For the foregoing reasons, the Court should enter summary judgment for Plaintiffs, enjoin Defendants from enforcing subsections (b)(1)-(3), (5), and declare those provisions unconstitutional.

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Respectfully submitted,

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

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