Nos. 22-1148 & 22-1150

IN THE

Supreme Court of the United States

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,
Petitioner,
v.
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., ET AL.,
Respondents.

JOSH STEIN, ET AL.,
Petitioners,
v.
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., ET AL.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

MATTHEW STRUGAR
LAW OFFICE OF MATTHEW STRUGAR
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010

DAVID S. MURASKIN
Counsel of Record
PUBLIC JUSTICE
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 797-8600
dmuraskin@publicjustice.net

(Additional Counsel on Inside Cover)

ALAN K. CHEN
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 East Evans Ave.
Denver, CO 80208

Counsel for Respondents

CORPORATE DISCLOSURE

Plaintiffs-Respondents have no parent corporations and issue no stock.

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INTRODUCTION

North Carolina Statute § 99A-2 enacts a novel set of punishments that Petitioners conceded below are designed to prohibit speech, especially public communications. The statute restricts employees' public communications about activities at their workplace or in "nonpublic areas" of their workplace—which are defined to encompass more than "private[] areas." *E.g.*, Pet. App. 8a.[1] The law's plain text also singles out for punishment "whistleblowing" to federal agencies, and even "legislative testimony on matters of public concern." *Id.* at 27a–28a.

The Fourth Circuit held § 99A-2 violated the First Amendment as applied to Respondents' speech—namely, demonstrating "animal-cruelty" at industrial agriculture facilities, laboratories, and zoos to consumers, prosecutors, regulators, and legislators. *Id.* at 4a. The court of appeals "reserve[d] all other applications for future case-by-case adjudication." *Id.* at 46a.

Petitioners' efforts to turn this measured holding into something warranting this Court's review are nonsense. Petitioners cannot even agree on what in the Fourth Circuit's judgment deserves attention. State Petitioners ask this Court to look at two of § 99A-2's subsections; N.C. Farm Bureau asks the Court to consider all four provisions challenged below. State Petitioners concede that audio-visual recording typically constitutes "constitutionally protected speech," but ask this Court to exclude such recording from the First Amendment when it occurs as part of

[1] References to the Appendix are to that in the lead Petition, No. 22-1148.

the tort they claim § 99A-2 codifies. State Pet. 12. N.C. Farm Bureau asks the Court to hold that the First Amendment is categorically inapplicable on private property, whether that property is open or closed or the law at issue punishes recording or any other form of expression. N.C. Farm Bureau Pet. 24.

In either case, review is unwarranted. Petitioners fail to demonstrate any tension among the lower courts. All the cited authority would hold Respondents' recordings protected and would have subjected each of § 99A-2's restrictions on Respondents' speech—recording and otherwise—to heightened First Amendment scrutiny, which Petitioners do not contest the challenged provisions fail. Therefore, every lower court mentioned by Petitioners would have reached the same result as the Fourth Circuit.

The Fourth Circuit's decision also tracks this Court's precedent. Petitioners insist the Fourth Circuit undermined the "right of private property owners to exclude others." N.C. Farm Bureau Pet. 14. But the Fourth Circuit explained a landowner's "right to exclude persons" from their property, even people who "wish[] to speak," remains untouched. Pet App. 10a. Likewise, Petitioners assert the Fourth Circuit created an exception to the holding that "newsgatherers must follow the same rules as everyone else." N.C. Farm Bureau Pet. 14. But the Fourth Circuit recognized "a journalist cannot invoke the First Amendment to shield herself" from laws applicable to others. Pet. App. 12a.

What drove the decision below is § 99A-2 does *not* merely authorize property owners to punish non-expressive conduct, creating a penalty that can be applied to speakers and others alike. Instead, § 99A-2

generates sanctions triggered by Respondents engaging in speech.

Thus, following this Court, the Fourth Circuit demanded the law satisfy First Amendment scrutiny before being applied to speech. *Id.* at 12a–13a. Because it failed that review as applied to Respondents' speech, it could not be used against those activities.

Further still, the case is a poor vehicle to address the arguments Petitioners raise. As a threshold matter, the Court lacks jurisdiction over N.C. Farm Bureau's Petition. Moreover, Petitioners suggest this Court should exclude § 99A-2 from First Amendment review to protect common law traditions, but § 99A-2 does not concern "any tried-and-true common law principles." Pet. App. 14a. The "duty of loyalty" Petitioners claim is codified in § 99A-2 was *first* articulated in a 1999 Fourth Circuit opinion, through an "incorrect *Erie* guess." State Pet. 6 (referencing *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999)); *see also* N.C. Farm Bureau Pet. 4 (same). Just two years later, the North Carolina Supreme Court explained the Fourth Circuit erred. State Pet. 6 (citing *Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001)). Nor does § 99A-2 resemble the other statutes Petitioners and their amici claim establish § 99A-2's import. At the same time, other laws are making their way through the circuits that present the questions raised.

The Petitions should be denied.

STATEMENT OF THE CASE

A. Section 99A-2's Text

Enacted in 2015, § 99A-2 nominally restricts "act[s] that exceed[] [a] person's authority" in "nonpublic areas." N.C. Gen. Stat. § 99A-2(a)-(b); Pet. App. 158a–59a. But it limits those acts to activities defined in five subsections, four of which are at issue here. *Id.* Each subsection has distinct elements, and is informed by separate definitions and exceptions.

The two provisions defended by State Petitioners—subsections (b)(1) and (b)(2)—apply when any employee acting without authorization: (i) "captur[es]" information via writing or other means ((b)(1)) or recording ((b)(2)); (ii) in "nonpublic areas of an employer's premises"; and (iii) "us[es] the information to breach the person's duty of loyalty to the employer." N.C. Gen. Stat. § 99A-2(b)(1)-(2).

"Nonpublic areas" are defined to mean "areas not accessible to or not intended to be accessed by the *general public*." N.C. Gen. Stat. § 99A-2(a) (emphasis added). That is, "nonpublic areas" encompass all business areas except those open to customers, and include areas such as loading docks, breakrooms, and bullpens.

Further, as Petitioners admitted below, the third element expands the provisions' reach to speech in public spaces, establishing that the provisions can be invoked only if employees "use" information outside the workplace. C.A. App. 407 (counsel for N.C. Farm Bureau speaking for all Petitioners). For instance, Petitioners stated the third element could be satisfied through "speaking to another person" in any location regarding the evidence the employee captured. *Id.*

Subsection (b)(3), defended by N.C. Farm Bureau but not State Petitioners, prohibits recordings via "unattended" devices. N.C. Gen. Stat. § 99A-2(b)(3). The provision is not limited to recordings in "nonpublic areas." It reaches any employee recording anywhere on a business property for any purpose. *Id.*

Subsection (b)(5), also defended by N.C. Farm Bureau but not State Petitioners, restricts "substantially interfer[ing] with ownership or possession" of a business. N.C. Gen. Stat. § 99A-2(b)(5). The parties agreed this is a "catch-all" meant to encompass activities equivalent to those restricted by subsections (b)(1)-(3). Pet. App. 21a. Thus, this provision "may reach even mere reporting of a conversation had with other employees." *Id.*

Subsection (e) provides exceptions to subsection (b)'s reach. Petitioners stated these exceptions were necessary because subsection (b) covers "whistleblowers." *Id.* at 27a. Yet, the exceptions "turn out to be narrow protections indeed." *Id.* The exceptions are limited to employees reporting "retaliatory employment discrimination to *state* agencies" and "*state* employees who offer legislative testimony." *Id.* at 28a (emphases added). Thus, even with the exceptions, the challenged subsections prohibit "a watchdog's publication" of material, "a worker who spots Occupational Safety and Health Administration (OSHA) violations [from] report[ing] them to the federal government, or a union [from] expos[ing] child labor violations" to legislators. *Id.* at 27a–28a. Revealing criminal activity to county prosecutors could also run afoul of § 99A-2.

B. Section 99A-2's Context

The State admitted below that Governor McCrory's veto statement accurately articulated § 99A-2's purpose. There, he explained the law is designed to stop "undercover investigat[ions]," particularly those of the "agricultural industry." C.A. App. 111–12. The statement went on that § 99A-2 would "create an environment that discourages" all employees "from reporting illegal activities" such as "sexual abuse of patients." *Id.* at 133.

In other words, § 99A-2 targets whistleblowing. In particular, it was designed to stop Respondents documenting illegal or unethical animal abuse at agriculture facilities to advance their "public advocacy" for additional animal protections and present evidence to law enforcement. *E.g.*, *id.* at 137–38 (Respondents' declaration).

Although Petitioners now claim the law was meant to address "increasing" business concerns, Farm Bureau Pet. 4; *see also* State Pet. 5, "North Carolina concede[d] the State produced no such evidence," Pet. App. 28a. In fact, it failed to show there had been any effort to employ "existing laws" to address any business complaints. Pet. App. 28a.

Petitioners' selective citations to the legislative record confirm the law's objective to prevent public disclosure of illegal or unethical activities. There, one of the law's sponsors explained he supported the statute because he has "family and friends who are in the restaurant industry" and he wished to prevent "embarrassment" to them from someone revealing what goes on at their establishments. C.A. App. 202–04.

C. Procedural History

Respondents filed suit in federal district court, alleging that subsections (b)(1)-(3) and (b)(5) violated the First and Fourteenth Amendments.

The district court granted summary judgment to Respondents on their First Amendment claim. It explained each of the provisions are "subject to First Amendment scrutiny." Pet. App. 86a. Each "includ[es] [Respondents'] speech as an element" of their prohibitions. *Id.* at 89a–90a.

Thus, § 99A-2 is unlike "laws of general application that operate independent of speech" and have "only an incidental effect on speech" when they are applied to speakers. *Id.* at 86a. Respondents do not "seek the protection of the First Amendment simply because [they] engage[] in speech while committing [other] torts" that do not target speech, but because under § 99A-2 liability can attach due to their speech. *Id.* at 89a.

Specifically, the challenged provisions prohibit the gathering of information used for public communication, which must be protected as speech to ensure such speech can occur. *Id.* at 90a–95a. Moreover, through regulating the subsequent "use" of that information, subsections (b)(1) and (b)(2) prohibit "creating" independent public expressions based on the information uncovered. *Id.* at 91a.

The district court then concluded § 99A-2 failed both strict and intermediate scrutiny. Because subsections (b)(2) and (b)(3) always involve speech, it held them facially invalid. In contrast, it concluded subsections (b)(1) and (b)(5) could be invoked without involving speech. Thus, those latter provisions could stand,

although they could not be applied to punish Respondents' speech. *E.g.*, *id.* at 111a.

The Fourth Circuit largely affirmed, but reversed the grants of facial relief. It held that none of the challenged provisions could be applied to Respondents' speech—documenting businesses' animal cruelty and communicating that information to the public and officials—which the Fourth Circuit characterized as "newsgathering." Pet. App. 41a.

The Fourth Circuit began its analysis by making clear that "an employer c[an] freely choose to deny entry" to Respondents. *Id.* at 11a. Relatedly, the Fourth Circuit reiterated there is no exception to laws found to "comport[] with First Amendment strictures," even if they inhibit newsgathering or subsequent expressions. *Id.* at 12a–13a. Laws that either prohibit non-expressive conduct like entry, or regulate speech but pass First Amendment scrutiny, can be applied universally, regardless of how they impact the "ability to gather and report the news." *Id.* at 15a.

However, like the district court, the Fourth Circuit recognized § 99A-2's restrictions are not so limited. The challenged provisions "create new categories of unprotected speech" through regulating "gather[ing] information as a predicate to speech" and "speak[ing] out." *Id.* at 11a, 21a–23a.

These provisions were also unlike anything upheld before. Petitioners argued the restrictions were tantamount to what was approved by the Fourth Circuit in *Food Lion*. However, the Fourth Circuit explained *Food Lion* did not allow restrictions on speech, but merely allowed undercover investigators to be sued for the non-expressive torts of acting against one

employer's interest while working for another (breaching the so-called "duty of loyalty") and related trespassing. *Id.* at 13a. Indeed, *Food Lion* "*rejected* damages flowing from any reporting," authorizing recovery only for "disloyal act[s]." *Id.* at 18a (emphasis in reported decision). Further still, following *Food Lion*, the North Carolina Supreme Court repudiated the Fourth Circuit's conclusion that employees other than company fiduciaries could be sued for disloyalty. *Id.* at 13a–14a. Thus, § 99A-2 reflects "novel" rules that prevent speech. *Id.* at 14a. "*Those* we must measure firsthand against the First Amendment[.]" *Id.* (emphasis in reported decision).

Proceeding with the First Amendment analysis, the Fourth Circuit held § 99A-2 content based and subject to strict scrutiny. *E.g.*, *id.* at 11a–12a, 23a. Petitioners did not attempt to satisfy that standard. *Id.* at 26a.

In the alternative, the Fourth Circuit held § 99A-2 failed the intermediate scrutiny applicable to content-neutral laws, "both because the legislature produced no record evidence justifying" the provisions, and because the "prohibitions are not tailored to any substantial government interest." *Id.* at 31a. North Carolina acknowledged it did not attempt to address the concerns allegedly motivating § 99A-2 prior to enacting the law. *Id.* at 28a. Further, while "North Carolina offers [that the provisions] protect private property against trespass," they limit unauthorized entries only if the entrant has certain objectives. *Id.* at 29a–30a. Accordingly, the provisions are not truly crafted to prevent unauthorized access. *Id.* Whatever "privacy interest" allegedly motivated the provisions also does not align with their scope, as they reach

information gathering in all "nonpublic areas," such as taking notes of public conversations on a "factory floor." *Id.* at 30a–31a.

In addition, the Fourth Circuit explained that even if the speech restricted by subsections (b)(1)-(3) and (b)(5) fell into some exception to the First Amendment, the challenged provisions would still require scrutiny. Unprotected speech cannot be regulated to facilitate viewpoint discrimination. *Id.* at 11a (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992)). Thus, if there were an exception to the First Amendment for unauthorized information gathering that applied to § 99A-2, First Amendment scrutiny would still be required. *Id.* at 11a–12a. North Carolina enacted § 99A-2 not to protect rightfully-private information, but to prevent public communications regarding illegal and unethical activities, especially in the agriculture industry. *Id.* Thus the challenged provisions would require strict scrutiny, which they fail.

The Fourth Circuit limited its remedy to as-applied relief. It recognized that "state courts and lower federal courts stand in a coordinate, not a hierarchical, relationship," and thus any ruling by the Fourth Circuit on § 99A-2's facial validity would be merely advisory to the judges most likely to apply the statute. *Id.* at 33a. This "circumscribed decision[]" also ensures future courts can consider whether prohibitions on other recordings or information gathering are consistent with the First Amendment. *Id.* at 36a. Thus, while the Fourth Circuit held § 99A-2 could not be applied to the communications in which Respondents engage, it "le[ft] it to" other courts to determine whether the statute posed First Amendment concerns in any other setting. *Id.* at 41a.

Judge Rushing dissented. She acknowledged that prohibitions on "recording matters of public interest" warrant "First Amendment protection." *Id.* at 55a. But she insisted that protection "is not categorical[]." *Id.* As a result, she argued that the panel was bound by *Food Lion,* which Judge Rushing read as holding laws like § 99A-2 constitutional. *Id.* at 53a–54a. When she "[m]ov[ed] beyond" that intra-circuit dispute, much of her analysis related to her distinct construction of the state law at issue. *Id.* at 54a. That led her to conclude it did not implicate the First Amendment. *Id.* at 56a–59a.

REASONS FOR DENYING CERTIORARI

Petitioners do not dispute that the challenged provisions of § 99A-2 restrict activities typically protected by the First Amendment—the recording and dissemination of information of public import. Nor do Petitioners deny that the provisions are unconstitutional as applied to Respondents' activities if they are subject to strict or intermediate scrutiny. Instead, Petitioners challenge the Fourth Circuit's decision that § 99A-2 is subject to First Amendment review when it restricts Respondents' speech. Petitioners ask this Court to grant certiorari to create new categories of unprotected speech, either for audio-visual recording of newsworthy material in "nonpublic areas" that purportedly involves a breach of a duty of loyalty (State Petitioners), or for all types of speech on private property, whether the property is truly private or merely a "nonpublic area" (N.C. Farm Bureau).[2]

[2] Therefore the various arguments Petitioners' amici make about the interest furthered by § 99A-2, in order to tip the means-ends scrutiny analysis, are irrelevant.

The Court should decline both requests. There is no conflict among the circuits on either of the questions presented. Vehicle problems would keep the Court from reaching those questions and undermine the case's import. Cases that do raise those questions are already percolating through the courts. Moreover, the Fourth Circuit's decision is correct.

I. This Case Presents No Circuit Split.

A. The circuits agree the First Amendment protects recordings like Respondents'.

State Petitioners acknowledge the Fourth Circuit's decision comports with Tenth Circuit precedent, which subjected a prohibition on recordings like those of Respondents to First Amendment scrutiny. State Pet. 14 (citing *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2647 (2022)). But, State Petitioners assert the "Fourth Circuit expressly split with the Ninth Circuit on the question of whether and when" recordings are protected. *Id.* at 13 (citing *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018)). That latter claim is indefensible.

As State Petitioners recognize, the Ninth Circuit in *Wasden* held "all recordings are constitutionally protected speech—even unauthorized recordings on nonpublic property." *Id.* at 12. Put another way, the Ninth Circuit, just like the Fourth, would have held § 99A-2's prohibitions on recording subject to First Amendment scrutiny.

In fact, the very language State Petitioners cite from the decision below underscores there is no disagreement between the Fourth and Ninth Circuits.

The Fourth Circuit stated the Ninth Circuit in *Wasden* had "gone further" in protecting recordings and explained the decision below was leaving the broader questions for a future case. Pet. App. 37a n.9. The Fourth Circuit explained this would allow the Ninth Circuit to "stress-test the outer limits" of its rule so the circuits will ultimately align. *Id.*

Lest there be any doubt, the Ninth Circuit has recognized its decision in *Wasden* "is consistent with" the Fourth Circuit's holding here. *Project Veritas v. Schmidt*, 72 F.4th 1043, 1055 n.10 (9th Cir. 2023).[3]

B. The circuits agree the First Amendment applies to statutes that concern "nonpublic areas."

All the cited case law in the N.C. Farm Bureau's Petition also supports the conclusion that the First Amendment applies when laws like § 99A-2 directly regulate speech.

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[3] Although filed in support of State Petitioners, but not N.C. Farm Bureau, the Utah amicus brief ignores the State's allegation of a split regarding audio-visual recordings and points instead to cases it claims suggest the First Amendment does not apply to activities on private property. Utah Amicus Br. 16–20. Those cases consist of: (i) the authority raised by N.C. Farm Bureau and addressed below; (ii) the Fourth Circuit's own opinion in *Food Lion*, which could not create a circuit split and was harmonized in the decision below; (iii) cases addressing this Court's unique limits on false speech that have no bearing on this case, *see* § II(C), *infra*; and (iv) additional cases reiterating recording is "subject to First Amendment protection," even when the recording occurs "without [] consent" and involves "invad[ing] private property." Utah Amicus Br. 19 (citing *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195–96 (10th Cir. 2017)).

The Fourth Circuit subjected § 99A-2 to First Amendment review because the challenged provisions punished Respondents for engaging in speech. *E.g.*, Pet. App. 14a; *see also id.* at 92a (district court opinion explaining Petitioners "conceded" § 99A-2's elements could be satisfied by speech alone). This distinguished § 99A-2 from so-called generally applicable laws like "breaking and entering, or document theft," which solely restrict non-expressive conduct so that the regulation does not implicate the First Amendment and has at most an "incidental effect[]" on speech. Pet. App. 12a, 15a (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)). That generally applicable laws regulating non-expressive conduct can impact speech without raising First Amendment concerns does nothing to support a law like § 99A-2 that punishes a "person for [] speech." *Id.* at 10a. The court of appeals then granted as-applied relief because the challenged provisions implicated the First Amendment and "cannot survive th[e requisite] scrutiny," *id.* at 13a, a determination Petitioners do not contest.

N.C. Farm Bureau's Seventh Circuit precedent is on all fours, explaining laws that directly restrict speech, including speech on private property, require First Amendment scrutiny. *520 South Michigan Avenue Associates, Ltd. v. Unite Here Local 1* reiterates that laws enforcing the "right to exclude" are exempt from First Amendment review because they solely regulate non-expressive conduct; thus the First Amendment has "no part to play" whether the law is being applied to speakers or others. 760 F.3d 708, 723 (7th Cir. 2014) (citing *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)).

That did not resolve *520 South Michigan Avenue Associates*, however. The defendant union was charged with harassment on private property, including "visiting offices" to protest customers working with the employer. *Id.* at 724. Restricting those activities, the Seventh Circuit recognized, involved policing a "mixture of conduct and communication." *Id.* at 723. Like the Fourth Circuit, the Seventh Circuit employed First Amendment scrutiny to determine whether such a rule survived before allowing it to be applied. *Id.* The Seventh Circuit allowed the law to be enforced because, unlike § 99A-2, it "serve[d] important state and public interests," was "narrowly tailored," and did not "reference [] the content of [the] message." *Id.* at 723–24.

Petitioners' cited Ninth Circuit authority is no different. The Ninth Circuit in *Planned Parenthood Federation of America, Inc. v. Newman* held anti-abortion activists who recorded Planned Parenthood's staff and clinics and released that information could be held liable because Planned Parenthood pursued claims for non-expressive conduct such as "forging signatures, creating and procuring fake driver's licenses, and breaching contracts." 51 F.4th 1125, 1135 (9th Cir. 2022). The Ninth Circuit explained these claims were comparable to those addressed in the other Ninth Circuit authority on which N.C. Farm Bureau relies, *Dietemann v. Time, Inc.*, 449 F.2d 245, (9th Cir. 1971). In *Dietemann* a journalist accessed a "private home" through "subterfuge" and the Ninth Circuit stated he could be charged with torts. *Planned Parenthood Fed'n*, 51 F.4th at 1134. (citing *Dietemann*, 449 F.2d at 247, 249). In particular, *Dietemann* confirms "[t]he First Amendment is not a license to trespass, to steal, or to intrude," and

journalists must obey such laws "applicable to all members of society." *Id.* Thus, the speakers in *Planned Parenthood Federation* could be subject to the "laws of general applicability" that were invoked by Planned Parenthood. *Id.* at 1135. *Dietemann* demonstrates those laws, unlike § 99A-2, regulate solely non-expressive activities similar to unauthorized entry. The First Amendment is not implicated when such laws are applied to anyone.[4]

In sum, the lower courts are in complete harmony: laws are subject to the First Amendment where they directly restrict otherwise protected speech. N.C. Farm Bureau cites cases in which laws did not regulate speech or survived First Amendment review. This case turned out differently only because Petitioners cannot make either showing (and do not even attempt here to make the latter one).

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[4] State Petitioners cite two additional cases that are more of the same, State Pet. 22 (and, as district court decisions, could not support a split even if they were not). *Democracy Partners v. Project Veritas Action Fund* allowed claims of fraud, trespass, breach of fiduciary duty and wiretapping to go forward for Project Veritas "infiltrat[ing] Democracy Partners' offices . . . and secretly record[ing] hours of conversation," explaining "[w]hether First Amendment scrutiny applied" turned on "whether the 'challenged conduct' is to some form of expression," which was not the case with those claims. 285 F. Supp. 3d 109, 112, 125 (D.D.C. 2018); *see also Council on Am.-Islamic Rels. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 331 (D.D.C. 2011) (addressing non-speech-based claims for breaching "contractual, fiduciary" and related obligations).

II. This Case Is a Poor Vehicle.

In addition to the absence of a split, this case is also riddled with vehicle problems that should lead the Court to pass on review.

A. The Court lacks jurisdiction over N.C. Farm Bureau's Petition.

N.C. Farm Bureau is the only Petitioner who asks this Court to review the Fourth Circuit's holding that subsections (b)(3) and (b)(5) violate the First Amendment as applied to Respondents' speech. It also asks the Court to consider different aspects of subsections (b)(1) and (b)(2) than do State Petitioners, not limiting its Petition to those subsections' restriction on audio-visual recording. *Compare* State Pet. i, *with* N.C. Farm Bureau Pet. i. Yet N.C. Farm Bureau lacks standing to seek that review. Accordingly, the Court does not have jurisdiction over N.C. Farm Bureau's Petition and cannot consider the aspects of the judgment the Farm Bureau uniquely raises.[5]

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[5] In addition, N.C. Farm Bureau appealed the summary judgment ruling to the Fourth Circuit while settlement discussions were underway between State Petitioners and Respondents. Respondents then moved to dismiss the Farm Bureau's appeal because it required and lacked standing to seek a "judgment of its own." *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 442 (2017). Because State Petitioners appealed after N.C. Farm Bureau's appeal disrupted the settlement talks, and Fourth Circuit rules require appellants to file a single brief containing a single request for relief, the panel did not address Respondents' motion. *See* C.A. Oct. 9, 2020 Order. Nonetheless, because N.C. Farm Bureau lacked standing as an appellant, it also cannot proceed as a petitioner.

"[S]tanding 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). While only one appealing party must have standing to proceed on a shared issue, an intervenor-defendant like N.C. Farm Bureau who seeks relief distinct from that of the named defendants must establish standing to appeal. *Town of Chester*, 581 U.S. at 439–40. To do so, it must show a "'direct stake' in the outcome of the[] appeal," through establishing a concrete, "personal and individual" injury stemming from the lawsuit's success. *Hollingsworth*, 570 U.S. at 705–06.

N.C. Farm Bureau cannot make that showing. Before the Fourth Circuit, it abandoned its lead argument in the district court that it had organizational standing, and claimed instead to represent the interests of two of its members. *See, e.g.*, Resp. C.A. Mot. to Dismiss Reply 2. Those members have no connection to this litigation. Neither alleges any basis to suspect they have been or will be subject to an investigation by Respondents or anyone else. One explains her farm does not raise animals. D. Ct. Doc. 83-3 ¶ 1 (Feb. 1, 2019). Without providing any rationale for her fear, she states she is concerned a "'planted' worker" will "interfere with our sweet potato harvest and sales." *Id.* ¶ 4. The other asserts the "possibility" he would be investigated at some unknown point in the future because he purports to "know farm families who have been" investigated for acts of animal cruelty. D. Ct. Doc. 83-2 ¶¶ 5–6 (Feb. 1, 2019). At best, these allegations amount to claims that the members wish to preserve § 99A-2 because "[s]ome day" they believe they could possibly wish to use § 99A-2 against someone, although not necessarily Respondents. *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 564 (1992). That is not an "'actual or imminent' injury" related to this case. *Id.*

B. Section 99A-2 does not derive from any common law tradition.

Petitioners claim review is warranted to prevent the First Amendment from undermining laws grounded in the "history and tradition" of the nation. State Pet. 20; *see also* N.C. Farm Bureau Pet. 21. However, § 99A-2 "is literally unprecedented in common or statutory North Carolina law." Pet. App. 29a.

In fact, both Petitioners concede that to the extent § 99A-2 codifies a "duty of loyalty" owed by all employees to their employers, that duty is not within North Carolina's traditions. It is derived solely from the 1999 judgment of the Fourth Circuit in *Food Lion*, which inaccurately predicted North Carolina law—an error the North Carolina Supreme swiftly corrected in 2001. State Pet. 6 (citing *Dalton*, 548 S.E.2d at 709); *see also* N.C. Farm Bureau Pet. 4.

At any rate, § 99A-2 does not establish a "duty of loyalty." The duty is not a "standalone cause of action," but rather part of one element within subsections (b)(1) and (b)(2). *E.g.*, Pet App. 89a.

Tacitly admitting the weakness of the argument that § 99A-2 codifies historic North Carolina common law, Petitioners argue in the alternative that § 99A-2 is instead an expression of property rights. State Pet. 19. This is equally baseless. The single North Carolina case Petitioners cite—an intermediate state court decision—explains North Carolina prevents "infiltrat[ion]." Pet. App. 36a (Fourth Circuit discussing

Petitioner's authority, *Miller v. Brooks*, 472 S.E.2d 350 (N.C. Ct. App. 1996)). That tort prohibits the "[t]he acts" of "intrusion on [] seclusion," namely stealing the plaintiff's mail or "invading a [] home" without permission, all of which is non-expressive conduct. *Miller*, 472 S.E.2d at 354–55. Indeed, *Miller* distinguished that tort from one punishing "public disclosure," which it acknowledged would raise "First Amendment concerns." *Id.*

In contrast, § 99A-2's goal is to punish public disclosures. As a result, its elements encompass information gathering to facilitate speech and the subsequent communication of information. *E.g.*, C.A. App. 111–12, 407 (Petitioners conceding same). It is not limited to punishing unauthorized access to property.

Moreover, the tort in *Miller* only covered truly private spaces. *E.g.*, Pet. App. 36a. Section 99A-2's reach to "nonpublic areas" encompasses places where there is no expectation of privacy. *Id.*[6]

Stretching further, Petitioners suggest that even if § 99A-2 does not connect to anything in North Carolina's common law, it should still be upheld to protect yet other traditions. State Pet. 20–21. However, the employment rules they reference are limited to policing employee's disclosures to competitors, not to the public, prosecutors, or regulators, which are restricted by § 99A-2. *See id.* They state their generic

[6] For this reason too, amicus American Farm Bureau's suggestion that the Fourth Circuit's decision somehow impinges upon "private family homes and lives" is off base. Am. Farm Bureau Amicus Br. 15. The Fourth Circuit held § 99A-2 invalid only as to the specific speech involved here, none of which concerns intruding upon or publicizing details of anyone's private home or life. *E.g.*, Pet. App. 46a.

history also establishes a "right to exclude" from property. *Id*. But the Fourth Circuit's holding that § 99A-2 cannot be applied to Respondents' speech leaves property owners' ability to control access and punish entry undisturbed. Pet App. 11a. The Fourth Circuit simply provides the state cannot create a special punishment for speech like Respondents' when some, but not all, of the speech occurs in "nonpublic areas." Nowhere do Petitioners or amici, *see* Utah Amicus Br. 3–7, identify a common law analogue implicated by that holding.

This Court has explained it will create a new exception to the First Amendment only if it is "presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.'" *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion); *see also United States v. Stevens,* 559 U.S. 460, 469–72 (2010) (similar). Although Petitioners try to shoehorn this case into that rubric, they cannot maintain that façade. Accordingly, this case does not present the Court with any opportunity to either consider the First Amendment's relationship to historic common law rules or craft a new category of unprotected speech in line with history or tradition.

C. Section 99A-2 is unlike other state statutes Petitioners reference.

Reviewing § 99A-2 also cannot provide the guidance to lawmakers Petitioners and amici suggest.

Petitioners argue § 99A-2 is like other laws aimed at undercover investigations. But, as Petitioners concede, those statutes focus on restricting "persons from knowingly obtaining" information "through

misrepresentation." *E.g.*, State Pet. 14–15; *see also id.* at 16–17 & n.3 (citing Ala. Code § 13A-11-153 (prohibiting "[o]btain[ing] access to an animal or crop facility by false pretenses" and other "deception"); Idaho Code § 18-7042(1) (prohibiting "interference" through "misrepresentation"); 720 Ill. Comp. Stat. 5/21-7(a), 5/21-9(a-5) (prohibiting access to areas at airports or "a place of public amusement" by "falsely representing" oneself); Iowa Code § 717A.3A (prohibiting access "by false pretenses," or using " a false statement or representation" to gain employment); Iowa Code § 717A.3B (prohibiting using "deception" to gain access or employment); Kan. Stat. §§ 47-1826, 47-1827 (prohibiting the use of "deception"); Utah Code § 76-6-112 (prohibiting obtaining access "under false pretenses")).[7]

Accordingly, those other statutes raise the question of when states can "create[] laws against deceptive trespasses." Utah Amicus Br. 9; *see also* State Pet. 14–15 (arguing there is a "split" between the

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[7] Two laws State Petitioners claim are part of this group, Montana Code §§ 81-30-102, 81-30-103, and North Dakota Century Code §§ 12.1-21.1-01, 12.1-21.1-02, are materially different. These laws mimic the Kansas law above, except unlike the Montana and North Dakota statutes, the definition of "[c]onsent" in the Kansas statute was modified so the law reached consent obtained through "deception," which is what subjected the Kansan provisions to challenge. *Kelly,* 9 F.4th at 1224–25. Thus, the Montana and North Dakota laws should not be included in this list. Two other laws Petitioners invoke are yet more distinct from both the listed statutes and § 99A-2. *See* Cal. Civ. Code § 1708.8(a) (prohibiting recordings "in a manner that is offensive to a reasonable person"); Wyo. Stat. §§ 6-3-414, 40-27-101 (prohibiting data collection with a "legal description or geographical coordinates of the location of the collection," information needed to submit the data to the government); *see also Michael,* 869 F.3d at 1195.

Ninth and Tenth Circuits regarding when the state can punish access obtained via false speech and this is the "uncertainty" the Court needs to address).

Section 99A-2, however, contains no prohibition on false pretenses, deception, or misrepresentations. Thus, the decision below (appropriately) does not weigh in on when false speech can be regulated consistent with the First Amendment. *See Alvarez*, 567 U.S. at 718–19 (discussing those rules).

State Petitioners try to force some connection between the decision below and the questions surrounding false speech by claiming the Fourth Circuit "appeared to" approve of the Tenth Circuit's analysis of the role "inten[t]" plays in regulating false speech. State Pet. 15 (citing *Kelly*, 9 F.4th at 1233). Incorrect. The Fourth Circuit cited that portion of the Tenth Circuit's analysis for the fact that the government can restrict unprotected speech only if its goal is to prevent the negative outcomes that led the speech to be unprotected. The government may not restrict unprotected speech to "discriminate based on speaker and viewpoint." Pet. App. 11a–12a (citing *Kelly*, 9 F.4th at 1233). The Fourth Circuit also cited that portion of *Kelly* for the Tenth Circuit's description of a viewpoint discriminatory law, which the Tenth Circuit reiterated would render a statute regulating false speech subject to the First Amendment regardless of any exception for those expressions—making the alleged split regarding the regulation of false speech all the more irrelevant to the analysis below. *Id.*

D. Other cases raising Petitioners' questions are working their way through the lower courts.

All told, Petitioners cite only two statutes that bear any resemblance to § 99A-2, and those statutes confirm that, should the Court wish to consider the circuits' consistent application of the First Amendment to such laws, it can and should wait for other cases.

Iowa Code § 727.8A prohibits trespassing and recording. The state has appealed the successful First Amendment challenge to that law to the Eighth Circuit. *Animal Legal Def. Fund v. Reynolds*, No. 22-3464 (8th Cir. Nov. 29, 2022). Unlike in this case, an element of Iowa Code § 727.8A truly incorporates pre-existing state law. *See Animal Legal Def. Fund v. Reynolds,* 630 F. Supp. 3d 1105, 1111 (S.D. Iowa 2022).

Arkansas Code § 16-118-113 mimics § 99A-2's list of regulated activities, but that list is "non-exclusive" in the Arkansas law. Pet. App. 90a n.19. Thus, the district court in this case explained courts considering the Arkansas law could weigh whether a law aimed largely at non-expressive activity, but whose elements capture some speech, can survive First Amendment scrutiny. *Id.* at 90 & n.19. The record here forecloses such analysis. As the State admitted § 99A-2 is aimed at speech, and Petitioners do not claim the law can survive First Amendment review. A pre-enforcement challenge was lodged against the Arkansas law. That case was only recently dismissed on state action grounds, with the court indicating it should be refiled against a different defendant. *Animal Legal Def. Fund v. Peco Foods, Inc.*, No. 4:19cv00442 JM, 2023 WL 2743238, at *7 (E.D. Ark. Mar. 31, 2023).

III. The Fourth Circuit's Decision Is Correct.

Finally, the decision below faithfully applies this Court's holdings. The First Amendment allows the government to regulate speech through policing non-expressive conduct or enacting laws that survive scrutiny. But laws targeting protected speech cannot evade First Amendment review. And § 99A-2 targets protected speech, with Petitioners failing to suggest it could survive scrutiny. Moreover, Petitioners do not address the Fourth Circuit's separate and independent rationale for its judgment: that, even if the speech regulated by § 99A-2 were unprotected, it could not stand because it is viewpoint discriminatory.

A. Section 99A-2 targets protected speech, requiring First Amendment scrutiny.

The challenged subsections of § 99A-2 target activities protected by this Court's First Amendment precedent, subjecting them to scrutiny.

This Court has repeatedly stated the First Amendment extends to prohibitions on gathering information to facilitate speech, the sole purpose of Respondents' activities at issue. *E.g.*, *Citizens United v. FEC*, 558 U.S. 310, 336 (2010) (First Amendment protects "speech process"); *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 792 n.1 (2011) (First Amendment protects "creating" speech). "Facts, after all, are the beginning point for much of the speech that is most essential[.]" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

Moreover, subsections (b)(1) and (b)(2)—the only provisions challenged by Petitioners with standing—penalize both information gathering and the

subsequent use of that information. It is beyond dispute that "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Sorrell*, 564 U.S. at 568.

Section 99A-2's exceptions also establish that the challenged provisions restrict communications to government agencies and legislators. Therefore, the subsections are "destructive of rights of association and of petition." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972).

It does not matter whether some non-expressive conduct might be reached by the same elements of the challenged provisions that restrict Respondents' speech. *See* Am. Farm Bureau Amicus Br. 10. A law that "may be described as directed at conduct" still requires First Amendment scrutiny if, as here, "the conduct triggering coverage under the statute consists" of First Amendment protected activities. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010).

Petitioners purport that this Court's authority allows states to restrict protected speech without surviving scrutiny so they can achieve other objectives. To the contrary, Petitioners' cases are entirely consistent with the Fourth Circuit's approach below. Their authority explains states can enact "generally applicable" laws like "break[ing] and enter[ing]," "antitrust," and "non-discriminatory taxes," and apply those regulations of non-expressive conduct to the media and others. *Cowles Media*, 501 U.S. at 669–70; *see also Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937). Such statutes are exempt from First Amendment review because they are targeted at "daily

transactions," not speech or predicates to speech. *Cowles Media*, 501 U.S. at 669–70. While some "ingenious argument" could be developed regarding how such statutes' restrictions eventually inhibit speech, these laws are "inhibition[s] of action" and that renders them unlike § 99A-2 because there is no "First Amendment right which is involved" in their application. *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965).

Hence, Petitioners' primary examples are cases upholding statutes aimed solely at unauthorized entry. Petitioners' claim that these cases address regulations on speech is make-believe. *See* N.C. Farm Bureau Pet. 19. Rather, these cases hold only that a law whose elements solely restrict non-expressive conduct can be applied to speakers. *See Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 737 (1970) (authorizing a household to opt out of receiving certain mail because unauthorized entry of mail to the home would be "a form of trespass"); *Lloyd Corp.*, 407 U.S. at 556 & n.4 (allowing "an ordinance which makes it unlawful to trespass" to be used against hand billers); *Hudgens*, 424 U.S. at 520–21 (explaining that *Lloyd Corp.* held there is no "First Amendment right to enter" and therefore "the pickets in the present case did not have a First Amendment right to enter").

The other cases Petitioners invoke are similar, exclusively affirming laws that solely encompass non-expressive conduct. *See Cowles Media*, 501 U.S. at 672 (authorizing claims for "disregard[ing] promises"); *Zemel*, 381 U.S. at 14 (allowing restriction on the "right to travel" abroad); *Associated Press,* 301 U.S. at 131–33 (authorizing suit for unlawful discharge).

Branzburg v. Hayes, 408 U.S. 665 (1972), confirms that laws restricting speech must pass First

Amendment review. In that case, a reporter sought relief from a grand jury subpoena, but conceded "neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information." *Id.* at 682. Therefore, the Court relied on the agreed-upon proposition that reporters have "no special privilege" to avoid constitutional laws, and held the challengers had to appear. *Id.* at 683. Yet, in doing so, the Court reiterated that a law must first be shown to be "valid" before it "may be enforced against the press" or anyone else. *Id.* at 682. The Court indicated this meant that even with grand jury subpoenas, First Amendment scrutiny applied to their regulations of speech, explaining the subpoenas could be enforced because they serve a substantial "public interest" and their "deterre[nt]" effect on speech is sufficiently tailored to their objectives. *Id.* at 690–91.

Petitioners suggest that protecting private property is especially important and should be uniquely allowed to trump speech without any First Amendment scrutiny. But this contention has no basis in law. Instead, the authority confirms laws regulating speech require First Amendment scrutiny. This Court's decision in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton* struck down a law prohibiting solicitors from "'going in and upon' private residential property." 536 U.S. 150, 154, 163–64 (2002). *Watchtower* stated the challenged law aided in securing private property rights through "the protection of residents' privacy" on their property, but explained it still required and failed First Amendment scrutiny. *Id.* at 164–65. Petitioners and their amici's only way to handle *Watchtower* is to claim the Court did not mean what it said when it explained the

law protected private property interests and still required First Amendment scrutiny. N.C. Farm Bureau Pet. 20; Utah Amicus Br. 15–16.[8]

Amici also rely on a series of cases addressing the special concerns raised by access to prisons and prisoners. But these cases add nothing. In each, the Court rejected the claim that the Constitution compels the government to create special access for the media. *Houchins v. KQED, Inc.*, 438 U.S. 1, 7–8 (1978); *see also Pell v. Procunier*, 417 U.S. 817, 834 (1974) (no "affirmative duty" to allow journalists to access prisoners in a manner "not available to members of the public generally"); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (rejecting special access to federal prisoners in a "case constitutionally indistinguishable from *Pell*"). These cases offer no analogy to § 99A-2, which does not concern itself with limiting access, but rather creates special punishments for expressions following entry.[9]

The cases on which Petitioners and amici fixate—*Cowles Media*, *Zemel, Lloyd Corp.*, *Hudgens*, and

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[8] Just last Term, this Court repeated that laws placing restrictions on speech require scrutiny regardless of their other functions. It explained that where public accommodation laws and the First Amendment "collide, there can be no question" the laws must pass First Amendment scrutiny. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2315 (2023).

[9] This also distinguishes the dicta relied on from *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019). That case was about state action, not the scope of free speech. Nonetheless, N.C. Farm Bureau and amici cite it for the proposition that private property owners can choose to deny access to certain speakers. N.C. Farm Bureau Pet. 18–19; Utah Amicus Br. 14. That does nothing to support § 99A-2, which authorizes property owners to punish speech.

Rowan—concern regulations of solely non-expressive conduct. Another line of authority establishes the press is not entitled to special privileges to speak. In contrast, the cases discussing direct restrictions on expressive activities explain those statutes can be applied to the media or others only if they survive scrutiny. Thus, the Fourth Circuit accurately tracked this Court's principles and properly held § 99A-2 could not be enforced against Respondents' speech if it could not pass First Amendment scrutiny, as Petitioners concede is the case.

B. Regardless, § 99A-2 is viewpoint discriminatory, requiring strict scrutiny.

As the Fourth Circuit also held, even if Petitioners were correct that the type of speech regulated by § 99A-2 falls into some new exception to the First Amendment, § 99A-2 would still be subject to strict scrutiny because the law is viewpoint discriminatory.

Petitioners concede § 99A-2 regulates speech. *E.g.*, Pet. App. 92a. "[S]peech can be proscribable on the basis of one feature . . . but not on the basis of another[.]" *R.A.V.*, 505 U.S. at 385. Thus, even where speech is unprotected, if the law's objective is "to handicap the expression of particular ideas" the First Amendment still applies. *Id.* at 394; *see also Kelly*, 9 F.4th at 1233 (same).

Beyond noting they argued otherwise below, nowhere do Petitioners contest the Fourth Circuit's conclusion that § 99A-2 is viewpoint discriminatory. To the contrary, Petitioners are bound by their admission that the goal of § 99A-2 is to prohibit public communications by certain actors about a particular industry. C.A. App. 111–12.

Amici's attempt to respond on Petitioners' behalf to this part of the Fourth Circuit's decision fails. For one thing, amici cannot raise issues in this Court that Petitioners themselves decline to raise. In any event, amici argue § 99A-2 is not viewpoint discriminatory because it is not aimed at speech critical of the employer. Am. Farm Bureau Amicus Br. 10. This argument ignores that § 99A-2 is aimed at speech about a specific industry. Moreover, Petitioners conceded amici's argument below. Petitioners explained that the "gravamen" of what § 99A-2 regulates—particularly through requiring a speaker breach the "duty of loyalty"—are activities "adverse to [an] employer's interests." C.A. App. 406 (N.C. Farm Bureau counsel speaking for all Petitioners).

Amici, in short, cannot paper over that Petitioners have waived any argument against the Fourth Circuit's viewpoint discrimination holding. For that reason alone, there is no basis in this Court for reversal.

CONCLUSION

For the foregoing reasons, the Petitions should be denied.

Respectfully submitted,

DAVID S. MURASKIN
Counsel of Record
PUBLIC JUSTICE
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 797-8600
dmuraskin@publicjustice.net

MATTHEW STRUGAR
LAW OFFICE OF
MATTHEW STRUGAR
3435 Wilshire Blvd.,
Suite 2910
Los Angeles, CA 90010

ALAN K. CHEN
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 East Evans Ave.
Denver, CO 80208

Counsel for Respondents

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