No. 20-1776 (L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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-Appellees, Cross-Appellants

v.

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Intervenor-Defendant-Appellant, Cross-Appellee,

and

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-Appellants, Cross-Appellees.

On Appeal from the U.S. District Court for the Middle District of North Carolina
Case No. 1:16-CV-00025-TDS-JEP

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 17 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES

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IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Amici have obtained consent to file this brief from all parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Amici are the Reporters Committee for Freedom of the Press, The Atlantic Monthly Group LLC, The Center for Public Integrity, Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, The McClatchy Company, LLC, Mother Jones, MPA - The Association of Magazine Media, National Journal Group LLC, National Press Photographers Association, The New York Times Company, Online News Association, Radio Television Digital News Association, The Seattle Times Company, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech.

Amici are media outlets and organizations that advocate on behalf of journalists and the press. Lead amicus the Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media.

Amici have a strong interest in this case. Specifically, amici have an interest in ensuring that journalists are able to report on matters of public concern without facing unconstitutional impediments to their newsgathering activities. If

whistleblowers (and other would-be sources) are punished for documenting evidence of dangerous, illegal, or unethical activity that they encounter, journalists will not be able to do their jobs effectively. For the reasons herein, amici urge the Court to affirm the district court's holdings that the challenged provisions are subject to—and fail under—a First Amendment analysis, but amend the order below to hold that the challenged provisions are subject to strict scrutiny and are facially invalid.

RULE 29(a)(4)(E) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), amici state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or any other person, other than the amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

Members of the public rely on members of the news media, like amici, to keep a watchful eye on the institutions and industries that affect their lives, and to keep them informed about matters implicating health, safety, and public welfare. For that reason, amici and the public have a strong interest in ensuring that courts reliably strike down state statutes like N.C. Gen. Stat. § 99A-2 ("Section 99A-2") that unconstitutionally interfere with journalists' ability to gather information of public concern, by threatening whistleblowers and other sources with liability should they come forward and speak with members of the press.

The district court, below, correctly examined Section 99A-2 through a First Amendment lens, and correctly concluded that—much like other state laws around the country enacted to punish and chill speech about conditions at agricultural properties and other facilities—Section 99A-2 does not survive First Amendment scrutiny. However, the district court's conclusion that subsections (b)(3) and (b)(5) of Section 99A-2 were subject only to intermediate scrutiny, as well as its conclusion that subsections (b)(1) and (b)(5) were not overbroad, are erroneous and should be corrected by this Court. Interference with newsgathering activities was not only the law's result, but also the law's intent. *See, e.g.*, Joint Appendix ("J.A.") at 330–32 (Representative Szoka stating, in support of Section 99A-2, that it is not "proper" for whistleblowing employees to give evidence of wrongdoing to

members of the news media). The very purpose of Section 99A-2 was to chill speech from sources to reporters, thereby obstructing journalists' ability to report on matters of the utmost public concern, including food safety, the treatment of workers at agricultural facilities, and the treatment of animals at research facilities.

Because Section 99A-2 stymies the ability of journalists to gather news and report on matters of substantial importance to the public, amici urge the Court to affirm the district court's conclusion that Section 99A-2 is unconstitutional, but to hold that the challenged provisions are facially invalid.

ARGUMENT

I. Section 99A-2 infringes upon constitutionally protected newsgathering rights.

Contrary to the district court's well-reasoned, correct determination that the challenged provisions of Section 99A-2 must pass muster under the First Amendment, Defendants-Appellants renew their argument on appeal that the law does not implicate First Amendment interests. Amici agree with the district court and Plaintiffs-Appellees that Section 99A-2 is not a "generally applicable law," and that *Food Lion Inc. v. Capital Cities/ABC Inc.*, 194 F.3d 505 (4th Cir. 1999) ("*Food Lion*") is of little relevance, because the torts at issue in *Food Lion*, unlike

Section 99A-2, operated independently of speech.[1] 194 F.3d at 521–22. Moreover, as Plaintiff-Appellees point out, Defendant-Appellants' contention that speech protections must be subordinated to concerns about private property is unsupported in the law. *See, e.g.*, *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 176 (2002) ("[I]t would be puzzling if regulations of speech taking place on another citizen's private property warranted greater scrutiny than regulations of speech taking place in public forums. Common sense and our precedent say just the opposite.").

Defendants-Appellants' repeated claim that the newsgathering activities chilled or prohibited by Section 99A-2 are not protected by the First Amendment is also incorrect. Section 99A-2 interferes with the ability of journalists to gather and report news of significant public concern, prohibits the expressive conduct of audiovisual recording, and (as discussed in Section III, below) chills constitutionally protected speech between reporters and their sources.

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[1] *Food Lion* is of little relevance even setting aside its questionable precedential value, given the subsequent decision by the Supreme Court of North Carolina. *See Dalton v. Camp*, 548 S.E.2d 704, 709 (N.C. 2001) (holding that while North Carolina courts "recognize the existence of an employee's duty of loyalty, [they] do not recognize its breach as an independent claim").

A. Section 99A-2 stifles the ability of the news media to gather and report information about matters of significant public concern.

The very purpose of Section 99A-2 is to thwart journalists' ability to do their jobs. *See, e.g.*, J.A. at 333–34 (Transcript of the Tape-Recorded Hearing of the N.C. General Assembly on H.B. 405, 2015-2016 Sess. 15–16 (N.C. June 3, 2015), during which Representative Michael Speciale, a sponsor of Section 99A-2, stated, "this bill is designed to go after people who intentionally hire on to a [business] . . . to do an exposé for ABC News"). In *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011), the U.S. Supreme Court observed that if a government "bent on frustrating an impending demonstration" passed a law demanding two years' notice before the issuance of parade permits, such a law, while facially content neutral, would be content based because its purpose was to suppress speech on a particular topic. Here, while the plain text of Section 99A-2 does not explicitly mention whistleblowers or journalists, its legislative history makes clear the legislators' intent to stop investigative journalism. *See, e.g.*, J.A. at 286 (Transcript of the Tape-Recorded Hearing of the Senate Commerce Committee on H.B. 405, 2015-2016 Sess. 9 (N.C. May 14, 2015), during which Representative Jonathan Jordan

proclaimed that the "crux" of Section 99A-2 is that it requires reporting information to law enforcement to deter "running off to a news outlet").

As the Supreme Court has recognized, "[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Moreover, "a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people." *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). Section 99A-2 undermines these fundamental principles by intentionally damming the flow of valuable information to the press and, therefore, to the public.

The sources of our nation's food supply and working conditions of agricultural workers are, without question, matters of legitimate public concern. And there are countless examples of investigative reporting that shined a light on such matters. *See, e.g.*, Michael Grabell, *Exploitation and Abuse at the Chicken Plant*, The New Yorker (May 1, 2017), https://perma.cc/8EWP-9VFY (uncovering the "harsh and at times illegal [working] conditions" at Case Farms, which Grabell described as "among the most dangerous workplaces in America"); Ted Conover, *The Way of All Flesh*, Harper's (May 2013), https://perma.cc/C7JF-7XZ5 (chronicling illegal and inhumane practices at a Cargill facility, including the use of electric prods on cattle being organized for slaughter); Michael Pollan, *Power Steer*, N.Y. Times

Magazine (Mar. 31, 2002), https://perma.cc/762E-HDP9 (reporting on the conditions in which commercial cattle are raised). These matters are unquestionably a matter of public concern in North Carolina and throughout the United States.

Unlike so-called "ag-gag" laws that typically focus on restricting recording at agricultural facilities, in particular, *see, e.g.*, Utah Code Ann. § 76-6-112, the reach of Section 99A-2 is broader and extends to any type of property. N.C. Gen. Stat. § 99A-2(b)(1) and (b)(2) (referencing the "nonpublic areas of an employer's premises"). The breadth of Section 99A-2 is troubling because the public's need for investigative journalism to bring to light newsworthy matters of public concern is not limited to any one industry or field—and is especially acute where vulnerable members of society are affected, as in the case of care at nursing homes, *see* Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. Times (Sept. 23, 2007), https://perma.cc/U7HT-GXCY (detailing neglect by nursing home staff and unsafe conditions for elderly at numerous homes), and day care facilities, Marlena Baldacci et al., *Day care worker accused of child abuse after video shows her throwing a toddler in a classroom, authorities say*, CNN (Mar. 1, 2019), https://perma.cc/SLA4-Z4B8. By stifling constitutionally protected activities, Section 99A-2 threatens to eliminate the kind of vital investigative reporting in the public interest.

B. Section 99A-2 unconstitutionally abridges the right to make audiovisual recordings.

Audiovisual recordings have long been recognized to be a "significant medium for the communication of ideas" entitled to full constitutional protection. *See, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *Jacobson v. U.S. Dep't of Homeland Sec.*, 882 F.3d 878, 882 (9th Cir. 2018). As the Seventh Circuit has explained, the "act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). In *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017), the Third Circuit held that the "First Amendment protects actual photos, videos, and recordings . . . and for this protection to have meaning the Amendment must also protect the act of creating that material."

Section 99A-2 curtails exercise of the First Amendment right to record by creating liability for the "record[ing]" of "images or sound occurring within an employer's premises and us[ing] the recording to breach the person's duty of loyalty to the employer"; and "placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data." N.C. Gen. Stat. § 99A-2(b).

The Ninth and Tenth Circuits have found similar restrictions unconstitutional. In *Western Watersheds Project v. Michael*, the Tenth Circuit considered a challenge to two Wyoming statutes, Wyo. Stat. Ann. §§ 6-3-414(c) and 40-27-101(c), that imposed civil and criminal liability on any person who "[c]rosses private land to access adjacent or proximate land where he collects resource data." *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1191 (10th Cir. 2017). The court held that the collection of resource data—including photography—"constitutes the protected creation of speech." *Id.* at 1195–96 ("An individual who photographs animals . . . is creating speech in the same manner as an individual who records a police encounter."). And, because law at issue sought to regulate that constitutionally protected creation of speech, the Tenth Circuit concluded it was subject to First Amendment scrutiny. *Id.* The Tenth Circuit remanded the case for consideration of whether the Wyoming statutes were unconstitutional; the District of Wyoming held on remand that the statutes did not survive strict scrutiny because they were not narrowly tailored. *Id.* at 1189.

Similarly, in 2018, the Ninth Circuit struck down almost all of an Idaho statute designed to stop the recording of undercover video at agricultural facilities. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). The Ninth Circuit reaffirmed that audio and video recording is constitutionally protected expression. *Id*. at 1203 ("It defies common sense to disaggregate the creation of

the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity[.]"). The Ninth Circuit held that the Idaho law had the improper purpose of targeting investigative journalists and protected speech. *Id*. at 1195.

II. The district court's application of intermediate scrutiny and failure to find overbreadth were in error and invite legislation intended to chill constitutionally protected reporter-source relationships.

A. The district court erred in applying intermediate scrutiny to subsections 99A-2(b)(3) and (b)(5), which are not content- and viewpoint-neutral.

The district court erred in holding that subsection (b)(3)—which makes it unlawful to "knowingly or intentionally plac[e] on the employer's premises an unattended camera or electronic surveillance device and us[e] that device to record images or data," N.C. Gen. Stat. § 99A-2(b)(3)—is content- and viewpoint-neutral and therefore subject to intermediate scrutiny. J.A. at 451. The district court also erred in holding that subsection (b)(5), which prohibits "act[s] that substantially interfere[] with the ownership or possession of real property," N.C. Gen. Stat. § 99A-2(b)(5), only "incidentally impact[s] speech[,]" and is therefore subject to intermediate scrutiny. J.A. at 452 (citing *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198, 209 (4th Cir. 2019) for the proposition that "intermediate scrutiny is the appropriate standard for reviewing conduct regulations that incidentally impact speech").

First, amici agree with Plaintiffs-Appellees that subsection (b)(3) is a content- and viewpoint-based restriction subject to strict scrutiny, *id.* at 447——not a content- and viewpoint-neutral law subject to intermediate scrutiny, as the district court concluded, *id.* at 448. The district court based its conclusion on the fact that "liability for using an unattended camera to record images or data does not define the regulated speech by subject matter." *Id.* at 450. This analysis, however, and the analysis concluding that subsection (b)(5) only incidentally impacts speech, overlooks the Supreme Court's warning in *Reed v. Town of Gilbert* that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).[2] Subsections (b)(3) and (b)(5) may not expressly define the targeted speech by its subject matter; but the practical effect—and, indeed, the purpose—of the law is to penalize speech critical of one's workplace.

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[2] Defendants-Appellants' argument that this portion of *Reed* is dicta is unavailing. For one, as Plaintiffs-Appellees point out, Section 99A-2, which regulates anti-employer speech without identifying a particular industry, is analogous to a law regulating political speech without identifying a specific set of politics. In *Cahaly v. Larosa*, this Court found such a law content-based and applied strict scrutiny. 796 F.3d 399, 405 (4th Cir. 2015). Moreover, even to the extent the quoted portion of Reed is dicta, this Court accords "great weight" to Supreme Court dicta. *See, e.g.*, *Fusaro v. Cogan*, 930 F.3d 241, 254 (4th Cir. 2019); *Nat'l Labor Relations Bd. V. Bluefield Hosp. Co.*, 821 F.3d 534, 541 n.6 (4th Cir. 2016).

Both the text and the legislative history of the law make evident this unconstitutional purpose. While debating the bill, Representative Speciale of the North Carolina legislature equated "tak[ing] [a] job . . . to do an . . . exposé for ABC News" with "frauding" [sic] their employer. J.A. at 344. Similarly, Representative Jordan stated that he supported the bill because he was "in favor of protecting private property. . . . And I can just imagine someone pretending to be someone who wanted to be an employee coming into that organization and causing all sorts of strife and problems in the back sections of a restaurant." J.A. at 202–03. And Representative Szoka's statement of support for Section 99A-2 noted that it is not "proper" for whistleblowing employees to give evidence of wrongdoing to members of the news media. J.A. at 330–32. In short, because the purpose and effect of subsections (b)(3) and (b)(5) is to penalize and chill speech critical of one's workplace, they are content- and viewpoint-based restrictions.

B. The district court erred in holding that subsections 99A-2(b)(1) and (b)(5) are not unconstitutionally overbroad.

The district court applied an incorrect overbreadth analysis that, if accepted, would chill the exercise of First Amendment rights. Amici agree with Plaintiffs-Appellees that Section 99A-2, including subsections (b)(1) and (b)(5), can be applied in a substantial number of unconstitutional ways "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *See United States v. Williams*, 553 U.S. 285, 292 (2008). This, as Plaintiffs-Appellees recognize,

could include joint liability for the members of the news media for publishing articles that rely on whistleblowers as sources. *See* J.A. at 171; N.C. Gen. Stat. § 99A-2(c).

Further, the district court's conclusion that "[c]onsidering the plainly legitimate sweep of subsections (b)(1) and (b)(5), and given where the statute *does not* reach . . . the Act does not cover a substantial amount of protected activity to render it overbroad," J.A. at 467, is erroneous because it fails to take into account the forward-looking aims of the overbreadth doctrine. As this Court has recognized, jurisdictional requirements, including that a complainant must have suffered an injury-in-fact, are "somewhat relaxed in First Amendment cases." *See Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) ("The leniency of First Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact."); *id.* at 239–40 ("Much like standing, ripeness requirements are also relaxed in First Amendment cases."). This is for good reason: "'Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he *will refrain from engaging further* in the protected activity. Society as a whole then would be the loser.'" *Id.* at 235 (emphasis added) (quoting *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984)).

The overbreadth doctrine is consistent with the First Amendment's purpose of protecting and encouraging speech, as it "allow[s] attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). Indeed, the Supreme Court has acknowledged that the doctrine reflects the fact that free expression is "of transcendent value to all society, and not merely to those exercising their rights." *Id.* The district court's analysis failed to adequately take into account the Supreme Court's admonition that overbroad statutes deprive First Amendment freedoms of the "breathing space" they need to survive. *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963) ("These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."). Thus, that Section 99A-2 could, on its face, be read to encompass all manner of constitutionally protected newsgathering activities and reporter-source communications should lead this Court to find it facially overbroad.

III. This Court should affirm the district court's conclusion that Section 99A-2 violates the First Amendment, but reverse its application of intermediate scrutiny and its incorrect application of the overbreadth doctrine.

Sources, confidential or otherwise, are the lifeblood of investigative reporting. "There are no stories without sources." Susan McGregor, *Digital Security and Source Protection for Journalists*, Tow Center for Digital Journalism (June 2014) at 12. And, when potential sources refuse to speak out publicly for fear of legal liability or other legal consequences, journalists—and, ultimately, the public—lose out on valuable, newsworthy information.

The district court's application of intermediate, rather than strict, scrutiny to provisions of Section 99A-2, as well as the district court's rejection of Plaintiffs-Appellees' arguments that the law is unconstitutionally overbroad, if accepted, would open the door to new legislative efforts to obstruct communications from sources to journalists. Journalists and their sources, who could include whistleblowing employees, have mutually reinforcing interests in informing the public. Whistleblowers may seek to disclose information about the facilities where they work in order to bring issues of public concern to light, and members of the news media, in turn, want to report such information to the public. *See* Nicholas Kristof, *Abusing Chickens We Eat*, N.Y. Times (Dec. 3, 2014), https://perma.cc/QBS3-7AM7.

Take, for example, The Guardian's reporting on environmental degradation and health defects in North Carolina resulting from industrialized animal farming. Erica Hellerstein and Ken Fine, *A million tons of feces and an unbearable stench: life near industrial pig farms*, The Guardian (Sept. 20, 2017), https://bit.ly/2xoSQ0l. The Guardian's reporting on blood pressure abnormalities, respiratory issues like asthma, and a diminished quality of life for people living near concentrated animal feeding operations ("CAFOs"), included an interview with Don Webb, a former hog farmer in Northampton County. *Id*. Mr. Webb left the agriculture industry due to a lack of proper waste management infrastructure; specifically, he had grown dissatisfied with having to spray fecal matter from overflowing manure "lagoons" onto nearby land—standard practice on industrialized farms to mitigate excess hog waste. *Id.* In describing the impact of this practice on his neighbors, Mr. Webb explained: "These are human beings[.] . . . They've worked their whole lives and are tryin' to have a clean home and a decent place to live, and they can't go on their front porch and take a deep breath." *Id*.

Journalists' access to first-hand accounts like Mr. Webb's enhances accuracy and credibility in reporting, increases transparency and reader trust, and enriches news stories. *See, e.g.*, *The Hierarchy of Information and concentric circles of sources*, American Press Institute (last visited Feb. 4, 2021),

https://perma.cc/NX8V-Q2UT. In addition, in the digital age, such first-hand sources also can provide video recordings and other documentary materials, which can further enhance the accuracy of reporting and allow journalists to tell more complete and powerful stories. *See, e.g.*, Deron Lee, *'Ag-gag' reflex*, Columbia Journalism Review (Aug. 6, 2013), https://perma.cc/Z5D5-GSJZ.

Laws like Section 99A-2 are aimed at damming the flow of this vital information from potential sources to journalists and, as a result, keep the public less informed. Will Potter, an award-winning investigative journalist, has interviewed numerous undercover investigators and farm workers who are "increasingly afraid of speaking out." Leah Edgerton, *Ace Interviews: Will Potter* Animal Charity Evaluators (May 6, 2016), https://perma.cc/7PFZ-5X8J. Potter attributes this fear to the proliferation of ag-gag laws. *See id*. To ensure that investigative reporting is not stymied as a result of such state laws, amici urge this Court to conclude that Section 99A-2—a law intended to disrupt the reporter-source relationship by subjecting whistleblowers and other sources to liability for speaking to journalists—is not an "incidental" infringement on the exercise of constitutional rights, but rather an unconstitutional content- and viewpoint-based restriction on speech.

CONCLUSION

For the reasons herein, amici urge the Court to affirm the district court's conclusion that the challenged provisions violate the First Amendment, but amend the order below to hold that the challenged provisions are facially invalid.

Dated: March 1, 2021

Respectfully submitted,

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