No. 22-1150

In the Supreme Court of the United States

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

v.

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

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Unopposed Motion for Leave to File and Brief of *Amici Curiae* State of Utah and 15 Other States in Support of Petitioners

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UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* STATE OF UTAH AND 15 OTHER STATES IN SUPPORT OF PETITIONERS WITHOUT 10 DAYS' NOTICE

Amici curiae, the States of Utah, Arkansas, Georgia, Idaho, Indiana, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Virginia, and West Virginia respectfully move for leave to file the accompanying brief in support of Petitioners Josh Stein, Attorney General of North Carolina, and Dr. Kevin Guskiewicz, Chancellor of the University of North Carolina-Chapel Hill, without 10 days' advance notice to the parties of *amici*'s intent to file as ordinarily required by Sup. Ct. R. 37.2.

On July 2, 2023, the States provided notice of their intent to file this brief to counsel of record for both Petitioners and Respondents. While the States provided 8 days' notice rather than the required 10 days' notice, Respondents are not prejudiced because their deadline to file a response has been extended to August 9, 2023. Counsel for Petitioners and Respondents do not oppose this filing.

As set forth in the enclosed brief, *Amici* States have a strong interest in Petitioners' challenge of the decision below. This case involves important questions about the States' ability to safeguard fundamental rights of property owners to exclude others while also preserving the freedom of speech.

Amici States' brief includes relevant material not brought to the attention of the Court by the parties that may be of considerable assistance to the Court. *See* Sup. Ct. R. 37.1.

Amici States therefore seek leave to file this brief in support of Petitioners.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

This case raises important and unsettled questions about property rights and the First Amendment. The protection of speech under the First Amendment is fundamental—necessary for freedom and democracy. But it is not limitless and sometimes competes with other guaranteed rights. To safeguard the fundamental rights of its property owners to exclude others while also preserving the freedom of speech, states need to know whether audio-visual recording on non-public property without the property owner's consent is protected speech. The Court's precedent does not do this.

All states have a duty and interest to protect both free speech *and* private property rights. The *Amici* States need clarification now about how these important rights intersect. And this case gives the Court an excellent opportunity to resolve the confusion and provide much needed uniform guidance for the entire country.

SUMMARY OF ARGUMENT

A fundamental aspect of an owner's control over his property is the right to exclude others from it—"one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). So important is that right that the common law enforced owners' rights to exclude others through civil actions for nominal damages and often punitive damages even if the trespasser committed no further injury on the property other than his physical presence; the entry itself is wrong.

It is not surprising that states want to safeguard private property interests by reinforcing the owner's right to exclude, particularly in circumstances where states have determined that additional protections are necessary for those unique property rights. The North Carolina statute at issue reinforces an owner's right to exclude others from her private property. The Act creates a civil cause of action for torts committed in nonpublic areas of private property: it prohibits employees from taking or recording information without authorization and using that information to breach their duty of loyalty to their employer.

The Court should take the case to resolve the circuit splits on the protections afforded unauthorized audio-visual recordings on private property. An answer will help states protect private property owners' interests while safeguarding citizens' First Amendment rights.

ARGUMENT

I. The Court should grant certiorari to delineate how states may protect their citizens' private property from unwarranted intrusion by deceptive individuals including employees who exceed the scope of their employers' consent.

A property owner has a fundamental right to exclude others from her property. State common law and statutory law protect this right and have done so for centuries. North Carolina has chosen to enact a speech-neutral law to protect the private property rights of employers against employees—or others—who exceed the scope of their employment or otherwise trespass and ultimately harm the landowner or its property. But North Carolina is not alone in this

regard. Many states' laws similarly protect the right of private property owners to exclude or to seek damages for similar intrusions.

Notwithstanding the extensive history and tradition permitting such protections, the fact that North Carolina's law is speech- and content-neutral, and the binding circuit precedent recognizing the permissibility of private property protections, the Fourth Circuit concluded that the First Amendment requires a "newsgathering" exception to North Carolina's law. App. 41a. States hold significant interests in protecting their citizens' private property rights and in the laws that protect those rights. And Supreme Court law has uniformly recognized that the First Amendment does not require private property owners to permit people to enter their land for information gathering, whether those people are trespassers, spies, or bona fide journalists seeking information on a story. Therefore, the Court should grant certiorari here to clarify whether the First Amendment impacts how states may protect property owners' rights to exclude others from their private property.

A. The right to exclude is integral to private property rights.

Property rights' crucial role in the American experiment can hardly be overstated. "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom" and it "must be secured, or liberty cannot exist." *Cedar Point*, 141 S. Ct. at 2071 (internal quotation marks omitted). Blackstone noted that "so great moreover is the regard for the law of private property, that it will not authorize the least violation of it; no, not even for

the general good of the whole community." 1 William Blackstone, *Commentaries* *135.

And John Locke's assertion that the preservation of property was the "great and chief end of [men] … putting themselves under Government," was a predominating perspective of the Framers of the U.S. Constitution. John Locke, Two Treatises of Government 368-69 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690); *see also* Robert Brauneis, *Eastern Enterprises, Phillips, Money, and the Limited Role of the Just Compensation Clause in Protecting Property "in its Larger and Juster Meaning*," 51 Ala. L. Rev. 937, 939 (2000) ("We all know that the prevailing view of the founding generation was that, as Gouverneur Morris, echoing Locke and others, put it at the Constitutional Convention, 'property [is] the main object of [s]ociety.'" (citing The Records of the Federal Convention of 1787, at 533 (Max Farrand ed. 1911)).

A fundamental aspect of an owner's property rights is the right to exclude. *See generally* David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39 (2000). At common law, the right to exclude was recognized as a *defining* characteristic of property. Blackstone described the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, *Commentaries* *2; *accord* Restatement (First) of Property § 7(a) (1936) (recognizing a possessory interest in land if a person has "a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present

occupation of the land"). Simply put, "to the extent one has the right to exclude, then one has property; conversely, to the extent one does not have exclusion rights, one does not have property." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 753 (1999).

Indeed, so integral is the right to exclude, property rights are described as "relations between people"—"exclusions which individuals can impose or withdraw with state backing against the rest of society." Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 378 (1954). This Court, too, has consecrated the right to exclude as "a fundamental element of the property right" and "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Cedar Point*, 141 S. Ct. at 2072 (quoting *Kaiser Aetna*, 444 U.S. at 176, 179-80).

Despite its importance as a property right, the right to exclude would be meaningless "without some institutional structure that stands ready to enforce it." Merrill, *supra* at 733; *see also* Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. at 371-72 ("[T]he existence of private property presupposes . . . some predictable course of sovereign action, so that the so-called property owner can count on state help in certain situations."). So American law protects property owners against trespassers who engage in various usurpations of their rights.

1. The right to exclude is recognized in Constitution law. For example, this Court has held that government entities violate the Fifth Amendment when they permanently occupy real property, even if it is *de minimis*. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-30 (1982). The Court has also

held that government entities search private property for Fourth Amendment purposes when they physically trespass to place devices to track citizens' movements, even if there might not be a reasonable expectation of privacy in citizens' public movements in the first place. *United States v. Jones*, 565 U.S. 400, 405–07, 411 (2012). These holdings are based on deeply rooted rules protecting property from trespass by private parties or the government. The Court has emphasized that "[o]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all." *Jones*, 565 U.S. at 405 (quoting *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765)).

2. A broad right to exclude is recognized in common law, permitting nominal and punitive damages. Common-law torts are another mechanism enforcing the right to exclude. When a party enters onto the property of another without permission, even if the party's presence causes no harm, the party is liable for trespass. Restatement (Second) of Torts § 163 (1965). Similarly, when a party receives conditional or restricted consent to enter private property, the consent "creates a privilege to do so only in so far as the condition or restriction is complied with." *Id.* § 168. That includes the right to restrict consent as to area, *id.* § 169, or time, *id.* § 170. "A consent restricted to entry for a particular purpose confers no privilege to be on the land for any other purpose." *Id.* § 168 cmt. b. Similarly, consent given under mistake, misrepresentation, or duress "concerning the nature of the invasion" or "the extent of the harm to be expected" is not effective. Restatement (Second) of Torts § 892B(2) (1979); *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219,

1248 (10th Cir. 2021) (Hartz, J., dissenting) (discussing sections 173 and 892B).

As a result, most states authorize an award of at least nominal damages for trespass without additional proof of harm. *See* Appendix A attached hereto. And the common law and most states provide punitive damages for trespassers, even when the trespasser does no additional harm to the property. Restatement (Second) of Torts § 163 cmt. e (1965). Most states' laws follow suit. *See* Appendix B attached hereto.

3. The right to exclude applies in various contexts. Subject to individual state laws, the property owner's scope of consent controls, whether engaging in activity protected by collective bargaining, *see Waremart Foods v. N.L.R.B.*, 354 F.3d 870, 876–77 (D.C. Cir. 2004), newsgathering on an issue of public concern, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518-19, 521-22 (4th Cir. 1999), or engaging in some other activity that might otherwise be constitutionally protected, *see Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) (concluding that there was no federal constitutional right to handbill in a private mall where the mall owners prohibited the activity).

Our common law history, the law from the several states, and this Court's interpretation of the Constitution paint a coherent picture: trespass law protects the right of property owners to exclude others on the property owner's own terms. Courts need not consider whether the trespasser causes separate, independent harm while on the property because "[t]he entry itself is wrong." *Snow v. City of Columbia,* 409 S.E.2d 797, 802 (S.C. Ct. App 1991). Whether through constitutional protections, tort claims, or punitive damages, courts recognize and protect the right to exclude.

B. States have an interest in protecting the right to exclude.

It can come as no surprise that states would want to safeguard private property interests by reinforcing a private property owner's right to exclude through legislation. This is particularly true in circumstances where the states have determined that additional protections are necessary given the unique types of trespass or characteristics of certain types of private property.

For example, Arizona and other states prohibit trespass on a commercial nuclear generating station. Ariz. Rev. Stat. Ann. § 13-4902(B); *see also*, *e.g.*, Miss. Code Ann. § 97-17-95. New Hampshire enhances the penalties for criminal trespass if the trespasser enters or remains on the grounds of a state correctional facility. N.H. Rev. Stat. Ann. § 635:2(III)(b)(4). And California's "anti-paparazzi" law includes enhanced civil penalties for those who engage in physical invasions of privacy with the intent to capture evidence of the plaintiff engaging in a "private, personal, or familial activity." Cal. Civ. Code § 1708.8(a). Federal law too adds sentencing enhancements if a criminal trespass occurred at, among other places, secured or restricted government facilities, vessels and airports, Arlington National Cemetery, or the White House. *See* U.S. Sent'g Guidelines Manual § 2B2.3(b)(1).

States have also enacted laws specifically prohibiting trespass when the trespasser's access to property belies their true intentions. For example, carrying a concealed firearm on property of another, without effective consent, is a trespass in Texas. Tex. Penal Code Ann. § 30.06(a)(1). Illinois penalizes trespass at airports and at athletic fields and stages where the

trespasser presents false uniforms, documents, credentials, or identities. 720 Ill. Comp. Stat. §§ 5/21-7(a), -9(a) to (a-5).

Further, multiple states have created laws against deceptive trespasses to animal agricultural operations. *See, e.g.*, Kan. Stat. Ann § 47-1827, held unconstitutional by *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1224 (10th Cir. 2021); Utah Code § 76-6-112, held unconstitutional by *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017); Idaho Code Ann. § 18-7042(1), held partially unconstitutional by *Animal Legal Def. Fund v. Wasden*, 878 F.,3d 1184, 1205 (9th Cir. 2018); Iowa Code § 717A.3A(1)(a), upheld as constitutional by *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2021). These states sought to protect employers involved in animal agricultural operations from employees using their employment to serve competing organizations, or goals at odds with their agricultural employer, to their agricultural employer's detriment.

North Carolina's Property Protection Act, which is at issue in this case, extends this protection to employers generally, not just those who run animal agricultural operations. *People for the Ethical Treatment of Animals, Inc. v. N. Carolina Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 820 (4th Cir. 2023). The law creates civil liability for employees who exceed their authority to enter private property by gathering information on the employer's private property and using the "information to breach the person's duty of loyalty to the employer." N.C. Gen Stat. Ann. § 99A-2(b)(1).

Employees who break their duty of loyalty by exceeding the scope of their consent to enter the land create safety and privacy concerns for the employer

and other employees, which can greatly hinder business operations. In animal agriculture, for example, trespassers who gain access through misrepresentation put the safety of workers and animals at risk and increase the likelihood of transmission of deadly (and costly) zoonotic diseases.[1] The United States has reason to protect its secure facilities and the President; California, to protect its celebrities from the prying eyes of the paparazzi; New Hampshire, to protect against escaping felons; Arizona, to protect critical infrastructure; Texas, to protect the peace of a home from unwanted deadly weapons; and Illinois, to protect athletes and performers from stalkers or disgruntled fans.

When trespass statutes punish employees for exceeding the scope of their consent to enter their employer's private land, or when employees breach their duty of loyalty to gain access to information on an issue of public concern, state trespass laws and the privacy interests they protect may collide with the putative trespassers' First Amendment rights. States need guidance when faced with this perfect storm where property rights and the First Amendment collide.

The Court should grant the petition for certiorari in this case to recognize the important private property interests at stake and provide that guidance.

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[1] *See, e.g.,* Expert Report of William James, D.V.M, M.P.H. at 4, *Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS (D. Utah Jan. 29, 2016), ECF No. 88-1; Expert Report of David A. Pyle, D.V.M. at 6-7, *Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS (D. Utah Jan. 29, 2016), ECF No. 89-1.

II. The Court should grant certiorari to resolve a circuit split and clarify the scope of application of the First Amendment to speech- and content-neutral laws affecting private property.

The decision below creates an exception to speech- and content-neutral laws when a tortfeasor intends to engage in "newsgathering" on private property in contravention to the property owner's scope of consent. This decision runs contrary to well-settled Supreme Court law regarding the scope of the First Amendment on private property and the right of individuals to violate neutral laws to "newsgather" on an issue of public concern. It also deepens a circuit split on these same issues. Because of the significant interests states have in protecting private property, the Court should grant certiorari to clarify the issues and resolve the split.

A. The opinion below departs from Supreme Court precedent and creates a First Amendment right to newsgather on private property without the owner's consent or contrary to the owner's interest.

In this case, PETA and other activist organizations want to conduct undercover investigations—their operatives get hired by an employer, carry out "surveillance" of nonpublic areas of private property, take and record data and information, and ultimately use that information against the hiring employer. App. 11a; *see also PETA v. Stein*, 466 F. Supp. 3d 547, 559 (M.D.N.C. 2020) (describing the activity PETA wishes to conduct). These activities violate North Carolina law which restricts conduct incidental to speech and is content neutral. N.C. Gen Stat. § 99A-2(a), (b)(1)-

(3), (5). The majority below concluded that North Carolina's Act violates the First Amendment and must be enjoined to the extent it "bar[s] protected newsgathering activities PETA wishes to conduct." App. 7a. But this Court has recognized that the First Amendment does not require private property owners to open their private spaces to a trespasser simply because the trespasser intends to engage in First Amendment activity.

Though this Court has not directly spoken about the degree to which the First Amendment protects newsgathering activity, or to record audio or video in in a public space,[2] this Court's precedent clearly establishes two related premises: the First Amendment is not violated when a law of general applicability incidentally restricts a person's ability to gather and report newsworthy information, and First Amendment rights do not extend to nonpublic spaces on private property.

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[2] Like the North Carolina petitioners, the States "take no issue with" the "robust circuit consensus" that engaging in audio-visual recording in a public space (particularly of public officials engaged in official duties) is constitutionally protected. Pet. at 12 & n.2 (citing cases from the First, Third, Fourth, Fifth, Seventh, and Eleventh Circuits establishing some form of First Amendment right to record public officials engaging in their public duty in a public place); *accord Irizarry v. Yehia*, 38 F. 4th 1282 (10th Cir. 2022) (concluding that such a right existed in 2019 and noting that "every circuit to consider whether there is a First Amendment right to film police in public" has held in the affirmative).

1. As this Court has explained, "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). In *Cowles*, the Court recognized that copyright, labor, antitrust, and tax laws all affected the ability of the press to report the news yet were not subject to First Amendment scrutiny because they were laws of "general applicability" that do not "target or single out the press." *Id.* at 669–70. And it concluded that the law of promissory estoppel, which in application would require newspapers to pay money for breaches of their promise of confidentiality to a source, was also a generally applicable law. *Id.* at 666, 670. Those exercising their First Amendment rights have "no special immunity from the application of general laws." *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937). Otherwise anyone with a subjective belief that they were gathering information of public concern would be able to "break and enter an office or dwelling" "with impunity." *Cowles*, 501 U.S. at 669.

2. This Court has not extended the exercise of First Amendment rights to private spaces. In *Lloyd Corp. v. Tanner*, this Court held that individuals had no First Amendment right to distribute handbills protesting the draft and the Vietnam War in the interior of a privately owned shopping mall, even though the mall was "open to the general public" and in some ways functioned similarly to a "business district." 407 U.S. 551, 568 (1972). The public had been invited to the mall for one purpose ("invitation is to come to the Center to do business with the tenants"), which did not give the public unfettered access to the private

property to engage in what would otherwise be core First Amendment activity. *Id.* at 564–65.

In *Hudgens v. NLRB*, the Court concluded that picketing employees did not have a First Amendment right to enter a shopping center to advertise a strike against one of the mall's tenants. 424 U.S. 507, 509, 520-21 (1976). The court concluded that "the constitutional guarantee of free expression has no part to play in a case such as this." *Id.* at 521.

And in *Manhattan Community Access Corp. v. Halleck*, this Court determined that a privately owned cable access channel was not a public forum subject to First Amendment protections, even though the cable access channel provided a forum for speech and even though the operators of the channel were heavily regulated by the government. 139 S. Ct. 1921, 1931 (2019). Reaffirming *Hudgens*, the Court concluded that "private property owners and private lessees [have] editorial discretion over speech and speakers on their property." *Id.*

In sum, even though the Court recognizes a "special solicitude for the guarantees of the First Amendment, [it] has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Lloyd Corp.*, 407 U.S. at 568.

3. As explained in the dissent below, the panel's opinion departs from both of these premises. It creates a special right to engage in "newsgathering," notwithstanding North Carolina's general prohibition on the conduct the newsgatherer intends to engage in. While the panel majority characterized the Act as a speech regulation, the Act only regulates trespass and

enforces an employee's duty of loyalty; torts that "do not necessarily involve expression or impose a unique burden on the press." App. 63a (Rushing, J., dissenting). While two subparagraphs of the Act require use of illegally acquired information "to breach the person's duty of loyalty to the employer," N.C. Gen Stat. §§ 99A-2(b)(1) & (b)(2), that does not turn those provisions into content-based restrictions on speech. As Judge Rushing noted "[a] person can 'use' captured data or recorded images … without ever disclosing the recording or speaking against the employer [by, for example] [u]sing recorded information to launch a competing product, to steal customers, or to blackmail management." App. 66a-67a (citing *Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001)). Thus, the panel's opinion opens speech-neutral statutes to First Amendment challenge when the tortfeasor (or criminal) is "looking for a juicy news story to sell." App. 66a.

Moreover, the panel's opinion extends First Amendment rights into private spaces. The panel concluded that the Court's decision to strike down a prohibition on canvassing and solicitation "in and upon private residential property" without a permit also meant that a government cannot provide a remedy for private property owners when trespassers surreptitiously record or otherwise engage in tortious conduct on private property if those trespassers are engaged in newsgathering. App. at 13a (quoting *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 154 (2002)). But *Watchtower* does not stand for the proposition that individuals who attempt to exercise their First Amendment rights are entitled to do so in nonpublic spaces. The First Amendment may protect a "knocker on the front door," *Florida v. Jardines*, 569 U.S. 1, 8 (2013), or a mailer's right to

access "the mailbox of an unreceptive addressee," *Rowan v. United States Post Off. Dep't*, 397 U.S. 728, 736–37 (1970), but its protections extend no further. In addition, it does not protect a delivery driver accessing the private property owner's bedroom simply because the intruder might find a "juicy story" of public interest, even if the intruder has permission to enter the property owner's kitchen to leave a bottle of milk. Restatement (Second) of Torts § 169 illus. 1.

B. The opinion below exacerbates a circuit split whether unauthorized, speech-related actions on nonpublic property are constitutionally protected speech.

The courts of appeals have split—sometimes even with themselves—on applying First Amendment protections to unauthorized actions taken on private property. The decision below exacerbates that split and creates additional confusion. The Court should grant certiorari to resolve the law and provide appropriate guidance.

1. In one set of cases, courts recognize that the First Amendment does not immunize individuals from liability for invasions of private property, even if the trespassers are gathering newsworthy information for dissemination later. For example, in *Dietemann v. Time, Inc.*, the Ninth Circuit determined that a magazine publisher could be held liable for invasion of privacy when it sent an undercover reporter into a home-based business of the target of its investigation to surreptitiously record and retransmit pictures and audio. 449 F.2d 245, 248–49 (9th Cir. 1971). It concluded that the "First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." *Id.* at 249. And it

did not matter that the undercover reporters were invited in to take part in a medical treatment (by an unqualified "quack" practicing medicine without a license) or that they were engaged in newsgathering to report on a matter of public concern. *Id*. at 245-46, 249-50; *see also Planned Parenthood Fed'n of Am., Inc. v. Newman*, 51 F.4th 1125, 1135 (9th Cir. 2022), pet. for cert. filed June 2, 2023 (reaffirming that "journalism does not give a license to break laws of general applicability").

In *Food Lion*, the Fourth Circuit considered whether the First Amendment protected a television network's undercover reporters from a suit for fraud and breach of duty of loyalty when the undercover reporters engaged in unauthorized activities that harmed the employer. 194 F.3d 505 (4th Cir. 1999). While the employer was not entitled to recover reputational damages for publication of truthful information incurred as a result of the investigation, *id*. at 523-24 (citing *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)), the Court followed *Cowles* and concluded that the undercover reporters could be held liable for the torts themselves. *Id*. at 521.

This line of cases reaffirms Supreme Court case law refusing to extend First Amendment protections to trespassers who engage in unauthorized activities in nonpublic portions of private property even when the trespassers are seeking newsworthy information.

2. A second line of cases provides a somewhat hybrid view, attempting to serve both property and First Amendment interests. In *Animal Legal Defense Fund v. Reynolds*, the Eighth Circuit considered Iowa's Agricultural Production Facility Fraud law, which criminalized (a) obtaining access to an agricultural

production facility by false pretenses; or (b) making a knowingly false statement in connection with obtaining employment at such a facility with the intent to commit an unauthorized act after being employed. 8 F.4th 781, 783 (8th Cir. 2021) (citing Iowa Code § 717A.3A(1)). It was challenged by similar organizations to the underlying case, who argued that the statute violated a First Amendment right to make false statements as part of their undercover investigations.

The Eighth Circuit, applying what Judge Grasz called "limited and sometimes hazy precedent," concluded that the access provision was the equivalent of a prohibition of trespass and was not subject to First Amendment scrutiny because the false speech allowing the trespass caused legally cognizable harm. *Id.* at 786; *see also id.* at 788 (Grasz, J., concurring.) On the other hand, the employment provision violated the First Amendment because it proscribed speech without satisfying strict scrutiny. *Id.* at 787. Though the case focused on the constitutionality of false speech, the Court still considered the effect of the proposed activities being allowed on private property. *See id.* at 786; *see also id.* at 788 (Grasz, J., concurring) (recognizing that Iowa's law can be viewed as prohibiting "lying to further an agenda at the expense of private property rights"); *id.* at 794 (Gruender, J., concurring in part and dissenting in part) (agreeing that the access prohibition was constitutional because it is a "trespass law" of the type existing before the ratification of the First Amendment, which provided a legally cognizable harm exempting the speech from constitutional protection).

And in the underlying case, the panel majority carved out a special First Amendment exception to trespass and breaches of the duty of loyalty when they

are done for newsgathering, App. 7a. Nonetheless, it refused to follow the even more drastic line of cases recognizing that surreptitious recording on private property is always constitutionally protected. App. 45a n.9; *see also* App 65a (Rushing, J., dissenting) ("The majority therefore rightly rejects the Ninth Circuit's decision in *Animal Legal Defense Fund v. Wasden*."). The panel majority thus "enjoin[ed] the Act [only] insofar as it applies to bar protected newsgathering activities PETA wishes to conduct," refusing to enjoin the act for all potential double-agent or spying conduct. *See* App. 7a.

3. The final line of cases extends significant First Amendment rights of parties to invade private property if the invasions are undertaken for pre-speech or newsgathering purposes. In *Western Watersheds Project v. Michael*, the Tenth Circuit concluded that an environmental group's "collection of resource data" was protected by the First Amendment as "protected creation of speech" and a Wyoming law, which prohibited trespassing over private land without owner permission to collect the data (on public land), was subject to First Amendment protection. 869 F.3d 1189, 1195–96 (10th Cir. 2017). In *Animal Legal Defense Fund v. Kelly*, the Tenth Circuit extended *Western Watersheds Project* and concluded that "recording of animals or the conditions in which they live[] is speech-creation" and subject to First Amendment protection, enjoining a Kansas law prohibiting taking "pictures by photograph, video camera or by any other means" without the consent of an animal-facility owner and with the intent to damage the enterprise. 9 F.4th 1219, 1228, 1235–36 (10th Cir. 2021).

In *Animal Legal Defense Fund v. Wasden*, the Ninth Circuit invalidated an Idaho law barring

individuals from entering an agricultural production facility and making a recording of the facility's operations without express consent of the owner. 878 F.3d 1184, 1203 (9th Cir. 2018). Though it concluded that another provision of the law that barred persons from knowingly obtaining employment through misrepresentation with an intent to harm the employer was constitutional, like the decisions from the Tenth Circuit, the court in *Wasden* took an expansive view of all pre-speech recording as protected by the First Amendment. *Id; see also Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017) (declaring Utah's animal agricultural interference law unconstitutional); *Project Veritas v. Schmidt*, --- F.4th ---, No. 22-35271 (9th Cir. July 3, 2023) (applying *Wasden* to strike down Oregon law prohibiting recording of conversations unless all participants are informed the conversation is being recorded).

C. The Court should grant certiorari to provide States with regulatory guidance.

The courts of appeals' perspectives on unauthorized audio-visual recording on private property vary greatly. States not only have an interest in protecting private property rights, but they also actively regulate in this area, including through statutes protecting against trespass in a variety of situations. Whether a state writes a statute to protect nuclear facilities from terrorism, a business from industrial espionage, celebrities from paparazzi, or agricultural operations from those opposed to animal agriculture, States need guidance to determine if First Amendment protections apply to the interlopers when they decide to engage in recording—whether they are newsgathering or have more nefarious intentions.

As described by the North Carolina petitioners, these lower court rulings not only result in different outcomes, but they reflect a "broader doctrinal uncertainty that States face when seeking to reinforce private property rights consistent with the First Amendment." Pet. 14. Some courts conclude that statutes protecting private property by requiring that a trespasser intend harm are less likely to run into First Amendment problems. *Wasden*, 878 F.3d at 1198. Some courts conclude that the inclusion of intent requirements makes the statutes more problematic and emblematic of viewpoint-based restrictions. *Kelly*, 9 F. 4th at 1236, 1245. And the court below concluded that the intent to gather newsworthy information was protected, but probably not other information. App. 47a-48a.

This confusing panoply of legal approaches makes drafting statutes more difficult for States, increases litigation, and leads to inconsistent results across the country. For the reasons stated in the North Carolina petition (Pet. 2-3, 18), this case provides an appropriate vehicle to clear up the "limited and sometimes hazy" precedent, *Reynolds*, 8 F.4th. at 788 (Grasz, J., concurring), and give States the necessary clarity in this area.

CONCLUSION

The Court should grant the petition for writ of certiorari to the Fourth Circuit.

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APPENDIX

APPENDIX

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Appendix A

States authorizing an award of nominal damages for trespass without additional proof of harm.

Alabama: *Webb v. Knology, Inc.*, 164 So. 3d 613, 619–20 (Ala. Civ. App. 2014).

Alaska: *Brown Jug, Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Loc. 959*, 688 P.2d 932, 938 (Alaska 1984).

California: *Costerisan v. Tejon Ranch Co.*, 62 Cal. Rptr. 800, 802 (Cal. Ct. App. 1967).

Colorado: *Sanderson v. Heath Mesa Homeowners Ass'n*, 183 P.3d 679, 684 (Colo. App. 2008).

District of Columbia *Wood v. Neuman*, 979 A.2d 64, 72–73 (D.C. 2009).

Florida: *Fletcher v. Fla. Publ'g Co.*, 319 So. 2d 100, 104 (Fla. Dist. Ct. App. 1975), *quashed on other grounds*, 340 So. 2d 914 (Fla. 1976).

Hawaii: *Howell v. Associated Hotels, Ltd.*, 40 Haw. 492, 499 (Haw. 1954).

Illinois: *Chi. Title Land Tr. Co. v. JS II, LLC*, 977 N.E.2d 198, 218–20 (Ill. App. Ct. 2012).

Kansas: *Gross v. Capital Elec. Line Builders, Inc.*, 861 P.2d 1326, 1328–30 (Kan. 1993).

Kentucky: *Smith v. Carbide & Chems. Corp.*, 226 S.W.3d 52, 54–55 (Ky. 2007).

Louisiana: *Britt Builders, Inc. v. Brister*, 618 So. 2d 899, 903 (La. Ct. App. 1993).

Maine: *Medeika v. Watts*, 957 A.2d 980, 982 (Me. 2008).

Massachusetts: *Dilbert v. Hanover Ins. Co.*, 825 N.E.2d 1071, 1077 (Mass. App. Ct. 2005).

Minnesota: *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 701 (Minn. 2012).

Mississippi: *Reeves v. Meridian S. Ry., LLC*, 61 So. 3d 964, 968–69 (Miss. Ct. App. 2011).

Missouri: *Crook v. Sheehan Enters., Inc.*, 740 S.W.2d 333, 335 (Mo. Ct. App. 1987).

Montana: *Davis v. Westphal*, 405 P.3d 73, 81–82 (Mont. 2017).

Nebraska: *George Rose Sodding & Grading Co. v. City of Omaha*, 193 N.W.2d 556, 558 (Neb. 1972).

Nevada: *Parkinson v. Winniman*, 344 P.2d 677, 678 (Nev. 1959).

New Hampshire: *Case v. St. Mary's Bank*, 63 A.3d 1209, 1216 (N.H. 2013).

New Jersey: *Ross v. Lowitz*, 120 A.3d 178, 188 (N.J. 2015).

New Mexico: *Holcomb v. Rodriguez*, 387 P.3d 286, 291 (N.M. Ct. App. 2016).

New York: *Ivory v. Int'l Bus. Machs. Corp.*, 116 A.D.3d 121, 132 (N.Y. App. Div. 2014).

North Dakota: *Kuntz v. Leiss*, 952 N.W.2d 35, 36–37 (N.D. 2020).

Ohio: *Smith v. A.B. Bonded Locksmith, Inc.*, 757 N.E.2d 1242, 1246 (Ohio Ct. App. 2001).

Oklahoma: *Stites v. Duit Constr. Co.*, 992 P.2d 913, 916 (Okla. Civ. App. 1999).

Oregon: *Rhodes v. Harwood*, 544 P.2d 147, 159 (Or. 1975) (en banc).

Pennsylvania: *Carter v. May Dep't Store Co.*, 853 A.2d 1037, 1041 (Pa. Super. Ct. 2004).

Rhode Island: *Gingras v. Richmond*, 329 A.2d 189, 190 (R.I. 1974).

South Carolina: *Snow v. City of Columbia*, 409 S.E.2d 797, 802 (S.C. Ct. App. 1991).

South Dakota: *Hoffman v. Bob Law, Inc.*, 888 N.W.2d 569, 577 (S.D. 2016).

Tennessee: *Price v. Osborne*, 147 S.W.2d 412, 413 (Tenn. Ct. App. 1940).

Texas: *Gen. Mills Restaurants, Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 833 (Tex. Ct. App. 2000), *abrogated on other grounds by Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015).

Utah: *Purkey v. Roberts*, 285 P.3d 1242, 1247–48 (Utah Ct. App. 2012).

Vermont: *Jones v. Hart*, 261 A.3d 1126,1147 (Vt. 2021).

Virginia: *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 233 (Va. 1946).

Washington: *Bradley v. Am. Smelting & Ref. Co.*, 709 P.2d 782, 787 (Wash. 1985) (en banc).

West Virginia: *EQT Prod. Co. v. Crowder*, 828 S.E.2d 800, 806 (W. Va. 2019).

Wisconsin: *Grygiel v. Monches Fish & Game Club, Inc.*, 787 N.W.2d 6, 19 (Wis. 2010).

Wyoming: *Bellis v. Kersey*, 241 P.3d 818, 825 (Wyo. 2010).

Appendix B

States authorizing punitive damages against trespassers who do not cause additional harm to the property.

Alabama: *Webb v. Knology, Inc.*, 164 So. 3d 613, 619–20 (Ala. Ct. App. 2014).

Arizona: *Goodman v. 12 Univ. LLC*, No. 2 CA-CV 2020-0034, 2020 WL 6878883, at *7–8 (Ariz. Ct. App. Nov. 23, 2020) (unpublished).

Colorado: *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1234 (Colo. 2001).

Delaware: *Williams v. Manning*, No. 05C-11-209-JOH, 2009 WL 960670, at *12 (Del. Super. Ct. Mar. 13, 2009) (unpublished).

Florida: *Fletcher v. Fla. Publ'g Co.*, 319 So. 2d 100, 112 (Fla. Dist. Ct. App. 1975), *quashed on other grounds*,340 So. 2d 914 (Fla. 1976).

Georgia: *Woodstone Townhouses, LLC v. S. Fiber Worx, LLC*, 855 S.E.2d 719, 730 (Ga. Ct. App. 2021).

Hawaii: *Howell v. Associated Hotels, Ltd.*, 40 Haw. 492, 496 (Haw. 1954).

Idaho: *Akers v. D.L. White Constr., Inc.*, 320 P.3d 428, 440–42 (Idaho 2014).

Illinois: *Chi. Title Land Tr. Co. v. JS II, LLC*, 977 N.E.2d 198, 220 (Ill. App. Ct. 2012).

Indiana: *True Temper Corp. v. Moore*, 299 N.E.2d 844, 846–48 (Ind. Ct. App. 1973).

Kansas: *Ultimate Chem. Co. v. Surface Transp. Int'l, Inc.*, 658 P.2d 1008, 1012 (Kan. 1983).

Maine: *Sebra v. Wentworth*, 990 A.2d 538, 543 (Me. 2010).

Maryland: *Staub v. Staub*, 376 A.2d 1129, 1133 (Md. Ct. Spec. App. 1977).

Michigan: *Kelly v. Fine*, 92 N.W.2d 511, 512–13 (Mich. 1958).

Minnesota: *Brantner Farms, Inc. v. Garner*, No. C6-01-1572, 2002 WL 1163559, at *3 (Minn. Ct. App. June 4, 2002) (unpublished).

Mississippi: *Patterson v. Holleman*, 917 So. 2d 125, 135 (Miss. Ct. App. 2005).

Missouri: *Bare v. Carroll Elec. Coop. Corp.*, 558 S.W.3d 35, 49 (Mo. Ct. App. 2018).

Nevada: *Droge v. AAAA Two Star Towing, Inc.*, 468 P.3d 862, 881 (Nev. Ct. App. 2020).

New Hampshire: *Vratsenes v. N.H. Auto, Inc.*, 289 A.2d 66, 68 (N.H. 1972).

New Mexico: *North v. Pub. Serv. Co. of N.M.*, 608 P.2d 1128, 1129 (N.M. Ct. App. 1980).

New York: *Arcamone-Makinano v. Britton Prop., Inc.*, 156 A.D.3d 669, 673 (N.Y. App. Div. 2017).

North Carolina: *Maint. Equip. Co., Inc. v. Godley Builders*, 420 S.E.2d 199, 203–04 (N.C. Ct. App. 1992).

North Dakota: *Adams v. Canterra Petroleum, Inc.*, 439 N.W.2d 540, 546 (N.D. 1989).

Oklahoma: *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716, 719 (Okla. 1983).

Oregon: *Rhodes v. Harwood*, 544 P.2d 147, 158–59 (Or. 1975) (en banc).

Pennsylvania: *Gavin v. Loeffelbein*, No. 341 EDA

2016, 2019 WL 3731757, at *9 (Pa. Super. Ct. Aug. 8, 2019) (unpublished).

Rhode Island: *Russell v. Kalian*, 414 A.2d 462, 464–65 (R.I. 1980).

South Carolina: *Greene-Mackey v. Bevins*, No. 2018-001372, 2021 WL 2822419, at *1 (S.C. Ct. App. July 7, 2021) (unpublished).

Tennessee: *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 641 (Tenn. 1996).

Texas: *Wilen v. Falkenstein*, 191 S.W.3d 791, 800 (Tex. Ct. App. 2006).

Utah: *Purkey v. Roberts*, 285 P.3d 1242, 1248 (Utah Ct. App. 2012).

Vermont: *Fly Fish Vt., Inc. v. Chapin Hill Ests., Inc.*, 996 A.2d 1167, 1173–77 (Vt. 2010).

Virginia: *Hamilton Dev. Co. v. Broad Rock Club, Inc.*, 445 S.E.2d 140, 143 (Va. 1994).

West Virginia: *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 883 (W. Va. 2010).

Wisconsin: *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 161 (Wis. 1997), *abrogated on other grounds by Kimble v. Land Concepts, Inc.*, 845 N.W.2d 395 (Wis. 2014).

Wyoming: *Goforth v. Fifield*, 352 P.3d 242, 250 (Wyo. 2015).