Case No. 17-1669

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-Appellants,

v.

JOSH STEIN, in his official capacity as Attorney General of North Carolina, and CAROL FOLT, in her official capacity as Chancellor of the University of North Carolina-Chapel Hill,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina

OPENING BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants do not issue stock and have no parent corporations.

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I. JURISDICTIONAL STATEMENT.

This action was brought in the Middle District of North Carolina pursuant to 42 U.S.C. § 1983 and § 1988, to prevent enforcement of North Carolina General Statute § 99A-2 ("the Anti-Sunshine Law" or "the Law"), which Plaintiffs allege violates the federal and state constitutional protections of free speech, the free press, the right to petition, equal protection, and due process, and is unconstitutionally vague. The district court had jurisdiction under 28 U.S.C. § 1331, § 1343, and § 1367. On May 2, 2017, the district court entered an opinion, order, and final judgment dismissing Plaintiffs' First Amended Complaint ("Complaint") because it concluded Plaintiffs lack standing. Joint Appendix 98-136 ("J.A.98-136"). Plaintiffs filed their notice of appeal from that decision on May 23, 2017. J.A.137-41. This Court has jurisdiction pursuant to 28 U.S.C § 1291.

II. ISSUES PRESENTED.

1. Whether Plaintiffs have standing to challenge a statute that has chilled their advocacy because it empowers Defendants to seek civil penalties against them if Plaintiffs engage in their desired activities.
2. Whether Plaintiffs have standing to challenge a statute that has chilled the communication of information on which they rely.

III. INTRODUCTION.

Plaintiffs' Complaint alleges the archetypal basis for standing to bring a pre-enforcement challenge to a law they contend violates the First Amendment. The Anti-Sunshine Law, N.C. Gen. Stat. § 99A-2, provides for punitive damages to punish undercover investigations that gather information from government or private offices in order to expose wronging to the public. Indeed, this is exactly how the Law's sponsors described its purpose: to stop "private special-interest organizations" from collecting and "sharing" information with the goal of "informing the public" about wrongdoing. J.A. 43-46. Further, the Law was modeled on legislation from other states that has been struck down because it seeks to prevent exposés regarding illegal or unethical conduct. J.A. 38-39.

Plaintiffs' Complaint alleges that the Anti-Sunshine Law has accomplished its goals by suppressing their speech in exactly the manner intended. Plaintiffs are public interest groups that perform the precise investigations and public whistleblowing targeted by the Law, and rely on the information those investigations generate for journalism and advocacy. As part of this work, Plaintiffs previously placed two investigators at a University of North Carolina-Chapel Hill ("UNC-CH") laboratory, who successfully carried out such an investigation. Plaintiffs allege they wish to investigate North Carolina governmental entities again, including that same UNC-CH lab, because they

possess information that lab is *currently engaged* in unlawful animal cruelty. Nonetheless, Plaintiffs have declined to conduct their desired investigations for fear of liability under the Law. Indeed, if they now were to conduct the same investigations of UNC-CH they performed in the past, they could be liable for nearly $4 million in punitive damages under the Anti-Sunshine Law.

This suit can lift the chill on Plaintiffs' speech. Plaintiffs seek declaratory and injunctive relief to prevent the Chancellor of UNC-CH and the Attorney General of North Carolina from enforcing the Anti-Sunshine Law against them. The Chancellor must authorize any lawsuit filed on UNC-CH's behalf. N.C. Gen. Stat. § 116-34; J.A.80. The Attorney General must agree to file suit on behalf of any state institution under the Anti-Sunshine Law. N.C. Gen. Stat. §§ 114-1, 114-2(2). Thus, an order preventing Defendants from exercising their powers to bring about a suit under the Anti-Sunshine Law would free Plaintiffs to engage in their desired investigations of North Carolina government facilities.

Nonetheless, the district court dismissed Plaintiffs' Complaint on the basis that they lack standing. The district court recognized the well-established rule that by passing legislation that creates the potential for government sanction, the government coerces people to comply, including by altering their First Amendment protected activities. Thus, a plaintiff who alleges it has engaged in self-censorship in response to a law has standing to challenge such a law. In other words, this

coercive effect of government regulation produces an actionable First Amendment injury whether or not the law is enforced, because the government already has used its power to manipulate the marketplace of ideas. There is pre-enforcement standing to challenge the government's ability to proceed under a law that has chilled speech, exactly as Plaintiffs do here.

However, the district court disregarded First Amendment standing doctrine and created a new rule, holding that traditional pre-enforcement standing only exists if the government enacts criminal fines, not civil penalties. Similarly, it stated that until the government actually begins proceedings against Plaintiffs, or Plaintiffs are already in the process of violating the Anti-Sunshine Law, Plaintiffs' fear of the Law's penalties is speculative and unactionable.

The district court's drastic narrowing of First Amendment standing doctrine contravenes the precedent of this Circuit and defies logic. Binding Circuit authority makes clear that whether a law imposes punitive damages or criminal penalties is irrelevant to First Amendment standing. The former can exert just as much coercive force as the latter.

Further, the implications of the lower court's contrary holding are dire. Under the lower court's rule, there would be nothing to stop governments from enacting as drastic civil penalties as they desire to, for example, deter newspaper articles criticizing government programs. The only way journalists could

challenge such a law would be to publish an article and risk financial ruin. This cannot be. The entire point of First Amendment pre-enforcement standing is to prohibit the state from putting people to such a test. By forcing individuals to decide between acting or risking sanction, the state will silence at least some speakers, undermining the First Amendment's protection.

The district court's faulty First Amendment analysis is enough to warrant reversal, but it is not all that necessitates this case be reinstated. The district court's decision should also be reversed because the court failed to accept the allegations of the Complaint as true, as it was required to do on a motion to dismiss. Going well beyond what is required to establish standing, the Complaint provides extensive allegations establishing Plaintiffs are prepared to carry out their investigations of UNC-CH and other state facilities, but, if they do so, they will face the Anti-Sunshine Law's penalties. The district court's suggestion that Plaintiffs' fear is speculative stemmed from its contrary view that Defendants are "far from likely [to] invoke the Act," a view unmoored from the allegations in the Complaint. J.A.119. Plaintiffs are not required to share the district court's faith in North Carolina authorities, particularly here, where they allege a substantial basis for fearing how Defendants will act.

The decision below should be reversed and the case remanded so that Plaintiffs may pursue their constitutional claims.

IV. STATEMENT OF THE CASE.

A. The Anti-Sunshine Law.

Both the text and history of the Anti-Sunshine Law establish it was designed to deter investigations of government and private facilities meant to bring illegal or unethical conduct to light.

The Anti-Sunshine Law is framed in neutral terms, stating it provides "owners or operators" of a facility a remedy for when people "exceed[] [their] authority" on the premises. N.C. Gen. Stat. § 99A-2(a). However, its definitions, scope, and exceptions make clear the Law's purpose is not to protect employers, but to punish undercover investigations that publicly blow the whistle regarding information of public concern.

The Anti-Sunshine Law defines "an act that exceeds a person's authority" as one of five types of conduct:

(1) An employee "enter[ing] the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business" "captur[ing] or remov[ing]" information without permission and "us[ing] the information to breach the person's duty of loyalty to the employer," N.C. Gen. Stat. § 99A-2(b)(1);

(2) An employee "intentionally enter[ing] the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business" "record[ing] images or sound" without permission and "us[ing] the recording to breach the person's duty of loyalty to the employer," N.C. Gen. Stat. § 99A-2(b)(2);

(3) Any person "[k]nowingly or intentionally 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)(3);

(4) Any person "[c]onspiring in organized retail theft," N.C. Gen. Stat. § 99A-2(b)(4); and

(5) Any person engaging in an "act that substantially interferes with the ownership or possession of real property." N.C. Gen. Stat. § 99A-2(b)(5).[1]

Liability is not limited to people who engage in the covered conduct. The Anti-Sunshine Law also creates "joint[]" liability for "[a]ny person who intentionally directs, assists, compensates, or induces another person to violate" the Law. N.C. Gen. Stat. § 99A-2(c).

The Law only exempts whistleblowers who report information they collect in a manner that "exceeds their authority" if they do so through specific, enumerated reporting procedures. *See* N.C. Gen. § 99A-2(e). The Law separately lists approved procedures for private and public sector employees to transmit the information they gathered to their superiors or other government officials. N.C. Gen. § 99A-2(e).[2]

The Anti-Sunshine Law then provides for "exemplary," *i.e.*, punitive, damages of $5,000 for each day an investigator "acted in violation" of the Law.

[1] Plaintiffs do not contend N.C. Gen. § 99A-2(b)(4), penalizing organized retail theft, had it been enacted alone, would be unconstitutional.

[2] The Law also provides an exception for "any governmental agency or law enforcement officer engaged in a lawful investigation of the premises or the owner or operator of the premises." N.C. Gen. § 99A-2(f).

N.C. Gen. § 99A-2(d)(4). It further provides for fee-shifting, making the investigator or his allies pay for the facility's attorneys' fees and litigation costs. N.C. Gen. § 99A-2(d)(3). At the same time, the Law makes clear it does nothing to alter the "[c]ompensatory damages [] otherwise allowed by State or federal law" or the courts' existing equitable powers. N.C. Gen. § 99A-2(d)(1)-(2).

This text reveals the Anti-Sunshine Law was enacted to penalize undercover investigations of public and private facilities that are conducted to inform the public. The Law provides for punitive damages if individuals engage in classic investigatory techniques, such as obtaining a position and "captur[ing]" or "record[ing]" information of concern, or leaving behind a recording device so that the investigator can uncover ongoing illegal or unethical conduct. N.C. Gen. Stat. § 99A-2(b)(1)-(3). In two instances, the recording or collection is only actionable if the information is "use[d]" in a manner that exposes the employer, such as through unflattering reports. N.C. Gen. Stat. § 99A-2(b)(1)-(2). Moreover, the Anti-Sunshine Law provides for "joint[]" liability, extending its penalties to individuals who "direct[], assist[], compensate[], or induce[]" the violations, aiming the statute at planned information gathering like that of journalists and activists. N.C. Gen. Stat. § 99A-2(c). The Law exempts only those who choose to report the information they obtain through the legislators' approved, closed-door

procedures, underscoring that it is focused on keeping the public in the dark. N.C. Gen. Stat. § 99A-2(e).

The Law's legislative history confirms this reading of the statute. In testifying in support of the Anti-Sunshine Law before the North Carolina Senate Commerce Committee, one of the bill's sponsors in the House of Representatives explained the "crux" of the Law is that it prohibits the collection and "sharing" of information, preventing people from "running out to a news outlet" with their information, and instead forcing them to report misconduct through preapproved channels. J.A.44-45. Another House sponsor stated that the Law's goal is to keep information from being given to "the media" and instead direct it exclusively to "state and federal regulatory agencies." J.A.45.

In particular, the Law's sponsors explained they wanted to stop "private special-interest organizations" from carrying out "undercover operation[s]," the objective of which is to gather "images or whatever" to inform the public. J.A.44-45. As another North Carolina Representative put it, the purpose of the Anti-Sunshine Law is to inhibit those who "want to do an exposé for ABC News" from engaging in investigations. J.A.45-46. This is exactly what it does.

B. The Impact of the Anti-Sunshine Law on Plaintiffs.

In the Complaint, Plaintiffs People for the Ethical Treatment of Animals ("PETA") and the Animal Legal Defense Fund ("ALDF") allege that, combined,

they have conducted undercover investigations of public and private facilities for nearly forty years in order to expose the illegal and unethical treatment of animals. J.A.16-20, 23-26. They and the other Plaintiffs—Center for Food Safety, Food & Water Watch, Farm Sanctuary, Government Accountability Project, Farm Forward, and the American Society for the Prevention of Cruelty—further allege that they rely on the information these investigations and other whistleblowers generate to produce books, articles, reports, newsletters, and movies, and engage in legislative advocacy. J.A.20-23, 26-37. Yet, because of the Anti-Sunshine Law, PETA and ALDF have stopped conducting investigations in North Carolina, and, as a result, all Plaintiffs have been deprived of information to support their campaigns. J.A.20-37.

Indeed, PETA alleges it possess information that a laboratory at UNC-CH is engaged in animal cruelty and that it would investigate that facility, were it not for the Anti-Sunshine Law. J.A.19-20. ALDF alleges it has identified numerous other North Carolina government facilities it would investigate and that it has spent thousands of dollars recruiting investigators in North Carolina. J.A.24-25. However, because the investigations can be lengthy—with individual investigators at times staying in their position for nearly a year—PETA and ALDF allege that their potential liability under the Anti-Sunshine Law has kept them from carrying out their desired investigations. J.A.19-20, 24-25.

PETA and ALDF's allegations make clear that their investigations are the types of activities targeted by the Anti-Sunshine Law. PETA's allegations describe that its investigatory procedures involve its employees obtaining positions at facilities it believes are engaged in animal cruelty and gathering information from the non-public areas that demonstrates misconduct. J.A.16-17. Although PETA turns over any evidence of criminal wrongdoing to the appropriate authorities, PETA has found that releasing the information it obtains to the public is one of its most successful advocacy tools; indeed, this is a primary reason it conducts undercover investigations. J.A.16-17.

In fact, PETA's allegations explain it previously used these techniques to investigate the *same* UNC-CH laboratory it has reason to believe is again engaged in unlawful animal cruelty. J.A.19. Previously, two PETA investigators, on two separate occasions, secured employment at this lab, and, over the course of twenty-three months, were able to record UNC-CH employees dismembering animals in violation of federal orders. J.A.19. The investigators tried to report this information to University officials, but their supervisor instructed them to keep quiet and, when the other employees heard about the investigators' complaints, they destroyed evidence of the animal abuse. J.A.19. PETA's investigators then left their positions in good standing, and PETA reported the information to the

public and the National Institutes of Health, which confirmed the investigators' findings. J.A.19.

ALDF alleges that it uses similar practices as PETA, but ALDF's investigators may also leave behind recording devices to monitor animals' behavior when humans are not around, which can reveal signs of mistreatment. J.A.23-25. Like PETA, ALDF conducts undercover investigations in order to release the information and change public perception and behaviors. J.A.25-26.

All other Plaintiffs allege that the Law's deterrent effect has also kept them from obtaining information on which they rely. In the past, they have educated their members, generated regulatory comments, and produced articles using the information gathered through undercover investigations conducted by PETA, ALDF, and others. J.A.20-23, 26-37. Plaintiffs monitor reports from undercover investigations so they can continue to engage in this work, but the Anti-Sunshine Law has reduced the information available to them by stopping PETA, ALDF, and others from conducting their investigations. *See*, *e.g.*, J.A.32-33.

Plaintiff Government Accountability Project ("GAP") alleges that the Anti-Sunshine Law has especially harmed its advocacy. Like the other Plaintiffs, GAP addresses corporate abuse, including mistreatment of animals, relying on undercover investigations to support its speech. J.A.30-31. But, GAP also advocates for whistleblower protections. J.A.31. GAP alleges that it accomplishes

this latter goal by gathering and highlighting the important public information whistleblowers have provided to the public—such as that of the UNC-CH employee who exposed the largest academic fraud in NCAA history. J.A.30-31. Because the Anti-Sunshine Law penalizes any sort of public whistleblowing, GAP alleges that the Law has diminished the pool of such information and thereby hindered its ability to argue for anti-retaliation laws. J.A.31.

C. Defendants' Role in Enforcing the Anti-Sunshine Law.

UNC-CH Chancellor Carol Folt is the North Carolina official who, at a minimum, is required to authorize any suit under the Anti-Sunshine Law before it can be brought based on an investigation of that institution, including, for instance, a suit against PETA if it were to conduct its investigation of the University's animal laboratory. By statute, Chancellor Folt is empowered with "executive authority" over UNC-CH. N.C. Gen. Stat. § 116-34(a). UNC's Policy Manual's explains this means Chancellor Folt is empowered to direct the filing of any suit that seeks less than $25,000, and must "initiate" any other suit on the University's behalf. J.A.80.[3]

[3] Before the district court, Defendants argued that the UNC President or the UNC Board of Trustees may actually be charged with bringing litigation on the University's behalf. *See* J.A.76. However, UNC's Policy Manual confirms the Chancellor is, at least, an essential component in bringing any suit under the Law. J.A.80.

The Attorney General is the state official charged with representing any state agency, including UNC-CH, in litigation for civil penalties. His statutorily prescribed "duties" include "represent[ing] all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State." N.C. Gen. Stat. § 114-2(2). By statute he also possesses all powers the Attorney General had at common law. N.C. Gen. Stat. § 114-1. This includes the power to "'prosecute all actions necessary for the protection and defense of the property and revenue of the sovereign people of North Carolina,' including 'the duty to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested.'" J.A.118 (quoting *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987)). Thus, if any Plaintiff were to violate the Law through an investigation of any state institution, the Attorney General would need to participate in any enforcement action, having to decide whether to file and pursue an action under the Law.[4]

[4] "[A] State agency may retain private counsel" to represent its interests, but this requires "permission by the Attorney General," meaning that even when outside counsel litigates on behalf of state agencies they only do so after the Attorney General has decided pursuing an action is appropriate. J.A.118.

D. The District Court's Decision.

The district court dismissed Plaintiffs' Complaint for lack of standing. It agreed Plaintiffs' allegations lay out the prototypical facts required to bring a pre-enforcement challenge to a law they claim violates the First Amendment. Yet, the district court held that the traditional First Amendment standing rules do not apply to the Anti-Sunshine Law. It held Plaintiffs here are required to demonstrate substantial additional injuries beyond being chilled by the statute in order for them to have standing. Because Plaintiffs did not allege that they had already suffered these supplemental harms, the district court dismissed the Complaint, holding Plaintiffs had not suffered an injury-in-fact.[5]

In fact, the district court began by acknowledging that Plaintiffs' allegations generally *would* establish their standing. The district court stated, "Courts routinely hold that when challenging a criminal law before it is enforced" plaintiffs can establish standing by "alleg[ing] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution'" by the defendants. J.A.108-09

[5] Plaintiffs' equal protection, due process, and vagueness claims all relate to their First Amendment claims—that the Anti-Sunshine Law violates Plaintiffs' fundamental rights, was passed out of animus for Plaintiffs and their speech, and fails to have the clarity required of laws regulating speech. *See, e.g.*, J.A.58-62. Thus, the district court exclusively focused on whether Plaintiffs satisfied the test for First Amendment standing.

(quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014), in turn quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). The district court further explained this Court has held that the existence of a "non-moribund statute 'presents such a credible threat'" of prosecution. J.A.114 (quoting *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999).

However, the district court continued, these traditional principles of First Amendment standing do not apply here because the Anti-Sunshine Law provides "a civil cause of action," not a criminal one. J.A.115 (emphasis in original). The district court did not explain why civil penalties are distinct from criminal ones for the purposes of standing. It simply dismissed Plaintiffs' case law that discussed the "threat of criminal prosecution," not civil sanctions, as inapplicable. J.A.114 (emphasis in original).

Moreover, the district court reached its conclusion even though it acknowledged that in *Mobil Oil Corp. v. Attorney General*, 940 F.2d 73 (4th Cir. 1991), this Court applied the traditional First Amendment standing doctrine—specifically the rule that the state's decision to enact a law creates an actionable chill on speech—"to a Virginia statute that imposed *civil* penalties for violating its terms." J.A.115 (citing *Mobil Oil*, 940 F.2d at 75) (emphasis added).

The district court distinguished *Mobil Oil* on two grounds. First, the district court said that *Mobil Oil* did not apply because the law at issue there itself

"contain[ed] a specific section that vest[ed] Virginia's Attorney General with authority to exercise his statutory powers to enforce the law and to investigate violations." J.A.116-17 (citations omitted). According to the district court, the Anti-Sunshine Law is distinct because it allows the government to seek damages only in the same way it "situated … any private employer." J.A.118. That is, the Law "creates only a potential civil cause of action available to any number of employers, public and private, without authorizing any particular State actor to enforce it." J.A.119. Without express statutory text incanting specifically that the government can enforce the Law—even though the Anti-Sunshine Law allows for the government to enforce its sanctions—the district court claimed *Mobil Oil* does not apply. J.A.119.

Second, the district court said that *Mobil Oil* is distinct because "at the time it filed its complaint, the plaintiff in *Mobil Oil* had suffered actual monetary damage by complying with the statute." J.A.120. The district court did not address Plaintiffs' allegations that they have spent substantial amounts of money recruiting investigators in North Carolina for investigations they cannot undertake because of the Anti-Sunshine Law, and that they have not been able to act on information that UNC-CH is engaged in animal cruelty, which hinders their ability to carry out their missions. J.A.19-20, 24. Instead, in a non-sequitur, the district court criticized Plaintiffs for not having incurred the particular costs of conducting

an investigation *without* collecting information, *i.e.*, in a different manner than Plaintiffs desire and use in their advocacy, so they could make additional allegations regarding the type of information they could collect and release. J.A.120-21.

Repackaging its holding that the Anti-Sunshine Law's passage did not create a sufficient threat to Plaintiffs to establish an injury-in-fact, the district further stated that unless Plaintiffs are actively risking liability under the Law, their claimed fear of sanction by the government, chilling their speech, is "speculative" and unactionable. J.A.119-26.

The district court stated that Plaintiffs' allegation that they have been "deterred" by the Anti-Sunshine Law is insufficient to establish standing; instead Plaintiffs must wait for Defendants to be "engaged" in prosecuting Plaintiffs under the Law to challenge its constitutionality. J.A.113. Unless the government has already initiated suit, the lower court stated, "it is entirely possible" that North Carolina officials, "as opposed to a private enterprise," would want to encourage, not punish those who "expose wrongdoing" in violation of the Law. J.A.119.

The district court did not address Plaintiffs' allegations that the last time PETA undertook an investigation of UNC-CH, PETA's investigators were told to look the other way and, after the investigators reported their information, UNC-CH's employees destroyed evidence. *See* J.A.19. Moreover, the district court did

not address the Law's sponsors' statements that they designed the statute to be used against Plaintiffs. J.A.43-46.[6]

Offering a slightly different rationale for why Plaintiffs' fears of liability are speculative, the district court also stated Plaintiffs have not taken enough steps along the path towards violating the Anti-Sunshine Law to be chilled by its potential penalties. J.A.121-24 (citing *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), and *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017)). Specifically, the district court stated Plaintiffs' claim that the Law deters their speech is unfounded because: (1) Plaintiffs "would have to wait for a job opening to be posted at a particular facility"; (2) Plaintiffs would have to "find a candidate" to present for the job; (3) "Defendants must select PETA's or ALDF's candidate" and (4) that person must then violate the Anti-Sunshine Law. J.A.122-23. Without showing each condition has come to fruition, the lower court stated, Plaintiffs cannot reasonably be chilled by the Law.

[6] In a footnote, the district court suggested there are also extra-statutory limitations on the government invoking the Law because North Carolina law provides that punitive damages can only be secured if a violator acted in a "willful" manner. J.A.115. However, the conduct regulated by the Law necessarily requires that a violator act in a "willful" manner. Indeed, the Law's exclusive function is to provide for punitive damages for its covered activities. It only allows for "[c]ompensatory damages as otherwise allowed by State or federal law" and equitable relief the courts can otherwise provide. N.C. Gen. § 99A-2(d).

In making these observations, the district court did not address Plaintiffs' allegations that: (1) Plaintiffs *have* identified numerous government facilities where they can and would place investigators, J.A.19-20, 24; (2) Plaintiffs *already* maintain investigators on staff, *see*, *e.g.*, J.A.16-17, 24, and spent thousands of dollars recruiting additional investigators in North Carolina, J.A.24; (3) Plaintiffs *regularly* conduct investigations in a manner that violates the Anti-Sunshine Law, including having placed two investigators at the *same* UNC-CH facility they wish to investigate, *see*, *e.g.*, J.A.19, 23-24; and (4) Plaintiffs already *possess* information that the UNC-CH facility is *currently* engaged in unlawful animal cruelty, J.A.19-20.

Having concluded that Plaintiffs lack standing because they do not have an appropriate basis to fear liability under the Law, the district court quickly concluded Plaintiffs lack standing based on their inability to obtain information that would have been disclosed had the Law not been in place. J.A.128-33. Here too, the district court acknowledged that typically Plaintiffs would have standing on this basis. It recognized "the well-established principle that the First Amendment protects the right to receive information from a willing speaker." J.A.128 (citing *Stephens v. Cty. of Albemarle*, 524 F.3d 485, 491-92 (4th Cir. 2008)). Therefore, the court stated, Plaintiffs should have standing if they can show that a law interferes with "'a speaker willing to convey the information'" to

Plaintiff absent the law—such as PETA, ALDF, or another whistleblower. J.A.129 (quoting *Stephens*, 524 F.3d at 492).

However, because the district court concluded that the Anti-Sunshine Law might not be enforced by North Carolina officials, and thus investigators' claims that they have been deterred by the law are not actionable, it also concluded it is too "speculative" to say that, were Defendants enjoined from acting under the Law, Plaintiffs would be able to obtain additional information regarding government facilities. J.A.130. Like with its analysis of PETA and ALDF's standing based on their chill, the district court stated that for Plaintiffs to have standing because they have been denied information, PETA and ALDF must alter their investigatory techniques and go into state facilities without making recordings or collecting information, in order to further detail what information PETA and ALDF would communicate to the other Plaintiffs if the Law were not in place. J.A.130.[7]

Plaintiffs appealed.

V. STANDARD OF REVIEW.

This Court "review[s] a district court's grant of a motion to dismiss for lack of subject matter jurisdiction *de novo*." *Columbia Gas Transmission Corp. v. Drain*, 237 F.3d 366, 369 (4th Cir. 2001). Where, as here, it is "contended that a

[7] Because the court concluded Plaintiffs lack standing to bring their federal constitutional claims, it exercised its discretion to "decline … supplemental jurisdiction over their State-law claims." J.A.133-34.

complaint simply fails to allege facts upon which subject matter jurisdiction can be based," the plaintiff need not come forward with evidence to substantiate standing; rather "the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration," meaning "all the facts alleged in the complaint are assumed to be true." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *see also AGI Associates, LLC v. City of Hickory*, 773 F.3d 576, 578 (4th Cir. 2014) (same). In fact, the Supreme Court has held that on a motion to dismiss for lack of standing, the reviewing court "must presume that the general allegations in the complaint encompass the specific facts necessary to support" standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

VI. SUMMARY OF ARGUMENT.

Plaintiffs' allegations bring this case squarely within what is required for standing to open the courthouse doors and allow them to challenge the Anti-Sunshine Law. Courts regularly hold plaintiffs have standing to raise First Amendment claims where, as here, plaintiffs allege a desire to engage in protected activities that are subject to government regulation, and that they have declined to do so for fear of government action. A law need not be enforced for there to be First Amendment standing. By providing itself the power to punish speech, the government coerces people to comply with its rules and thereby chills free expression. Accordingly, self-censorship to avoid government sanction is an

actionable injury-in-fact redressable by challenging the authority of the officials empowered to act.

Here, Plaintiffs' allegations go much further. They allege not only that they *want* to engage in the activities that have been chilled by the Anti-Sunshine Law, but that they *have repeatedly engaged* in those activities at North Carolina government facilities in the past and are *fully prepared* to do so again because they *possess* information indicating such investigations are warranted. They allege they have only been chilled from carrying out their investigations and engaging in their related advocacy because of the substantial damages Defendants could seek against them under the Law. Plaintiffs' standing should not be in dispute.

The district court's holding that the well-established rules for First Amendment standing do not apply here because the Anti-Sunshine Law provides for civil, rather than criminal, penalties has no basis in law or logic. This Circuit and others have repeatedly applied the same test for standing to challenge civil or criminal statutes under the First Amendment. For example, *Mobil Oil Corp. v. Attorney General*, 940 F.2d 73 (4th Cir. 1991), applied the traditional First Amendment standing doctrine in a challenge to a civil statute that exclusively provided a private right of action, only allowing the state to seek equitable relief to enforce the law's requirements.

The district court's attempts to distinguish *Mobil Oil* are inconsistent with that case's holding and facts. Indeed, the district court's effort to read *Mobil Oil* to say a civil statute can only be prospectively challenged if it recites that it can be enforced by the government, or if the plaintiff has spent funds to tee-up such a confrontation would undermine the core rationale for pre-enforcement standing: The government cannot force a person to choose between muting their speech and testing the government's resolve to enforce a law. For these reasons, *Mobil Oil* itself rejects the district court's analysis.

Indeed, imposing stricter standing requirements based on the label a law places on its penalties is an unsustainable result. As the Supreme Court has explained, the threat of punitive damages like those imposed by the Anti-Sunshine Law "serve[s] the same purposes as criminal penalties"; "they are aimed at deterrence and retribution." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003). To allow the potential for civil sanctions to remain on the books until the state chooses to enforce them, when a criminal statute would be subject to a pre-enforcement challenge, would only enable the government to force self-censorship and squelch speech through a formalistic end run around the First Amendment.

The district court's conclusion that Plaintiffs' fears are "speculative" because (a) the government *might* not enforce the Anti-Sunshine Law against

Plaintiffs, and (b) Plaintiffs have not yet commenced an investigation showing they will violate the Law, are even more unfounded. Just like the district court's distinction between civil and criminal statutes, its claims that Plaintiffs' chill is speculative fail as a matter of First Amendment law. Again, the fact that a government *may* choose not enforce a law does not immunize the statute from a First Amendment challenge. Likewise, pre-enforcement challenges can be brought even if the plaintiff has yet to take every step necessary to expose itself to liability. The First Amendment allows people to challenge laws that create the potential, not certainty, of liability because that potential alone amounts to a governmental coercion of speech. *See, e.g.*, *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

Moreover, the district court's reasons for holding Plaintiffs' fears speculative resulted from it ignoring Plaintiffs' allegations, despite its obligation to treat them as true. The Complaint establishes that there is every likelihood the Anti-Sunshine Law will be enforced against Plaintiffs if they launch their desired undercover investigations. The Complaint also details that Plaintiffs have put in place the tools to undertake, and will be able to undertake their investigations as soon as the Law's chill is removed. The district court failed to acknowledge, let alone credit these allegations.

The district court's final error is in concluding Plaintiffs do not separately have standing as would-be recipients of information that the Anti-Sunshine Law has repressed. Contrary to the district court's holding, Plaintiffs do not need to prospectively prove what information they have been deprived of due to the Anti-Sunshine Law. Rather, they have standing to challenge the Law so long as they have a reasonable basis to believe it has resulted in them being denied information. This is certainly true here, as the Law targets the types of information on which Plaintiffs rely.

Plaintiffs have standing under multiple established doctrines and should be allowed to proceed with their claims.

VII. ARGUMENT.

A. A plaintiff has pre-enforcement standing to challenge a law as violating the First Amendment if the government's power to enforce the law causes the plaintiff to self-censor.

i. The specter of government sanction can create First Amendment standing by forcing self-censorship, even if the government has not acted.

Like all federal claims, First Amendment challenges are subject to Article III's case-or-controversy requirement. "[A] plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable

decision." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014) (quotation marks and brackets omitted).

However, the courts have consistently acknowledged that they must apply "a 'low threshold'" and "'quite forgiving'" standard for determining when a plaintiff has suffered a First Amendment injury at the hands of the government. *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013) (quoting *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14–15 (1st Cir.1996)); *see also Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) ("The Supreme Court of the United States has explained that standing requirements are somewhat relaxed in First Amendment cases[.]").

This is because the First Amendment does not merely restrict the government "actual[ly] prosecuti[ng]" constitutionally protected activities; it also guards against the government enacting laws that create the *risk* of state action because that *possibility* alone can lead people to "self-censor[]," skewing discourse and undermining the First Amendment. *Am. Booksellers Ass'n, Inc.*, 484 U.S. at 393. The First Amendment applies to all governmental efforts "to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994).

If the government "'rais[es] the specter'" it will impose sanctions for First Amendment protected activities it can "'drive certain ideas or viewpoints from the marketplace,'" whether or not the sanctions are ever enforced. *Id.* (quoting *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). This is an injury to the would-be speaker that is protected by the First Amendment.

Accordingly, First Amendment challenges "occupy a somewhat unique place in Article III standing jurisprudence" because the government may have "not yet applied the allegedly unconstitutional law to the plaintiff, and thus there is no tangible injury," but nonetheless a plaintiff could have suffered "a cognizable Article III injury." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 47 (1st Cir. 2011). A law discouraging the exercise of a plaintiff's First Amendment rights—inducing a plaintiff to self-censor—for fear of government sanction is a form of government manipulation of speech, producing an actionable, constitutional harm, and thereby standing to challenge the government's power. *Id.*

ii. Therefore, at the pleadings stage, a plaintiff must allege only that it has refrained from engaging in activities because of its reasonable fear of the government's power to penalize its activities.

Because self-censorship is an actionable harm, "[t]o establish standing for a preenforcement challenge to a regulation, it is enough to 'allege[] *an intention* to

engage in a course of conduct arguably affected with a constitutional interest, but proscribed'" by a statute that has produced a "reasonable" "fear" of state action under that law, which has led the plaintiff to alter its activities. *Va. Soc'y for Human Life, Inc.*, 263 F.3d at 388–89 (emphasis added) (alterations in original) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

Put another way, a plaintiff does not need to prove that it is currently engaged in activities that violate the challenged law. It only needs to contend it wants to engage in the covered conduct, but has not done so because of the power the state could wield against it under the challenged law if the plaintiff were to act. Thus, for example, where a law limited political expenditures, it was more than sufficient for standing that "the plaintiffs had engaged in … campaigns in the past and that they professed *an intent* to engage in such activities in the future," causing them to have "some reason in fearing prosecution" and be chilled from proceeding. *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir.1996) (emphasis added) (quotation marks omitted).

iii. The existence of a law regulating a plaintiff's conduct constitutes a reasonable basis for fearing its enforcement.

While the fear of government action, and thus the chill on speech, "cannot be imaginary or wholly speculative," the default rule is that the existence of a statute that allows the government to penalize a plaintiff's conduct provides a

reasonable basis to fear government sanction and alter one's speech in response, establishing an injury-in-fact resulting from the official's power to enforce the law, and thus standing. *Va. Soc'y for Human Life, Inc.*, 263 F.3d at 386. As this Court put in it *Mobil Oil*, "We see no reason to assume that the [state] legislature enacted this statute without intending it to be enforced." 940 F.2d at 76. Thus, according to *Mobil Oil*, the challenged law's passage produced an "actual and well-founded fear" of enforcement, justifying self-censorship and producing "harm all the while." *Id.* (quotation marks omitted).

As this Court has put it elsewhere, "A non-moribund statute that 'facially restrict[s] expressive activity by the class to which the plaintiff belongs' presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (alteration in original) (quoting *N.H. Right to Life PAC*, 99 F.3d at 15); *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 711 (6th Cir. 2015) ("Generally, standing is found based on First Amendment violations where the rule, policy or law in question has explicitly prohibited or proscribed conduct on the part of the plaintiff."). Passing a law that is "aimed directly" at a plaintiff's activities establishes "a credible threat" of the law's enforcement, making it reasonable for a plaintiff to "refrain[] from making, issuing, or distributing" the regulated materials and thus provides the foundation for a First Amendment injury-

in-fact. *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1192-94 (D.C. Cir. 1992); *see also Mobil Oil Corp.*, 940 F.2d at 76 (same).

Indeed, once a plaintiff establishes its conduct is covered by a non-moribund statute, the burden shifts to the government to show that a plaintiff is unreasonable in believing the government can enforce the law against it and altering its speech accordingly. Unless the state has "suggested that the newly enacted law will not be enforced, [] we see no reason to assume otherwise." *Am. Booksellers Ass'n, Inc.*, 484 U.S. at 393.

Accordingly, this Court required the government "promulgate[] a rule exempting" plaintiffs from government sanction under a challenged law before it would entertain the government's argument that the law did not present a reasonable threat and induce self-censorship, resulting in standing. *N.C. Right to Life, Inc.*, 168 F.3d at 710; *see also N.H. Right to Life Political Action Comm.*, 99 F.3d at 14.

* * *

In short, a First Amendment injury exists at the hands of government defendants if the state places "the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity," because when faced with that choice the courts recognize it is appropriate (and indeed the government's intent) for the

plaintiff to choose compliance. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). Thus, a plaintiff who alleges its speech has been chilled by a law can proceed against officials empowered to act under the law, even if the law is not enforced, because its passage allows the government to accomplish its unconstitutional end of manipulating speech. The plaintiff is suffering a constitutional harm due to the law's enactment, which can be remedied by enjoining the government officials' power.

B. Plaintiffs here more than sufficiently allege they reasonably fear the Anti-Sunshine Law, providing them standing to seek to enjoin Defendants from enforcing the Law.

Here, Plaintiffs go well beyond alleging the minimum requirements for standing to bring a pre-enforcement challenge to prevent Defendants from exercising their power to enforce Anti-Sunshine Law. As explained above, Plaintiffs' Complaint details: (1) that PETA and ALDF wish to engage in the types of investigations regulated by the Law at government facilities, including at UNC-CH because they possess information that there is ongoing misconduct at its lab; (2) precisely how PETA and ALDF intend to engage in those investigations, bringing them under the Law; (3) that PETA and ALDF are prepared to engage in those activities using their investigators on staff and those they recruited in North Carolina; (4) that PETA and ALDF have refrained from conducting those investigations because of the risks posed by the Law; and (5) that Defendants are

the officials empowered to initiate or file suits under the Law if Plaintiffs were to carry out their investigations. J.A.16-20, 23-26.[8]

The allegations, which the district court was required to take as true, *see, e.g.*, *AGI Associates*, 773 F.3d at 578; *Adams*, 697 F.2d at 1219, more than establish that Defendants' authority to enforce the Anti-Sunshine Law has chilled Plaintiffs' speech. The Complaint not only provides that Plaintiffs "intended" to engage in the regulated activities—and thus they reasonably altered their advocacy in response to the Law—but that they are fully able to engage in and had a history of engaging in the exact types of activities the Anti-Sunshine Law targets, making Plaintiffs' fear of the Law's enforcement against them all the more reasonable and concrete.

These allegations demonstrate Plaintiffs are suffering a classic First Amendment injury at the hands of Defendants, which can be redressed through a declaration and an injunction preventing the Defendants from enforcing the Law. *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997) ("When government action or inaction is challenged by a party who is a target or object of that action, as in this case, 'there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or

[8] Defendants have never suggested they would exercise restraint in enforcing the Anti-Sunshine Law.

requiring the action will redress it.'" (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Therefore, Plaintiffs have standing to bring this suit.

C. The district court erred in holding that, because the Anti-Sunshine Law provides for civil rather than criminal penalties, the traditional rules of First Amendment standing do not apply.

Despite the above precedent, the district court erroneously held that Plaintiffs' self-censorship in the face of a statute targeting their activities is insufficient to establish standing. To justify this outcome the district court principally focused on the fact that the Anti-Sunshine Law "creates only a potential civil cause of action." J.A.119. But, the district court's conclusion that the standing rules differ if a plaintiff is challenging a civil as opposed to a criminal statute is wrong on several counts. It is contradicted by this Court's controlling authority in *Mobil Oil*, 940 F.2d 73, as well as the decisions of numerous sister circuits. It is also illogical. Pre-enforcement standing results from the accepted truth that legislating conduct is inherently coercive. A law's passage leads people to alter their behavior and mute their speech in response because they reasonably believe the state would not have regulated that conduct unless it intended for those regulations to be carried out. That North Carolina has awarded itself civil, rather than criminal enforcement authority under the Anti-Sunshine Law does not undercut the need for pre-enforcement standing to stop the government manipulating discourse in this manner.

i. The district court's ruling is contrary to this Court's precedent in Mobil Oil.

Mobil Oil establishes a plaintiff has standing to challenge a civil statute that empowers the state to proceed against the plaintiff for the plaintiff's desired conduct, causing a chill. In *Mobil Oil*, the plaintiff sought to prevent enforcement of the Virginia Petroleum Products Franchise Act ("VPPFA"), which imposed restrictions on gasoline station franchise agreements. The VPPFA provided a "stiff civil remedy … $2,500 liquidated damages plus actual damages and attorney's fees" *solely* to franchisees who received an unlawful contract. *Mobil Oil*, 940 F.2d at 75 (emphasis in original removed). The VPPFA separately enabled the Virginia Attorney General to "investigate and bring an action in the name of the Commonwealth to enjoin any violation." *Id.* (quotation marks omitted).

In holding that Mobil had standing to challenge the VPPFA, this Circuit explained "that Mobil's predicament—submit to a statute or face the likely perils of violating it—is precisely why the declaratory judgment cause of action exists." *Id.* at 74. Mobil had taken steps to comply with the VPPFA, but this Court explained that was not necessary for standing. To the contrary, there was standing simply because the law regulated Mobil's conduct. This Court held that, under the circumstances of *Mobil Oil*, a "person aggrieved by laws he considers unconstitutional" can seek relief "against the arm of the state entrusted with the

state's enforcement power, all the while complying with the challenged law." *Id.* at 75.

Notably, the Virginia Attorney General raised many of the same arguments the district court relied on below, and this Court rejected each. Like the lower court here, the Virginia Attorney General said that the state's "discretionary enforcement authority," combined with the fact that the VPPFA provided a civil, rather than criminal, remedy indicated the VPPFA was "intended to be enforced by private suits." *Id.* at 76. Therefore, the Virginia Attorney General argued, Mobil did not reasonably fear state action. *Id.*

This Court declared these arguments "irrelevant." *Id.* It explained that even though the state could *not* exercise the VPPFA's civil penalties, and could *only* seek equitable relief to enforce the statute's rules, as long as the "Attorney General has an independent power to enforce VPPFA," that authority was sufficient for Mobil to have standing to challenge the law. *Id.* at 77.

Relatedly, the Virginia Attorney General argued Mobil needed to produce evidence "that the Attorney General will enforce the statute" before Mobil could reasonably fear the statute's enforcement. *Id.* at 76. In rejecting this argument, this Court explained that "[t]he Attorney General has not, however, disclaimed any intention of exercising her enforcement authority" and thus the existence of the

statute established a reasonable basis to fear the state's enforcement and for Mobil to self-censor. *Id.*

In this manner, *Mobil Oil* disposes of the lower court's holding that the traditional First Amendment standing rules do not apply here because the Anti-Sunshine Law "merely" authorizes civil penalties. In *Mobil Oil* this Court considered a statute that permitted the Virginia Attorney General to seek much less severe sanctions than those provided for in the Anti-Sunshine Law (equitable relief as opposed to punitive damages). Nonetheless, *Mobil Oil* discredits the district court's holding that the government's decision to coerce individuals through passing non-criminal sanctions increases the burdens on plaintiffs to establish standing. *Mobil Oil* provides that if a plaintiff can be subject to the government's enforcement authority it is appropriately chilled by that authority and can pursue a First Amendment claim to stop the law's enforcement, exactly as Plaintiffs have done here.

a. The lower court's efforts to distinguish *Mobil Oil* have no basis in law or fact.

The district court sought to distinguish *Mobil Oil* in two ways, neither of which withstands scrutiny. First, the district court stated *Mobil Oil* does not apply because the VPPFA itself provided the Virginia Attorney General could seek equitable relief under that law, whereas the North Carolina officials' express power

to enforce the Anti-Sunshine Law is spelled out in other statutes. The Anti-Sunshine Law's text creates a single "civil cause of action available to any number of employers, public and private" and only North Carolina officials who are otherwise authorized to employ the state's legal remedies (such as Defendants) can bring a suit about. J.A.119.

Yet, whether or not the statute being challenged itself says it can be enforced by the defendant, as opposed to creating an available cause of action, with the state spelling out who has bureaucratic authority to invoke that cause of action elsewhere, has no bearing on whether the state's authority creates a reasonable chill. People do not look to how the defendant's authority is codified to determine whether they are at risk for government sanction. The question for First Amendment standing is whether a plaintiff's self-censorship is reasonable and a plaintiff's fear of enforcement is not undermined because of the code sections through which the government authorizes itself to act.

If there were any doubt on this point, it would be dispelled by the Eighth Circuit's holding in *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011). There, the court rejected the Minnesota Attorney General's claim that she was immune from suit because she did not have a "special role in the enforcement of the law." *Id.* at 632. The Eighth Circuit held that the Attorney General was a proper defendant simply "by virtue of the office's participation in the enforcement

mechanism," regardless of how the statutory scheme provided for that participation. *Id*. Because the powers of her office, codified elsewhere, allowed her to initiate "a civil complaint" under the challenged statute as well as "become involved in a criminal prosecution … upon request of the [independent] county attorney assigned to a case," she could be sued for declaratory and injunctive relief on the basis that her power to enforce the law unconstitutionally manipulated speech. *Id.*

So too here. North Carolina statutes provide for Chancellor Folt and Attorney General Stein to "initiate" and litigate suits under the Anti-Sunshine Law if Plaintiffs conduct their desired investigations of government facilities. N.C. Gen. Stat. § 116-34(a) (explaining the chancellor has all "executive authority" over the campus, which UNC's Policy manual explains includes the power to "initiate" suits); N.C. Gen. Stat. § 114-2(2) (requiring the Attorney General to prosecute all civil actions on the state's behalf). Defendants are involved in the "enforcement mechanisms" of the Anti-Sunshine Law and thus their authority has chilled speech.

Further, the district court simply misread the VPPFA. The challenged provisions of the VPPFA did *not* themselves authorize the Virginia Attorney General to enforce the statute. Rather, as the *Mobil Oil* court explained, the Virginia Attorney General could seek equitable relief to require compliance with the VPPFA because there existed a separate code section enacted *before* the

challenged amendments to the VPPFA came into law that empowered the Virginia Attorney General to act under the "VPPFA and three other statutes." 940 F.2d at 75 (citing Va. Code § 59.1-68.2, a provision codified in an entirely different Chapter than the VPPFA and that provides the Attorney General authority to act under a variety of Chapters, Articles, and Titles). Thus, the VPPFA was no different than how the district court characterized the Anti-Sunshine Law, with one needing to look elsewhere to determine the challenged provisions could be enforced by the government.

Second, the district court stated that *Mobil Oil* did not apply because Mobil "had suffered actual monetary damage by complying with the statute." J.A.120. Yet, as noted above, *Mobil Oil* itself explained it would have found standing even had Mobil not spent money to comply with the VPPFA, because a law's passage creates a reasonable fear of enforcement. 940 F.2d at 74-75. Indeed, this is the only conclusion *Mobil Oil* could have reached consistent with First Amendment case law. In *Athens Lumber Co. v. Federal Election Commission*, for example, the district court dismissed the case for lack of standing because the plaintiffs failed to spend "corporate funds [to] expose themselves to civil penalties.'" *Athens Lumber Co., Inc. v. Fed. Election Comm'n*, 718 F.2d 363 (11th Cir. 1983) (en banc), adopting the standing analysis in the panel opinion 689 F.2d 1006, 1012 (11th Cir. 1982). The Eleventh Circuit was "unpersuaded by this reasoning." 689 F.2d at

1012. The plaintiff's "intent[]" to engage in the regulated conduct was sufficient to establish standing. *Id.*

The district court's statement that *Mobil Oil* does not apply because Plaintiffs have not incurred a monetary harm is also error because it ignores the allegations in the Complaint. ALDF alleges that it spent thousands of dollars to prepare for investigations that would violate the Anti-Sunshine Law, but it cannot put that outlay to use because of its fear of liability under the Law. J.A.24. PETA alleges it has been deterred from acting on its information regarding UNC-CH, and thus it has been unable to carry out its mission to protect animals, which is also how PETA raises funds. J.A.16-20. In other words, Plaintiffs are identically situated to how the lower court portrayed Mobil.

In short, the district court's holding that traditional First Amendment standing rules do not apply to the Anti-Sunshine Law runs directly counter to *Mobil Oil*, which is binding precedent. None of the district court's justifications for distinguishing *Mobil Oil* are tenable. Its refusal to credit Plaintiffs' allegations, in contradiction to how it was required to proceed, only further undermines its reasoning.

ii. Other circuits likewise apply the same First Amendment standing doctrine for challenges to civil and criminal statutes.

Mobil Oil aside, the district court's decision to create a new standing doctrine based on the distinction between civil and criminal statutes is inconsistent with precedent from numerous other courts. *Accord Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432-33 (2001) (punitive damages like those at issue here "have been described as 'quasi-criminal,'" and "operate" equivalent to criminal fines).

The Second Circuit, for example, held the fact that a plaintiff "faces the possibility of civil litigation rather than criminal prosecution here is of no moment. The fear of civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000). The potential for "a civil penalty of up to $10,000 for each infraction" creates a "deterrence" of speech that is "palpable enough" for standing. *Id; see also Hedges*, 724 F.3d at 196, 198 (plaintiff has "standing to challenge a civil penalty provision despite the state's argument that it never had enforced the statute against anyone"); *see also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1106 (10th Cir. 2006) (en banc) (Tacha, J., Ebel, J. & Kelly, J. dissenting on other grounds) (stating *New York Times v. Sullivan*, 376

U.S. 254 (1964), recognizes "the threat of civil liability" can create a sufficient chill for standing).

The Eighth Circuit has gone even further and held that a statute that exclusively "provided for a *private right of action* against a person or entity who violated the statute" was sufficient to create an injury-in-fact because providing for civil liability deters speech, undermining the First Amendment. *Balogh v. Lombardi*, 816 F.3d 536, 542 (8th Cir. 2016) (emphasis added). The *Balogh* court concluded the plaintiff there lacked standing because its reasonable fear of liability could not be traced to or redressed by an order against the government—as the law expressly stated only "*private civil* litigants [] may seek damages." *Id.* at 543-44 (quotation marks omitted) (emphasis added). Yet, such a limitation is not only absent from the Anti-Sunshine Law, it is disproven by the Law's plain text. N.C. Gen. Stat. § 99A-2(e) (separately detailing how government employees can report information so as not to be liable under the Law, making clear that government employers can enforce the Law if information is collected or released in violation of the statute).

In sum, other circuits recognize that protecting free speech requires people be able to challenge all laws that the state can use against them whether the government has chosen to enact civil liability or criminal penalties. This Court

should not countenance the district court creating a circuit split *sub silentio*, especially here, where its reasons for doing so are unsound.

D. The district court erred in holding Plaintiffs' injury is speculative.

To prop up its conclusion that Plaintiffs' chill is insufficient to establish standing, the district court offered two reasons why Plaintiffs' fear of the Law—and thus their self-censorship—results from "speculation." Therefore, according to the district court, it is Plaintiffs' unreasonable concern for liability, not the Law, that has led them to self-censor, meaning there is no injury-in-fact. As elaborated below, these justifications for the court's outcome suffer from the same errors as its other analysis. Indeed, the district court's reasons for holding Plaintiffs' fears speculative amount to a restatement of its incorrect conclusion that self-censorship cannot create standing, when self-censorship is a quintessential basis for First Amendment standing. Moreover, the district court was only able to cast Plaintiffs' fears as speculative by substituting its "own observations" in place of Plaintiffs' well-pleaded allegations, which addressed each purported missing link. *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 211–12 (4th Cir. 2017) (explaining a court's "observation[s]" regarding how the government is or will act are only ever appropriate "with the benefit of an evidentiary record at summary judgment" and when made at the motion to dismiss stage "impermissibly inject[] an evidentiary

issue into a plausibility determination"). Either one of these defects is enough to reject the district court's statements that Plaintiffs' injuries are "speculative."

i. Plaintiffs need not wait until Defendants initiate enforcement of the Law to have standing.

The district court first stated Plaintiffs' fears are speculative because Defendants' decision to bring a "civil lawsuit" like that authorized under the Anti-Sunshine Law is "fact-specific, nuanced, and sometimes complicated." J.A.119. In the lower court's view, because Defendants could choose "other legal theories at [their] disposal" rather than prosecute Plaintiffs under the Anti-Sunshine Law, or might even "not [] seek to punish" Plaintiffs at all because Defendants would appreciate Plaintiffs "expos[ing] wrongdoing," the Law's passage does not create a "threat of enforcement." *Id*. Thus, the district stated, until Plaintiffs can establish "how" or "whether" Defendants will sue under the Law, Plaintiffs have not suffered an injury. J.A.120.

Yet, again, First Amendment standing does not require the state to actually enforce the challenged law. The government always has prosecutorial discretion and thus when faced with pre-enforcement challenges routinely argues that Plaintiffs lack standing because the defendants "never had the opportunity to exercise" that discretion, *i.e.*, that the plaintiff should have waited until the government said it would sue. *Six Star Holdings, LLC v. City of Milwaukee*, 821

F.3d 795, 803 (7th Cir. 2016). The courts have held "there is no requirement to give [the government] such an opportunity." *Id.* "The plaintiff 'need not demonstrate to a certainty that it will be prosecuted,'" just that it faces that risk. *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1192 (10th Cir. 2000) (quoting *Vt. Right to Life*, 221 F.3d at 382).

Further, the district court's statement that Plaintiffs are speculating because they have not shown the government *will* enforce the Anti-Sunshine Law fails to take account of the allegations in the Complaint. Plaintiffs allege that UNC-CH officials attempted to quiet Plaintiffs' prior investigations. J.A.19. That allegation, coupled with the fact that the entire point of the Anti-Sunshine Law is to stop "private special-interest organizations" like Plaintiffs from conducting undercover investigations in North Carolina, J.A.45, makes the district court's analysis indefensible.

Even though Plaintiffs are not legally required to demonstrate the Anti-Sunshine Law is likely to be enforced against them, to reach its contrary conclusion the district court abandoned its obligation to treat the allegations in the Complaint as true. In place of Plaintiffs' allegations, the district court substituted its own counterfactual statements. Put another way, the district court's first basis for claiming Plaintiffs' fears are speculative disregards the principles of standing as well as the standard of review.

ii. Plaintiffs need not have completed their investigation to have standing.

The district court next attempted to cast Plaintiffs' fear as speculative because Plaintiffs have refrained from conducting their investigations, *i.e.*, they allege their conduct was chilled. J.A.122-23. The court opined that there are four "contingent" events Plaintiffs need to prove will come to fruition, essentially by showing they had carried out investigations in violation of the Law, in order for them to fear its enforcement. J.A.122-23. This second basis for holding that Plaintiffs are speculating suffers from the same defects as the first.

The district court's rationale collapses because the so-called contingencies are sufficiently alleged as fact in Plaintiffs' Complaint, meaning had the lower court properly applied the standard of review its own logic would have dictated Plaintiffs' fears are sufficiently reasonable and concrete to provide standing.

- The district court's first "contingency" making Plaintiffs' fear speculative is that Plaintiffs must "wait for a job posting to be posted at a particular facility" they wish to investigate. J.A.122. But, Plaintiffs allege they have identified numerous government facilities they wish to investigate, and ALDF alleges certain of its investigative techniques fall within the Anti-Sunshine Law without the investigators ever being hired, through its

investigators simply placing recording devices in non-public areas. J.A.19-20, 24; *see also* N.C. Gen. Stat. § 99A-2(b)(3).

- The district court's second "contingency" is that Plaintiffs may not be able to "find a candidate" for the job who is willing to "engage in conduct that violates" the Anti-Sunshine Law. J.A.122-23. But, Plaintiffs allege that they maintain investigators on staff and that they have already expended significant amounts of money recruiting additional investigators in North Carolina. J.A.16-20, 24.
- The district court's third "contingency" is that Plaintiffs will have difficulty "record[ing] th[e] conduct" in a manner that violates the Law. J.A.123. But, Plaintiffs allege that "recording conduct" is precisely what Plaintiffs' investigators are trained to do and have done for years. J.A.16-20, 23-24. Moreover, they allege they possess specific information indicating there is ongoing misconduct that they could document. J.A.19-20.
- The district court's fourth "contingency" is that the government must "hire" Plaintiffs' investigators at the facilities they wish to investigate before they will be subject to the Anti-Sunshine Law. J.A.123. But, Plaintiffs allege that PETA and ALDF's investigators have been hired by countless facilities in order to conduct investigations, including *twice* at the particular UNC-CH

facility PETA wishes to investigate. J.A.16-19, 23-24.[9] Indeed, North Carolina plainly believed PETA and ALDF would be able to carry out their desired investigations, as this is why it enacted the Law. J.A.43-46.

Further still, the district court's focus on whether there are contingencies fails to properly apply standing doctrine. To determine whether a plaintiff has standing, the question is not whether there are any "contingent events" before the government can impose liability, with a pre-enforcement challenge that is always the case. *McCardell v. U.S. Dep't of Hous. & Urban Dev.*, 794 F.3d 510, 520 (5th Cir. 2015) (examining civil rights claims that are subject to more stringent standing requirements). Instead, the question is whether the plaintiffs made "adequate[] alleg[ations]" that demonstrate they possess an appropriate rationale for modifying their activities in response to the Law. *Id.*

As detailed above, where First Amendment interests are at stake, the courts only require a plaintiff allege it wishes to engage in regulated conduct, but has been deterred from doing so because of the law. Then, absent an extraordinary showing by the government, the courts recognize that the plaintiff incurred a First Amendment injury. In other words, the district court's consideration of the

[9] *See also N.H. Right to Life Political Action Comm.*, 99 F.3d at 14 (stating that past experience and a desire to "engage in such activities in the future" provided a reasonable basis to fear a statute that targeted such conduct, even when the statute had never been enforced).

"contingencies" here was irrelevant. Moreover, even without this "forgiving" test for standing, Plaintiffs' Complaint is undoubtedly sufficient as it alleges ample facts showing Plaintiffs rightfully fear the Anti-Sunshine Law's enforcement against them. Any way one approaches the district court's analysis, it is faulty.

a. The authority relied on by the district court demonstrates Plaintiffs' allegations are sufficient.

Indeed, even assuming the "contingencies" the district court focused on were not addressed in the Complaint, the authority on which the district court relied highlights that Plaintiffs' allegations of chill are sufficiently justified for Plaintiffs to proceed. The district court's cases hold that "contingencies" are only relevant to the standing analysis if they make a plaintiff's chill dependent on the conduct of third-parties not before the court, and, then, only if a plaintiff has no basis to allege that third-party conduct will come about. *Texas v. United States*, 787 F.3d 733, 752 (5th Cir. 2015) ("[W]here the Supreme Court has found that an injury is not fairly traceable, the intervening, independent act of a third party has been a necessary condition of the harm's occurrence or the challenged action has played a minor role." (citing *Clapper v. Amnesty International USA*, 568 U.S. 398, 422 (2013)). These cases do nothing to diminish the precedent that a plaintiff has standing to challenge a law where it can allege that absent its own self-censorship the government would be empowered to penalize its speech.

The district court's primary authority, *Clapper*, is a case that arose on summary judgment where, unlike here, the court could make factual findings that undermined the plaintiffs' claimed fear of liability. 568 U.S. at 407. In *Clapper*, the Court found that the plaintiffs' fears depended on a "highly attenuated chain of possibilities." *Id.* at 410. The *Clapper* plaintiffs were "U.S. persons" who the Supreme Court explained "cannot be targeted for surveillance" under the law they challenged. *Id.* at 411. Instead, the *Clapper* plaintiffs' fear derived from a concern that "the Government will target *other individuals*—namely, the[] [plaintiffs'] foreign contacts"—and the plaintiffs would be caught up in the surveillance of the third-party. *Id.* (emphasis in original). Government surveillance of the plaintiffs' foreign contacts required approval by the courts, another party not in the case, and the *Clapper* plaintiffs "d[id] not even allege that the Government ha[d] sought … approval." *Id.*

In other words, the contingencies that caused the plaintiffs to lack standing in *Clapper* did not depend on whether the plaintiffs would be able to subject themselves to the law—the district court's concern here—but how the defendants would treat non-parties, which in turn was dependent on the conduct of yet another actor (the Foreign Intelligence Surveillance Court). The *Clapper* defendants needed to seek and obtain approval to surveil the plaintiffs' foreign contacts—who were the true targets of the law—before the *Clapper* plaintiffs could even suggest

there was a possibility they would be subject to unconstitutional surveillance. On those facts, it is not surprising *Clapper* held the plaintiffs' fear speculative. But, *Clapper* is wholly unlike the standard First Amendment challenge here, where Plaintiffs fear that a statute *designed* to punish their past and intended future activities will be used against them.

The district court similarly erred in relying on *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017). *Beck* depended on *Clapper* and is distinguishable for the same reasons. The *Beck* plaintiffs brought suit against the government for allowing their data to be "misplaced." *Id.* at 267. However, this Court held the plaintiffs lacked standing because the alleged injury required the intervening conduct of the believed thieves, third parties who were not before the court. *Id.* at 275. Moreover, the *Beck* plaintiffs made no allegations whatsoever to establish their belief that the thieves (if they existed) would use the material they stole in the ways the plaintiffs feared, meaning the plaintiffs did not even allege facts to suggest they *could* be harmed. Indeed, the data had been stolen years earlier and "after extensive discovery" the plaintiffs had "uncovered no evidence" the information had "been accessed." *Id.* at 274-75. Here, in contrast, not only are the relevant actors all before the Court, but Plaintiffs allege they are prepared to conduct and have previously conducted the exact investigations the Anti-Sunshine Law targets, and further that, in the past, UNC-CH used the tools at its disposal to attempt to

cover up its misconduct, facts that reasonably generate Plaintiffs' fear here. J.A.19.[10]

Thus, while case law restricts pre-enforcement challenges where the causal connection between the law's passage and the plaintiff's fear is dependent on and broken by the intervening conduct of a third-party the plaintiff cannot plausibly allege, this case, where the challenged law targets Plaintiffs' conduct and empowers Defendants to seek the Anti-Sunshine Law's penalties against them, is entirely different. Of course, Plaintiffs need to carry out their investigations before they would face liability, but this is hardly speculative when Plaintiffs state they wish to do so and they have repeatedly done so in the past. Thus, even were the traditional First Amendment standing doctrine—that Plaintiffs only need to allege

[10] The additional authority cited by Defendants below does nothing to alter the analysis. *Golden v. Zwickler*, 394 U.S. 103, 109 (1969), concerned a pamphleteer's challenge to a law that would limit his ability to distribute literature about a congressman in the next election, when the congressman, who was not a defendant in the case, had not committed to seek reelection. In *Laird v. Tatum*, 408 U.S. 1, 13 (1972), the plaintiffs sought to enjoin intelligence gathering that was not targeted at the plaintiffs. *Charter Federal Savings Bank v. Office of Thrift Supervision*, 976 F.2d 203, 209 (4th Cir. 1992), dismissed a claim against a government agency that was *prohibited* from acting unless it was granted additional authority. *Kemler v. Poston*, 108 F. Supp. 2d 529, 538 (E.D. Va. 2000), addressed a circumstances where there was no law to "compel[plaintiffs] to do, or to refrain from doing, anything." Here, Defendants have the ability to proceed against Plaintiffs were Plaintiffs to engage in the investigation they have shown they can and would undertake.

the state passed a law regulating their desired conduct—not to apply in this case, Plaintiffs would still have standing.

E. In the alternative, Plaintiffs have standing because it is reasonable to conclude the Anti-Sunshine Law has prevented them from obtaining information on which they rely.

Separate and apart from its errors in analyzing Plaintiffs' standing based on the chill on Plaintiffs' speech, the district court also erroneously denied Plaintiffs standing on the basis that the Anti-Sunshine Law interferes with their access to information. There is "standing to assert a right to receive speech" for which a plaintiff only must allege that "there exists a speaker willing to convey the information to her" who has been constrained by the potential for the defendant to act under the challenged statute. *Stephens v. Cty. of Albemarle*, 524 F.3d 485, 492 (4th Cir. 2008).

Each Plaintiff alleges that it has relied on in the past and wishes to again rely on the information generated through undercover investigations like those of PETA and ALDF, which have been chilled by the Anti-Sunshine Law. *See*, *e.g.*, J.A.21-22, 27-33, 35-36. Further, GAP alleges that it regularly relies on information that all different types of whistleblowers provide to the public. J.A.31. Because the Anti-Sunshine Law was designed to keep this exact information from reaching the public, GAP has not only been denied information from PETA and ALDF, but from other whistleblowers, who likewise have been chilled by the Law.

J.A.31. Thus, Plaintiffs are being denied information that they would have received if Defendants did not have authority to enforce the Law. Plaintiffs have standing on this basis. *Stephens*, 524 F.3d at 492.

The district court concluded Plaintiffs lack standing because, to mount a pre-enforcement challenge, Plaintiffs should have taken additional steps towards violating the Anti-Sunshine Law. According to the district court, Plaintiffs need to demonstrate PETA or ALDF have obtained "particular information" the other Plaintiffs would have been provided absent the Anti-Sunshine Law, or point to some other "individual investigator" who has specific information he would provide Plaintiffs if the Law were lifted. J.A.132-33.

Again, the district court improperly raised the burden on Plaintiffs. "[A]s long as they can demonstrate that the [rule] is an obstacle to their attempt to obtain access" to information, plaintiffs have standing on the ground that they have been denied the ability to obtain information. *United States v. Wecht*, 484 F.3d 194, 202–03 (3d Cir. 2007). Courts have explained there is standing when plaintiffs allege people "were willing to talk at some point prior" to the government passing the challenged law, *FOCUS v. Allegheny Cty. Court of Common Pleas*, 75 F.3d 834, 839 (3d Cir. 1996), or where "[i]t is hard, in fact, to imagine that there are no willing speakers" who would speak with plaintiffs absent the challenged law, *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 607 (2d Cir. 1988). This

Court's decision in *Stephens* denied informational standing, but only because the plaintiff did not allege she "ever once was a recipient of information" *and* she "has not actively sought information." *Stephens*, 524 F.3d at 493. Like with other pre-enforcement standing doctrines, the informational standing doctrine recognizes that as soon as a law is on the books it can interfere with communications. As long as it is appropriate to believe the law could interfere with Plaintiffs' communications, that is sufficient for standing. Certainly such a potential exists here when Plaintiffs rely on the type of information that the Law seeks to prevent from becoming public.

Moreover, again, the district court improperly ignored the allegations in the Complaint. It did not discuss that PETA and ALDF allege they have specific investigations they wish to conduct, and, at least with UNC-CH, particular information warranting the investigation, indicating they would be able to generate the type of information on which the other Plaintiffs have relied in the past. J.A.19-20; *see also* J.A.24. It also did not address that GAP relies on all sorts of whistleblowers' disclosures, whether or not they are directed to GAP, meaning GAP just needs to sufficiently plead that a single whistleblower has been deterred by the Law in order to show it has been denied specific information on which it relies. *See* J.A.31. Deterring whistleblowers is the Anti-Sunshine Law's stated purpose. J.A.43-46. Accordingly, Plaintiffs' allegations establish a basis to

believe there is "particular information" they would have relied on, but have been denied because of the Law. Under the district court's own erroneous reasoning the Complaint is sufficient.

VIII. CONCLUSION.

Plaintiffs seek declaratory and injunctive relief to prevent the government from proceeding against them under a newly enacted law passed to penalize the Plaintiff "private-special interest organizations" from developing "exposé[s]" that inform the public about illegal and unethical conduct—exactly as Plaintiffs have repeatedly done in the past, but have declined to do in North Carolina since the Law's passage, despite Plaintiffs' evidence justifying such investigations. No more is required for the courts to entertain Plaintiffs' claims that the Anti-Sunshine Law violates their First Amendment rights. The district court's decision to the contrary relies on unique rules of its own creation that required it to ignore the allegations in the Complaint. The decision below also runs counter to controlling authority. The district court should be reversed and the case remanded for further proceedings.

IX. REQUEST FOR ORAL ARGUMENT.

Plaintiffs request oral argument. The decision below conflicts with the precedent of this Court and numerous other circuits. It also provides a roadmap by which states can coerce speech without being subject to challenge unless and until

a plaintiff places itself in harm's way and risks the statute's penalties. The district court's decision undermines the First Amendment.

August 4, 2017

Respectfully submitted,

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X. ADDENDUM OF STATUTORY TEXT.

N.C. Gen. Stat § 99A-2:

Recovery of damages for exceeding the scope of authorized access to property

(a) Any person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained. For the purposes of this section, "nonpublic areas" shall mean those areas not accessible to or not intended to be accessed by the general public.

(b) For the purposes of this section, an act that exceeds a person's authority to enter the nonpublic areas of another's premises is any of the following:

(1) An employee who enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer's data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer.

(2) An employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer.

(3) Knowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data.

(4) Conspiring in organized retail theft, as defined in Article 16A of Chapter 14 of the General Statutes.

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

(c) Any person who intentionally directs, assists, compensates, or induces another person to violate this section shall be jointly liable.

(d) A court may award to a party who prevails in an action brought pursuant to this section one or more of the following remedies:

(1) Equitable relief.

(2) Compensatory damages as otherwise allowed by State or federal law.

(3) Costs and fees, including reasonable attorneys' fees.

(4) Exemplary damages as otherwise allowed by State or federal law in the amount of five thousand dollars ($5,000) for each day, or portion thereof, that a defendant has acted in violation of subsection (a) of this section.

(e) Nothing in this section shall be construed to diminish the protections provided to employees under Article 21 of Chapter 95 or Article 14 of Chapter 126 of the General Statutes, nor may any party who is covered by these Articles be liable under this section.
(f) This section shall not apply to any governmental agency or law enforcement officer engaged in a lawful investigation of the premises or the owner or operator of the premises.
(g) Nothing in this section shall be construed to limit any other remedy available at common law or provided by the General Statutes.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the August 4, 2014, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

DATED this August 4, 2017.

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