No. 17-1669

In the
United States Court of Appeals
for the Fourth Circuit

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., et al.,

Plaintiffs-Appellants,

v.

JOSHUA STEIN, as Attorney General of North Carolina, et al.,

Defendants-Appellees.

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

BRIEF OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

I certify, pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, that no appellee is in any part a publicly held corporation, a publicly held entity, or a trade association, and that no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation.

Dated: September 26, 2017

/s/ Sripriya Narasimhan
Sripriya Narasimhan

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1. Was the district court right to conclude that activist groups lacked an injury in fact, when the injuries alleged by the groups depended on a long series of speculative contingencies?

2. Was the court right to reach the same conclusion when the groups claimed standing as information recipients, given that the groups' alleged injuries in this capacity depended on the same series of contingencies?

3. Was the court right to conclude that the groups' alleged injuries are not traceable to Chancellor Folt or Attorney General Stein?

INTRODUCTION

In 2015, the North Carolina General Assembly enacted a law (the Act) that gives employers a private cause of action against employees who gain access to nonpublic data or images and who use these data in a manner inconsistent with the employees' terms of employment.

Less than two weeks after the law became effective, eight animal-rights and food-safety advocacy organizations (the groups) filed the lawsuit at issue here. They have asserted First Amendment claims against the Attorney General of North Carolina (formerly Roy Cooper, now Josh Stein) and the Chancellor of the University of North Carolina-Chapel Hill (Carol Folt).

Three of the plaintiffs (collectively PETA) allege that because they fear that the Act will be enforced against them, they are refraining from conducting "undercover investigations" at state-government facilities. All eight of the plaintiffs (the groups) allege that the Act is stopping them from receiving and using information from undercover investigations.[1]

[1] The three plaintiffs who allege that they want to conduct undercover investigations are People for the Ethical Treatment of Animals, Animal Legal Defense Fund (ALDF), and Farm Sanctuary. For simplicity, this brief will refer to these three defendants collectively as PETA unless the context requires a more specific reference. In the few places where the context

The investigations that PETA allegedly wants to pursue involve recruiting investigators to seek employment at certain state-government facilities. If the investigators are hired, they will look for any perceived mistreatment of animals and try to document it. PETA alleges that this information would then be shared with the groups. PETA also alleges that it would make this information public as part of its advocacy efforts.

In this lawsuit, the groups assert that the Act injures them in two ways. PETA claims that it cannot conduct undercover investigations. The groups claim that they cannot receive information from undercover investigations and use that information in their activism.

As the district court correctly held, however, the groups lack standing on both of these theories.

First, PETA lacks standing to claim that any risk of enforcement of the Act will chill its investigations. To bring a pre-enforcement challenge to the constitutionality of a civil statute, a plaintiff must allege that she faces a certain or substantial risk of civil enforcement. A plaintiff cannot allege a

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requires a reference to People for the Ethical Treatment of Animals itself, the brief will say "PETA itself."

To refer collectively to all eight of the plaintiffs, the brief will use the phrase "the groups."

substantial risk of enforcement when multiple conditions would need to be satisfied before she would ever be able to violate the statute.

That is the case here. The complaint shows that PETA has not yet violated the Act; indeed, PETA has not even put itself in a position to violate the Act. To violate the Act, PETA would have to satisfy a long series of conditions:

- PETA would have to recruit willing investigators.
- It would then have to identify particular state facilities at which it wants to embed investigators.
- PETA's chosen investigators would then have to compete successfully for employment at the targeted facilities.
- Alleged mistreatment of animals would have to occur at the targeted state facilities.
- The investigators would need to find a way to document the alleged mistreatment.

As these points show, PETA's risk of violating the Act is based on a long series of contingencies, one or more of which might not be satisfied. An alleged injury that depends on this many contingencies fails the test for

standing that the U.S. Supreme Court established just four years ago in *Clapper v. Amnesty International USA*. The district court was right to apply *Clapper* and to dismiss PETA's claims for lack of standing.

Second, the district court was also right to dismiss all eight plaintiffs' claims that the Act limits their ability to receive information from undercover investigations and to use that information in their activism. To allege standing as a recipient of information, a plaintiff must allege that he has identified a particular speaker who is willing to convey particular information to him.

The complaint here fails this test in more than one way:

- The groups have not identified a particular willing speaker. PETA, after all, has not yet embedded any investigators at a state facility. With no investigators in place, there currently is no particular speaker who wants to convey information to the groups.
- In addition, because no investigation has been conducted, the groups have not alleged that there is any particular information to convey.

In the absence of both of these points, the groups lack standing on an "information recipient" theory.

Finally, even if the groups had alleged a substantial risk that the Act would be enforced against them, they would still lack standing. They would lack it for an independent reason: the injuries alleged by the groups are not traceable to either of the two defendants in this case.

To have standing to sue, plaintiffs must show that their injuries are legitimately traceable to the defendants, not to third parties who are not before the court. In this case, where the groups are challenging the constitutionality of the Act, the groups must show that the defendants they have sued—Chancellor Folt and Attorney General Stein—have the authority to enforce the Act against the groups. Here, the complaint does not make that showing.

Chancellor Folt, for example, lacks the authority to enforce the Act under the circumstances here. By statute, the Board of Governors of the University of North Carolina has the exclusive authority to sue on behalf of UNC institutions. The Board of Governors has delegated that authority to the Chancellor, but the delegation covers only relatively minor cases. As the

current litigation shows, any lawsuit that seeks to enforce the Act against PETA would not qualify as a minor lawsuit.

The Act does not provide for enforcement by Attorney General Stein either. Instead, the Act simply creates a private right of action—a right of action that is limited to the owners or operators of targeted premises. The Attorney General is not the owner or occupier of any premises that PETA claims it will target.

In sum, the groups lack standing in multiple respects. The defendants respectfully request that the Court affirm the district court's order that dismissed the groups' lawsuit.

STATEMENT OF FACTS

A. The North Carolina General Assembly Enacts the North Carolina Property Protection Act.

In 2015, the North Carolina General Assembly enacted the North Carolina Property Protection Act. Act of May 19, 2015, ch. 50, § 1, 2015 N.C. Sess. Laws 113, 113-14 (codified at N.C. Gen. Stat. § 99A-2 (2015)). The Act creates a right of action against an employee who accesses nonpublic areas of an employer's facility and who, in violation of the employee's duty of loyalty, captures or removes data or records images or sound. N.C. Gen. Stat.

§§ 99A-2(a), (b)(1), (2). In addition, the Act creates a cause of action against anyone who installs a camera or electronic-surveillance device on an employer's premises or who otherwise substantially interferes with the ownership of the property. *Id.* §§ 99A-2(b)(3), (5).

The Act also creates civil liability for anyone who intentionally directs, assists, pays, or induces an employee to violate the statute. *Id.* § 99A-2(c).

The right of action under the Act extends only to a limited type of plaintiff: "the owner or operator of the premises" targeted by a sham employee. *Id.* § 99A-2(a). An owner or operator may sue for equitable relief, compensatory damages, attorneys' fees and costs, and exemplary damages of up to $5000 per day of violation. *Id.* § 99A-2(d).

B. The Groups Have, in the Past, Conducted Investigations.

The plaintiffs here (the groups) are eight animal-rights and food-safety advocacy organizations. They allege that their advocacy efforts depend, in part, on what they call undercover investigations. J.A. 16.

As noted above, the groups fall into two categories. All eight plaintiffs allege that they want to receive and use information gathered in undercover investigations. J.A. 16-37. A subset of the groups (collectively PETA) allege

that they want to conduct these investigations. J.A. 17-20, 23-24, 26-28; *see supra* note 1 (describing the party names in this brief).

In 2001, PETA itself engaged investigators to uncover alleged mistreatment of animals at some of UNC-Chapel Hill's facilities. J.A. 19. After receiving information from these investigators, PETA itself publicized the investigators' findings. J.A. 17-20.

In this lawsuit, PETA itself alleges that it is aware of similar mistreatment of animals at UNC-Chapel Hill laboratories. J.A. 19. It goes on to allege that because it fears liability under the Act, it has not yet hired investigators to infiltrate these facilities. J.A. 20-21.

ALDF alleges that it has, in the past, conducted more than a dozen investigations in North Carolina, but never at a state-government facility. J.A. 23. ALDF claims, however, that it has now recruited investigators who are ready to conduct investigations in North Carolina. J.A. 24. It also alleges that it has identified state facilities where it would like to conduct investigations. J.A. 24. ALDF claims that its investigators have not yet sought employment at these facilities because ALDF fears liability under the Act. J.A. 24-25.

Farm Sanctuary has, in the past, conducted animal investigations at farms. J.A. 27. Farm Sanctuary does not allege, however, that it has ever conducted an investigation at a state facility in North Carolina. Likewise, Farm Sanctuary does not allege that it has done anything to identify investigators to pursue employment at any state facility in North Carolina.

The groups allege that they at least partially rely on these investigations for their advocacy efforts. J.A. 16-37. They claim that they fear liability under the Act for seeking information gathered in these investigations. J.A. 16-37.

C. The Groups Sue the Attorney General and the Chancellor.

Soon after the Act became effective, the groups sued Attorney General Roy Cooper[2] and Chancellor Carol Folt in district court. The groups claimed that the Act violates the First Amendment's Free Speech Clause, the Fourteenth Amendment's Equal Protection and Due Process Clauses, and several corresponding provisions of the North Carolina Constitution. J.A. 11-12.

[2] Under Rule 25(d) of the Federal Rules of Appellate Procedure, the current Attorney General, Josh Stein, has replaced Attorney General Cooper in this lawsuit.

The defendants moved to dismiss the groups' complaint. They argued that the groups lacked standing to sue, that the Eleventh Amendment barred the lawsuit, and that the groups failed to state a claim.

D. The District Court Holds That the Groups Lack Standing.

The district court dismissed the groups' lawsuit for lack of standing. J.A. 99. The court did not reach the defendants' other arguments for dismissal. J.A. 104-05.

Regarding PETA's fear of liability, the district court held that PETA has not alleged enough facts to show that it faces an imminent risk of injury. J.A. 122-24. Instead, the court held that PETA's alleged risk of injury is too speculative to confer standing. J.A. 123.

Applying *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), the district court held that PETA has failed to show a substantial risk that it will face liability under the Act. J.A. 122. Specifically, PETA has not alleged that it is currently ready to violate the Act. J.A. 123. Instead, PETA simply alleges that it might violate the Act someday. J.A. 124.

To support that allegation, moreover, PETA is relying on a "string of events that are speculative, attenuated, and dependent in part upon the decisions of independent" people. J.A. 123. For PETA to face a substantial

risk of liability under the Act, PETA would have to wait for a job opening to be posted, find a candidate who is willing and qualified to apply for that position, and, if the candidate somehow gets the job, induce the sham employee to engage in conduct that violates the Act. J.A. 122-23. The court noted that PETA has not yet taken any of these predicate actions. J.A. 123.

Because PETA's fear of liability under the Act depends on a long chain of conditions—conditions that might never be satisfied—PETA does not have standing. J.A. 128.

The district court also held that the groups lack standing to claim that the Act is preventing them from receiving information. "Information recipient" standing requires a plaintiff to identify a particular speaker who is willing to give the desired information to the plaintiff. J.A. 128-29. Here, as the court noted, the groups have not identified any particular speaker of this kind. Indeed, they have not alleged that the information they seek exists at all. J.A. 130-31. Thus, the groups' bid for "information recipient" standing fails.

Finally, the district court held that the groups have not alleged any credible threat that the defendants will enforce the Act against them. J.A. 124. As the court noted, the groups have not alleged that either defendant

has sued or threatened to sue their organizations. J.A. 125. When, as here, a plaintiff allegedly fears civil liability under a statute, the plaintiff must allege actual lawsuits or threats of enforcement by the defendants. J.A. 125-26. Because there are no allegations of that kind here, the groups lack standing to sue Chancellor Folt and Attorney General Stein. J.A. 126.

SUMMARY OF ARGUMENT

For three reasons, the district court was right to hold that the groups lack standing in this case.

First, PETA lacks standing because its alleged risk of injury depends on a speculative chain of conditions—indeed, conditions that involve the conduct of third parties.

PETA claims to fear that the Act will be enforced against it. That enforcement could only occur, however, if PETA could violate the Act.

That is not the case here. PETA is several steps short of being ready to violate the Act. To violate the Act in a way that would risk claims by North Carolina state officials, PETA would need to:

- hire investigators,
- identify openings at state facilities,

- get its investigators to compete successfully for jobs at state facilities,
- find conditions that allegedly mistreat animals, and, finally,
- induce the investigators to document these conditions in a way that violates the Act.

This chain of conditions is not just unduly long; it depends on conduct by separate actors. For example, PETA must find investigators who are willing to become sham employees at government facilities. Even more improbably, hiring managers for government agencies would have to choose these sham applicants over all other applicants.

Because PETA's fear of enforcement of the Act depends on so many conditions, and because many of those conditions turn on the decisions of independent actors, PETA's fear of injury is too attenuated to support standing.

Second, the groups' claim that they have standing as information recipients likewise fails. To have standing on this theory, a plaintiff must identify a particular speaker who is willing to convey particular information to her.

Here, the groups have not alleged any facts that identify a particular willing speaker or, indeed, any particular information that any speaker is willing to disclose to the groups. As noted above, for PETA to get to the point where an investigator could report any mistreatment of animals, PETA would have to satisfy a long series of conditions that are beyond its control. Only in the unlikely event that PETA satisfied all those conditions could there be a particular speaker (a specific investigator) who would be willing and able to convey specific information to the groups. Because the groups have not alleged the arrival of that unlikely day, the groups lack standing to sue based on an inability to receive speech.

Third, the groups lack standing because their alleged risk of injury is not traceable to the defendants. In a case like this one, traceability requires that the named defendants have the authority to enforce the challenged statute. Here, neither Chancellor Folt nor Attorney General Stein has the authority to enforce the Act.

Under the circumstances here, Chancellor Folt does not have the authority to sue under the Act on behalf of UNC-Chapel Hill. By statute, only the Board of Governors of UNC has the authority to file lawsuits on behalf of UNC institutions. J.A. 80.

The Board of Governors has delegated some limited litigating authority to Chancellor Folt, but a lawsuit against these groups under the Act would fall outside that limited authority. The delegation to the Chancellor covers only "routine" lawsuits—lawsuits with less than $25,000 at stake.

Because of the $5000-per-day damages available under the Act, any lawsuit against the groups would almost surely fall outside the monetary definition of "routine." Indeed, given the history of the current litigation, Chancellor Folt and the Board of Governors would almost surely treat any affirmative lawsuit against these groups as utterly non-routine.

Attorney General Stein, likewise, is not an enforcer of the Act. The Act does not give a right of action to the Attorney General; instead, it allows lawsuits by owners and operators of targeted premises. PETA does not allege that it is targeting the North Carolina Department of Justice for any animal-welfare surveillance, so Attorney General Stein falls outside the owner/operator category.

If PETA did target a state agency for surveillance, and if PETA somehow overcame the above conditions and managed to violate the Act, a state agency might sue PETA under the Act. But even if that unlikely event occurred, the plaintiff under the Act would not be Attorney General Stein.

The plaintiff would be the owner or operator of the targeted premises: the North Carolina Department of Administration or the targeted state agency itself.

Thus, even in the unlikely event that the groups suffered any injury from the Act, that injury would not be traceable to Chancellor Folt or Attorney General Stein.

For all of these reasons, the district court was right that the groups in this case lack Article III standing.

STANDARD OF REVIEW

This Court applies de novo review to an order that dismisses a complaint for lack of standing. *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009).

ARGUMENT

To have Article III standing here, the groups must establish all of the following points: (1) they have suffered an injury in fact, (2) their injury is fairly traceable to the challenged acts of the defendants, and (3) it is likely, as opposed to speculative, that the injury would be redressed by a favorable

decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

The groups accept these requirements in principle. They argue, however, that because their lawsuit involves a First Amendment challenge, they are largely exempt from these requirements. Br. 49. They argue that they can establish standing by showing only (1) that they want to violate the Act and (2) that they have not done so because they fear government action. Br. 29.

As shown below, these arguments fail in more than one way.

I. The District Court Was Right to Conclude That the Groups' Fear of Injury Was Too Speculative to Confer Standing.

The groups misconstrue how the elements of standing apply in this case.

At a high level of generality, it is true that courts apply standing doctrine a bit less stringently in First Amendment cases. *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). To avoid putting people to a hard choice between sacrificing their First Amendment rights and avoiding sanctions, the Supreme Court has allowed some plaintiffs to raise First Amendment

claims without first fully violating the statutes they are challenging. *See, e.g.*, *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984).

As section A below discusses, however, pre-enforcement First Amendment challenges are not exempt from all aspects of the standing inquiry. The groups must still allege an injury that is actual or imminent, not conjectural or hypothetical. *Clapper*, 568 U.S. at 409.

As section B shows, the district court here was right to hold that PETA fails these requirements for standing.

Finally, section C explains how PETA's arguments misapply the Supreme Court's recent decision in *Clapper*.

A. A Mere Intention to Engage in Unlawful Conduct Does Not Establish Standing.

To have Article III standing, a plaintiff must allege an injury that is, in terms of probability, "certainly impending." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). The injury must also be imminent. *Clapper*, 568 U.S. at 409.

Although imminence is "concededly an elastic concept, it cannot be stretched beyond its purpose." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992). Allegations of a merely possible future injury do not create standing. *Whitmore*, 495 U.S. at 158.

Even in the First Amendment context, plaintiffs must show that their risk of future injury is certain, or at least substantial. *Susan B. Anthony List v. Dreihaus*, 134 S. Ct. 2334, 2341 (2014). When a plaintiff relies on an "attenuated chain of inferences necessary to find harm," the plaintiff fails even the "substantial risk" standard. *Clapper*, 568 U.S. at 414 n.5.

The Supreme Court's decision in *Clapper*—a First Amendment case—illustrates these principles. In *Clapper*, the Second Circuit held that the plaintiffs had standing to bring a pre-enforcement challenge to a statute as long as the plaintiffs could show a mere "objectively reasonable likelihood" that they would violate that statute. *Id.* at 410. The Supreme Court specifically rejected that "objectively reasonable likelihood" test. The Court called that test "inconsistent with our requirement that 'threatened injury must be certainly impending.'" *Id.* (quoting *Whitmore*, 495 U.S. at 158).

By rejecting the "objectively reasonable likelihood" test in a First Amendment case, the Court showed that the test for risk of injury in First Amendment cases is the same as in other cases. Indeed, the Court cited decisions, in and outside the First Amendment context, that require plaintiffs to show "certainly impending" injuries. *Id.* at 409 (citing *Monsanto*

Co. v. Geertson Seed Farms, 561 U.S. 139, 153 (2010); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

The *Clapper* Court made another important point as well. The Court held that plaintiffs lack standing when their claimed injury is "premised on a speculative chain of possibilities." *Id.* at 410 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)).

The Court's analysis of the particular chain of possibilities in *Clapper* is likewise important. *Clapper* was a pre-enforcement First Amendment challenge to the Foreign Intelligence Surveillance Act. *Clapper*, 568 U.S. at 405. That statute authorizes the federal government to seek a special court's permission to electronically capture communications of non-U.S. persons who are located abroad. *Id.* at 404-05.

The plaintiffs alleged that their communications might be subject to government surveillance because their work required them to engage in sensitive and privileged communications with foreign clients and colleagues. *Id.* at 406. The possibility of government surveillance, they claimed, compromised their ability to locate witnesses and to communicate confidentially with their clients and colleagues. *Id.* Indeed, the plaintiffs alleged that because they wanted to maintain confidentiality, they had

completely stopped communicating with at least some of these people. *Id.* at 406-07.

These allegations fell short of an injury in fact, the Court decided, because the plaintiffs' fear that their communications would be monitored was not imminent enough. *Id.* at 422. The Court noted that for the plaintiffs' claimed injuries to occur, all of the following things would need to happen:

- The government would have to decide to target the communications of the plaintiffs' clients and partners.
- The government would then have to invoke its statutory authority to intercept those communications.
- The judges on the special court would have to grant permission for surveillance.
- The government would then have to actually intercept communications between the plaintiffs and the overseas targets.

Id. at 410.

Because the plaintiffs did not allege that this long chain of events would occur, the Court held that the plaintiffs' theory of injury rested on a "speculative chain of possibilities." *Id.* at 414.

The *Clapper* Court also stressed that the likelihood of satisfying the above conditions did not depend on the plaintiffs alone; it depended on the conduct of independent actors. *Id.* at 413-14. This fact, the Court held, makes it more difficult for a plaintiff to show in advance that she will incur an injury. *Id.* A plaintiff cannot show that she faces a substantial risk of harm when she cannot control or predict the actions of independent actors in the injurious chain of events. *Id.*; *accord Lujan*, 504 U.S. at 562. Because of the Court's longstanding "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors," the Court held that the plaintiffs lacked an injury in fact. *Clapper*, 568 U.S. at 414.

Clapper reinforced a point that the Court had made before: even in a First Amendment case, the plaintiff's risk of injury must be at least substantial. *Id.* at 414 n.5; *see, e.g.*, *Babbitt*, 442 U.S. at 298-99. *Clapper*, however, also makes a new point as well: a plaintiff's risk of injury is not substantial when that injury depends on a series of conditions outside the plaintiff's control. *Clapper*, 568 U.S. at 413-14.

Since the Supreme Court decided *Clapper*, several courts of appeals have applied the Court's warning against relying on speculative chains of

possibilities. These courts have denied standing to plaintiffs who have sued based on uncertain risks of future injury.

In *Barber v. Bryant*, for example, the Fifth Circuit held that a plaintiff lacks standing to challenge a statute when he is not yet fully ready to violate the statute. 860 F.3d 345, 357 (5th Cir. 2017). The court considered a challenge to a Mississippi statute that allowed state officials to refuse to recognize same-sex marriage. *Id.* at 351. One of the plaintiffs alleged that he intended to marry a member of the same sex and was therefore harmed by the statute. *Id.* at 357. He did not, however, claim that he was prepared to marry a member of the same sex at that time. *Id.* He also did not allege that he intended to marry in Mississippi. *Id.* The court held that a lack of any concrete plan to marry a same-sex partner in Mississippi made any claim of injury too speculative to create standing. *Id.*

In the short time since *Clapper*, other courts of appeals have applied similar reasoning. *See, e.g.*, *Crawford v. U.S. Dep't of the Treasury*, No. 16-3539, 2017 U.S. App. LEXIS 15648, at *29-30 (6th Cir. Aug. 18, 2017) (rejecting standing in the absence of evidence that a plaintiff would take a specific course of action that would subject him to injury); *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 918 (D.C. Cir. 2015) (finding an alleged injury from

regulations too speculative when the plaintiffs did not allege that that there was a substantial risk the regulations would cause the injury alleged).

As all of these decisions show, when a plaintiff's claim rests on a speculative chain of possibilities—even in the First Amendment context—the plaintiff has not shown that she will suffer an imminent injury. In the absence of that showing, the plaintiff lacks standing.

B. The Risk That PETA Will Be Sued Under the Act Is Not Imminent.

Here, the district court concluded that PETA has not alleged the substantial risk of injury that standing would require. When the court reached that conclusion, it applied the law correctly.

PETA alleges that the threat that someone will sue it under the Act has chilled PETA's speech. J.A. 16-20, 23-28. It has not shown, however, that there is any basis for a chill. Specifically, PETA has not shown that it faces a certain or substantial risk of a lawsuit. At best for PETA, the risk of a lawsuit depends on a long chain of events, many of which involve independent actors. In short, PETA's theory rests on the same type of speculative chain of possibilities that the Supreme Court and other courts have rejected. *See supra* pp. 20-25 (discussing these decisions).

PETA itself, for example, alleges that it would like to conduct an investigation at an unnamed state facility. J.A. 19-20. PETA itself has not alleged, however:

- that it has recruited investigators,
- that it has identified any open positions at any state facility,
- that the state facility has interviewed any secret investigators that PETA itself has recruited,
- that the state facility has hired any of these investigators, or
- that the investigators have observed any conditions that would lead them to violate the Act.

Before PETA itself could be sued under the Act, every one of the above events would need to occur.

The claim that PETA itself would eventually satisfy this long series of conditions is exactly the type of speculative chain of possibilities that the Supreme Court rejected in *Clapper*. Here, just as in *Clapper*, a large number of independent events would have to occur before PETA itself could be sued, and thus injured. The need for all those events to occur puts PETA itself too many steps away from its feared injury. *See Clapper*, 568 U.S. at 414.

Another flaw noted in *Clapper* applies here as well. In *Clapper*, the Court also stressed that the plaintiffs' theory of standing depended on the actions of independent actors not before the Court—namely, the special court and the foreign clients and colleagues. *Id.* at 414. Here, likewise, the theory of injury for PETA itself depends on the actions of independent actors: individuals it recruits, as well as the people who make personnel decisions at any targeted state facilities. Thus, for PETA itself, the arguments for standing suffer from the same infirmities that afflicted the plaintiffs' theory in *Clapper*.

Farm Sanctuary is in the same position as PETA itself. It, too, has not yet recruited investigators or identified open positions. Indeed, Farm Sanctuary, unlike PETA itself, does not allege that it has *ever* conducted an investigation at a state facility in North Carolina. *Compare* J.A. 19 (alleging that PETA itself has conducted investigations at UNC-Chapel Hill), *with* J.A. 26-27 (containing no allegations that Farm Sanctuary has conducted investigations in any state facility). Thus, Farm Sanctuary is too many steps removed from its feared injury.

ALDF has progressed farther down the speculative chain of possibilities than the other PETA plaintiffs have, but still not far enough to

support standing. ALDF alleges that it has recruited some investigators and has used resources to recruit more.[3] J.A. 24. But ALDF has not alleged that its investigators have interviewed for open positions, that any of them have secured employment at any state facility, or that they have observed any conditions that would make ALDF want to violate the Act. J.A. 24-25.

In addition, ALDF's risk of harm depends on the actions of at least one set of independent actors: hiring personnel at state facilities. There is no guarantee that any ALDF investigator who applies for a job at a state facility will get the job. That decision lies in the hands of the hiring personnel. Only if an investigator is hired can the investigator even observe conditions within the facility, let alone violate the Act. Because ALDF's risk of harm depends on the decisions of an independent actor who is a key link in the chain of possibilities, ALDF has not alleged a substantial risk of harm.

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[3] It is unclear whether ALDF has even identified any openings for which its investigators could apply. ALDF alleges that it has "collected employment applications at some" facilities. J.A. 24 ¶ 30. But it does not say that those facilities are state facilities. In any event, even if ALDF had identified any openings at state facilities, the existence of several other contingencies still makes the risk of injury too speculative to confer standing on ALDF.

For all of these reasons, the district court was right to reject these plaintiffs' theories of standing.

C. *Clapper* Governs This Case.

As shown above, *Clapper* governs standing in cases like this one: pre-enforcement challenges to the constitutionality of a statute. Trying to avoid *Clapper*, PETA argues that *Clapper* is "wholly unlike the standard First Amendment challenge here." Br. 52; Brief of Professors Alan Chen et al. at 12-13, Doc. 23-1 [hereinafter Professors' Amicus Br.]. PETA's attempts to minimize *Clapper* fail.

For the most part, PETA attacks *Clapper* by citing pre-*Clapper* decisions. *See* Br. 26-31. These decisions, however, do not account for the *Clapper* Court's holding that a First Amendment plaintiff must show a substantial risk of harm, unburdened with contingencies.

A post-*Clapper* decision, in contrast, shows the right analysis.

One year after *Clapper*, the First Circuit relied on *Clapper* to strengthen the First Circuit's test for standing. In *Blum v. Holder*, the court held that the plaintiffs' fear of prosecution was too attenuated, under *Clapper*, to create a substantial risk of injury. 744 F.3d 790, 798-99 (1st Cir. 2014).

In *Blum*, individual animal-rights activists challenged a federal statute that criminalized "force, violence, and threats involving animal enterprises." *Id.* at 792 (quoting 18 U.S.C. § 43). The activists claimed that the statute chilled them from investigating, documenting, or filming conditions at farms and restaurants, then publicizing those conditions. *Id.* at 793.

Applying *Clapper*, the court held that the plaintiffs lacked standing to sue. Before *Clapper*, the First Circuit had allowed pre-enforcement challenges under the First Amendment as long as the plaintiffs showed an "objectively reasonable" fear of prosecution. *Id.* at 798 (citing earlier First Circuit decisions). The court held that *Clapper* expressly rejected this looser standard. *Id*. at 797-98. After *Clapper*, the First Circuit realized, a plaintiff's asserted injury must be "certainly impending" or must present a "substantial risk." *Id*. at 797-99.

As *Blum* illustrates, pre-*Clapper* decisions need careful appraisal in light of the Supreme Court's new teachings. Here, PETA's arguments under pre-*Clapper* decisions miss the mark.

PETA argues that in a "standard" pre-enforcement challenge, a plaintiff must only: (1) allege an intention to engage in the proscribed speech and (2) face a credible threat of prosecution. Br. 29-30 (citing *Va. Soc'y for Human*

Life, Inc. v. Fed. Election Comm'n, 263 F.3d 379, 388-89 (4th Cir. 2001)). PETA argues that it satisfies this test because it has alleged that it intends to violate the Act. Br. 32-33.

PETA's discussion of the law, however, is unduly selective. PETA omits one of the cases that the *Clapper* Court relied on to formulate its test: *Babbitt v. United Farm Workers National Union*. *See Clapper*, 568 U.S. at 409 (citing *Babbitt,* 442 U.S. at 298). The Court in *Babbitt* required that a plaintiff allege more than a mere intent to violate a statute. *Babbitt*, 442 U.S. at 298-99. Instead, standing requires a "*realistic* danger of sustaining a *direct* injury as a result of the statute's operation or enforcement." *Id.* at 298 (emphasis added).

Indeed, even the pre-*Clapper* decisions cited by PETA demanded a realistic danger that a statutory violation would lead to enforcement by the state. *See, e.g.*, *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088-89 (10th Cir. 2006); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13-14 (1st Cir. 1996).

Unlike PETA, the plaintiffs in the cited cases faced a realistic danger of violating a statute. In those cases, the plaintiffs, to get into a position to violate the statutes at issue, were not relying on any conduct of independent

actors. Instead, the danger of state enforcement depended solely on the plaintiffs' own actions.

For example, in *North Carolina Right to Life, Inc. v. Bartlett*, this Court held that Right to Life had standing because it would have violated a campaign finance law if it had not refrained from distributing voter guides. 168 F.3d 705, 710 (4th Cir. 1999). After new campaign finance laws were enacted, the Board of Elections told Right to Life that if it continued its practice of distributing voter guides, it would violate the new laws. *Id.* Fearing liability, Right to Life filed a pre-enforcement challenge. This Court held that Right to Life had standing to sue. *Id.* at 711.

In that case, however, the risk that Right to Life would violate the challenged statute did not depend on any contingencies other than its own *willingness* to distribute voter guides. No contingencies stood in the way; instead, Right to Life was immediately ready, willing, and able to distribute the guides. *See id.* at 710. That immediate readiness and lack of contingencies is what makes *North Carolina Right to Life* and similar decisions different from this case. *See supra* pp. 25-29.

Other cases that PETA cites likewise feature plaintiffs whose risk of injury stemmed directly from unilateral self-censorship:

- In *Cooksey v. Futrell*, the plaintiff's injury stemmed only from the fact that he altered his own website. *See* 721 F.3d at 232.
- In *Virginia Society for Human Life, Inc. v. Federal Election Commission*, the plaintiff likewise suppressed its own speech: It planned to distribute voter guides, but refrained from distributing them for fear of violating regulations. *See* 263 F.3d at 381, 389.
- Finally, in *National Organization for Marriage v. McKee*, the plaintiff created templates of advertisements, but refrained from posting them. 649 F.3d 34, 49 (1st Cir. 2011).

In all of these cases, unlike this one, the plaintiffs' injuries were fully within their control. They did not depend on any events outside the plaintiffs' control or on any actors beyond the plaintiffs themselves.

Because of this factual distinction, none of these decisions conflicts openly with *Clapper*. Instead, these decisions show only that courts have allowed standing when a plaintiff can show that the only contingency between her and a statutory violation is her own willingness to commit the violation.

These cases, in contrast, are silent on the new and reinforced requirements in *Clapper*: the requirements that a plaintiff show (1) that she faces a certain or substantial risk of violating a challenged statute and (2) that the risk does not depend on any intervening actors or events. *See Clapper*, 568 U.S. at 410, 414. Those are the requirements that this case fails.

Finally, of course, even if there were any tension between the cited cases and *Clapper*, the Supreme Court's 2013 teachings in *Clapper* would control here. *See, e.g.*, *Blum*, 744 F.3d at 797-98 (illustrating this point).

For all of these reasons, the district court was right when it applied *Clapper* and held that PETA lacks standing.

II. The District Court Was Right to Deny Standing for the Groups That Claimed Standing Based on Their Ability to Receive Speech.

In a last-ditch effort, the groups argue that they have standing on the basis that the Act infringes their right to *receive* the speech of others. Br. 54.

As the district court correctly held, however, the groups lack standing to pursue this claim as well. *See* J.A. 128-33. The groups' claim that the Act interferes with their right to receive speech fails for the same reason that defeated the claims of PETA: the claim depends on too many speculative contingencies.

It is true that "the Constitution protects the right to receive information and ideas" from a willing speaker. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

This right, however, depends on the existence of a known speaker who is ready and willing to convey information and ideas to the plaintiff. *See, e.g.*, *Stephens v. Cty. of Albemarle*, 524 F.3d 485, 492 (4th Cir. 2008).

In *Stephens*, for example, this Court held that even though the plaintiff could identify two willing speakers, she did not have standing, because she could not prove that the speakers were willing to convey information directly to her. *Id.*

As this Court has likewise held, when a plaintiff cannot identify a *particular* willing speaker, she does not have standing to sue. *ACLU v. Holder*, 673 F.3d 245, 255 (4th Cir. 2011). In *ACLU*, the plaintiffs alleged that, if not for the sealing of qui tam complaints, qui tam relators would discuss their qui tam complaints with the plaintiffs. *Id.* Despite this allegation, the plaintiffs still lacked standing: they could not identify any *particular* qui tam relator who, but for the sealing provisions, was willing to speak to the plaintiffs. *Id.* The plaintiffs' claim failed, in short, because they did not show a direct connection between a particular willing speaker and themselves.

Those requirements defeat the groups' "receipt of speech" theory here as well. Here, as in the above cases, the groups have not alleged that a particular speaker is ready to convey information to them. Instead, their claim suffers from two independent and fatal flaws:

1. No investigator has yet been hired at a state facility, so there is no particular, ready speaker. *See* J.A. 17-20; 23-24; 26-28.
2. No investigation has occurred yet, so there is no information to convey. *See* J.A. 17-20; 23-24; 26-28.

Thus, the groups' "receipt of speech" theory fails on two independent grounds.

To try to sidestep these problems, the groups argue that, almost 15 years ago, there once were speakers who were willing to convey similar information to them. Br. 54; *see* J.A. 17-20. On this basis, they argue that they should "be able to generate the type of information on which the other Plaintiffs have relied in the past." Br. 56.

Those references to past successes, however, cannot show the *current* readiness that the organizations lack. This Court's decisions require that, today, particular speakers must be willing to convey particular information to the groups. *See ACLU*, 673 F.3d at 255; *Stephens*, 524 F.3d at 492. Here,

the groups have not alleged any current basis for predicting that they can overcome the many obstacles that they would face before they could receive information today.

Because the groups have not alleged the existence of a particular willing speaker who is willing to convey particular information to them, they lack standing under a receipt-of-speech theory.

III. Any Risk of Injury Is Not Fairly Traceable to Chancellor Folt or Attorney General Stein.

Finally, even if the groups had alleged an impending injury, they would still lack standing for an independent reason: any injury that the groups allege is not traceable to either defendant.

To have standing, a plaintiff must show that the injury it complains of is traceable to an action by the defendant, not traceable to independent actions by a third party. *Friends of the Earth*, 528 U.S. at 180-81; *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

In a pre-enforcement challenge to the constitutionality of a statute, when a plaintiff has not yet experienced an injury, she must show that the defendant is the government official charged with enforcing the challenged

statute. *Bronson v. Swensen*, 500 F.3d 1099, 1109-10 (10th Cir. 2007); *New Hampshire Right to Life*, 99 F.3d at 13.

Here, the groups are suing based on an alleged fear that they will be sued for violating the Act. They also claim that the defendants are the persons who will sue them. Br. 39.

The groups' claims fail. Even if the groups violate the Act, neither Chancellor Folt nor Attorney General Stein has the statutory authority to sue under the Act. Therefore, neither defendant is a proper party to this pre-enforcement challenge.

A. Chancellor Folt Does Not Have Authority to Enforce the Act.

The groups allege that they hope to infiltrate laboratories at UNC-Chapel Hill. J.A. 19-20. They imply that if they succeed, UNC will sue them under the Act. J.A. 20. But even if the groups were able to violate the Act on UNC premises, Chancellor Folt would not have the authority to sue the groups over such a violation.

Chancellors are the "administrative and executive head[s]" of UNC institutions. N.C. Gen. Stat. § 116-34(a). A chancellor's authority is delegated to her by the Board of Governors of UNC, through the President of UNC. *See*

id. (The chancellor "shall exercise complete executive authority . . . subject to the direction of the President. [She] shall be responsible for carrying out policies of the Board of Governors and the board of trustees."); *id.* § 116-11(13) ("The Board may delegate any part of its authority . . . to the board of trustees or, through the President, to the chancellor of the institution . . . .").

As these statutes show, "only the Board of Governors [of UNC] is capable in law to sue and be sued." *Bd. of Governors of Univ. of N.C. v. U.S. Dep't of Labor*, 917 F.2d 812, 816 (4th Cir. 1990). Unless the Board of Governors has specifically given a chancellor the authority to sue, a chancellor may not file a lawsuit on behalf of a UNC institution. As a policy manual in the record states, a "constituent institution [of UNC] has no independent authority to initiate or settle lawsuits in its own name." J.A. 80.

It is true that the Board of Governors has delegated some litigating authority to individual UNC institutions. Br. 39. However, this delegated authority is limited to lawsuits that "do not require the attention of the Board of Governors"—that is, lawsuits with stakes under $25,000. J.A. 80. In other cases, a chancellor may request permission to sue, but she may not sue in those cases without the approval of the Committee on University Governance. J.A. 80.

Under these principles, Chancellor Folt has independent authority to sue only in a dispute that has stakes under $25,000 and that is otherwise routine.

The lawsuit that the groups hypothesize here, a lawsuit under the Act, would fall outside that authority. The groups themselves stress that the Act allows exemplary damages of $5000 for each day of a violation. J.A. 43, 86; N.C. Gen. Stat. § 99A-2(d); *see also* Br. 3 ("[I]f [PETA] 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 . . . ."). Indeed, they blame any chill on the prospect of such an award. *See* J.A. 86 ("The fear of being fined. That's what prevents us.").

A hypothetical lawsuit under the Act—unlikely as it is—would almost surely involve stakes higher than $25,000. The groups allege that their earlier investigations have occurred over months or years. J.A. 19, 25. Based on this allegation, the groups are likely to violate the Act for longer than five days. Thus, they could face time-based damages that exceed $25,000. A lawsuit for that amount would fall outside Chancellor Folt's delegated authority to file routine lawsuits.

Finally, even if any lawsuit under the Act fell short of $25,000, such a lawsuit would still be one that may require the attention of the Board of Governors. Here, history teaches that any lawsuit under the Act would face First Amendment defenses that parallel the claims asserted here. Given that likelihood, even if Chancellor Folt had nominal authority to sue the groups under the Act, the Board of Governors would almost surely become involved in any decision to sue under the Act.

In sum, Chancellor Folt does not have authority to enforce the Act. Thus, any injury is not traceable to Chancellor Folt.

B. Attorney General Stein Is Not an Enforcer of the Act.

The groups also argue that Attorney General Stein enforces the Act. J.A. 37. For several reasons, this argument fails.

First, the Act itself does not even mention the Attorney General. *See* N.C. Gen. Stat. § 99A-2.

Second, the right of action that the Act creates does not apply directly to the Attorney General. To the contrary, the Act gives a right of action to "the owner or operator of the premises" that a sham employee invades. *Id.* § 99A-2(a). The groups have not alleged that the North Carolina Department of Justice is one of their targets for investigation. Thus,

Attorney General Stein is not the owner or operator of any premises in question.

Third, if the groups invaded a North Carolina state agency other than the Department of Justice, and if a lawsuit under the Act resulted, the party enforcing the Act would not be Attorney General Stein.

In a lawsuit of that kind, the plaintiff would be the owner or operator of the facility in question. *Id.* The facility's owner would probably be the North Carolina Department of Administration, which owns and leases most state buildings. *See id.* §§ 146-25, -27. The operator would probably be the state agency targeted by the groups.

If such a lawsuit occurred, the Attorney General would not be a plaintiff. He would be the plaintiff's lawyer. When a state agency becomes involved in litigation, North Carolina law empowers the Attorney General "[t]o represent" that state agency. *Id.* § 114-2(2).

Contrary to the groups' argument, representing a state-agency plaintiff in a statutory lawsuit is not the same thing as enforcing a statute. *See* J.A. 37; Br. 39; *see also* Professors' Amicus Br. 6-7.

The enforcer of a statute is the person or entity whose acts create a coercive effect. *See, e.g.*, *Okpalobi v. Foster*, 244 F.3d 405, 426-27 (5th Cir.

2001) (holding that a state's attorney general was not a proper party because the coercive impact of the state law in question came from the conduct of the plaintiffs, not from the conduct of the attorney general). A coercive effect, after all, is what allegedly causes harm to a defendant in a statutory lawsuit. *Id.*

In a lawsuit under the Act, the entity that creates a coercive effect on the defendant—the enforcer of the Act—is the entity that actually sues a defendant. *See, e.g.*, Br. 13-14. When a state agency sues under the Act, the enforcer is the state agency itself, not the agency's lawyer.

This litigant-vs.-lawyer distinction is the key difference between this case and *Mobil Oil Corp. v. Attorney General*, 940 F.2d 73 (4th Cir. 1991). In *Mobil Oil*, the statute in question *expressly allowed* Virginia's attorney general to investigate violations of the statute and to sue under the statute in the name of the commonwealth. *Id.* at 75. Here, in contrast, the Act grants no such authority. *Compare* N.C. Gen. Stat. § 99A-2 (granting no explicit authority to the Attorney General), *with id.* §§ 75-9 to -15.2 (illustrating a grant of authority to the Attorney General). In *Mobil Oil*, the express authority to sue that the Virginia statute gave the attorney general transformed the attorney general from lawyer to plaintiff. Because the Act

here lacks that key feature, Attorney General Stein is not an enforcer of the Act.[4]

To ignore the distinction between state litigants and their lawyer, as plaintiffs are trying to do here, would give future plaintiffs an end run around the traceability element of Article III standing. *See Lujan*, 504 U.S. at 560-61. Instead of having to trace any injury to an executive-branch official who causes alleged harm by enforcing a given statute, plaintiffs could simply sue attorneys general. This end run would manufacture standing where none legitimately exists.

In sum, if any state agencies filed lawsuits under the Act, the agency plaintiffs would be the enforcers; Attorney General Stein would be the agencies' lawyer. That role would not make him an enforcer of the Act.

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[4] The fact that the Attorney General has the authority to defend the constitutionality of North Carolina statutes, *see* Professors' Amicus Br. 18, does not change the above conclusions. Intervening to defend the constitutionality of a statute is, as the description suggests, a fundamentally defensive role. The defensive nature of that role distinguishes it from affirmatively enforcing—that is, coercively deploying—a statute. *See, e.g.*, *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015).

For these reasons, the groups' claimed injury is not traceable to any acts of the Attorney General. The district court was right to conclude that the groups have no standing to sue him.

CONCLUSION

The defendants respectfully request that the Court affirm the district court's judgment.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

This appeal involves the application of settled law, so oral argument is probably unnecessary. However, if the Court wishes to hold oral argument, the defendants stand ready to participate.

Respectfully submitted,

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September 26, 2017

CERTIFICATE OF SERVICE

I certify that on this 26th day of September, 2017, I filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

/s/ Sripriya Narasimhan
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 8725 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface: 14-point Constantia font.

/s/ Sripriya Narasimhan
Sripriya Narasimhan

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-Addendum 2-

North Carolina General Statutes

Chapter 75

Monopolies, Trusts and Consumer Protection

Article 1

N.C. Gen. Stat. § 75-9. Duty of Attorney General to investigate.

The Attorney General of the State of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations or persons doing business in this State, which are or may be embraced within the meaning of the statutes of this State defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations or persons in North Carolina doing business in violation of law; and all other corporations of every character engaged in this State in the business of transporting property or passengers, or transmitting messages, and all other public service corporations of any kind or nature whatever which are doing business in the State for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the Utilities Commission or Commission of Banks [Commissioner of Banks] is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted.

§ 75-10. Power to compel examination.

In performing the duty required in G.S. 75-9, the Attorney General shall have power, at any and all times, to require the officers, agents or employees of any such corporation or business, and all other persons having knowledge with respect to the matters and affairs of such corporations or businesses, to submit themselves to examination by him,

and produce for his inspection any of the books and papers of any such corporations or businesses, or which are in any way connected with the business thereof; and the Attorney General is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any justice or judge of the appellate or superior court divisions, after five days' notice of such application, for an order on any such person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge.

§ 75-11. Person examined exempt from prosecution.

No natural person examined, as provided in G.S. 75-10, shall be subject to indictment, criminal prosecution, criminal punishment or criminal penalty by reason of or on account of anything disclosed by him upon examination, and full immunity from criminal prosecution and criminal punishment by reason of or on account of anything so disclosed is hereby extended to all natural persons so examined. The immunity herein granted shall not apply to civil actions instituted pursuant to this Chapter.

§ 75-12. Refusal to furnish information; false swearing.

Any corporation or person unlawfully refusing or willfully neglecting to furnish the information required by this Chapter, when it is demanded as herein provided, shall be guilty of a Class 3 misdemeanor and only fined not less than one thousand dollars ($1,000): Provided, that if any corporation or person shall in writing notify the Attorney General that it objects to the time or place designated by him for the examination or inspection provided for in this Chapter, it shall be his duty to apply to a justice or judge of the appellate or superior court division, who shall fix an appropriate time and place for such examination or inspection, and such corporation or person shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this Chapter. False swearing by any person examined under the provisions of this Chapter is a Class I felony.

§ 75-13. Criminal prosecution; district attorneys to assist; expenses.

The Attorney General in carrying out the provisions of this Chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this Chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this Chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of the district attorneys in the State, who shall, upon being required to do so by the Attorney General, send bills of indictment and assist him in the performance of the duties of his office.

§ 75-14. Action to obtain mandatory order.

If it shall become necessary to do so, the Attorney General may prosecute civil actions in the name of the State on relation of the Attorney General to obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders, to carry out the provisions of this Chapter, and the venue shall be in any county as selected by the Attorney General.

§ 75-15. Actions prosecuted by Attorney General.

It shall be the duty of the Attorney General, upon his ascertaining that the laws have been violated by any trust or public service corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the State, or any officer or department thereof, as provided by law, or in the name of the State on relation of the Attorney General, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it.

§ 75-15.1. Restoration of property and cancellation of contract.

In any suit instituted by the Attorney General to enjoin a practice alleged to violate G.S. 75-1.1, the presiding judge may, upon a final determination of the cause, order the restoration of any moneys or property and the cancellation of any contract obtained by any defendant as a result of such violation.

§ 75-15.2. Civil penalty.

In any suit instituted by the Attorney General, in which the defendant is found to have violated G.S. 75-1.1 and the acts or practices which constituted the violation were, when committed, knowingly violative of a statute, the court may, in its discretion, impose a civil penalty against the defendant of up to five thousand dollars ($5,000) for each violation. In any action brought by the Attorney General pursuant to this Chapter in which it is shown that an action or practice when committed was specifically prohibited by a court order, the Court may, in its discretion, impose a civil penalty of up to five thousand dollars ($5,000) for each violation. Civil penalties may be imposed in a new action or by motion in an earlier action, whether or not such earlier action has been concluded. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant. The clear proceeds of penalties so assessed shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

Chapter 99A

Civil Remedies for Interference with Property

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.

Chapter 114

Department of Justice

Article 1

N.C. Gen. Stat. § 114-2. Duties.

It shall be the duty of the Attorney General:

. . . .

(2) To represent 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. Where the Attorney General represents a State department, agency, institution, commission, bureau, or other organized activity of the State which receives support in whole or in part from the State, the Attorney General shall act in conformance with Rule 1.2 of the Rules of Professional Conduct of the North Carolina State Bar.

. . . .

Chapter 116

Higher Education

Article 1

Part 2

Organization, Governance and Property of the University

N.C. Gen. Stat. § 116-11. Powers and duties generally.

. . . .

(13) The Board may delegate any part of its authority over the affairs of any institution to the board of trustees or, through the President, to the chancellor of the institution in any case where such delegation appears necessary or prudent to enable the institution to function in a proper and expeditious manner. The Board may delegate any part of its authority over the affairs of The University of North Carolina to the President in any case where such delegation appears necessary or prudent to enable The University of North Carolina to function in a proper and expeditious manner. Any delegation of authority may be rescinded by the Board at any time in whole or in part.

. . . .

Chapter 116

Higher Education

Article 1

Part 3

Constituent Institutions

N.C. Gen. Stat. § 116-34. Duties of chancellor of institution.

(a) The chancellor shall be the administrative and executive head of the institution and shall exercise complete executive authority therein, subject to the direction of the President. He shall be responsible for carrying out policies of the Board of Governors and of the board of trustees. As of June 30 of each year he shall prepare for the Board of Governors and for the board of trustees a detailed report on the operation of the institution for the preceding year.

(b) It shall be the duty of the chancellor to attend all meetings of the board of trustees and to be responsible for keeping the board of trustees fully informed on the operation of the institution and its needs.

(c) It shall be the duty of the chancellor to keep the President, and through him the Board of Governors, fully informed concerning the operations and needs of the institution. Upon request, he shall be available to confer with the President or with the Board of Governors concerning matters that pertain to the institution.

(d) Subject to policies prescribed by the Board of Governors and by the board of trustees, the chancellor shall make recommendations for the appointment of personnel within the institution and for the development of educational programs.

Chapter 146

State Lands

Article 6

Acquisitions

N.C. Gen. Stat. § 146-25. Leases and rentals.

(a) General Procedure. – If, after investigation, the Department of Administration determines that it is in the best interest of the State that land be leased or rented for the use of the State or of any State agency, the Department shall proceed to negotiate with the owners for the lease or rental of such property. All lease and rental agreements entered into by the Department shall be promptly submitted to the Governor and Council of State for approval or disapproval.

(b) Leases Exceeding 30-Year Terms. – The Department of Administration shall not enter into a lease of real property for a period of more than 30 years, or a renewal of a lease of real property if the renewal would make the total term of the lease exceed 30 years, unless specifically authorized to do so by the General Assembly. The Department of Administration shall report to the Joint Legislative Commission on Governmental Operations at least 30 days prior to entering or renewing such a lease and shall include a copy of the legislation authorizing the lease or lease renewal in the report. This subsection shall not apply to leases by a university endowment to a university.

Chapter 146

State Lands

Article 7

Dispositions

N.C. Gen. Stat. § 146-27. Leases and rentals.

(a) General. – Every sale, lease, rental, or gift of land owned by the State or by any State agency shall be made by the Department of Administration and approved by the Governor and Council of State. A lease or rental of land owned by the State may not exceed a period of 99 years. The Department of Administration may initiate proceedings for sales, leases, rentals, and gifts of land owned by the State or by any State agency.

(b) Large Disposition. – If a proposed disposition is a sale or gift of land with an appraised value of at least twenty-five thousand dollars ($25,000), the sale or gift shall not be made until after consultation with the Joint Legislative Commission on Governmental Operations.

(c) Expired effective September 1, 2007.