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

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION.

Plaintiffs have standing to bring this constitutional challenge. Defendants *admit* "a state agency might sue" Plaintiffs under the Anti-Sunshine Law (or "the Law"), N.C. Gen. Stat. § 99A-2, if Plaintiffs investigate state facilities in order to reveal illegal or unethical conduct to the public. Defs.' Br. 16. Further, Plaintiffs allege that they are prepared to conduct such investigations because they possess information that specific state facilities—including a University of North Carolina-Chapel Hill ("UNC-CH") lab—are currently engaged in unlawful animal cruelty, and they employ investigators who are specially trained to gain access to those facilities and gather evidence of misconduct. *See*, *e.g.*, J.A.16-20. But, Plaintiffs have self-censored because of the Law, forgoing their desired investigations. Defendant Chancellor Folt is the official who *must* initiate *any* suit under the Law for an investigation of UNC-CH, J.A.80, and Defendant Attorney General Stein must choose to file that suit, *see* Defs.' Br. 42. In these circumstances, it defies reality to claim Plaintiffs have not alleged standing to challenge the Law for violating their First Amendment rights.

Indeed, demonstrating just how far the district court had to stretch to dismiss Plaintiffs for lack of standing, Defendants offer ***no*** support for the lower court's primary rationale: That, while Plaintiffs would have standing if the Anti-Sunshine Law presented "the threat of criminal prosecution," because the Law "provides a

civil cause of action," different rules apply. J.A.114-15 (emphasis in original). Defendants do not even mention this holding. Accordingly, they do nothing to dispute the binding and persuasive authority Plaintiffs provided that explains there is no distinction between challenging criminal and civil statutes for purposes of establishing First Amendment standing. Plfs.' Opening Br. 34-44.

Instead, Defendants exclusively argue that *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), worked a fundamental shift in First Amendment standing doctrine so individuals no longer have standing if a statute chills them from engaging in protected speech. Defs.' Br. 29-30. Defendants cite to *Clapper*'s conclusion that plaintiffs lack standing if they contend they are injured by the potential for future government action and, to do so, rely on a "highly attenuated chain of possibilities" amounting to "mere speculation." 568 U.S. at 410. While Defendants waffle on exactly what *Clapper* requires, they insist it rewrote Article III's test for an injury-in-fact so Plaintiffs cannot raise their First Amendment claims unless they have *already* engaged in activities that would lead them to "be sued under" the Anti-Sunshine Law. Defs.' Br. 26.

Clapper itself disproves Defendants' contention that it upended standing doctrine, explaining the decision merely elaborates on standing law the Court has "repeatedly reiterated" elsewhere. 568 U.S. at 409. That aside, Defendants' reliance on *Clapper* fails for four separate reasons.

First, *Clapper* arose on summary judgment, not the motion to dismiss at issue here. As this Court recently emphasized, the two postures are "different in kind," and "relying so heavily on *Clapper*" at the motion to dismiss stage "blur[s] the line between the distinct burdens." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 211-12 (4th Cir. 2017); *see also Schuchardt v. President of the United States*, 839 F.3d 336, 351 (3d Cir. 2016) (stating substantially the same); Plfs.' Opening Br. 44-45. Indeed, analyzing whether Plaintiffs' basis for standing is "speculative" at this stage would be inconsistent with the "presum[ption] 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). Plaintiffs must be given the opportunity to establish that their alleged injury is not speculative.

Second, this Court recently held "*Clapper*'s discussion of speculative injury" is limited to analyzing "theories of standing [based] on prospective or threatened injury." *Wikimedia Found.*, 857 F.3d at 211. Therefore, *Clapper* is inapplicable here, because Plaintiffs allege that they have *already* self-censored in response to the Anti-Sunshine Law. Self-censorship is a present, not a prospective injury. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *see also* Plfs.' Opening Br. 26-32.

Third, even if *Clapper*'s "speculative injury" analysis applies here, Plaintiffs' allegations more than satisfy its requirements. Contrary to Defendants' suggestions, *Clapper* did not eliminate standing based on the risk of future harm so that plaintiffs must engage in prohibited conduct, Defs.' Br. 26; rather *Clapper* requires that the risk of future harm "not [be] too speculative," 568 U.S. at 409. Here, Plaintiffs' detailed allegations establishing their interest in and ability to engage in the investigations regulated by the Anti-Sunshine Law more than satisfy *Clapper*. *See, e.g.*, J.A.16-20; Plfs.' Opening Br. 47-49. Defendants do not even argue to the contrary. Like the district court below, they simply pretend Plaintiffs' allegations do not exist. *See, e.g.*, Defs.' Br. 26.

Fourth, Plaintiffs separately have standing because the Anti-Sunshine Law interferes with their right to receive information. *See* Plfs.' Opening Br. 54-57. Defendants argue that post-*Clapper* there is only standing based on the right to receive information if a plaintiff establishes a law is preventing *particular* people from making *specific* statements. Defs.' Br. 34-37. This is inconsistent with the entire premise of listener standing: The First Amendment prohibits the government from "manipulat[ing] the public debate." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). A law that alters public discourse by inhibiting upcoming disclosures presents just as much of a First Amendment violation as one that prevents specific statements people are already prepared to make; both skew

the marketplace of ideas. The Anti-Sunshine Law, which penalizes people for providing Plaintiffs the precise information Plaintiffs have received in the past and continue to rely upon for their advocacy, plainly manipulates public debate and violates Plaintiffs' right to receive information. *See* N.C. Gen. Stat. § 99A-2(e) (allowing disclosures only through secret, official channels).

Defendants' single additional argument, that Plaintiffs' injuries are not traceable to them, is frivolous. Defendants admit "Chancellor Folt has independent authority to sue" under the Anti-Sunshine Law in some circumstances, they just believe a suit "would almost surely" require UNC's Board of Governors to become involved. Defs.' Br. 40. Even if true, this argument at most warrants adding the Board of Governors as a Defendant. Moreover, even that is unnecessary. According to UNC's policy manual, the Chancellor must "initiate" *all* suits brought by her institution. J.A.80. Further, under North Carolina law, a suit under the Anti-Sunshine Law can be filed only if the Attorney General exercises his discretion to do so. *See* N.C. Gen. Stat. §§ 114-1.1, 114-2(2). Both of the named Defendants are required to act before the state can proceed under the Law, making Plaintiffs' injuries directly traceable to them. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003) (there is causation for standing if the injury "flow[s] indirectly" from the defendant and thus certainly

if the defendant is "direct[ly] involve[d]" in bringing about the injury); *see also* Plfs.' Opening Br. 33-34, 37-39.

In sum: Defendants fail to defend the decision below, fail to acknowledge this Circuit's controlling case law rejecting their contentions, and fail to address the facts in the Complaint that undermine their caricature of the issues. Their Opposition underscores that the district court should be reversed.

II. ARGUMENT.

a. *Clapper* is inapposite because Plaintiffs are currently being harmed by the Anti-Sunshine Law.

Leaving aside this Court's precedent that *Clapper* applies only at summary judgment, Defendants' reliance on it is misplaced because *Clapper* did not address the primary injury Plaintiffs allege. Defendants argue that *Clapper*'s "principles" indicate Plaintiffs lack standing because their injury is based on an "attenuated chain," but *Clapper* concerned whether plaintiffs have standing due to their risk of *future* injury. *See* Defs.' Br. 20 (quotation marks omitted). Plaintiffs here are experiencing an *ongoing* harm because they have engaged in self-censorship to avoid the Anti-Sunshine Law's penalties. Where the challenged law "unquestionably regulat[es]," and thus appropriately chills the plaintiff's conduct, *Clapper* itself explains standing is not based on "speculation about potential governmental action," but rather a present injury. 568 U.S. at 420.

In *Clapper*, the plaintiffs claimed their constitutional rights were violated because "there [was] an objectively reasonable likelihood that their communications with their foreign contacts [would] be intercepted under [50 U.S.C.] § 1881a at some point in the future." 568 U.S. at 410. They could not claim their desired conduct was regulated by § 1881a because that statute exclusively allowed for surveillance of foreigners, and the *Clapper* plaintiffs were domestic individuals and entities. *Id.* at 411. Further, the *Clapper* plaintiffs explained the potential for surveillance had not caused them to forgo their desired "communications with their foreign contacts;" it had merely forced them to invest in different "e-mail and phone" technologies "or to travel so that they can have in-person conversations." *Id.* at 415 (further stating this injury was characterized as one of "cost[]" not chill). As the Supreme Court put it, the *Clapper* plaintiffs' claimed harm was "very different" from First Amendment allegations based on a law's "chilling effect." *Id.* at 418-99 (quotation marks omitted).

With this background, this Circuit held *Clapper*'s analysis of whether a "chain" of events resulting in the potential for future injury is too "speculative" applies only when the injury has not yet occurred. *Clapper*'s reasoning is "inapposite" where the plaintiff "pleaded an actual and ongoing injury." *Wikimedia Found.*, 857 F.3d at 211; *see also Schuchardt*, 839 F.3d at 350-51

(explaining it "distinguish[ed]" *Clapper* because in *Clapper* the plaintiffs "pleaded only prospective injury").

Therefore, because Plaintiffs allege they have "self-censored" in response to the Anti-Sunshine Law, *Clapper* is inapplicable. Engaging in "'self-censorship'" is not simply evidence that the plaintiff fears future harm, but an injury unto itself because the "'claimant is chilled from exercising h[is] right to free expression.'" *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (alteration in original) (quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir.2011)). By passing a law that "'intimidates people into censoring their own speech'" the government is doing more than creating a risk of prosecution, it is exerting its power to change constitutionally protected conduct, which produces an immediate First Amendment injury. *Covenant Media of N.C., L.L.C. v. City of Monroe*, 285 F. App'x 30, 36 (4th Cir. 2008) (unpublished) (quoting *City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 757 (1988)). The First Amendment prevents the government from "suppress[ing] unpopular ideas." *Turner Broad. Sys., Inc.*, 512 U.S. at 641. Accordingly, "self-censorship" is a First Amendment "harm that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 47 (1st Cir. 2011) ("The chilling of protected speech may thus alone qualify as a cognizable, Article III injury.").

Thus, so long as the state has enacted legislation that logically causes the plaintiff to self-censor, there is a current injury. A plaintiff cannot rely on its idiosyncratic reading of a law to justify self-censorship, *Cooksey*, 721 F.3d at 236, but "[a] non-moribund statute that 'facially restrict[s] expressive activity by the class to which the plaintiff belongs'" objectively justifies self-censorship and creates a harm sufficient to support standing. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (quoting *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir.1996)). As this Court has explained elsewhere, when the legislature enacts a statute, people can reasonably conclude the legislature "intend[s] [the law] to be enforced;" thereby the law produces "an actual and well-founded fear that [it] will be enforced," appropriately causing people whose conduct falls within the statute to self-censor, "*incurring harm all the while*." *Mobil Oil Corp. v. Attorney General*, 940 F.2d 73, 76 (4th Cir. 1991) (quotation marks omitted) (emphasis added).

The Anti-Sunshine Law restricts Plaintiffs' desired activities making it fitting for them to self-censor—as they allege they have, J.A.19-20, 24-25—and thus they are currently suffering a First Amendment injury. Indeed, the Anti-Sunshine Law was expressly passed to punish "'private special-interest organizations'" like Plaintiffs from carrying out the exact "'undercover operation[s]'" Plaintiffs have performed in the past, including in North Carolina,

and wish to conduct again, making it indisputably appropriate for Plaintiffs to be chilled by the Law. J.A.44-45 (quoting North Carolina legislators). Plaintiffs are suffering an "ongoing injury," making *Clapper* "inapposite." *Wikimedia Found.*, 857 F.3d at 211; *see also Animal Legal Def. Fund v. Herbert*, No. 2:13-CV-00679-RJS, 2017 WL 2912423, at *5 (D. Utah July 7, 2017) (concluding there is standing to challenge a law that prohibits undercover investigations because the plaintiffs had "engaged in undercover operations," they "now wish to conduct operations" again, and "they presently have no intention to do so" because the law chilled their conduct).

Defendants' thin effort to counteract this logic easily shatters. Defendants argue that after *Clapper*, an Article III injury-in-fact cannot "depend on any events outside the plaintiffs' control" and "[P]laintiffs' own actions" cannot bring about liability under the Anti-Sunshine Law, as that requires a successful undercover investigation and subsequent "state enforcement." Defs.' Br. 32. This argument misses the point. There can be government action besides prosecution that suppresses speech. Legislating is government action, which has the effect of manipulating speech as soon as it causes self-censorship. Plaintiffs' First Amendment rights *are* being violated from conduct in which the state has *already* engaged and Plaintiffs' *existing* response to it. There is nothing "dependent" about Plaintiffs' injury at all. *Am. Booksellers Ass'n*, 484 U.S. at 393.

To agree with Defendants that all that is relevant is the potential for prosecution would give the government a free pass to manipulate public debate until an individual steps forward to risk liability. *Id.* Indeed, Defendants claim this case can be distinguished from other pre-enforcement challenges because there, unlike here, "[n]o contingencies stood in the way" of the plaintiff's potential liability, Defs.' Br. 32; but Defendants are forced to admit that with pre-enforcement cases there is always the question of whether the government will prosecute, an event "outside the plaintiff's control" that Defendants claim prohibits standing, *see, e.g.*, Defs.' Br. 22-23, 33. Defendants' reasoning would gut pre-enforcement challenges, requiring plaintiffs to subject themselves to a law's sanctions in order to test its constitutionality, precisely what pre-enforcement standing is meant to avoid. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). Defendants' rewriting of First Amendment standing doctrine cannot be reconciled with the case law and would squelch speech by allowing unconstitutional laws to linger.

In short, far from speculating about future harms, Plaintiffs are bringing this action based on the well-recognized injury to their First Amendment rights they are currently suffering: the injury of self-censorship. This establishes an Article III injury-in-fact. Defendants' attempt to apply *Clapper* here would upend substantial precedent that recognizes passing a law targeting individuals and causing them to

self-censor (like the Anti-Sunshine Law has done to Plaintiffs) creates an ongoing injury.

b. Regardless, Plaintiffs' allegations easily satisfy *Clapper*'s requirements.

Even if this Court focuses on Plaintiffs' potential for future prosecution, rather than the current injury they are suffering due to their self-censorship, Defendants' reliance on *Clapper* fails. There is nothing speculative about Plaintiffs' allegations that they will fall within the Anti-Sunshine Law's grasp, and thus their risk of future harm provides standing under *Clapper*. *See AGI Assocs., LLC v. City of Hickory*, 773 F.3d 576, 578 (4th Cir. 2014) (allegations in the Complaint must be treated as true for purposes of a motion to dismiss).

Defendants insist there is a "long series of conditions" that must occur before Plaintiffs can be pursued under the Anti-Sunshine Law and therefore Plaintiffs are relying on a "speculative chain of possibilities," which, under *Clapper*, defeats standing. Defs.' Br. 26. Specifically, Defendants indicate that to have standing Plaintiffs must identify a "state facility" they wish to investigate, "recruit[] investigators," secure employment at the facility, and "observe[] any conditions that would lead them to violate the Act." *Id.* However, like the district court below, Defendants entirely fail to address the allegations in the Complaint that establish these exact predicates. *See id.*

In the Complaint, PETA alleges that: (1) it has already identified a state facility it is prepared to investigate, the UNC-CH lab, because it has evidence that lab is currently engaged in unlawful animal cruelty, J.A.19-20; (2) PETA maintains investigators on staff in order to document this misconduct, *id.*; (3) those investigators engage in the precise employment-based investigations the Anti-Sunshine Law prohibits, J.A.16-19; and (4) PETA has successfully conducted such investigations since 1981, including previously investigating this exact same UNC-CH lab, *id*; *see also* N.C. Gen. Stat. § 99A-2(b)(1)-(2) (creating liability for PETA's desired employment-based undercover investigations).[1]

And, separately, Plaintiff ALDF alleges that: (1) it has identified other North Carolina government facilities it wishes to investigate, J.A.24; (2) it regularly engages in such investigations, J.A.23; (3) it recruited individuals in North Carolina to carry out those investigations, J.A.24; and (4) the investigators ALDF uses are trained to gather information through gaining employment in order to access materials, which violates the Anti-Sunshine Law, but they may not need to do so to run afoul of the Law because they may also investigate by leaving

[1] Defendants repeatedly state PETA has "not yet hired investigators." Defs.' Br. 9 (citing J.A.20-21). This is just false. Defendants' cited section of the Complaint explains PETA is prepared to "instruct[] one of its investigators to secure employment" at UNC-CH to conduct an undercover investigation so the information he obtains can be released to the public. J.A.20. PETA's staff includes investigators it can instruct to engage in investigations at any time.

recording devices unattended to capture animals' movements, J.A.23-24; *see also* N.C. Gen. Stat. § 99A-2(b)(3) (creating liability for leaving a recording device unattended).

In sum, Plaintiffs allege that they have evidence indicating they would uncover information they wish to collect and provide to the public through investigating several specific North Carolina government facilities, including UNC-CH, in violation of the Anti-Sunshine Law, and that Plaintiffs' personnel and history establish they will be able to conduct those investigations. Plaintiffs have substantively addressed how each "condition" Defendants posit is required will come to fruition. *See N.H. Right to Life Political Action Comm.*, 99 F.3d at 14 (a plaintiff's past conduct substantiates that it will fall within a challenge law).

Nothing in *Clapper* comes close to suggesting Plaintiffs' allegations result in improper "speculation" regarding their risk of future harm. *Clapper* held its plaintiffs were speculating that their communications would be swept up in § 1881a's surveillance because the plaintiffs had *no* facts substantiating that the government's "targeting practices" would capture the plaintiffs' speech. 568 U.S. at 411. The *Clapper* plaintiffs stated that they "*assum[ed]*" they would be inadvertently surveilled without alleging "specific facts" supporting that assumption. *Id.* at 412 (quotation marks omitted) (emphasis in original). Moreover, the *Clapper* plaintiffs' assumption was inconsistent with § 1881a itself,

which required that any surveillance must "minimize the acquisition … of nonpublicly available information concerning unconsenting United States persons," *and* that the Foreign Intelligence Surveillance Court ("FISC") must review all planned surveillance to make sure it satisfied this standard. *Id.* at 414. The plaintiffs, United States persons, did not and could not produce any evidence substantiating their fear that their speech would be caught up by § 1881a despite these safeguards. Finally, the *Clapper* Court noted that whether the plaintiffs' speech would be captured also depended on the government succeeding in surveilling while the plaintiffs were in communication with their foreign contacts, another predicate the plaintiffs offered no support would come about. *Id.* The *Clapper* plaintiffs lacked standing because their claims of injury were entirely "hypothetical." *Id.* at 416.

This case is wholly unlike *Clapper*, where numerous necessary "assumptions" went entirely unaddressed. As detailed above, Plaintiffs have discussed and supported how each step necessary for them to be subject to the Anti-Sunshine Law's penalties will come about, making their fear of that future harm "concrete, particularized, and actual" under *Clapper*. 568 U.S. at 409 (quotation marks omitted).

Defendants' arguments to the contrary rely on a formulistic reading of *Clapper*. First, they claim that *Clapper* prohibits standing based on any "long

chain of events." Defs.' Br. 25; *see also id.* at 14. However, the number of steps involved cannot be a basis to deny standing. Any event can be parsed into its component parts. *Clapper* itself indicates claims cannot be dismissed simply based on how many steps are involved; instead what is relevant is the plaintiff's ability to support the links in the chain. 568 U.S. at 410-14 (examining the individual links).

Defendants also suggest this case is like *Clapper* because Plaintiffs can only fall within the Anti-Sunshine Law if they are hired at facilities engaged in misconduct, and the *Clapper* plaintiffs' speech could only be captured if the government's surveillance was approved by the FISC. Defs.' Br. 14, 25-26. However, also as noted above, Defendants' analogy fails on the facts. Plaintiffs need not be hired to conduct investigations in violation of the Anti-Sunshine Law. The Law prohibits anyone from leaving behind "an unattended camera or electronic surveillance device" and "record[ing]" information. N.C. Gen. Stat. § 99A-2(b)(3) (unlike other provisions in the Law this section omits language limiting its reach to "[a]n employee").

More importantly, hiring managers lack the central characteristics of the FISC. By statute, the FISC had to use its judgment to limit the potential for domestic surveillance, and thereby mitigated the *Clapper* plaintiffs' exact fear of injury. 568 U.S. at 414. The FISC's involvement was an intervening force that broke the chain on which the *Clapper* plaintiffs relied because the evidence

indicated it would prevent, not bring about, the harm. Hiring managers, in contrast, are not instructed to apply their independent judgment to reduce the potential for Plaintiffs' liability under the Anti-Sunshine Law; they are seeking to secure employees who meet posted qualifications in order to fill the positions Plaintiffs wish to obtain. Further, Plaintiffs allege that their investigators are skilled at and have been immensely successful in obtaining such positions. The fact that both *Clapper* and this case involve someone's approval does not make the bureaucratic hiring process that Plaintiffs have mastered equivalent to the FISC engaging in judicial review to prevent the *Clapper* plaintiffs' feared harm.[2]

The handful of post-*Clapper* cases Defendants cite likewise do not come close to substantiating Defendants' claim that Plaintiffs are "speculating." In *Blum v. Holder*, the court explained the plaintiffs lacked standing because "[t]he Government has affirmatively represented that it does not intend to prosecute [the plaintiff's] conduct because it does not think it is prohibited by the statute." 744 F.3d 790, 798 (1st Cir. 2014). While the government's formal disavowal that it will prosecute the plaintiff can negate a First Amendment injury, Defendants have

[2] In addition, unlike the FISC, the hiring managers are not third-parties uninvolved in this litigation. *Clapper*, 568 U.S. at 414 n.5 (noting that the FISC are "independent actors not before the court" and thus plaintiffs would not be able "bear the burden" of proving standing). Hiring managers are employed by Defendants. Thus, they are before the court and additional evidence substantiating Plaintiffs' allegations could easily be produced in discovery.

not made such a representation here. Plfs.' Opening Br. 31, 33 n.8. To the contrary, Defendants note they may enforce the Anti-Sunshine Law if Plaintiffs proceed with their desired investigations. Defs.' Br. 16.

In each of Defendants' other cases the plaintiffs made "no statement" that they had any specific "plans" that could result in them being harmed through implementation of the challenged law. *Barber v. Bryant*, 860 F.3d 345, 357 (5th Cir. 2017) (explaining the plaintiff lacked standing to challenge Mississippi's gay-marriage ban because "[h]e does not allege … even that he intend[s] to get married in Mississippi"); *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 458 (6th Cir. 2017) (explaining "no Plaintiff claims to hold enough foreign assets" so that any of them could ever "be subject to" the challenged "reporting requirement"); *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915 (D.C. Cir. 2015) (stating that Plaintiffs "fail to allege" that the challenged rule changes the risks to which they are exposed).

To the extent these cases speak to this matter at all, they underscore that to apply *Clapper* one must engage with the facts, which both Defendants and the district court ignored. While standing based on a fear of future harm cannot result from unsubstantiated assumptions, Plaintiffs' Complaint provides extensive support for why they believe they will fall under the Anti-Sunshine Law. In this

manner, Plaintiffs well exceed *Clapper*'s demands. Defendants' arguments, unmoored from the Complaint, should be rejected out of hand.

c. Plaintiffs also have standing because the Law undermines their ability to receive information on which they rely.

In addition to standing based on their self-censorship and well-substantiated fear of future suit, Plaintiffs also have standing because the Anti-Sunshine Law interferes with their ability to receive information. Defendants, like the district court below, admit that the First Amendment protects the ability to "'receive information.'" Defs.' Br. 35 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). The Anti-Sunshine Law seeks to suppress the public release of information, particularly the type of information on which Plaintiffs have relied and will continue to do so. *See, e.g.*, J.A.16-17, 21-24, 27-33, 35-36. In fact, Plaintiffs PETA and ALDF allege the Law has stopped them from conducting investigations and releasing information like that all Plaintiffs have used in the past. Thus, the Anti-Sunshine Law has interfered with Plaintiffs' First Amendment right to receive information, providing them standing.

Defendants argue that the right to receive information is only violated if a law stops a specific "known speaker who is ready and willing to convey information," but the case law proves otherwise. Defs' Br. 35. Indeed, Plaintiffs pointed this Court to numerous cases—none of which Defendants address or

distinguish—that hold there is an actionable First Amendment injury if striking down the law would "let loose" speakers to provide the desired type of information. *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 607 (2d Cir. 1988); *see also FOCUS v. Allegheny Cty. Court of Common Pleas*, 75 F.3d 834, 839 (3d Cir. 1996) (allowing a claim to proceed because people "were willing to talk at some point prior"); Plfs.' Opening Br. 55-56. A plaintiff does not need to prove an unknowable counterfactual: *i.e.*, that if the law did not exist, a specific individual would make a precise statement. Standing derives from the fact that the law has *stopped communications*. The question for standing based on the right to receive information is whether the plaintiff has established that those subject to the challenged law "would speak more freely" to the plaintiff if the law was lifted, regardless of whether certain speech "may or may not be uttered." *United States v. Wecht*, 484 F.3d 194, 203 (3d Cir. 2007).

The two cases Defendants cite do not suggest otherwise. In *Stephens v. County of Albemarle*, 524 F.3d 485 (4th Cir. 2008), prior to the suit, the plaintiff had "never approached" anyone seeking the information she claimed she was now prevented from obtaining, and the speakers she claimed would come forward declared to the court they had nothing more to say on the matter. *Id.* at 492. In *ACLU v. Holder*, 673 F.3d 245 (4th Cir. 2011), the plaintiffs challenged the constitutionality of the False Claims Act's requirement that whistleblowers must

file their complaints under seal, preventing them from speaking to the public. However, the plaintiffs failed to talk with any current or former whistleblowers and thus could not allege whether individuals who voluntarily chose to participate in the False Claims Act's scheme, rather than going to the public, would have spoken about their claims absent the seal. *Id.* at 255. These cases do not establish that Plaintiffs need to "allege[] the existence of a particular willing speaker who is willing to convey particular information to them." Defs.' Br. 37. Instead, the cases simply show that plaintiffs cannot proceed when they fail to establish a law has the potential to interfere with the communication of information.

That is certainly not a concern here. Plaintiffs allege that as part of their regular activities people have provided them the type of information the Anti-Sunshine Law seeks to repress. *See, e.g.*, J.A.21-22, 27-33, 35-36. At least some Plaintiffs have previously obtained such information in North Carolina from state employees. J.A.30-31. Moreover, Plaintiffs PETA and ALDF explain they have been inhibited from collecting information in North Carolina due to the Law and there is specific information they would collect and release if it were not for the Law. J.A.19-20, 24-25. These facts establish that speakers would be "let loose" to talk to Plaintiffs if the Law, which penalizes such speech, did not exist. The statute would no longer intimidate people from making statements Plaintiffs have shown people will make. Thus, Plaintiffs are suffering a First Amendment injury because

the Anti-Sunshine Law undermines their ability to receive information, providing them standing.

d. Defendants' traceability arguments are factually false and not a basis on which to sustain the district court.

Finally, any fair reading of the relevant law and policies undermines Defendants' claim that Plaintiffs' injuries are not traceable to Chancellor Folt and Attorney General Stein. An injury is traceable to the defendant if there is "a causal connection between the injury" and the conduct sought to be declared unlawful and enjoined. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Put another way, where a plaintiff seeks "the cessation of [] illegal conduct," if the claimed injury can be redressed through the relief sought it is also traceable to the defendant. *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990); *accord 281 Care Committee v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011) (government official is a proper defendant where his or her office "participat[es] in the enforcement mechanism" of the challenged law).

Here, UNC's policy manual states that *any* request to "initiate litigation shall be made by the chancellor" of the effected institution. J.A.80. Defendants admit Chancellor Folt also has independent "litigating authority" in "lawsuits with stakes under $25,000," thus any suit under the Anti-Sunshine Law for an investigation of UNC-CH that lasted five days or less would be entirely at her discretion. Defs.'

Br. 39-40. However, per the policy manual, her role does not stop there; she *must* also decide to "initiate" a process with UNC's Board of Governors in order for the University to bring *any* other suit under the Law. J.A.80.

Moreover, the Attorney General would "be the plaintiff's lawyer" if UNC-CH or any other state agency were to sue under the Anti-Sunshine Law. Defs.' Br. 42. He fulfills this role as part of his responsibility to "'represent'" all state agencies. *Id.* (quoting N.C. Gen. Stat. § 114-2(2)). Contrary to Defendants' suggestion, this does not mean he would be a hired gun, required to proceed at the agency's direction. Defs.' Br. 42. Per North Carolina law, the Attorney General is "an independent constitutional officer" who cannot be ordered to take a case. *State v. Camacho*, 406 S.E.2d 868, 871 (N.C. 1991). Any filing would be at the Attorney General's discretion.

In other words, preventing Defendants from enforcing the Anti-Sunshine Law would directly remedy Plaintiffs' injuries. Preventing the Chancellor from wielding the Law would remove any need for Plaintiffs to self-censor by declining to investigate UNC-CH because no action under the Law could ever be "initiate[d]." J.A.80. Preventing the Attorney General from enforcing the Law would lift the chill on Plaintiffs investigating UNC-CH and every other state institution because the Attorney General would not be able to exercise his discretion to bring a case under the Law. Such a ruling would also ensure that the

Law would not continue to inhibit whistleblowers regarding state institutions, enabling Plaintiffs to receive the information to which they are entitled. Thus, there can be no question that Plaintiffs' injuries would be remedied if these Defendants were prohibited from acting, meaning there is standing to sue these Defendants. *Drutis v. Rand McNally & Co.*, 499 F.3d 608, 612 (6th Cir. 2007) ("Article III standing ultimately turns on whether a plaintiff gets something (other than moral satisfaction) if the plaintiff wins." (emphasis removed)).

Moreover, Defendants' traceability arguments are peculiar because, even if one were to accept them as true, this litigation should continue. According to Defendants, any action UNC-CH would bring under the Anti-Sunshine Law "would almost surely … fall outside Chancellor Folt's delegated authority to file." Defs.' Br. 40. Thus, although Chancellor Folt would still have to "initiate" the suit, it would need to be approved by the Board of Governors. J.A.80. Put another way, Defendants believe the most likely scenario is that enjoining the Board of Governors would equally remedy certain of Plaintiffs' injuries as enjoining the Chancellor. At most, this indicates the Board of Governors should be joined to the case.

Defendants' argument does nothing to undermine Plaintiffs' claim that they are suffering an injury at the hands of the state and therefore should be allowed to proceed. There is no requirement that a plaintiff must name every official involved

in enforcement. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003) (there is causation if the defendant is "involve[d]" in bringing about the injury, even if others are involved as well). Such a rule would devolve into a shell game, where states would divide enforcement authority, making plaintiffs struggle to locate all of the relevant actors. Plaintiffs have named officials central to the Law's enforcement. Regardless, even under Defendants' traceability analysis, Plaintiffs' case should be reinstated so they can seek to prevent the Board of Governors, as well as the Chancellor and Attorney General, from enforcing the Anti-Sunshine Law.

III. CONCLUSION.

The Anti-Sunshine Law has accomplished its exact objective, to stop Plaintiffs from investigating illegal and unethical conduct and revealing it to the public to bring about reform. It interferes with Plaintiffs' speech and they should be able to raise their constitutional challenge to the Law. Defendants, reasonably, present no defense of the decision below, as it wrongly dismissed Plaintiffs on the basis that the Anti-Sunshine Law imposes punitive civil damages rather than criminal fines. Instead, Defendants attempt to craft an argument based on *Clapper*, but that decision is inapplicable in this case where Plaintiffs have engaged in self-censorship, as this Circuit's binding authority explains. Defendants' argument is also unfounded in light of the allegations in the Complaint, which Defendants fail

to address. Their separate traceability argument is both meritless and pointless. There is no basis on which to sustain the decision below, which should be reversed and this case remanded for further proceedings.

October 10, 2017

Respectfully submitted,

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I HEREBY CERTIFY that on the October 10, 2017, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

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