In The United States District Court
For The Middle District of North Carolina
Greensboro Division

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,

v.

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

Defendants,

And

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Intervenor-Defendant.

Case No.: 1:16-cv-25

PLAINTIFFS' SUR-REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants' and Intervenor's Consolidated Reply shifts a core component of their argument and, for the first time, claims "newsgathering in nonpublic areas" is not protected by the First Amendment because it is not speech. Dkt. No. 121, at 8 (contending "gather[ing] information" in nonpublic areas is "different than" other forms of speech in nonpublic areas). This argument is inconsistent with the case law on which it relies and proven irrelevant by the text of the Anti-Sunshine Law—as it ignores N.C. Gen. Stat. §§ 99A-2(b)(1)-(2) prohibit information gathered on private property from being "use[d]" *elsewhere*, including public spaces, and that N.C. Gen. Stat. § 99A-2(c) prohibits groups from "directing" or "inducing" people to conduct investigations, regardless of where that speech occurs. Thus, Plaintiffs submit this sur-reply to correct Defendants' and Intervenor's new argument, presented for the first time in their reply.

Defendants and Intervenor previously argued that if a law "implicate[s] the property owner's privacy and possessory rights" then the First Amendment does not apply. Int. Br., Dkt. No. 110, at 8; Defs. Br., Dkt. No. 108, at 16 ("It is well-established that there is no First Amendment right to interfere with someone's property rights[.]"); *see also, e.g.*, Defs. Br. 9; Int. Br. 8, 11; Defs. Opp., Dkt. No. 115, at 7-8; Int. Opp., Dkt. No. 116, at 1 (emphasizing Anti-Sunshine Law should survive because it protects against "trespass"). Plaintiffs then demonstrated Supreme Court authority holds the First Amendment *does* apply to unauthorized speech on private property, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); Plfs. Opp., Dkt. No. 114, at 8-10; Consolidated Reply 8, and, more broadly, to all laws regulating speech rather than non-expressive conduct, *see*, *e.g.*, Plfs. Opp. 6-10, 15-16. Thus, the Consolidated Reply, at 8, shifts to arguing "newsgathering in nonpublic areas" falls within a special exception to the First Amendment so it cannot be considered "speech."

This argument is *explicitly* rejected by the case law on which the Consolidated Reply relies. The civil and criminal statutes at issue in *Western Watersheds Project v. Michael* prohibited data collection on private land in Wyoming, and "[c]ross[ing] private

land to access adjacent or proximate land [to] collect[] resource data," be that on public *or private* land. 869 F.3d 1189, 1191 (10th Cir. 2017). The district court originally concluded the provisions "d[id] not regulate protected First Amendment activity" because it believed there was no right to engage in speech on others' property. *Id.* Plaintiffs appealed regarding the crossing prohibition—explaining their primary interest in Wyoming was to collect data on public land to develop journalism and advocacy. *Id.* at 1197.[1] The Tenth Circuit reversed holding, "[t]he fact that one aspect of the challenged statutes concerns private property does not defeat the need for First Amendment scrutiny." *Id.* at 1195. That is, "[a]lthough trespassing does not enjoy First Amendment protection," because "the statutes at issue target the 'creation' of speech," which *is* protected by the First Amendment, they required First Amendment review. *Id.* at 1192. In particular, because the statutes prohibited trespassing to gather "information plaintiffs need to engage in" journalism and advocacy, the First Amendment applied, regardless of whether that information gathering occurred on public or private land. *Id.* at 1197.

On remand, the defendants in *Western Watersheds Project* made a similar argument to the Consolidated Reply, that because the plaintiffs emphasized their desire to collect information on public land, the Tenth Circuit's decision only establishes the First Amendment covers data collection on public land, and "plaintiffs have no protected speech right on private land based upon this [district court's] prior order." 353 F. Supp. 3d at 1189 n.7. The district court rejected this claim, explaining the Tenth Circuit held data collection on both public and private land is protected by the First Amendment. *Id.* Further, the district court reversed its earlier statements that the First Amendment should

[1] As discussed more below, the Consolidated Reply's assertion that the crossing provision only regulated data collection on "public land" is false. Consolidated Reply 5. In fact, Wyoming argued adjudication needed to be delayed "because it is unclear what type of land" the data will be collected upon, as the crossing provision regulated data collection that "may occur on private land," an argument that the district court rejected because Wyoming failed to demonstrate the type of land was relevant. *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1188 & n.7 (D. Wyo. 2018).

not apply to activities on private property, adopting the view that "'[i]f a person's First Amendment rights were extinguished the moment she stepped foot on private property, the State could, for example, criminalize any criticism of the Governor, or any discussion about the opposition party, or any talk of politics whatsoever, if done on private property. This runs directly afoul of the First Amendment.'" *Id.* (quoting *ALDF v. Herbert*, 263 F. Supp. 3d 1193, 1208–09 (D. Utah 2017)). Thus, Wyoming's civil and criminal prohibitions on data gathering required First Amendment review whether the data was gathered on public or private land.[2]

Indeed, any other outcome would be inconsistent with numerous Supreme Court decisions. *Watchtower* struck down a statute that created a special penalty for trespassing to "solicit." 536 U.S. at 154, 168. The Court explained that even though the law increased "the protection of residents' privacy," that was not constitutionally sufficient. *Id.* at 165. Instead, the Court needed to determine whether the restriction on unauthorized speech on private property satisfied the requisite First Amendment scrutiny, which it did not. *Id.*

The notion that, for First Amendment purposes, "soliciting" is different from "information gathering" used to develop speech has also been rejected by the Supreme Court. The Court has repeatedly stated, "Whether government regulation applies to creating, distributing, or consuming speech makes no difference" for First Amendment purposes. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (First Amendment must protect obtaining facts

[2] The *Western Watersheds Project* district court did ask whether the civil and criminal statutes should be treated differently—an argument the Consolidated Reply also implies, at 7—but, the court continued, "neither party seemed to believe any distinct analysis was required," thus it abandoned the issue. *W. Watersheds Project*, 353 F. Supp. 3d at 1189 n.7. The Consolidated Reply's attempt to raise the issue here ignores that the Fourth Circuit already rejected civil-criminal distinctions *in this case*. The Fourth Circuit explained it had "no trouble concluding [the Anti-Sunshine Law's civil penalties] would be an impediment" to speech equivalent to those of criminal penalties. *PETA v. Stein*, 737 Fed. App'x 122, 131 n.4 (4th Cir. 2018) (further noting Defendants refused to defend the civil-criminal distinction on appeal).

because "[f]acts, after all, are the beginning point for much speech"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010) ("[l]aws enacted to control" what speech is produced "abridg[e] the freedom of speech" in the same manner as laws that "suppress speech" itself); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (First Amendment applies equally to laws that limit the "formation of intelligent opinions," as laws that prohibit expression of those opinions).

Moreover, in addition to failing on the law, the Consolidated Reply's new argument also fails on the facts. Subsections (b)(1) and (2) of the Anti-Sunshine Law do not solely prohibit information gathering on private property—which, contrary to the Consolidated Reply's assertions, is used for a variety of speech, not just journalism—but also separately prohibit "using" the information gathered. That is, in addition to prohibiting "creating" speech, a First Amendment protected activity, subsections (b)(1) and (2) prohibit subsequent communications, no matter where those communications occur, another First Amendment protected activity. N.C. Gen. Stat. §§ 99A-2(b)(1)-(2). Further, subsection (c) targets speech that generates undercover investigations, creating liability for "[a]ny person who," in any place, "intentionally directs … or induces another person to violate this section." *Id*. § 99A-2(c). In other words, even if one were to believe the Consolidated Reply that the First Amendment does not apply to information gathering on private property, subsections (b)(1)-(2) and (c) infringe on the First Amendment in other ways. *See* Int. Opp. 15 ("communications with the media fall within the statute's reach"). Defendants and Intervenor appear to admit statutes that regulate speech in "public spaces" must be subject to the full scope of First Amendment review. *See* Consolidated Reply 7. Thus, while the Consolidated Reply's reading of *Western Watersheds Project* is incorrect, even under its reading, subsections (b)(1)-(2) and (c) would fail because they limit speech in public spaces, triggering First Amendment review; and, for the reasons Plaintiffs state elsewhere, the Law fails all levels of First Amendment scrutiny.

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Respectfully submitted,

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