

**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' BRIEF IN
SUPPORT OF THEIR
MOTION FOR LEAVE TO
FILE A SUR-REPLY**

Plaintiffs move for leave to file the attached four-page sur-reply solely to address a new argument raised in Defendants' and Intervenor's Consolidated Reply, Dkt. No. 121, as is provided for in this Court's decision in *CIP Construction Co. v. Western Surety Co.*, 2018 WL 3520832, at *8-9 (M.D.N.C. July 20, 2018) (Schroeder, J.).¹

¹ The Government-Defendants and Intervenor altered how they are referring to themselves in their Consolidated Reply, calling themselves, collectively, "Defendants."

While Defendants and Intervenor had repeatedly argued the Anti-Sunshine Law should stand because it protects against “trespass,” *see, e.g.*, Defs. Br., Dkt. No. 108, at 9; Int. Br., Dkt. No. 110, at 8, 11; Defs. Opp., Dkt. No. 115, at 7-8; Int. Opp., Dkt. No. 116, at 1, in their Consolidated Reply they revise that argument to contend there is a special exception to the First Amendment for “newsgathering” on property on which there has been a trespass. Consolidated Reply 8. That is, they now claim, “newsgathering” on private property does not qualify as “speech” protected by the First Amendment.

This is an unanticipated development, as the Anti-Sunshine Law does *not* simply prohibit “newsgathering” on private property, but also prohibits “using” the information gathered in *public* spaces, N.C. Gen. Stat. §§ 99A-2(b)(1)-(2), (e), and, *separately*, punishes organizations “directing” or “inducing” undercover investigations no matter where those communications occur, *id.* § 99A-2(c). These are independent attacks on First Amendment rights that are not limited to restricting speech on private property, and thus cannot be justified by the new argument.

Further still, the district court authority on which the Consolidated Reply relies expressly rejects this new argument. Consolidated Reply 5-6 (citing *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176 (D. Wyo. 2018), which holds “Tenth Circuit opinion” supports that “data collection” is covered by a “protected speech right *on private land*,” *id.* at 1190 n.7 (emphasis added)). Accordingly, Plaintiffs could not have known they needed to address this argument earlier.

This Court has allowed a sur-reply in such circumstances, explaining that where a party raises a new argument in its reply that involves “different considerations,” even if that new argument is “closely related” to prior claims, “fairness dictate[s]” the court allow a sur-reply. *CIP Constr. Co.*, 2018 WL 3520832, at *9 (Schroeder, J.); *accord, e.g., Starnes v. Conduent Inc.*, 2018 WL 3466951, at *3 (M.D.N.C. July 18, 2018); *Halpern v.*

Consistent with the prior briefing, Plaintiffs refer to them as Defendants and Intervenor, respectively.

Wake Forest Univ. Health Scis., 268 F.R.D. 264 (M.D.N.C. 2010); *Burr v. Branker*, 2009 WL 1298116, at *23 (M.D.N.C. May 6, 2009) (report and recommendation). Here, the Consolidated Reply’s new argument requires a distinct discussion of the Anti-Sunshine Law—to describe how it not only prohibits speech on private land, but also in public spaces—and also an in-depth description of the case law to demonstrate how the Consolidated Reply misrepresents the holding on which it relies.

Moreover, fairness particularly favors allowing a sur-reply here given the misconduct of Defendants and Intervenor throughout their briefing. They have both “incorporate[d] by reference” arguments made by the other to evade the word limits for their opening briefs and oppositions. Defs. Br. 26; Int. Opp. 22. In addition, Defendants presented standing arguments that were expressly rejected by the Fourth Circuit *in this case*, without acknowledging that case law, requiring Plaintiffs to respond to improper contentions. *See, e.g.*, Defs. Opp. 3-5; Plfs. Reply, Dkt. No. 120, at 9-10.

Further still, Defendants and Intervenor used their positions as separate parties to file separate opening and opposition briefs, providing them substantially more words than Plaintiffs to state their positions. Then—despite Intervenor’s representation to the Court that it has a “unique perspective” that is “not shared by the” Defendants and thus could not be represented by them, Int. Reply ISO Mot. to Int., Dkt. No. 91, at 5—Defendants and Intervenor successfully moved to consolidate their replies, which both disproved that their earlier separate briefing was necessary, and provided them the opportunity to develop the new argument to which Plaintiffs must now respond.

For the foregoing reasons, Plaintiffs request they be allowed to file the attached four-page sur-reply, which is limited to responding to the new argument.

October 24, 2019

Respectfully submitted,

By: /s/ David S. Muraskin
David S. Muraskin*
PUBLIC JUSTICE, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
Counsel for Plaintiffs

Daniel K. Bryson
N.C. Bar Number: 15781
Jeremy Williams
N.C. Bar Number: 48162
Whitfield Bryson & Mason LP
900 W. Morgan Street
Raleigh, NC 27603
(919) 600-5000
dan@wbmlp.com
jeremy@wbmlp.com
Counsel for Plaintiffs

Leslie A. Brueckner*
Public Justice, P.C.
474 14th Street Suite 610
Oakland, CA 94612
(510) 622-8205
lbrueckner@publicjustice.net
Counsel for Plaintiffs

Matthew Strugar*
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
323-696-2299
matthewstrugar.com
*Counsel for People for the Ethical Treatment of
Animals, Inc.*

Matthew Liebman*
Cristina Stella*
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931
(707) 795-7533
mliebman@aldfALDF.org
cstella@aldf.org
Counsel for Animal Legal Defense Fund

Justin Marceau*
University of Denver—Strum College of Law
(for reference purposes only)
2255 E. Evans Ave.
Denver, CO 80208
(303) 871-6000
jmarceau@law.du.edu
Counsel for Animal Legal Defense Fund

Scott Edwards*
Food & Water Watch
1616 P St. NW
Washington, DC 20036
(202) 683-2500
sedwards@fwwatch.org
Counsel for Food & Water Watch

Jennifer H. Chin*
Robert Hensley*
ASPCA
520 Eighth Avenue, 7th Floor
New York, NY 10018
(212) 876-7700
jennifer.chin@aspc.org
robert.hensley@aspc.org
*Counsel for American Society for the
Prevention of Cruelty to Animals*

*Appearing by Special Appearance

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(1)

I hereby certify that this brief contains 702 words, excluding the caption, signature blocks, and certificate. That word count was calculated using the Microsoft Word program used to write this brief.

By: /s/ David S. Muraskin
David S. Muraskin
Public Justice