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-Appellees, Cross-Appellants

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-Appellants, Cross-Appellees

And

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

Intervenor-Defendant-Appellants, Cross-Appellees

No. 20-1776

Motion To Dismiss Intervenor's Appeal For Lack Of Jurisdiction

"Plaintiffs brought this action, alleging that [N.C. Gen. Stat. § 99A-2] interferes with their plans to conduct undercover investigations of government facilities in North Carolina for the purpose of gathering evidence of unethical and illegal animal practices and to disseminate this information to the public, in violation of the First and Fourteenth Amendments to the United States Constitution … . Plaintiffs sought an order declaring the Act unconstitutional and enjoining [North Carolina governmental] Defendants from enforcing the Act." *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 Fed. App'x 122, 126 (4th Cir. 2018). This Court held Plaintiffs pled standing against the named State Defendants, the Chancellor of the University of North Carolina—Chapel Hill and the North Carolina Attorney General. *Id.* at 131-132. On remand, the district court held the challenged provisions of N.C. Gen. Stat. § 99A-2 were unconstitutional on their face or as-applied to Plaintiffs, and enjoined the State Defendants from enforcing the law. *People for the Ethical Treatment of Animals, Inc. v. Stein*, --- F. Supp. 3d ---, 2020 WL 3130158, at *25 (M.D.N.C. June 12, 2020) (also attached as Exhibit A pursuant to Federal Rule of Appellate Procedure 27(a)(2)(B)(iii)).

Between this Court's remand for consideration of the merits, and the district court's determination on the merits, the district court exercised its discretion to allow the North Carolina Farm Bureau Federation, Inc. ("Farm Bureau") to

intervene. It explained it was exercising its discretion under Federal Rule of Civil Procedure 24(b) to allow the Farm Bureau to enter the case because the Farm Bureau would assist the State's defense, "arguing the same question[s]" as the State Defendants. Dkt. No. 92, at 7.

The Farm Bureau has now filed the lead notice of appeal in this matter. Dkt. No. 143 (Farm Bureau Notice of Appeal), *appeal docketed* No. 20-1776. The Farm Bureau's appeal is separate and apart from the State Defendants' Notice of Appeal, which the Farm Bureau did not join. Dkt. No. 145 (State Defendants' Notice of Appeal), *appeal docketed* No. 20-1777.

Controlling Supreme Court precedent makes clear the Farm Bureau lacks standing to prosecute an independent appeal of this matter. *See, e.g., Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). The district court's injunction does not run against the Farm Bureau or any of its members, only the State Defendants. The Farm Bureau's only interest in this matter is its generalized grievance that it believes N.C. Gen. Stat. § 99A-2 should be held constitutional. Such a concern has never provided standing. While the Farm Bureau conceivably could have proceeded *with* the State Defendants, as only one party to an action must have standing, that is not how it or the State Defendants chose to docket their appeals. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("the presence of one party with standing is sufficient to satisfy Article III's

case-or-controversy requirement"). As described below, the Farm Bureau chose to proceed on its own to disrupt Plaintiffs' and Defendants' efforts to resolve this matter without appeal. This Court lacks jurisdiction over that independent action and it should be dismissed.[1]

I. For An Intervenor To Appeal It Must Have Standing.

Article III's standing requirements apply to appellants just as they apply to district court plaintiffs. As the Supreme Court has explained, while "[m]ost standing cases consider whether a plaintiff has satisfied the requirement when filing suit, [] Article III demands that an actual controversy persist throughout all stages of litigation. That means that standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Hollingsworth*, 570 U.S. at 705 (internal citations omitted). Thus, where a district court allows individuals who are not the named defendants "to intervene to defend" the challenged law, if those intervenors subsequently appeal, the court of appeals "must decide whether [they] ha[ve] standing to appeal the District Court's order." *Id.* at 702, 705.

[1] Pursuant to Local Rule 27(a), Plaintiffs informed counsel for both the Farm Bureau and State Defendants of their intent to file this motion. The Farm Bureau indicated it will oppose this motion. The State Defendants indicated they did not wish to take a position without seeing and considering the motion.

Indeed, the Supreme Court, sitting as a court of appeals, relied on this principle to dismiss an appeal by state legislators who intervened to defend a law they passed. The Court explained the legislators "carried the laboring oar in urging the constitutionality of the challenge [law] at a bench trial." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). Nonetheless, "'[m]erely because a party appears in the district court proceedings does not mean that the party automatically has standing to appeal the judgment rendered by that court.'" *Residences at Bay Point Condo. Ass'n, Inc. v. Standard Fire Ins. Co.*, 641 Fed. App'x 181, 183 (3d Cir. 2016) (unpublished) (quoting *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation*, 32 F.3d 205, 208 (5th Cir. 1994)). Therefore, when intervenors "seek[] to invoke" a court of appeals' jurisdiction, they must establish they have standing "in [their] own right" to proceed. *Virginia House of Delegates*, 139 S. Ct. at 1951.

II. The Farm Bureau Lacks Standing To Appeal On Its Own.

Supreme Court authority also provides intervenors like the Farm Bureau lack standing to appeal. In *Hollingsworth*, like here, the district court allowed the private "proponent of [an] initiative [] to intervene to defend it" on the merits. *Hollingsworth*, 570 U.S. at 702 (internal citation omitted). There, like here, the plaintiffs prevailed, but the "District Court had not ordered [intervenors] to do or

refrain from doing anything," it solely "enjoined the state officials named as defendants from enforcing" the law. *Id.* at 705. There, like here, the intervenor's "only interest in having the District Court order reversed was to vindicate the constitutional validity of" the law. *Id.* at 706.

On this basis, the Supreme Court held the intervenors lacked standing to appeal. Their "generalized grievance" regarding the lower court's legal analysis, "no matter how sincere, is insufficient to confer standing." *Id.* A party cannot "state an Article III case or controversy" where their claimed injury is their "interest in proper application of the Constitution and laws." *Id.*

The Farm Bureau did not seek to establish its standing in the summary judgment proceedings, and its earlier filings, as best, put forward a "generalized grievance" for participating in this litigation. In fact, it represented to the district court it "need not establish Article III standing" and merely addressed the issue in a footnote to its motion to intervene. Dkt. No. 83, at 7 n.2. Therefore its separately docketed appeal must be dismissed.

Lest there be any doubt, that footnote suggested that because the Farm Bureau's members—like every other business owner or operator in North Carolina—could potentially wield the cause of action created by N.C. Gen. Stat. § 99A-2, its members had standing to try to preserve the law. *Id.* However, the Supreme Court has explained that when a purported injury is "shared in

substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction" because it is the very definition of a "generalized grievance." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Indeed, the Farm Bureau's member declarants made clear they had *no* specific reason to believe they would ever use the law, but rather sought to defend it so that they and "farmers like" them can have another tool to use against advocacy groups. Dkt. No. 83-2 ¶ 7; *see also* Dkt. No. 83-3 ¶ 6 (same). Therefore, the Farm Bureau did not establish standing to proceed on behalf of its members because it did not establish its members had standing.

The Farm Bureau also asserted in a single sentence that it had standing on behalf of itself, because Plaintiffs' constitutional claims, if successful, would cause the organization to "expend[] resources," but that contention is unsubstantiated. Dkt. No. 83, at 7 n.2. The Farm Bureau's declaration in support of its organizational standing merely stated the organization "supported" the law when it was enacted and subsequently "educated" its members about its existence, without stating the Farm Bureau was engaged in *any* ongoing efforts regarding the law, or that the Farm Bureau would undertake efforts regarding the law if it were struck down. Dkt. No. 83-1 ¶¶ 6-7. As this Court has made clear, where an organization asserts standing based on the organization's diversion of resources in a case seeking forward looking relief, the organization must establish some "burden" it

"would face going forward" if it failed to obtain its desired outcome. *Benham v. City of Charlotte*, 635 F.3d 129, 139 (4th Cir. 2011); *see also Nnebe v. Daus*, 644 F.3d 147, 157-58 (2d Cir. 2011) (Farm Bureau's authority in support of its organizational standing, which held standing existed if there were *ongoing* expenditures that would continue if the requested relief were denied). Therefore, the Farm Bureau failed to establish standing on behalf of itself.

The Farm Bureau was allowed to intervene merely because it claimed a general interest in defending the law. This is because it had no other basis on which to intervene, never establishing any sort of standing to defend the law. Nonetheless, the Farm Bureau noticed an appeal in this matter, No. 20-1776, on its own, Dkt. No. 143. Because the Farm Bureau lacks standing, that appeal cannot proceed.

III. The Facts Of This Case Do Not Warrant A Different Outcome.

The Farm Bureau is certain to point out that after it filed its notice of appeal, the State Defendants appealed, and courts have allowed appeals to proceed where one party has standing. But, the State Defendants' independent appeal does not allow the Farm Bureau's separate action. This is particularly true, as the Farm Bureau strategically chose not to join the State Defendants' separate appeal. The Farm Bureau is seeking to litigate its own case, which this Court has no jurisdiction to entertain.

To the extent intervenors like the Farm Bureau have been allowed to appeal that is because they have proceeded *with* a party who had standing. If, like here, an intervenor lacks standing, it can only appeal if it employs "piggyback standing." *Kane Cty. v. United States*, 950 F.3d 1323, 1324-25 (10th Cir. 2020) (en banc). That is, it can only proceed to the extent it does not "seek[] additional relief beyond" that requested by the party with standing. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). Solely if a "party with appellate standing asserts each challenge to the district court's decision" can an intervenor without standing pursue that claim by joining that challenge. *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1142 (9th Cir. 2018).[2]

Here, in contrast, the Farm Bureau improperly seeks to create its own vehicle, distinct from that of the State Defendants, to appeal the decision below. *Ore. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1233 (9th Cir. 2017) ("This ineluctable requirement [of appellant standing] is not vitiated simply because an intervenor is raising a new or different claim for

[2] For these reasons, to the extent the Farm Bureau notes Plaintiffs have separately cross-appealed, Dkt. No. 149, that is irrelevant to the analysis. As described above, Plaintiffs prevailed below and merely believe there are additional bases on which they could have prevailed. The Farm Bureau is seeking to independently raise bases to reverse the district court. A party with standing must pursue those claims, and the Farm Bureau lacks standing.

relief in the context of an existing case rather than bringing an original suit."). By appealing independently from the State Defendants, the Farm Bureau has asserted a right to request distinct relief, a right it does not have.

This is not mere formalism. Plaintiffs and the State Defendants were in talks to resolve this matter without appeal when the Farm Bureau filed its notice, doing so ahead of the deadline to appeal. That notice successfully disrupted those discussions. Moreover, below, the Farm Bureau litigated theories the State Defendants did not genuinely prosecute. *Compare* Dkt. No. 110, at 19-22 (Farm Bureau summary judgment brief) *with* Dkt. No. 108, at 26 (State Defendants summary judgment brief). Throughout this case, and particularly now on appeal, the Farm Bureau has sought to direct this litigation when the true State Defendants should be charged with doing so. Its separately docketed appeal, for which it lacks standing, should be dismissed.

IV. Conclusion.

For the foregoing reasons the Court should dismiss appeal No. 20-1776, the Farm Bureau's action, for lack of standing.

August 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the August 7, 2020, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

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