2019 WL 7583969 (M.D.N.C.) (Trial Motion, Memorandum and Affidavit)
United States District Court, M.D. North Carolina.

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.

Roy COOPER, 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.

and

NORTH CAROLINA FARM BUREAU FEDERATION, INC., Intervenor-Defendant.

No. 1:16-cv-00025-TDS-JEP.
September 3, 2019.

Brief Amici Curiae of the Reporters Committee for Freedom of the Press and 21 Other Organizations in Support of Plaintiffs' Motion for Summary Judgment

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STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press and 21 other media organizations, through undersigned counsel, respectfully submit this brief as *amici curiae* in support of Plaintiffs' Motion for Summary Judgment. [1] *Amici* have filed an accompanying motion seeking leave of Court to file this *amici* brief. Plaintiffs, Defendants, and Intervenor-Defendant all consent to the filing of this *amici* brief.

Amici are listed and described in Appendix A. As news media outlets and organizations dedicated to defending the First Amendment and the newsgathering rights of journalists, *amici* have a strong interest in this case. Specifically, *amici* have an interest in ensuring that journalists are able to report on matters of public concern without facing unconstitutional impediments to their newsgathering activities. If whistleblowers (and other would-be sources) are punished for documenting evidence of dangerous, illegal, or unethical activity that they encounter, journalists will not be able to do their jobs effectively. For the reasons herein, *amici* urge the Court to grant summary judgment in favor of Plaintiffs.

SUMMARY OF THE ARGUMENT

N.C. Gen. Stat. § 99A-2 ("Section 99A-2") stifles public debate and discussion, discourages whistleblowers from coming forward for fear of liability, and favors corporate interests at the expense of First Amendment freedoms and a well-informed citizenry. Section 99A-2, much like other laws that have been struck down as unconstitutional, punishes the disclosure of information about agricultural properties and other facilities—including both commercial and state facilities—to members of the news media. As a result, Section 99A-2 dramatically chills reporter-source communications and obstructs journalists' ability to report on matters of public concern, including but not limited to food safety, the treatment of workers at agricultural facilities, and the treatment of animals at research facilities. Particularly troublingly for *amici*, as discussed in more detail below, is that interfering with newsgathering activities was, apparently, the law's intent. *See* Transcript of the Tape-Recorded Hearing of the N.C. General Assembly, 2015-2016 Sess. 4 (N.C. June 3, 2015) (Representative Szoka stating, in support of Section 99A-2, that is not "proper" for whistleblowing employees to give evidence of wrongdoing to members of the news media).

Members of the public cannot themselves monitor all of the institutions that affect their lives; they rely on members of the news media to keep them informed about matters implicating health, safety, and public welfare. Because Section 99A-2 stymies the ability of news organizations to gather news and report on matters of significant public interest, *amici* urge the Court to grant summary judgment in favor of Plaintiffs.

ARGUMENT

I. Section 99A-2 infringes upon the newsgathering rights of journalists.

State laws that penalize individuals, including whistleblowers, for documenting industry practices and conditions on properties like industrialized farms have consistently been struck down as unconstitutional. *See generally, Ag-gag Across America*, Center for Constitutional Rights (2017), https://perma.cc/W34N-2P3P. The statute at issue here, Section 99A-2, purports to restrict such constitutionally protected conduct by whistleblowers and others in all "nonpublic areas of an employer's premises[,]" thus implicating any number of businesses or enterprises, including industrialized farms, nursing homes, labs, and other places where a lack of transparency could have dire public health consequences.

In many states, legislators have *attempted* to pass such laws, but failed; in several cases, the failed bills were similar to Section 99A-2 in key ways. [2] In 2013, for example, a proposed "ag-gag" [3] bill in Tennessee was vetoed by the governor on the ground that it was "constitutionally suspect." Andy Sher, *Tennessee Governor Bill Haslam vetoing 'ag gag' bill*, Times Free Press (May 13, 2013), https://perma.cc/RKZ3-HR3A.

Utah passed an ag-gag law in 2012 proscribing conduct similar to the conduct described in Section 99A-2. *See*Utah Code § 76-6-112(2)(a) (containing a provision against recording which stated that a person is guilty of "agricultural operation interference" if the person, without consent from the owner of the operation, knowingly records image or sound by leaving a recording device on the premises). In 2017, the U.S. District Court for the District of Utah struck down Utah's law as unconstitutional on the ground that it violated the First Amendment. In doing so, the district court explained: "Utah undoubtedly has an interest in addressing perceived threats to the state agricultural industry, and as history shows, it has a variety of constitutionally permissible tools at its disposal to do so. *Suppressing broad swaths of protected speech without justification, however, is not one of them*." (emphasis added). *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).

A. *Section 99A-2 unconstitutionally abridges the right to make audiovisual recordings.*

Audiovisual recordings have long been recognized to be a "significant medium for the communication of ideas" entitled to full constitutional protection. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). The First Amendment protects "the broader right to film." *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("the First Amendment protects the act of making film, as 'there is no fixed First Amendment line between the act of creating speech and the speech itself"') (citation omitted). As the Seventh Circuit has stated, the "act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). In *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017), the Third Circuit held that the "First Amendment protects actual photos, videos, and recordings ... and for this protection to have meaning the Amendment must also protect the act of creating that material." Indeed, especially today, "[w]e live, relate, work, and decide in a world where image capture from life is routine, and captured images are part of ongoing discourse, both public and private." Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 337 (Jan. 2011).

Section 99A-2 infringes on this constitutional right to record by, in pertinent part, creating liability for the "record[ing]" of "images or sound occurring within an employer's premises and us[ing] the recording to breach the person's duty of loyalty to the employer;" and "plac[ing] on the employer's premises an unattended camera or electronic surveillance device and us[ing] that device to record images or data." N.C. Gen. Stat. § 99A-2(b).

A recent decision of the Tenth Circuit is instructive. In 2017, the court considered whether a Wyoming law that imposed both civil and criminal liability for individuals that "without authorization ... enter[ed] private land for the purpose of collecting resource data" implicated the First Amendment. *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1193 (10th Cir. 2017) (internal quotation marks omitted). The collection of resource data was defined by statute to mean, in part, "photograph[ing] ... information in any form," *id.* at 1195, where the geographical coordinates of the photograph were also recorded. The Tenth Circuit held that the collection of resource data, including photography, "constitutes the protected creation of speech." *id.* at 1196-97 ("An individual who photographs animals ... is creating speech in the same manner as an individual who records a police encounter."). The law at issue was thus found to regulate speech and was subject to a First Amendment analysis. The Tenth Circuit remanded the case for consideration of whether the Wyoming statutes were unconstitutional; the District of Wyoming held on remand that the statutes were content-based restrictions on speech (and thereby subject to strict scrutiny). *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1187 (D. Wyo. 2018). Further, because the statutes were not narrowly tailored, they

violated the First Amendment. *id.* ("The government has no legitimate explanation for the specific targeting of data collectors over other types of individuals engaged in trespass.").

Similarly, in 2018, the Ninth Circuit struck down almost all of an Idaho statute designed to bar the recording of undercover video at agricultural facilities. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). The Ninth Circuit reaffirmed that audio and video recording is constitutionally protected expression, *id.* at 1203, and concluded the law had the improper purpose of targeting investigative journalists and protected speech. *id.* at 1195. It stated that:
It is no surprise that we have recognized that there is a 'First Amendment right to film matters of public interest.' *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). It defies common sense to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity.

id. at 1203*; see also Herbert*, 263 F. Supp. 3d at 1208 (holding that Utah's ag-gag statute violated the First Amendment, in part due to its recording provisions). [4]

B. *Section 99A-2 is an impermissible content-based restriction*.

Content-based restrictions on speech are presumptively unconstitutional under the First Amendment. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). The government is prohibited from restricting speech based on its content because such restrictions threaten to "manipulate the public debate through coercion rather than persuasion," *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 641 (1994), and permit governments to "drive certain ideas or viewpoints from the marketplace." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1982). Laws imposing content-based speech restrictions are constitutional *only* if they survive strict scrutiny, which requires that the law be narrowly tailored to serve a compelling state interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

The Supreme Court in *Reed* defined content-based regulations as "those that target speech based on its communicative content." *id.* It noted that:

> This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

id. at 2227.

In *Blackston v. State of Ala.*, 30 F.3d 117, 120 (11th Cir. 1994), the Eleventh Circuit concluded that if a government ban on tape recording was "affected by sympathy or hostility for the point of view being expressed by the communicator," *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976), the law would be subject to strict scrutiny.

Section 99A-2 is unquestionably content-based. It penalizes speech that "breach[es] the person's duty of loyalty to the employer," N.C. Gen. Stat. § 99A-2(b)(2), [5] and thus "defin[es] regulated speech by its function or purpose," *see Reed*, 135 S. Ct. at 2222. *Wasden*, discussed *supra* at 6, is again illustrative. In that case, Idaho's ag-gag law was found to impose unconstitutional

content-based restrictions on speech because "a videographer could record an after-hours birthday party among co-workers, a farmer's antique car collection, or a historic maple tree *but not* the animal abuse, feedlot operation, or slaughterhouse conditions." *Wasden*, 878 F.3d at 1204 (emphasis added). Section 99A-2 contains the same constitutional infirmity, because it impermissibly allows the government to "select which issues are worth discussing or debating," *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

II. Section 99A-2 chills constitutionally protected reporter-source communications.

Sources, confidential or otherwise, are the lifeblood of investigative reporting. "There are no stories without sources." Susan McGregor, *Digital Security and Source Protection for Journalists*, Tow Center for Digital Journalism (June 2014) at 12. Section 99A-2 threatens the existence of these vital reporter-source relationships.

Journalists and their sources, who could include whistleblowing employees, have mutually reinforcing interests in informing the public. Whistleblowers, for example, may seek to disclose information about the facilities where they work in order to bring issues of public concern to light, and the news media, in turn, wants to report on such information. *See* Nicholas Kristof, *Abusing Chickens We Eat*, The New York Times (Dec. 3, 2014), https://perma.cc/QBS3-7AM7 (Craig Watts of Fairmont, North Carolina, a former farmer for Perdue who raised about 720,000 chickens a year for the company, invited the press into his facility to see the "raw, angry, red flesh" of the chickens, nearly all of whom "lost their feathers").

Take, for example, The Guardian's comprehensive reporting on environmental degradation and health defects in North Carolina resulting from industrialized animal farming. Erica Hellerstein and Ken Fine, *A million tons of feces and an unbearable stench: life near industrial pig farms*, The Guardian (Sep. 20, 2017), https://bit.ly/2xoSQ0***I***. The Guardian discussed blood pressure abnormalities, respiratory issues like asthma, and diminished quality of life for people living near concentrated animal feeding operations ("CAFOs"), and conducted an interview with Don Webb, a former hog farmer in Northampton County. *id.* At his farm's peak, Mr. Webb had about 4,000 hogs. *id.* He left the agriculture industry due to a lack of proper waste management infrastructure; specifically, according to Mr. Webb, he had grown dissatisfied with having to spray fecal matter from overflowing "manure lagoons" onto nearby land—standard practice on industrialized farms to mitigate excess hog waste. *id.* In describing the impact of this practice on his neighbors, Mr. Webb explained: "These are human beings. They've worked their whole lives and are tryin' to have a clean home and a decent place to live, and they can't go on their front porch and take a deep breath." *id.* He posited: "Suppose that was my mama and daddy back there... [h]ow would I feel?" *id.*

Journalists' access to first-hand accounts like Mr. Webb's enhances accuracy and credibility in reporting, increases transparency and reader trust, and enriches news stories, allowing reporters to convey more than can be said based on second-or third-hand accounts. *See, e.g.*, *The Hierarchy of Information and concentric circles of sources*, American Press Institute (last visited Aug. 5, 2019), https://perma.cc/Z76A-3SC3. In addition, in the digital age, those sources can provide the evidence and documentary materials which further enhance accuracy and allow journalists to complement their written word. *See, e.g.*, Deron Lee, '*Ag-gag' reflex*, Columbia Journalism Review (Aug. 6, 2013), https://perma.cc/Z5D5-GSJZ.

Laws like Section 99A-2 chill the flow of this vital information from potential sources to journalists. Will Potter, an award-winning investigative journalist, has interviewed numerous undercover investigators and farm workers who are "increasingly afraid of speaking out." Animal Charity Evaluators, *Interview with Will Potter* (May 6, 2016), https://perma.cc/A8SB-9MGJ. Potter attributes this fear to the proliferation of ag-gag laws. *See id.* Because one of the many roles of journalism is to "amplif[y] marginalized voices"—for example, the voices of agricultural workers—access to inside sources is indispensable to fully telling these stories. *id.* Section 99A-2 impedes those stories from being told.

III. Section 99A-2 hampers the ability of the news media to report on matters of significant public concern.

The very purpose of Section 99A-2 is to thwart the ability of members of the news media to do their jobs. *See, e.g.*, Transcript of the Tape-Recorded Hearing of the N.C. General Assembly, 2015-2016 Sess. 15-16 (N.C. June 3, 2015) (during which Representative Michael Speciale, a sponsor of Section 99A-2, stated, "this bill is designed to go after people who intentionally hire onto a [business] ... to do an exposé for ABC News[.]"). In *Sorrell v. IMS Health*, 564 U.S. 552, 566 (2011), the U.S. Supreme Court stated that if a government "bent on frustrating an impending demonstration" passed a law demanding two years' notice before the issuance of parade permits, such a law, while facially content-neutral, would be content-based because its purpose was to suppress speech on a particular topic. Here, while the plain text of Section 99A-2 does not explicitly mention whistleblowers or journalists, its legislative history makes clear the legislators' intent to stifle investigative journalism. [6] *See, e.g.*, Audio Recording: Senate Commerce Committee Hearing, 2015-2016 Sess. 14:10-14:45 (N.C. May 14, 2015) (Representative Jordan proclaiming that the "crux" of Section 99A-2 is that it requires reporting information to law enforcement to deter "running off to a news outlet."). [7]

"The Constitution specifically selected the press ... to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The Supreme Court explained "that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people."*New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

Section 99A-2 undermines these fundamental principles. It blocks the flow of valuable information to the press and, therefore, the public. Because it is "well established that the Constitution protects the right to receive information and ideas," *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and because the government is prohibited from "limiting the stock of information from which members of the public may draw," *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978), the Court should grant summary judgment in favor of Plaintiffs.

Reporting on the source of our nation's food supply and lives of agricultural workers is, without question, a matter of legitimate public concern. There are countless examples of the importance of such reporting. Take, for example, *The New Yorker*'s reporting on Case Farms, a business with locations in Troutman, Morganton, and Dudley, North Carolina. *See* Michael Grabell, *Exploitation and Abuse at the Chicken Plant*, The New Yorker (May 1, 2017), https://perma.cc/8EWP-9VFY. The reporting describes how some workers "must wait so long [to use the bathroom] that some of them wear diapers." *id.* One woman interviewed said that the "company disciplined her for leaving the line to use the bathroom, even though she was seven months pregnant." *id.* Working conditions for these agricultural workers is unquestionably a matter of public concern in North Carolina, and throughout the United States.

Ted Conover, a writer for *Harper's*, gained employment as a food safety inspector and wrote an in-depth reflection about his time working at a Cargill slaughterhouse. He wrote about how when reeling cattle in a straight line in order to put a bolt to their heads to kill them, workers would, in defiance of company regulations, use electric prods to straighten out cattle who were essentially disrupting the line. Ted Conover, *The Way of All Flesh*, Harper's (May 2013), https://perma.cc/C7JF-7XZ5. Conover's writing not only detailed the operation of an industrial slaughterhouse ("steam and splashing as the viscera hit the table with a plop"), but also highlighted socio-economic issues. Conover described, for example, the workers' "frustration with how seemingly irrational thinking in big cities can affect life in the country" when "some city person's fantasy" about what it means to treat animals humanely "influence[s] the whole rural economy." *id.*

Unlike ag-gag laws that typically focus on restricting recording at agricultural facilities, *see, e.g.*, Utah Code § 76-6-112, the reach of Section 99A-2 is broader and extends to any property. The expanse of Section 99A-2 is troubling because the need for investigative journalism to bring to light matters of public concern will always be pressing—irrespective of industry or field

—and especially where vulnerable members of society are exploited. This is as true at nursing homes, *see* Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, The New York Times (Sep. 23, 2007), https://perma.cc/U7HT-GXCY (detailing not only neglect by nursing home staff but unsafe conditions for the elderly at numerous homes), and day care facilities, Marlena Baldacci, *et al*., *Day care worker accused of child abuse after video shows her throwing a toddler in a classroom, authorities say*, CNN (March 1, 2019), https://perma.cc/C6SU-J7B, as well as at agricultural facilities.

Public scrutiny spurred by investigative reporting has led to improvements in working conditions, food safety, and quality of life for many people. By stifling constitutionally protected activities, Section 99A-2 threatens to eliminate the kind of vital public interest reporting that has, in the past, led to safer food, a cleaner environment, and better conditions for workers and animals alike.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to grant summary judgment in favor of Plaintiffs. Dated: September 3, 2019
Respectfully submitted,

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Appendix not available

NOTE 17

Footnotes

1 No party's counsel authored any part of this brief. No person other than *amici* or their counsel contributed money intended to fund the brief's preparation or submission.

2 In more than fifteen states, bills intended to curb whistleblowing activity at places like agricultural facilities have died before ever becoming law. Several such bills contained a recording provision similar to that of Section 99A-2. *See, e.g.*, H.B. 2587, 51st Leg. (Ariz. 2014); H.B. 1104, 64th Leg. (Wash. 2015).

3 The term "ag-gag" was coined by New York Times writer Mark Bittman in 2011. *See* Mark Bittman, *Who Protects the Animals?*, The New York Times (April 26, 2011), https://perma.cc/N74F-JUE8. "Ag-gag" laws are state laws that, among other things, may forbid filming or photography at concentrated animal feeding operations, or otherwise protect the agriculture industry by discouraging whistleblowing. As discussed in this *amici* brief, Section 99A-2 is not limited solely to agricultural facilities; rather it applies to all businesses, as well as state properties. However, Section 99A-2 features key hallmarks of ag-gag laws and suffers from the same constitutional infirmities as ag-gag laws that have been found unconstitutional. As such, *amici* reference ag-gag laws in this brief.

4 While the Idaho ag-gag law in *Wasden* and the Utah law in *Herbert* imposed criminal liability for recording, both criminal and civil statutes can impose unconstitutional restrictions on speech. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action .... The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.") (citation omitted).

5 It appears from the legislative history that some members of the North Carolina legislature equated "tak[ing] a job ... to do an ... exposé for ABC News" with "frauding" [sic] their employer. Transcript of the Tape-Recorded Hearing of the N.C. General Assembly, 2015-2016 Sess. 16 (N.C. June 3, 2015) (statement of Representative Speciale). To the extent that the Legislature deems this a "breach[] of the person's duty of loyalty to [his] employer," N.C. Gen. Stat. § 99A-2(b)(1), *amici* note that the Idaho statute in *Wasden* was struck down, in part, due to its provision penalizing entry into an agricultural facility by misrepresentation, which violated the First Amendment. *Wasden*, 878 F. 3d at 1194-95. *See also United States v. Alvarez*, 567 U.S. 709, 729 (2012) (upon which *Wasden* relies).

6 "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Rankin*, 821 S.E.2d 787, 792 (N.C. 2018) (quoting *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016)). With this guidepost in mind, it is clear that Section 99A-2's intended consequence is to stifle investigative journalism.

7 In support of their motion for summary judgment, Plaintiffs present a fulsome discussion of the legislative history of Section 99A-2. Plaintiffs' Brief in Support of Their Motion for Summary Judgment at 4-6 and 19.

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