

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF 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.)

1:16CV25

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.)

MEMORANDUM OPINION AND ORDER

THOMAS D. SCHROEDER, Chief District Judge.

Plaintiffs People for the Ethical Treatment of Animals, Inc. ("PETA"), Center for Food Safety ("CFS"), Animal Legal Defense Fund ("ALDF"), Farm Sanctuary, Food & Water Watch ("FWW"), Government Accountability Project ("GAP"), Farm Forward, and the

American Society for the Prevention of Cruelty to Animals (“ASPCA”) seek to permanently enjoin North Carolina Attorney General, Josh Stein, and University of North Carolina-Chapel Hill Chancellor, Dr. Kevin Guskiewicz, from enforcing subsections of North Carolina General Statute § 99A-2 as unconstitutional under the First and Fourteenth Amendments to the United States Constitution. (Doc. 21 ¶ 142.)

Before the court are cross-motions for summary judgment filed by Plaintiffs (Doc. 98) and Defendants (Doc. 107), as well as Intervenor-Defendant North Carolina Farm Bureau Federation, Inc. (“Intervenor”) (Doc. 109). With leave of court, *amici* Reporters Committee for Freedom of the Press and twenty-one other organizations¹ have filed a brief in support of Plaintiffs’ motion for summary judgment. (Doc. 106.) The motions have been fully briefed, and the court held oral argument on February 6, 2020. For the reasons set forth below, the court will grant in part and deny in part the parties’ motions for summary judgment, finding that the challenged provisions of the law fail to pass muster under

¹ *Amici* are as follows: American Society of News Editors; The Associated Press Media Editors; Association of Alternative Newsmedia; Capitol Broadcasting Company, Inc.; First Look Media Works, Inc.; Forbes Media LLC; Freedom of the Press Foundation; Gannett Co., Inc.; GateHouse Media; The International Documentary Association; The Investigative Reporting Workshop; The National Press Club; The National Press Club Journalism Institute; The National Press Photographers Association; The North Carolina Press Association; The Online News Association; POLITICO; Radio Television Digital News Association; Reporters Without Borders; Society of Professional Journalists; and The Tully Center for Free Speech. (Doc. 106 at 25-30.)

the First Amendment - two provisions fail facially, and the remaining two provisions fail as applied to Plaintiffs.

I. BACKGROUND

A. Facts

The facts, either not in dispute or viewed in the light most favorable to the non-moving parties in the cross-motions for summary judgment, establish the following:

On June 3, 2015, over then-Governor Patrick McCrory's veto,² the North Carolina General Assembly passed the North Carolina Property Protection Act, 2015 N.C. Sess. Laws 50, codified at N.C. Gen. Stat. § 99A-2 ("Property Protection Act" or "Act"). (Doc. 21 ¶ 1; Doc. 108 at 4.) The Act amended current law that provides a civil remedy for interference with certain property rights by creating a civil cause of action for the owner or operator of a premises as follows:

(a) Any person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained. For the purposes of this section, "nonpublic areas" shall mean those areas not accessible to or not intended to be accessed by the general public.

² In his veto statement, Governor McCrory stated: "While I support the purpose of this bill, I believe it does not adequately protect or give clear guidance to honest employees who uncover criminal activity. I am concerned that subjecting these employees to potential civil penalties will create an environment that discourages them from reporting illegal activities." (Doc. 99-8 at 4.)

N.C. Gen. Stat. § 99A-2(a). Under the law, "an act that exceeds the person's authority" within the meaning of section (a) "is any of the following":

- (1) An employee who enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer's data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer[;]
- (2) An employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer[;]
- (3) Knowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data[;]
- (4) Conspiring in organized retail theft, as defined in Article 16A of Chapter 14 of the General Statutes[; or,]
- (5) An act that substantially interferes with the ownership or possession of real property.

Id. § 99A-2(b). "Any person who intentionally directs, assists, compensates, or induces another person to violate this section" can be held jointly liable with the employee or actor. Id. § 99A-2(c).

Any party who prevails in an action brought under the Act can recover equitable relief, compensatory damages, costs and

attorneys' fees, as well as "[e]xemplary damages as otherwise allowed by State or federal law in the amount of five thousand dollars (\$5,000) for each day, or portion thereof, that a defendant has acted in violation of subsection (a)." Id. § 99A-2(d). The Act further provides that nothing in it shall be construed to "diminish the protections provided to employees under Article 21 of Chapter 95 [Retaliatory Employment Discrimination] or Article 14 of Chapter 126 [Protection for Reporting Improper Government Activities] of the General Statutes" or "limit any other remedy available at common law or provided by the general Statutes." Id. § 99A-2(e), (g).

Plaintiffs are eight organizations who either "engage in employment-based undercover investigations to document and expose animal abuse" (Doc. 99 at 2) or "use[] information from whistleblowers and investigators in their advocacy" (id. at 7). PETA says it has identified animal testing laboratories at the University of North Carolina-Chapel Hill that it would like to investigate through the use of an undercover investigator, but it has refrained from doing so out of fear and the "threat of exemplary damages and other civil penalties under [the Act]." (Doc. 100-1 ¶¶ 17-18, 24.) Similarly, ALDF says it is prepared to conduct undercover investigations at state-owned facilities in North Carolina, but those preparations were "thwarted when the [Act] passed." (Doc. 100-2 ¶ 8.) Both PETA and ALDF represent

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