CV-20-1538

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND; ANIMAL EQUALITY; CENTER FOR BIOLOGICAL DIVERSITY; and FOOD CHAIN WORKERS ALLIANCE, **APPELLANTS**

v.

JONATHAN and DeANN VAUGHT, D/B/A PRAYER CREEK FARM; and PECO FOODS, INC., **APPELLEES**

REPLY TO APPELLEE PECO FOODS, INC.'S OPPOSITION TO THE MOTION TO PARTICIPATE IN SUPPORT OF PLAINTIFFS-APPELLANTS

Deans and Law Professors, Erwin Chemerinsky, Alan B. Morrison, John F. Preis, Dr. Cynthia Boyer, Clay Calvert, Eric M. Fink, Heidi Kitrosser, Justin Pidot, David Schultz, and Alexander A. Reinert, hereby reply to the June 9, 2020, objection of Defendant-Appellee Peco Foods, Inc. to the Deans and Law Professors' motion to participate as amici curiae in support of Plaintiffs-Appellants. In that objection, Defendant Peco Foods, later joined by Defendants-Appellees Jonathan and DeAnn Vaught, repeatedly make a rather extraordinary and manifestly incorrect claim:

"More importantly, the Deans and Law Professors do not profess to have any special insight into Article III's injury-in-fact requirement." (See p. 3)

It is clear that Code § 16-118-113 (the "Ag-Gag Law" or "Act") was enacted in order not just to have a "chilling" effect on conduct but, in actuality, a "freezing" effect on that conduct. It is also clear that Plaintiffs are the target of the civil liability authorized by the Act. Defendants by virtue of their roles in the food processing industry are necessary parts of the process by which the State is attempting to control conduct through private enforcement of the law. Indeed, despite their protestations Defendants never renounce their right to seek the remedies accorded to them by the statute. Defendants by their own admission are aware that Plaintiffs are at substantial risk under the statute if they proceed with the type of investigations they have long undertaken. Thus, there is clearly a "chilling" effect and the real question becomes whether the proscribed conduct is protected by the First Amendment. If so, the statute should be found to be unconstitutional. It is amici's opinion that this evaluation must be undertaken by the court below. What is missed by the Defendants and was missed by the court below is that constitutional "standing" does not occur only after a violation but rather when the prospect of the enforcement of a statute "chills" the prospective conduct, thereby preventing protected speech from occurring in the first place. Plaintiffs have standing to seek this determination by the court below.

Defendants' contention that the deans and law professors do not have any "special insight" from which to provide to this Court their views on the constitutional matters at issue here is plainly wrong. Amici file this because they respect the determinations made by Federal circuit courts and recognize the importance of those determinations. They seek to express their views because in many cases First Amendment jurisprudence has been at the core of their professional work, study, teaching, and writing. Indeed, it seems impossible to believe that Defendants are not aware of the experience of amici (a few of which are described in more depth below), much less their ability to offer "special insight into Article III's injury-in-fact requirement":

CLAY CALVERT is Professor of Law, Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida where he specializes in First Amendment law. He holds a joint appointment with the University of Florida Levin College of Law and the University of Florida College of Journalism and Communications. He previously was the John and Ann Curley Professor of First Amendment Studies at the Pennsylvania State University where he co-directed the Pennsylvania Center for the First Amendment. He has authored or co-authored more than 150 scholarly articles for law journals, primarily on the First Amendment. A member of the State Bar of

California, he has also written books dealing with the First Amendment, including Voyeur Nation: Media, Privacy and Peering in Modern Culture (Westview, 2000).

Prior to becoming the Dean of Berkeley Law, from 2008-2017 **ERWIN CHEMERINSKY** was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law. Dean Chemerinsky is the author of more than 200 law review articles and eleven books, including leading casebooks and treatises about constitutional law, such as *Constitutional Law: Principles and Policies*. New York: Aspen Law and Business. In the U.S. Supreme Court, he has argued the following First Amendment cases: *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005), *Tory v. Cochran*, 544 U.S. 734, 737–38, 125 S.Ct. 2108, 161 L.Ed.2d 1042 (2005), and *United States v. Apel*, 571 U.S. 359, 369, 134 S.Ct. 1144, 186 L.Ed.2d 75 (2014).

HEIDI KITROSSER is an expert on the constitutional law of federal government secrecy and on separation of powers and free speech law more broadly. She has written, spoken, and consulted widely on these topics. She wrote *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution* which was published in 2015 by the University of Chicago Press. Professor Kitrosser's articles have appeared in many publications, including

Supreme Court Review, Georgetown Law Journal, UCLA Law Review, Minnesota Law Review, and Constitutional Commentary.

ALAN MORRISON has argued 20 cases before the U.S. Supreme Court, including *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976) (making commercial speech subject to the First Amendment). He has also written several law review articles on the First Amendment.

DAVID A. SCHULZ is the Floyd Abrams Clinical Lecturer in Law and Senior Research Scholar in Law at Yale Law School, where he serves as Director of the Media Freedom & Information Access Clinic and teaches newsgathering and the First Amendment. Currently, he is also Senior Counsel to the Media Practice Group at Ballard Spahr, LLP. He regularly writes and speaks on media law issues. He is the co-editor of *Newsgathering and the Law* (Lexis/Nexis 2019), now in its fifth edition.

Amici request that this court accept the filing of their brief.

Dated: June 15, 2020

Respectfully submitted,

/s/ Mark I. Bronson

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