
No. 12-2084

In the United States Court of Appeals for the Fourth Circuit

STEVE COOKSEY,

Plaintiff-Appellant,

v.

MICHELLE FUTRELL; BRENDA BURGIN ROSS; KATHLEEN SODOMA; CHRISTIE NICHOLSON; PHYLLIS HILLIARD; CATHLEEN E. OSTROWSKI; RICHARD W. HOLDEN, SR.,

Defendants-Appellees.

BRIEF OF *AMICUS CURIAE* ACLU OF NORTH CAROLINA LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Christopher Brook
ACLU of North Carolina
Legal Foundation
P.O. Box 28004
Raleigh, NC 27611-8004
919-834-3466
866-511-1344 (fax)
cbrook@acluofnc.org

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 12-2084 Caption: Steve Cooksey vs. Michelle Futrell, et al

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Signature: /s/ Christopher A. Brook Date: November 20, 2012

Counsel for: ACLU of NC Legal Foundation,Inc.

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I certify that on November 20, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Christopher A. Brook
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INTERESTS OF *AMICUS CURIAE*

The American Civil Liberties Union of North Carolina ("ACLU-NC") is a statewide, nonprofit, nonpartisan organization with approximately 11,000 members. Since its inception, the mission of the ACLU-NC and its Legal Foundation has been to defend the constitutional rights of all people through advocacy and litigation. The rights guaranteed to individuals in the First Amendment to the United States Constitution are fundamental to the protection of all Americans from the abuse of governmental power. The ACLU-NC and its Legal Foundation have frequently been involved in litigation to safeguard these indispensable rights. The ACLU-NC is particularly interested in the case at bar because of its potential impact on the ability of individuals to seek judicial review when their expressive activity has been chilled by the government.

Both parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29, no party's counsel authored the brief in whole or in part; and no party, party's counsel, or other person contributed money intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

Appellant provided his opinion on dietary matters on his website. J.A. 12, ¶ 29. The North Carolina Board of Dietetics/Nutrition ("Board of Dietetics") opened an official investigation into the Appellant shortly after January 12, 2012. J.A. 18,

¶ 63. As part of this official investigation, the Board of Dietetics' Executive Director, as well as members of the Board of Dietetics' Complaint Committee, examined Appellant's website. J.A. 17, ¶ 71.

The Executive Director and members of the Board of Dietetics' Complaint Committee produced a red-pen review of Appellant's website as a part of their official investigation. J.A. 19, ¶ 72. The review included multiple revisions that would bring Appellant's website into compliance with the law. *Id.* Appellant then changed his website to conform to the Board of Dietetics' legal conclusions. J.A. 25-26, ¶¶ 101-04. The Board of Dietetics closed its official investigation on April 19, 2012, subsequent to the Appellant's revision of his website but reserved the right to monitor the situation. J.A. 21, ¶ 105; J.A. 105.

The district court held "inasmuch as plaintiff was not subject to any actual or imminent enforcement of the [Dietetics/Nutrition Practice] Act, he lacks Article III standing." J.A. 129. In support of this holding, the district court concluded

> the record before the court is devoid of any evidence or even an allegation that the state board made a formal determination on whether plaintiff violated the Dietetics/Nutrition Act, N.C. Gen Stat. § 90-350, *et seq.*, took or threatened any formal action in response to the complaint lodged against plaintiff, or ordered compliance in any way. Indeed, there is no evidence or allegation that the state board or its executive director referred the complaint to a district attorney for prosecution.

J.A. 128-29. The district court also noted Appellant did not pursue formal administrative review prior to filing litigation, leaving only "the shakiest of

foundations for this court to determine whether state laws or state regulations violate protections afforded under the First Amendment to the United States Constitution." J.A. 130. These conclusions led the district court to find that Appellant "voluntarily remov[ed] part of [his] website in response to an inquiry from a state licensing board," an insufficient injury to establish standing. J.A. 129.

"Government action will be sufficiently chilling" to produce the injury requisite for standing purposes "when it is 'likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights.'" *Benham v. City of Charlotte, N.C.*, 635 F.3d 129, 135 (4th Cir. 2011) (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)). Standing is even more easily established when a criminal statute "tends to chill the exercise of First Amendment rights." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) ("*NCRL*"). Courts have not and should not require a "formal determination" of a statutory violation, a compliance order, or a referral for criminal prosecution from a governmental agency for an individual to establish standing in the First Amendment context. J.A. 128-29. Doing so would not only deviate from well-established legal precedent but also make it much more difficult to safeguard cherished First Amendment rights.

ARGUMENT

I. Appellant suffered injury sufficient to establish standing.

"To demonstrate injury in fact" to establish standing "it [is] sufficient… to show that [one's] First Amendment activities have been chilled." *Benham*, 635 F. 3d at 135 (quoting *Smith v. Frye*, 488 F.3d 263, 272 (4th Cir. 2007)). Appellant can show the requisite injury occurred due to both the months-long investigation by the Board of Dietetics and the criminal sanctions imposed by the Dietetics and Nutrition Practice Act on expressive activity.

A. Appellant was deterred from exercising his First Amendment rights by the Board of Dietetic's months-long investigation of his expressive activity.

"Government action will be sufficiently chilling when it is 'likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights.'" *Benham*, 635 F.3d at 135 (quoting *Constantine*, 411 F.3d at 500). Instead of requiring formal enforcement measures, the Fourth Circuit focuses on whether governmental action was "threatening, coercive, or intimidating so as to intimate that punishment, sanction or adverse regulatory action will imminently follow" in determining whether an individual's "constitutionally protected speech" has been adversely impacted. *Blankenship v. Manchin*, 471 F.3d 523, 529 (4th Cir. 2006). "Exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983," for example, seeking redress for restrictions of expressive activity. *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982). The government's actions in the current controversy naturally deterred

Appellant from continuing to speak and, thus, he can show an injury sufficient to establish standing.

Pursuant to its express statutory authority, the Board of Dietetics opened an investigation of the Appellant shortly after January 12, 2012. J.A. 18, ¶ 63. The Board of Dietetics' Executive Director informed Appellant at the outset of the investigation that, while preferring to resolve complaints informally, they were empowered to seek an injunction to prevent the unlicensed practice of dietetics. J.A. 18, ¶ 64. She went on to note "the [Board of Dietetics'] Complaint Committee and I will take a closer look at your website over the next few weeks and let you know if we have any requested changes." J.A. 55.

After their review, the Executive Director provided Appellant with a red-pen edit of "necessary changes to your [web]site." J.A. 35-53, 66. Said red-pen review featured multiple large "Xs" through portions of the website as well as at least ten conclusions explicitly or implicitly labeling specific statements by Appellant illegal. J.A. 35-53. For example, one of the red-pen comments admonished, "You should not be addressing diabetic's [sic] specific questions. You are no longer just providing information when you do this, you are assessing and counseling, both of which require a license." J.A. 39.

The conclusion of the Board of Dietetics' investigation of Appellant underlines that the red-pen review was a stick to produce action. In an April 9,

2012, letter to Appellant—copied to the Board of Dietetics' counsel—the Executive Director linked the closure of their three-month investigation to the fact that Appellant "remained in substantial compliance with the requirements of Article 25, Chapter 90 of the North Carolina General Statutes." J.A. 105. However, the letter warned, "the Board [of Dietetics] reserves the right to continue to monitor this situation." *Id.* Any "person of ordinary firmness," *Benham*, 635 F.3d at 135 (quoting *Constantine*, 411 F.3d at 500), would construe such a governmental investigation as "intimat[ing] that punishment, sanction, or adverse regulatory action will imminently follow" in the absence of compliance. *Blankenship*, 471 F.3d at 529. Appellant's removal of material from his website was hardly a voluntary response to a government "inquiry," but instead the natural result of governmental requests backed by reference to legal consequences in the absence of compliance. J.A. 129.

B. Appellant has standing to mount a pre-enforcement challenge to the Dietetics/Nutrition Practice Act as he desires to engage in expressive activity criminalized by the statute.

The standard for establishing the injury requisite for standing is especially lenient in cases involving potential criminal sanctions for expressive activity.

> When a plaintiff faces a credible threat of prosecution under a criminal statute he has standing to mount a pre-enforcement challenge to that statute. A non-moribund statute that facially restrict[s] expressive activity by the class to which the plaintiff belongs presents such a credible threat, and a case or controversy thus exists in

> the absence of compelling evidence to the contrary. This presumption is particularly appropriate when the presence of a statute tends to chill the exercise of First Amendment rights.

NCRL, 168 F.3d at 710. In short, the Fourth Circuit has long realized the importance of allowing individuals to challenge government restrictions on expression prior to any enforcement steps.

For example, ACLU-NC recently represented Sarah Preston, a registered North Carolina lobbyist, in her facial and as-applied challenge to the constitutionality of the North Carolina Campaign Contributions Prohibition ("Campaign Contributions Prohibition"). *Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011). Plaintiff Preston alleged the Campaign Contributions Prohibition infringed on her "rights to freedom of speech and freedom of association" by restricting her ability to make campaign contributions as well as to show support for local candidates. *Id.* at 732. Though the North Carolina State Board of Elections "enforces the Campaign Contributions Prohibition," reports "violations of the Campaign Contributions Prohibition to the district attorney for possible criminal prosecution," and "is also authorized to issue advisory opinions to candidates or other entities seeking an interpretation of the statute," *Id.* at 731, Preston did not engage with this governmental agency prior to filing litigation. *Id.* at 728-731.

Despite the fact that Preston had not acted such as to prompt "a formal determination on" the legality of her proposed conduct, provided the basis for a

"complaint to a district attorney for prosecution," or even justified "an inquiry" from the North Carolina State Board of Elections ("Board of Elections"), J.A. 128-29, she had standing for both her facial and as-applied constitutional challenge. *Preston*, 660 F.3d at 732-36. Questioning Preston's as-applied standing,

> [Defendant] Board [of Elections] claims that the record in this case shows absolutely no application of the Campaign Contributions Prohibition to Preston and that Preston has not offered any authority for the proposition that her '**inchoate desire, without any government action**, constitutes application of the statute to her.' In addition, the Board [of Elections] argues that the activities prohibited by the statute are clear and that Preston has no reason to refrain from her desired activities out of confusion regarding the statute's application.

Id. at 735 (emphasis added). The Court dismissed this challenge *in a paragraph* noting that, while she had not yet acted to do so, "Preston faces a 'credible threat of prosecution' should she donate money or otherwise violate the Campaign Contributions Prohibition, thus giving her standing to mount an as-applied challenge to the statute." *Id.* (quoting *NCRL*, 168 F.3d at 710). Affirmative steps by a plaintiff leading a governmental enforcement action are, thus, not a prerequisite to standing when criminal sanctions loom.

The Appellant, like Plaintiff Preston, has standing under these facts even absent providing his opinions through his website and the months-long investigation of the Board of Dietetics. The Dietetics/Nutrition Practice Act makes

it a crime for persons without a dietitian's license to "[e]stablish priorities, goals, and objectives that meet nutrition needs" and to "[p]rovide[] nutrition counseling in health and disease." N.C. Gen. Stat. §§ 90-352(4)(b) & (c); *id.* § 90-365 (requiring a license to provide dietary advice); *id.* § 90-366 (criminal penalties for violation). Lacking a dietitian's license, Appellant is plainly a member of "the class" implicated by the "non-moribund" Act. *NCRL*, 168 F.3d at 710. It is likewise apparent that the above provisions restrict Appellant's desire to engage in "expressive activity." *Id.* Appellant has "standing to mount a pre-enforcement challenge" to these provisions regardless of whether he had any interactions with the Board of Dietetics. *Id.*

Precedent makes plain that Appellant suffered injuries sufficient to establish standing. Plaintiff Preston did not point to any effort she took to administratively clarify the scope of the statutory restriction. *Preston*, 660 F.3d at 735. She could not highlight any actions she engaged in that could have, or did, lead the Board of Elections to enforce the statute she claimed unconstitutionally stifled her First Amendment rights. *Id.* On the other hand, the Board of Dietetics opened a months-long official investigation of Appellant, J.A. 18, ¶ 63, J.A. 105. The investigation featured a red-pen review identifying allegedly illegal speech on his website, J.A. 35-53, as well as a letter noting that, while he had come into compliance with the

law through his website edits, "the Board [of Dietetics] reserves the right to continue to monitor this situation." J.A. 105. The Dietetic/Nutrition Practice Act alone would grant Appellant standing, but the Board of Dietetics' actions in the current controversy underline the "credible threat of prosecution" he faced. *Preston*, 660 F.3d at 735.

II. Affirming the district court's ruling requiring "formal" governmental action for standing would chill individual expressive activity by complicating efforts to vindicate these constitutional rights in court.

Allowing the government to escape judicial review of its speech regulations prior to their enforcement or the exhaustion of formal administrative processes impacts not only the Appellant but also many of the clients represented by the ACLU-NC. Since its inception, the mission of the ACLU-NC and its Legal Foundation has been to defend constitutional rights through advocacy and litigation. This focus has led the ACLU-NC to frequently file pre-enforcement actions, such as in *Preston v. Leake*, to ensure individuals do not engage in self-censorship owing to fear of government sanction for their expressive activities.

Affirming the district court ruling on standing in the current controversy would result in the widespread chilling of First Amendment speech. Governmental agencies could follow the Board of Dietetics' model by clearly communicating that individual speech runs afoul of the law, requesting its removal, and identifying legal consequences in the absence of compliance, all without the check of judicial

review. Most persons would choose to comply when so confronted by the government. Those who felt their rights were unconstitutionally infringed by the proposed governmental remedy would have two options to seek redress in the neutral judiciary. They could await civil or criminal sanction to establish standing. Or they could attempt to navigate between a rock and a hard place, avoiding sanction while doing enough to gain access to the courts. This balancing act would require seeking judicial review after government action had matured beyond an informal "inquiry" but before it had led to civil or criminal sanctions. J.A. 129. The moment to act would be when the government engaged in "formal action," J.A. 129, apparently something more involved than a months-long investigation, J.A. 18, ¶ 63, 105, featuring a red-pen website review noting "necessary changes," J.A. 35-53, 66, as well as the identification of potential sanctions for non-compliance. J.A. 18, ¶ 64.

Organizations devoted to the protection of First Amendment rights such as the ACLU-NC would face a similar challenge. The ACLU-NC would have to advise clients such as Plaintiff Preston that they could not clearly obtain standing until sanctioned. Moving forward earlier would risk devoting precious resources to litigation before the nebulous "formal action" tipping point arrived. J.A. 129.

Such a regime would turn the Fourth Circuit presumption in favor of standing "when the presence of a statute tends to chill the exercise of First

Amendment rights" on its head. *NCRL*, 168 F.3d at 710. Standing requirements predicated on "formal determination[s]" and "formal action" create unnecessary uncertainty and encourage perverse line-drawing exercises. J.A. 128-29. Greater uncertainty would frustrate individual and organizational efforts to safeguard freedom of speech. Formalistic standing determinations would allow the government to exercise broader unchecked control over individual expressive activities. Both, in turn, would result in greater self-censorship and make it more difficult to vindicate First Amendment rights through the courts.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court ruling that Plaintiff did not have standing and remand the case so that it may proceed on the merits.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION

/s/

Christopher Brook
ACLU of North Carolina Legal Foundation
P.O. Box 28004
Raleigh, NC 27611-8004
919-834-3466
866-511-1344 (fax)
cbrook@acluofnc.org

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-2084 **Caption:** Cooksey v. Futrell, et al

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(s) Christopher A. Brook

Attorney for ACLU of NC Legal Foundation, Inc

Dated: November 20, 2012

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Jeff Rowes
Paul Sherman
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203

Robert W. Shaw
Williams Mullen
P.O. Box 1000
Raleigh, NC 27601

W. Clark Goodman
Sean F. Perrin
Womble Carlyle Sandridge & Rice, LLP
301 South College Street, Suite 3500
Charlotte, NC 28202

Henry W. Jones, Jr.
Lori P. Jones
Jordan Price Wall Gray Jones & Carlton, PLLC
P.O. Box 1066
Raleigh, NC 27605

/s/ Christopher A. Brook
Signature

November 20, 2012
Date

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s)

/s/ Christopher A. Brook
(signature)

Christopher A. Brook
Name (printed or typed)

(919) 834-3466
Voice Phone

ACLU of NC Legal Foundation, Inc.
Firm Name (if applicable)

(866)511-1344
Fax Number

PO Box 28004

Raleigh, NC 27611
Address

cbrook@acluofnc.org
E-mail address (print or type)

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