In the United States District Court
For the Eastern District of Arkansas

ANIMAL LEGAL DEFENSE FUND; ANIMAL EQUALITY; CENTER FOR BIOLOGICAL DIVERSITY; and FOOD CHAIN WORKERS ALLIANCE *Plaintiffs*, v. JONATHAN and DeANN VAUGHT, doing business as Prayer Creek Farm, and PECO FOODS, INC. *Defendants*.	Case No.: 4:19-CV-442-JM **PLAINTIFFS' CONSOLIDATED SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

Plaintiffs submit this short Sur-Reply solely to correct Defendants' material misstatements of law and fact in the replies they were granted leave to file.

I. There Is A Cause of Action To Enjoin Violations of the Constitution.

Despite their protestations, Defendants' additional authority confirms it is irrelevant whether Plaintiffs can proceed under 42 U.S.C. § 1983 or *Bivens*, as Plaintiffs can seek the relief they request directly under the Constitution. Defendants' latest case, *DeVilbiss v. Small Business Administration*—a suit for damages—merely explains that absent an "express waiver of sovereign immunity," 28 U.S.C. § 1331 "standing alone do[es] not mandate compensation by the government" for unlawful conduct. 661 F.2d 716, 717 (8th Cir. 1981) (quotation marks omitted). Section 1983 and *Bivens* waive sovereign immunity, allowing a party to seek damages (and fees) for constitutional violations, which is why they are regularly employed in constitutional litigation. *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) ("petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment"). However, because Plaintiffs do

not seek damages, Plaintiffs' claims do not need to fit within § 1983 or *Bivens*. Indeed, Defendants' own authority establishes the Supreme Court has declined to extend *Bivens* precisely because the Court believes plaintiffs should seek equitable relief under the Constitution rather than pursue *Bivens* claims. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (declining to extend *Bivens* because people "may seek injunctive relief").

Wholly ignoring Judge Berzon's discussion of the issue, *Securing Fragile Foundations: Affirmative Constitutional Adjudication In Federal Courts*, 84 N.Y.U. L. Rev. 681 (2009), Defendants insist Plaintiffs' examples of landmark litigation occurring under the Constitution actually arose under 42 U.S.C. § 1983 or *Bivens*. Peco Reply, Dkt. No. 36, at 2. To the contrary, in *Ex Parte Young*, the Supreme Court held "the circuit court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States." 209 U.S. 123, 145 (1908). In *Brown v. Board of Education*, long before *Bivens*, the plaintiffs' *exclusive* statement of jurisdiction to the Supreme Court was that they are entitled to "assert[] [a] right to injunctive relief [] based upon the unconstitutionality" of the law. Statement as to Jurisdiction, *Brown v. Bd. of Educ.*, 1951 WL 82600, at *3. And *Bolling v. Sharpe*, 347 U.S. 497 (1954), could only have proceeded under the Constitution. *See District of Columbia v. Carter*, 409 U.S. 418 (1973) (holding that § 1983 could not be used in the District of Columbia where *Bolling* arose).

Likewise, failing to address *Whitman v. Department of Transportation*, 547 U.S. 512, 513-14 (2006), or *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 642 (2002)—both of which establish constitutional claims can proceed under 28 U.S.C. § 1331—Defendants now cite *Syngenta Seeds, Inc. v. Bunge North America, Inc.*, 773 F.3d 58 (8th Cir. 2014), for the proposition that § 1331 does not provide jurisdiction. However, *Syngenta*

Seeds is exactly like the case Plaintiffs distinguished in their Opposition. Dkt. No. 28, at 24. There, unlike here, the plaintiff sought relief for statutory violations, and the court held the statute did not provide a cause of action. *Syngenta Seeds, Inc.*, 773 F.3d at 62-63. While Congress can control what rights it creates, it cannot limit redress of constitutional rights.

II. Plaintiffs Have Standing.

Defendants also assert that their admitted ability to seek penalties under the Ag-Gag Law should Plaintiffs engage in their desired activities cannot give rise to an actual, ongoing injury-in-fact by chilling Plaintiffs' speech. Peco Reply 5-6. That claim hides their own controlling authority. As they previously admitted, in *Digital Recognition Network, Inc. v. Hutchinson*, the Eighth Circuit held where "there is a credible threat that private parties will enforce the Act" against a plaintiff, causing self-censorship to avoid that potential for liability, the court "may assume that [the plaintiff] satisfies the injury-in-fact element of standing" and that injury is traceable to and redressable against the private party who would have the "authority to enforce" the law, if the desired conduct occurred. 803 F.3d 952, 957-58 (8th Cir. 2015); *see also Balogh v. Lombardi*, 816 F.3d 536, 542 (8th Cir. 2016) (agreeing *Digital Recording* provides that the potential "that private parties will enforce a statute" bringing about "chill[]" creates an injury-in-fact (quotation marks omitted)); *Fort Des Moines Church of Christ v. Jackson*, 215 F. Supp. 3d 776, 786 (S.D. Iowa 2016) (private parties' ability to enforce a law, generating chill, creates an injury-in-fact); *accord People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 Fed. App'x 122, 132 (4th Cir. 2018) (unpublished) (standing against state officials because their right to pursue a "private right of action" like any other "owner or operator of any targeted facility" can produce chill). Contrary to Defendants' insinuation that Plaintiffs must engage in conduct that will expose them to liability and be sued, the entire premise of the chill doctrine is that

standing exists even though defendants cannot yet enforce a law, because the challenged statute has chilled the plaintiff's covered, constitutionally-protected conduct. The Eighth Circuit has made clear that chill can be created by private parties like Defendants.

For these reasons, Defendants' claim that Plaintiffs did not address traceability boggles the mind. *See, e.g.*, Plfs. Opp. 11-15; *see also id.* 19. By definition, Defendants' ability to enforce the Ag-Gag Law when it is violated, which chills Plaintiffs' speech prior to enforcement, is an injury traceable to and redressable against Defendants. *See, e.g.*, *People for the Ethical Treatment of Animals*, 737 Fed. App'x at 132. Again, Defendants' own authority confirms as much. *Digital Recognition Network*, 803 F.3d 957-58. Indeed, despite the Vaughts' attempt to rewrite *Eckles v. City of Corydon*, it explains there is First Amendment standing if there is an actual "threat of prosecution" *or* a party has "the authority to enforce" the statute, thereby creating a chill that prevents speech and enforcement. 341 F.3d 762, 768 (8th Cir. 2003).[1]

Defendants also insist Plaintiffs' chill is unreasonable, Peco Reply 5, but they never address the extensive allegations in the Complaint that must be taken as true: (a) Plaintiffs have proven they are able to gain access to facilities like Defendants', Complaint, Dkt. No. 1 ¶¶ 56-57, 62;[2] (b) given the nature of Defendants' operations, Plaintiffs *will* uncover information useful for their advocacy, *id.* ¶¶ 16, 67-69, 70-72—which, contrary to Peco's fabrication, need not involve unlawful conduct, *see* Peco Reply 7; and (c) Plaintiffs have an investigator ready, willing and able to carry out these investigations, Complaint ¶ 73. In other words, the facts establish that if

[1] The Vaughts ask this Court to look at *Eckles*' discussion of a "private libel action." Vaughts Reply, Dkt. No. 35, at 2. Plaintiffs' quoted section comes from the exact page to which the Vaughts cite.

[2] Adopting one of the Vaughts' earlier, illogical arguments, Peco claims Plaintiffs must show they previously "investigated the Peco facility in Arkansas." Peco Reply 6. This has also been expressly rejected by in-circuit authority Defendants do not acknowledge. *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 915 n.7 (S.D. Iowa 2018); *see also* Plfs.' Opp. 12 n.4.

Plaintiffs take any further steps, they will expose themselves to liability at the hands of Defendants, making their chill perfectly reasonable.

Defendants also elide their role in creating Plaintiffs' chill. Arkansas' Ag-Gag Law was sponsored by Defendants; legislators and lobbyists stated it would be used by *these Defendants* against *these Plaintiffs*; and these Defendants refused to waive their rights to enforce the Law against Plaintiffs. Complaint ¶¶ 26, 44-47, 50-52, 56, 71, 98-102.

Indeed, as Plaintiffs explain in their Opposition, 16-18, they have not only pleaded that they are suffering an ongoing injury (chill), but also that Defendants' suit against them is imminent. That is a separate basis for standing that Defendants do not address in their replies, and one that can only be resolved at summary judgment. *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 211-12 (4th Cir. 2017); *Schuchardt v. President of the United States*, 839 F.3d 336, 351 (3d Cir. 2016).

When stripped of its posturing and misdirection, Defendants' actual standing argument now appears to be that this Court should ignore *Digital Recording* and its progeny and hold that the chill doctrine does not apply when a statute can be enforced by a private party. The Vaughts insist Plaintiffs must first be expressly threatened with enforcement, Vaughts Reply 2, and Peco claims Plaintiffs must have already acted "in violation of state law," Peco Reply 7. Yet, the entire point of the chill doctrine is that "self-censorship" to avoid legal risks undermines the First Amendment. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Thus the courts must intervene when that self-censorship occurs, *id.*, as Plaintiffs ask here.

III. The First Amendment's Protections Are Already at Stake.

Finally, Defendants ask this Court to hold—even though Plaintiffs are suffering an Article III injury-in-fact to their First Amendment rights, traceable to Defendants' potential to

enforce the Ag-Gag Law, and thus redressable through an injunction against Defendants and a declaration that the Law is unconstitutional—that Plaintiffs cannot state a claim under the First Amendment, at least until Defendants choose to sue. *See* Peco Reply 9. Of course, this would negate the chill doctrine—which is meant to allow prospective challenges, and the Eighth Circuit has held applies to private enforcement. *See*, *e.g.*, *Digital Recording*, 803 F.3d at 957-58; *Fort Des Moines Church of Christ*, 215 F. Supp. 3d at786. It is also wholly inconsistent with the purpose of prospective and declaratory relief, which are designed to clarify people's rights so that they are willing to exercise them. *See* 28 U.S.C. § 2201(a). Indeed, Defendants' position on when the First Amendment can be invoked is so narrow and incoherent they even suggest Plaintiffs may not be allowed to state a First Amendment claim when Plaintiffs face a "private lawsuit against them." Vaughts Reply 4.

Defendants' position also cannot be reconciled with *New York Times Co. v. Sullivan*, which held "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." 376 U.S. 254, 265 (1964). As a result, Defendants simply do not address that statement; only the Vaughts try to distinguish *Sullivan*, and do so on its facts. Vaughts Reply 3. The First Amendment power here is the power to suppress speech through a party wielding the potential for state-approved sanction, forcing self-censorship. That is occurring in this case, including through Defendants continuing to hold out their potential to use the Ag-Gag Law against Plaintiffs, and refusing to respond to Plaintiffs' letters. *See Digital Recording*, 803 F.3d at 957-58 (holding that potential for private enforcement can produce a First Amendment injury-in-fact); *Fort Des Moines Church of Christ*, 215 F. Supp. 3d at786 (same). Therefore, Plaintiffs' chill in response to Defendants' potential to use a new cause of action must implicate the First Amendment.

While Defendants complain there is limited case law showing chill created by private conduct creates an actionable case-or-controversy, that is only because (thankfully) it is extremely rare for a state to create a law for the express purpose of empowering private citizens to unconstitutionally chill speech, as occurred here. Complaint ¶¶ 27-28. Yet, Defendants also ignore that in *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007), the Eighth Circuit found justiciable a declaratory judgment action claiming a common-law damages suit would violate the First Amendment. Defendants insist *C.B.C.* is different because the Declaratory Judgement Act defendant "counterclaimed" against the Declaratory Judgment Act plaintiff, Vaughts Reply 3, but that "counterclaim" did not provide the court jurisdiction. The issue in *C.B.C.* was whether baseball players could seek damages for the use of their likeness. The Declaratory Judgement Act plaintiff sued a licensee of the baseball players to establish that the players could not exclusively license their images to that company. That licensee asserted a "counterclaim" that was merely a defense. It did not assert an independent cause of action against the Declaratory Judgement Act plaintiff. *C.B.C. Distribution & Mktg.,* 505 F.3d at 820 ("Advanced Media counterclaimed, maintaining that CBC's fantasy baseball products violated rights of publicity *belonging to major league baseball players* and that the players, through their association, had licensed those rights." (emphasis added)). As a result, *C.B.C.* provided the basis for another court to declare a private party's potential use of a common-law cause of action would violate the First Amendment before the defendant even answered. *CBS Interactive Inc. v. Nat'l Football League Players Ass'n, Inc.*, 259 F.R.D. 398, 420-21 (D. Minn. 2009). Thus, should this Court need support for hearing this case beyond the multiple ways in which Plaintiffs can establish standing, additional controlling and persuasive authority provides as much.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to counsel for all parties.

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