IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

ANIMAL LEAGUE DEFENSE FUND; ANIMAL EQUALITY; CENTER FOR BIOLOGICAL DIVERSITY; and FOOD CHAIN WORKERS ALLIANCE **PLAINTIFFS**

v. **4:19cv00442 JM**

JONATHAN AND DEANN VAUGHT, d/b/a PRAYER CREEK FARM; and PECO FOODS, INC. **DEFENDANTS**

ORDER

Plaintiffs—the Animal League Defense Fund (ALDF), Animal Equality (AE), the Center for Biological Diversity (CBD), and the Food Chain Workers Alliance (FCWA)—are seeking declaratory and injunctive relief to stop Defendants' ability to enforce Ark. Code Ann. §16-118-113. Pending are motions to dismiss filed by Defendants Peco Foods, Inc. (Peco) and Jonathon and Deann Vaught (the Vaughts). (Doc. Nos. 18, 24). Plaintiffs have filed a consolidated response to both motions (Doc. No. 28), and Defendants have each filed a reply (Doc. Nos. 36 and 35). For the reasons stated below, the motions to dismiss are granted.

Factual Allegations

In 2017, the Arkansas General Assembly passed Ark. Code Ann. §16-118-113, **"**Civil cause of action for unauthorized access to property." The statute provides, in part:

> (b) A person who knowingly gains access to a nonpublic area of a commercial property and engages in an act that exceeds the person's authority to enter the nonpublic area is liable to the owner or operator of the commercial property for any damages sustained by the owner or operator.

> (c) An act that exceeds a person's authority to enter a nonpublic area of commercial property includes an employee who knowingly enters a nonpublic area of commercial property for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and without authorization subsequently:
>
> (1) Captures or removes the employer's data, paper, records, or any other documents and uses the information contained on or in the employer's data, paper, records, or any other documents in a manner that damages the employer;
> (2) Records images or sound occurring within an employer's commercial property and uses the recording in a manner that damages the employer;
> (3) Places on the commercial property an unattended camera or electronic surveillance device and uses the unattended camera or electronic surveillance device to record images or data for an unlawful purpose;
> (4) Conspires in an organized theft of items belonging to the employer; or
> (5) Commits an act that substantially interferes with the ownership or possession of the commercial property.
>
> (d) A person who knowingly directs or assists another person to violate this section is jointly liable.
>
> (e) A court may award to a prevailing party in an action brought under this section one (1) or more of the following remedies:
> (1) Equitable relief;
> (2) Compensatory damages;
> (3) Costs and fees, including reasonable attorney's fees; and
> (4) In a case where compensatory damages cannot be quantified, a court may award additional damages as otherwise allowed by state or federal law in an amount not to exceed five thousand dollars ($5,000) for each day, or a portion of a day, that a defendant has acted in violation of subsection (b) of this section, and that in the court's discretion are commensurate with the harm caused to the plaintiff by the defendant's conduct in violation of this section.
>
> . . . .
>
> (g) This section does not apply to a state agency, a state-funded institution of higher education, a law enforcement officer engaged in a lawful investigation of commercial property or of the owner or operator of the commercial property, or a healthcare provider or medical services provider.

Ark. Code Ann. § 16-118-113 (West). Plaintiffs refer to the statute as the Arkansas Ag-Gag law, which they say was passed "to suppress undercover operations at agricultural facilities and evade

the courts' ability to alleviate that unconstitutional thwarting of speech."

The Vaughts operate Prayer Creek Farm, a pig farm in Horatio, Arkansas. Defendant Deann Vaught, a state Representative, was the lead sponsor of § 16-118-113 and a member of the Farm Bureau, one of the industry supporters of the law. Peco is an Alabama-based company that operates numerous Arkansas facilities, including a slaughter and processing plant and hatchery in Pocahontas and another in Batesville. Section 16-118-113 was passed following Peco's substantial expansion and investment in Arkansas. Plaintiffs are nonprofits organizations dedicated to reforming industrial agriculture and protecting the people, animals, and the environment from possible harm present in the industrialized food production system. Plaintiffs allege that employment-based undercover investigations of industrial agricultural facilities have "proven some of the only means to demonstrate the truth" about how these facilities operate and thus provide information that has led to criminal prosecution, changes in consumer purchasing, and reforms in the manufacturing processes. They further allege that "[t]he particular conduct the statute prohibits mirrors the techniques of employment-based undercover investigators."

Plaintiffs ALDF and AE wish to investigate Prayer Creek Farm and the Peco facilities in Arkansas, as they have investigated many other facilities in the past, and they have retained an investigator who is prepared to conduct employment-based investigations of these facilities. The sole purpose of their investigations would be to obtain information "that they would release to the public, use in their advocacy, and allow other advocacy groups to use to demonstrate the harms industrial agriculture generates." (Doc. No. 1, ¶74). ALDF and AE sent the Vaughts and Peco a letter requesting that they waive their right to enforce §16-118-113 for any investigation of their facilities; Defendants did not do so. Therefore, ALDF and AE assert that they have "concrete

and substantial reasons" to fear that Defendants would use §16-118-113 against them if they were to conduct the undercover investigation of the facilities as they desire to do.

The remaining plaintiffs, CBD and FCWA, do not wish to engage in the type of investigations conducted in the past by ALDF and AE. However, CBD regularly uses information gathered from such investigations to further its work aimed at protecting threatened species and their habitats from the dangers of pollution and habitat degradation from factory farms and slaughter operations, and FCWA uses information it receives from undercover investigations to further its efforts to improve wages and conditions for all workers along the food chain. These Plaintiffs allege that the chilling effect of §16-118-113 on the desired investigations of ALDF and AW thwarts the ability of CBD and FCWA to obtain the information they need to engage in protected speech.

All four Plaintiffs seek declaratory judgment that §16-118-113 is unconstitutional on its face and as applied, and they seek injunctive relief to "stop the threat" that Defendants will enforce Ark. Code Ann. §16-118-11 (Doc. No. 1, ¶ 3) and thus remove the chill from the exercise of their First Amendment rights and secure their rights to equal protection under the law.

Defendants filed separate motions to dismiss seeking dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and failure to state a claim pursuant to Rule 12(b)(6). Because the Court finds as a threshold matter that Plaintiffs do not have standing, it will not address the 12(b)(6) argument.

Legal Standard

The jurisdiction of federal courts is limited to actual cases and controversies by Article III, § 2, of the United States Constitution. *Eckles v. City of Corydon*, 341 F.3d 762, 767 (8th Cir.

2003). To establish Article III standing, a plaintiff must establish three elements: (1) an "injury in fact"—an invasion of a legally protected interest which is both "concrete and particularized" and "actual or imminent; " (2) proof that the injury is "fairly ... trace[able] to the challenged action of the defendant; and (3) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." (*Id.* at 564) (internal citation and quotations omitted).

In the absence of allegations establishing these elements, a defendant is entitled to a dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Between them, Defendants argue that the complaint fails to establish each of these elements.

Injury in Fact

Plaintiffs allege that they are suffering injury in that they are self-censoring their protected speech to avoid civil liability. Under § 16-118-113, they face the possibility of civil liability if the following occurs: an investigator hired by ALDF and AE (who they have already chosen) gets a job at one of Defendants' facilities, the investigator performs the investigations (such as ALDF and AE have successfully done numerous times in the past), ALDF and AE receive information from the investigations that they and CBD and FCWA promulgate in the public interest (information such as has led to prosecutions, food safety recalls, citations and closures in the past), and Defendants file civil actions pursuant to §16-118-113 as a result.

To show an injury-in-fact for this type of pre-enforcement challenge, a plaintiff "must

present more than allegations of a subjective chill. There must be a claim of specific present objective harm or a threat of specific future harm." *Eckles* at 767 (citation and internal quotation marks omitted).

Eckles was decided on the issue of whether the plaintiff had established an injury in fact in a free speech challenge. Eckles had posted various large signs on his property criticizing the local governments and making religious and political statements after he had unsuccessfully challenged the increase in the assessed value of his property. He was sent a notice of abatement from the city stating that if he failed to remove the signs, the city would remove them for him and charge him for the removal. He was also sent two letters from a law firm on behalf of the county, one which stated that his failure to remove these signs "could result in action from the City of Corydon and the Iowa Department of Transportation" and the other stating that the law firm would recommend that county officials pursue private actions against Eckles if he failed to remove the signs. The district court found that Eckles lacked standing to pursue his claims against both the city and the county, and the Eighth Circuit reversed in part and affirmed in part.

As against the city, the Eighth Circuit found that Eckles had standing because the letter of abatement showed that there was an imminent and concrete threat of financial injury as a result of his allegedly protected activity. However, the Court affirmed the district court's finding that Eckles's claim against the county was "too general and speculative to confer standing, and that the threats were not concrete nor particularized, not actual nor imminent, but merely conjectural or hypothetical." *Id*. at 768-769.[1]

[1] The Court also noted that there was no evidence that the county had the authority to enforce ordinances mentioned in its letters. *Eckles* at 769.

The Eighth Circuit has recognized that "[w]hen a party brings a pre-enforcement challenge to a statute that provides for criminal penalties and claims that the statute chills the exercising of its right to free expression, the chilling effect alone may constitute injury." *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006) (citing *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996)) and *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) ("Reasonable chill exists when a plaintiff shows 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution.") (citing *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)).

The threat of civil liability can also create an unconstitutional chilling of the first amendment's guarantee of free speech and satisfy the injury-in-fact requirement. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-278 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.") In *Balogh v. Lombardi*, 816 F.3d 536 (8th Cir. 2016), the Eighth Circuit held that "'a credible threat that private parties will enforce' a statute may also satisfy the injury-in-fact requirement." *Id.* at 542 (quoting *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir.2015)).

The Missouri statute challenged in *Balogh* created a private right of action against anyone who, without the approval of the Director of Corrections (DOC), knowingly disclosed the identity of an execution-team member. The ACLU had obtained DOC documents pursuant to the

Missouri Sunshine Law[2] and had published them on its website before realizing that, due to a recent change in the DOC execution protocol, the published documents could identify members of the execution team in violation of the statute. As soon as it learned of the change in DOC protocol, the ACLU removed the documents from its website. *Id*. at 540. The ACLU and one of its members filed a pre-enforcement action seeking injunctive relief and a declaration that the statute was unconstitutional as applied to DOC records the ACLU had already obtained because the statute chilled its protected speech. The Eighth Circuit held that the ACLU had alleged an injury-in-fact under these circumstances. *Id.* at 542.

The Court finds that the allegations of Plaintiffs' complaint do not satisfy the requirements that the injury be "concrete and particularized" and "actual or imminent." In *Balogh*, the plaintiff had already obtained and published documents on its website; it alleged that it took them down from its website due to the threat of civil action under the challenged law. The injury was both concrete and particularized—limited to the DOC records that the ACLU had already obtained, and imminent—they had published them once and would do so again but for the threat of civil liability. The allegations made in this case establish neither a "specific present objective harm or a threat of specific future harm." An investigator has not been hired by a Defendant and, consequently, has not found any form of protected speech that Plaintiffs would seek to publish. Plaintiffs do not allege that the Vaught Defendants have engaged in the type of practices that Plaintiffs would like to expose---only that Plaintiffs "believe" it is "likely" given the volume of pigs their farm can maintain, the wholly-enclosed design of the facility, and Defendant Deann

[2] Mo.Rev.Stat. § 610.023

Vaught's role in sponsoring §16-118-113.[3] Plaintiffs alleged that Peco has "an established history of environmental pollution and failure to comply with environmental laws," but with respect the two Peco facilities they wish to investigate in Arkansas, the complaint alleges Plaintiffs "believe there is an important public interest in understanding how Peco operates in Arkansas." These allegations describe a subjective chill, not "a claim of specific present objective harm or a threat of specific future harm." To find these allegations sufficient to satisfy the injury-in-fact requirement would be an expansion of the "case or controversy" limitation on this Court's subject matter jurisdiction in violation of Article III.

In *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 F. App'x 122 (4th Cir. 2018) (unpublished), a decision that Plaintiffs understandably rely on—the Fourth Circuit addressed the injury-in-fact issue in a free-speech challenge to the North Carolina law that §16-118-113 was modeled after.[4] Eight public-interest organizations, including ALDF, sued the chancellor of the University of North Carolina-Chapel Hill and the Attorney General of North Carolina asserting pre-enforcement challenge to N.C. Gen. Stat. Ann. § 99A-2. The district court dismissed the complaint, finding that the plaintiffs lacked standing because private enforcement of the law was premature and speculative. *People for Ethical Treatment of Animals, Inc. v. Stein*, 259 F. Supp. 3d 369 (M.D.N.C. 2017). On appeal, the Fourth Circuit reversed and remanded, finding that the plaintiffs had sufficiently alleged an injury-in-fact "at least at this stage of the litigation" by alleging "an actual and well-founded fear that the [Act] will be enforced, and ha[ve]

[3] Doc No. 1, ¶¶67-69.

[4] "Representative Vaught . . . . explained in introducing the Arkansas Ag-Gag law to the House Judiciary Committee that it 'is modeled after a newly enacted law in North Carolina in 2016.'" (Complaint, Doc. No. 1, ¶27).

in fact self-censored [themselves] by complying with the [Act], incurring harm all the while." *Stein*, at 131 (quoting *Mobil Oil Corp. v. Att'y Gen. of Va.*, 940 F.2d 73, 76 (4th Cir. 1991) (internal quotation marks omitted)).

The Court agrees with that court's decision as to the standing of the plaintiff PETA. The court found "[o]f particular relevance" these allegations: PETA had previously uncovered illegal and unethical abuse of animals at the UNC-Chapel Hill laboratories; when its investigators tried to report those violations to the university, "employees in the lab discarded and hid evidence;" it had publicized its findings which had been confirmed by the National Institutes of Health; on information and belief the unethical and illegal treatment of animals continues at these laboratories; and, PETA would conduct another investigation of these facilities but has chosen not to because it fears liability under the act. *Id.* at 127. The Court agrees that this is sufficient to establish an injury-in-fact. On the other hand, the allegations relevant to ALDF in *Stein* go no further to establish "a specific present objective harm or a threat of specific future harm" than do the allegations in the present case.

The Court recognizes that the Eighth Circuit has before it an appeal in the case of *Animal Legal Def. Fund v. Reynolds*,[5] which arises out of a pre-enforcement challenge of an Iowa statute that criminalizes the act of obtaining access to an agricultural facility by false pretenses or makes a false statement in order to get hired at such a facility with the intent to commit an unauthorized act. The plaintiffs, including ALDF and PETA, sued the governor, the attorney general, and a

[5] Two orders from the Southern District of Iowa in *Animal Legal Def. Fund v. Reynolds* are on appeal: the order denying defendants' motion to dismiss, 297 F. Supp. 3d 901 (S.D. Iowa 2018) and the order granting defendants' motion for summary judgment finding the challenged statute unconstitutional, 353 F. Supp. 3d 812 (S.D. Iowa 2019).

county attorney alleging that the statute violated the First and Fourteenth Amendments. In an order denying the defendants' motion to dismiss, the district court found that plaintiffs had alleged an injury in fact sufficient to establish standing:

> All of these organizations have previously conducted undercover investigations at agricultural facilities. These Plaintiffs allege that they wish to conduct undercover investigations in Iowa but do not presently intend to do so because of § 717A.3A. That undercover investigations may be *complex* is not a bar to standing. Plaintiffs allege they routinely overcome any such complexity to conduct successful investigations. Because the First Amendment protects against the chilling of speech, it is not necessary for Plaintiffs to provide concrete operational blueprints—who, what, when, and where—for activities they do not intend to conduct when the entire basis for their claim is that the challenged law makes such activities illegal.

Id. at 914–15. Those allegations do not lead this Court to reach the same conclusion in the challenge to this Arkansas statute imposing civil liability. The Iowa district court reiterated that "concerns over the chilling effects on speech are significantly more acute when a criminal sanction is involved rather than a civil cause of action"[6] and noted that "[t]he nature of the sanction alone materially distinguishe[d]" the criminal case from those like *Stein* that involved civil liability. *Reyonlds*, 297 F. Supp. 3d at 916.

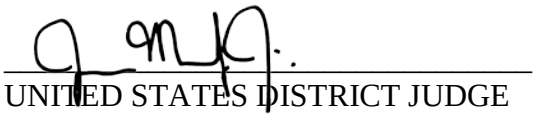
For the reasons stated above, the Court finds that Plaintiffs have not alleged fact sufficient to established an injury in fact. Therefore, the issues of traceability or redressability will not be addressed.

[6] Citing to *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006) and *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011).

Conclusion

Defendants' Motions to Dismiss (Doc. Nos. 18 and 24) are GRANTED. The complaint will be dismissed without prejudice.

IT IS SO ORDERED this 14th day of February, 2020.



UNITED STATES DISTRICT JUDGE