Case No. 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,

Plaintiffs-Appellants,

v.

JONATHAN and DeANN VAUGHT, doing business as Prayer Creek Farm, and PECO FOODS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Arkansas

REPLY BRIEF OF APPELLANTS

David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiffs-Appellants
(additional counsel listed on inside cover)

Cristina Stella
Kelsey Eberly
Alene Anello
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931
(707) 795-2533
cstella@aldf.org
keberly@aldf.org
aanello@aldf.org
Counsel for Plaintiff-Appellant
Animal Legal Defense Fund

Matthew Strugar
Law Office of Matthew Strugar
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
(323) 696-2299
matthew@matthewstrugar.com
Counsel for Plaintiff-Appellant
Animal Legal Defense Fund

Alan K. Chen
Univ. of Denver Sturm College of Law
2255 E. Evans Avenue, Rm 455E
Denver, Colorado 80208
(303) 871-6283
achen@law.du.edu
Counsel for Plaintiff-Appellant
Animal Legal Defense Fund

Sarah Hanneken
Animal Equality
8581 Santa Monica Blvd. Ste. 350
Los Angeles, CA, 90069
(414) 405-0538
sarahh@animalequality.org
Counsel for Plaintiff-Appellant
Animal Equality

Hannah Connor
Center for Biological Diversity
P.O. Box 2155
St. Petersburg, FL 33731
(202) 681-1676
HConnor@biologicaldiversity.org
Counsel for Plaintiff-Appellant
Center for Biological Diversity

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I. INTRODUCTION AND SUMMARY.

Despite portraying themselves as victims of a "manufactured" controversy, Peco Foods, Inc. ("Peco") Br. 9, Defendants make clear they seek to dissuade Plaintiffs from exercising their First Amendment rights by forcing them to risk penalty under Arkansas' Ag-Gag Law (or the "Law") to vindicate those rights. Defendants raise jurisdictional claims to bar this pre-enforcement challenge, while conceding they "might bring suit" against Plaintiffs if Plaintiffs proceed. Peco Br. 7; *see also* Jonathan and DeAnn Vaught (the "Vaughts") Br. 14. Defendants admit receiving Plaintiffs' pre-suit letters, which asked Defendants to agree the Law is unconstitutional and thereby relieve Plaintiffs' fear of enforcement, and they admit they tactically refused to respond to preserve their "rights under the Act," and discourage Plaintiffs from undertaking their desired activities. Vaughts Br. 10-11; *see also* Peco Br. 5; *see also 281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011) (evidence defendant "actually reject[s] a statute" can negate chill).

These are the precise facts that justify pre-enforcement standing based on a law's chilling effect on speech. The Supreme Court recognizes that where a plaintiff faces a "risk [of] punishment for his conduct," he may "refrain from engaging further." *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). If the law restricts speech, "[s]ociety as a whole then would be the loser." *Id.* In fact, because the First Amendment protects the open marketplace of ideas, a

law that causes people to "self-censor[]" creates cognizable First Amendment harm. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Therefore, "when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided" does not stand. *Sec'y of State of Md.*, 467 U.S. at 956. Courts must "intervene" so plaintiffs are not placed between "the Scylla of intentionally flouting state law and the Charybdis of forgoing what [they] believe[] to be constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

To hold as Defendants request, that these principles do not apply here because Arkansas empowered private parties to seek civil damages under the Ag-Gag Law, rather than enforcing the Law itself, would create an exception that swallows these rules. The state could pass libel laws for reporting on businesses, and the press could only vindicate their freedoms by risking sanction, eroding coverage. The government could pass statutes allowing people offended by signs or chants to sue for damages and that law would stay on the books, intimidating people from attending rallies until activists accepted that risk. This is not hypothetical, but the vision the Arkansas legislature laid out when it enacted the Ag-Gag Law. J.A.17-19 (Complaint).[1]

[1] Peco attempts to undercut these concerns by feigning it is uncertain it will "defend the constitutionality of the" Law. Peco Br. 5-6. But, that does nothing to

Thankfully, Defendants' contention that Plaintiffs lack pre-enforcement standing ignores a host of case law, including binding circuit precedent. To deny Plaintiffs have an injury-in-fact, Defendants replace the test for injury-in-fact based on a law's chilling effect, with the test for injury-in-fact from the risk of imminent harm. Peco Br. 16 (stating the court should "look[] [to] whether a lawsuit is imminent" to determine if Plaintiffs suffer chill); Vaughts Br. 12 (asserting Plaintiffs lack standing because they have not shown "future harm" is "certainly impending"); *see also* J.A.122-23 (district court opinion, similar). However, this Court recognizes distinct "types of injuries may confer Article III standing to seek prospective relief. First, [the plaintiff] could establish standing by alleging an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder. Second, [the plaintiff] can establish standing by alleging that it self-censored." *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th

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diminish the harm to the marketplace of ideas by it hedging on this issue, and, in fact, Peco asks this Court to rule on the merits and hold there is no "constitutional right to lie to get a job." Peco Br. 10 n.2. Standing, however, "in no way depends on the merits." *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023 (8th Cir. 2012). Moreover, the Ag-Gag law does not prohibit lying, thus Plaintiffs are not asserting a right to lie, Ark. Code § 16-118-113, and "false statements or representation[s]" to gain employment have been recognized as protected speech, *Animal Legal Def. Fund ("ALDF") v. Reynolds*, 297 F. Supp. 3d 901, 909, 923 (S.D. Iowa 2018), *appeal docketed*, No. 19-1364 (8th Cir. Feb. 22, 2019).

Cir. 2016) (citations and quotation marks omitted). The risk of future suit and self-censorship (chill) are different injuries.

To the extent Defendants actually address standing based on chill, they dispute Plaintiffs' allegations that establish Plaintiffs are reasonably chilled, *compare* Peco Br. 12 *with* Plfs.' Br. 10-16, which is improper at this motion to dismiss stage, *Wieland v. U.S. Dep't of Health & Human Servs.*, 793 F.3d 949, 953 (8th Cir. 2015). They also insist such standing does not exist when a private party causes chill, Peco Br. 12, even though this Court has stated a law that empowers "private parties" to enforce its provisions can produce an "injury-in-fact" if it chills speech. *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015).[2]

Moreover, Plaintiffs further allege they are injured because they do face a risk of imminent suit, and also have been denied access to information—separate injuries-in-fact Defendants do not contest can form the basis of a pre-enforcement action against private parties. Defendants argue this Court should follow *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), and conclude Plaintiffs do not face a risk of imminent harm. Peco Br. 16-17; Vaughts Br. 12. But that case arose

[2] Defendants effectively abandon the district court's rationale, that the chill doctrine is different where a statute imposes civil penalties rather than criminal fines. *See* Peco Br. 12, 15 (noting chill doctrine has been applied to civil statutes); Vaughts Br. 19 (similar); *see also* Plfs.' Br. 43-47 (citing case law demonstrating the Ag-Gag Law's penalties can chill speech, which Defendants do not dispute).

on summary judgment. Thus, to present this claim Defendants again ask the Court to make factual findings against Plaintiffs, which is improper at this stage, Peco Br. 17-18; Vaughts Br. 11. Defendants further insist no case law supports "listener standing," Peco Br. 11 n.3, when Defendants simply do not address it, *compare* Plfs.' Br. 48-49 *with* Vaughts Br. 27-28.

Their arguments on traceability, redressability, and the lack of a "statutory basis" to hear constitutional claims repeat their errors. Defendants argue Plaintiffs have not established their injuries are traceable to or redressable against Defendants by claiming Plaintiffs are not suffering an injury-in-fact. Peco Br. 20-21. Likewise, while Defendants concede constitutional claims for equitable relief can be brought under 28 U.S.C. § 1331, they assert this statute does not provide a basis for Plaintiffs' claims because "private parties" cannot chill speech creating a constitutional injury-in-fact, Peco Br. 24.

Defendants have held out the possibility that they will use the Ag-Gag Law against Plaintiffs. That has caused Plaintiffs to self-censor. Defendants have chilled Plaintiffs' speech. Thus, Plaintiffs have standing to challenge the constitutionality of Defendants' use of the Ag-Gag Law. This is in addition to, and separate from, Plaintiffs' other bases for standing. Defendants and the decision below contort established doctrine. Arkansas and Defendants have not discovered a constitutional

loophole that laid dormant for 200 years, but allows them to squelch speech until Plaintiffs risk sanction. This case should be reversed and remanded.

II. INJURIES-IN-FACT DUE TO A LAW'S CHILLING EFFECT AND THE RISK OF IMMINENT FUTURE HARM ARE DISTINCT.

Like the district court, Defendants claim Plaintiffs cannot be chilled and thereby injured by the Ag-Gag Law because certain "contingencies" make it too speculative when Plaintiffs will be subject to suit by Defendants. *E.g.*, Peco Br. 13; J.A.122-23 (district court decision). However, "theories of standing" based on the imminence of suit are "different in kind" than those based on chill. *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 211 (4th Cir. 2017). Indeed, the risk of imminent harm is not specific to First Amendment concerns, but a cognizable injury-in-fact in all contexts. *E.g. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-30 (2007). Put simply, Defendants seek to prevail by conflating two independent bases for standing, and thereby negating the unique First Amendment rights and injuries courts have long been recognized.

Beyond distinguishing these two types of injuries, *Missourians for Fiscal Accountability*, 830 F.3d at 794, this Court has also expressly rejected Defendants' suggestion that the risk of imminent harm is a proxy for chill, Peco Br. 16. It held that where a plaintiff claims it is chilled, a defendant cannot argue that the "alleged injury rests upon contingent future events that may not occur." *281 Care Comm.*,

638 F.3d at 631. This is because where the "injury is speech that has already been chilled" that "injury has already occurred." *Id.* To examine whether chill is too "contingent" to be imminent is self-contradictory; an injury from chill is ongoing. *Id.*; *see also* Plfs.' Br. 38-39.

As the en banc Tenth Circuit explained, in a case Defendants fail to address, chill producing an injury-in-fact arises when "the very existence of some statute discourages, or even prevents, the exercise of [] First Amendment rights." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc). "Such a plaintiff by definition does not—indeed, should not—have a present intention to engage in that speech at a specific time in the future." *Id.* The statute's harm is it causes inaction. Thus "it makes no sense" to require the plaintiff to detail "specific plans" showing it can engage in the law's covered conduct and be subject to suit. *Id.* The injury-in-fact is the very self-censorship that prevents the risk of suit from developing.

The case on which Defendants rely to claim Plaintiffs' injury is "speculative" and thus not "imminent," Peco Br. 16; Vaughts Br. 12, itself states it is inapplicable where plaintiffs contend they have been chilled. *Clapper* explains its facts are "very different" from First Amendment cases involving "chilling effect." 568 U.S. at 418-19. Indeed, the *Clapper* plaintiffs explained they were *not* chilled, stating the law at issue had not caused them to forgo their desired

"communications with their foreign contacts;" it had merely forced them to invest in different "e-mail and phone" technologies "or to travel." *Id.* at 414, 415. It is only in this context—absent chill—that the Court explained it needed to determine whether the "chain of contingencies" establishing the risk of imminent harm was concrete and actionable or speculative and in-actionable. *Id.* at 410-11. With chill, no inquiry into the nature of the future risk is necessary.

Consistent with this, cases cited in Plaintiffs' opening brief, unaddressed by Defendants, hold *Clapper* "inapposite" where the plaintiff "pleaded an actual and ongoing injury" like chill. *Wikimedia Found.*, 857 F.3d at 211; *Schuchardt v. President of the United States*, 839 F.3d 336, 350-51 (3d Cir. 2016) ("distinguish[ing]" the *Clapper* plaintiffs who "pleaded only prospective injury" from those who contend their injury "already occurred"); *see also People for the Ethical Treatment of Animals, Inc. ("PETA") v. Stein*, 737 Fed. App'x 122, 131 (4th Cir. 2018) (unpublished) (because the plaintiffs established chill, an "actual injury, we need not visit the district court's determination of whether *Clapper* would strip Plaintiffs of their standing").

Defendants' and the district court's focus on the "long chain of hypotheticals" they believe must come to pass before Plaintiffs could be sued under the Ag-Gag Law, Peco Br. 7, concerns a form of injury distinct from Plaintiffs' primary theory, chill.

III. PLAINTIFFS HAVE ALLEGED AN INJURY-IN-FACT BASED ON THE AG-GAG LAW'S CHILLING EFFECT.

When standing based on chill is considered, it is plain Plaintiffs are suffering that injury-in-fact. This Court has explained to have such standing, "the plaintiff needs only to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the" challenged law, and that "self-censorship" is not due to an "imaginary" fear, but an "objectively reasonable" one. *281 Care Comm.*, 638 F.3d at 627. If the fear is reasonable, the injury-in-fact is not "self-inflicted," but rather inflicted by the law and those who could use it. *Compare* Peco Br. 17 *with 281 Care Comm.*, 638 F.3d at 627.

A plaintiff proves its self-censorship is objectively reasonable by establishing the plaintiff "wishes" to engage in activities that the law "prevents." *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 604 (8th Cir. 2013); *see also id.* ("Merely alleging a desire to engage in the proscribed activity is sufficient to confer standing."). That is, if the activities a plaintiff states it has forgone due to the law could be captured by that law, then that law logically led the plaintiff to self-censor, and the plaintiff is objectively reasonably chilled. *E.g.*, *Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009) (Vaughts' authority explaining plaintiffs lacked standing only because they were "not the target of the statute's prohibition"); *Preston v. Leake*, 660 F.3d 726, 735-36 (4th Cir. 2011) ("We have

held a law that facially restricts expressive activity by the class to which the plaintiff belongs presents such a credible threat of prosecution." (cleaned up)); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 47 (1st Cit. 2011) (chill where plaintiff is "within the class of persons potentially chilled"); Plfs.' Br. 27-30.

This is exactly what Plaintiffs allege here, Plfs. Br. 30-33, facts that must be taken as true at this stage, *Wieland*, 793 F.3d at 953. Plaintiffs explain the Ag-Gag Law restricts the precise techniques ALDF and Animal Equality ("AE") use in their employment-based undercover investigations, which they rely on to produce their advocacy. J.A.23-27 (Complaint). They have retained an investigator who is prepared to engage in the prohibited activities in Defendants' facilities; they know that investigator will uncover information of value that all Plaintiffs would use in their advocacy; and the only reason that investigator is not moving forward is the Ag-Gag Law. J.A.27-29, 31-36 (Complaint). ALDF and AE are "within the class of persons potentially chilled" because they wish to engage in the activities the Law prohibits, and thus they are suffering an injury-in-fact by self-censoring to avoid the Law. *Nat'l Org. for Marriage*, 649 F.3d at 47.

Indeed, the allegations go well beyond the minimum needed to establish that injury. Evidence of past activities falling within the challenged law's prohibitions like ALDF's and AE's, J.A.23-27, "obviously cannot be an indispensable element—people have a right to speak for the first time—[but] such evidence lends

concreteness and specificity to the plaintiffs' claims, and avoids the danger that Article III requirements be reduced to the formality of mouthing the right words." *Initiative & Referendum Inst.*, 450 F.3d at 1089.[3]

Defendants are only able to contest that the Ag-Gag Law covers Plaintiffs' desired activities by misstating the Complaint and the text of the Law. Peco states ALDF's and AE's intended activities are not covered by the Ag-Gag Law because: (i) they do not know Peco "to be in violation of any federal or state requirement"; and (ii) they do not explain how they "will inflict damage on Peco." Peco Br. 12. However, ALDF and AE explain they wish to gather and release information about Defendants' *lawful* activities that they *know* are ongoing in order to build pressure

[3] Since Plaintiffs need not have previously engaged in their desired speech to be chilled, Defendants and the district court are also incorrect Plaintiffs must show they previously investigated Defendants' facilities, J.A.124 (district court opinion), or other "family farms" in the state in order to have standing, Peco Br. 14-15; Vaught Br. 20. Indeed, as the district court acknowledged, *PETA* held ALDF had standing because it alleged it had "conducted undercover investigations" elsewhere, and the law would prevent it from "carry[ing] out [its] plans" to investigate the defendants' facilities it had not previously investigated. 737 Fed. App'x at 130. Further, Defendants fail to explain why their ownership structure bears on Plaintiffs' chill, but to the extent it does, Plaintiffs actually allege they have investigated family-owned factory farms like those of Defendants. J.A.24 (discussing ALDF's investigation of the Maschhoffs, a family owned operation). Likewise, Defendants fail to explain why it is important Plaintiffs have engaged in prior investigations within Arkansas' borders, and other courts have rejected the need for such evidence, *ALDF v. Herbert*, 263 F. Supp. 3d 1193, 1200 (D. Utah 2017), but, here too, Plaintiffs' allegations address that concern, explaining they have invested the resources to carry out investigations in the state, J.A.29, as others have successfully done in Arkansas in the past, J.A.16.

for regulatory changes. J.A.27-29. Moreover, Plaintiffs explain they use information from their undercover investigations to "advocate against and hold companies accountable," including by "encouraging [consumers] to choose compassion over cruelty," *i.e.*, producing reputational harm that can result in financial injury. J.A.25-26, 32-35. Even were that not the case, the Ag-Gag Law provides for liquidated damages and fee-shifting, creating a penalty if Plaintiffs engage in the regulated activities without producing clear damages. Ark. Code. § 16-118-113(e)(3)-(4).

Defendants also cherry-pick a couple of facts from two cases and insist they comprise the requirements for chill, but their reading has been rejected. Like the district court, they note that in *Balogh v. Lombardi*, 816 F.3d 536 (8th Cir. 2016), the plaintiffs challenged a law that restricted the dissemination of information, and the plaintiffs had "already obtained" and published documents they claimed could contain the restricted material. J.A.122; Peco Br. 14; Vaughts Br. 15-16. However, the above-cited authority establishes that is not necessary for chill. *E.g.*, *Initiative & Referendum Inst*, 450 F.3d at 1089. Moreover, *Balogh* itself makes clear plaintiffs need not prove they have or can violate the challenged law to be chilled. It explains the plaintiffs were *not* certain the documents they possessed contained the regulated information and the evidence in the record indicated they did not. *Balogh*, 816 F.3d at 540, 542. Nonetheless, the plaintiffs had standing. *Id.* at 542.

Confirming plaintiffs not need be poised to immediately violate the challenged law, in yet another case Defendants fail to address, this Court explained a "general expression of intent" to violate a law at some point "is enough" for standing based on chill. *Jones v. Jegley*, 947 F.3d 1100, 1103-04 (8th Cir. 2020); *see also* Plfs.' Br. 34-38. Thus, in *Jones*, the plaintiff had standing because she stated she was chilled from making a political donation, even though the candidate she stated she would donate to "ha[d] not yet solicited or accepted contributions." 947 F.3d at 1104.

The Vaughts also cite *Eckles v. City of Cordon*, 341 F.3d 762 (8th Cir. 2003), noting that one of the defendants there had expressly threatened the plaintiffs with action under the challenged law. *Eckles*, 431 F.3d at 768; Vaughts Br. 14. However, this Court has been clear that fact too is unnecessary for standing based on chill. "[A] plaintiff need not have been actually … threatened" to have such standing. *281 Care Comm.*, 638 F.3d at 627. And, of course, here Defendants' pre-suit silence was meant to intimate Plaintiffs should fear suit under the Ag-Gag Law. *See* Vaughts Br. 10-11; J.A.22-23 (Complaint).

If Plaintiffs' desired First Amendment activities fall within the activities prohibited by a statute and thus they are refraining from engaging in them, the law objectively reasonably chills Plaintiffs' speech and generates an injury-in-fact. Plaintiffs' allegations establish they are self-censoring in response to the Ag-Gag

Law, refraining from engaging in activities they have a long history of pursuing, because the Law penalizes them. Thus, they are suffering a concrete and particularized, actual and ongoing injury-in-fact; the Law is chilling their speech.

IV. THAT DEFENDANTS ARE PRIVATE PARTIES DOES NOT ALTER PLAINTIFFS' CHILL.

To the extent Defendants engage with any of Plaintiffs' other case law on chill, they dismiss it because it involved suits against public officials not private parties. Peco Br. 13-16; Vaughts Br. 17-20, 24-26. But, this Court has twice held private parties can chill speech just like public officials. Those decisions follow Supreme Court precedent and have been echoed by other courts.

In *Balogh* and *Digital Recognition Network*, this Court considered laws that solely provided a "private right of action against a person or entity who violated the statute." *Balogh*, 816 F.3d. at 542. This Court explained that as with any other case alleging standing based on chill, if the plaintiff shows "an objectively reasonable fear of legal action that chills its speech" then it has "alleged an injury in fact." *Id.* As this Court put it in *Digital Recognition Network*, where the plaintiff alleged it wished to engage in activities "arguably affected with a constitutional interest" under the First Amendment, which it would "resume[]" if the law were enjoined, but which it had stopped because it feared "private parties w[ould]

enforce the Act," that allegation "satisfie[d] the injury-in-fact element of standing." 803 F.3d at 957.

Peco circularly insists these opinions cannot mean what they say because plaintiffs should not be allowed to sue private parties to alleviate their chill. Peco Br. 20. However, *Balogh* and *Digital Recognition Network* instruct exactly that. In both cases, the plaintiffs named government officials as defendants who could not wield the challenged law and this Court held the plaintiffs lacked standing because their injury was not traceable to nor redressable against those defendants. *Balogh*, 816 F.3d. at 543-44; *Dig. Recognition Network*, 803 F.3d at 958. This Court stated the proper defendants are "[p]rivate litigants." *Dig. Recognition Network*, 803 F.3d at 958. In *Balogh* the Court even faulted the plaintiff for not following *Digital Recognition Network* and ensuring "the named defendants [] possess authority to enforce the complained-of provision." *Balogh*, 816 F.3d at 543-44. It went on that proper defendants in that case were "private civil litigants who may seek damages under" the challenged statute. *Id.* at 544.

Such holdings are required by Supreme Court precedent. The Court has explained that even though the Constitution "is directed against State action and not private action," where a "state rule of law … impose[s] invalid restrictions on [plaintiffs'] constitutional freedoms of speech and press," the existence of the law itself is sufficient "state action" to raise First Amendment concern. *New York*

Times Co. v. Sullivan, 376 U.S. 254, 265 (1964). Put another way, when a state passes a law that empowers private parties to chill speech, it is the same constitutionally as the state chilling speech itself. *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 880 (9th Cir. 1987) ("State laws whether statutory or common law, including tort rules, constitute state action."). "[S]ometimes the state can censor just as effectively through legal forms that are private as it can through ones that are public." *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 224 (4th Cir. 2019). Therefore, to protect the open marketplace of ideas, courts must allow standing to challenge private enforcement of a law targeting speech just as they would against public enforcement, or they would undermine the First Amendment.

Accordingly, in striking down the North Carolina law on which Arkansas' Ag-Gag Law is modeled, that court explained it was irrelevant whether a law "operates in the private sphere." *PETA v. Stein*, 2020 WL 3130158, at *7 (M.D.N.C. June 12, 2020). There "is state action to the extent the State has identified speech (or in some cases, conduct which can include speech) it wishes to allow to be proscribed and has empowered private parties to enforce the prohibition." *Id.* (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991)).

Defendants argue, without any authority, that private parties are innately different from public officials because, unlike private parties, "the courts may

reasonably assume that state actors will enforce the law … and that in turn makes it more than reasonable for groups to refrain from acting." Peco Br. 15; *see also* Vaughts Br. 8. Yet, just like private actors, state actors maintain the option not to enforce a law. Moreover, even where state actors have said they have "no present intention to enforce [a] statute[]," this Court has held that does not undermine standing based on chill. *UFCWA, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 430 (8th Cir. 1988).

Regardless, here, Defendants have stated they will consider using the Ag-Gag Law against Plaintiffs, if Plaintiffs proceed as they wish. *E.g.*, Vaught Br. 8 (listing Ag-Gag Law as future "option"). They purposefully did not respond to Plaintiffs' pre-suit letters or make any other statements regarding their intent to enforce the Law in order to maintain that potential, and Plaintiffs concomitant fear. *E.g.*, Peco Br. 5-7. Further, Defendant DeAnn Vaught stated when she introduced the Law she was doing so for it to be used by "farmer[s]" like her to prevent groups like Plaintiffs from gathering videos and engaging in advocacy. J.A.38 (Complaint). Defendants' conduct has made clear Plaintiffs have a valid reason to fear Defendants' use of the Law.

This Court, building on Supreme Court precedent, rightfully recognizes that Defendants can be subject to pre-enforcement challenge by Plaintiffs. To hold that because Defendants are private parties they cannot chill speech, producing a First

Amendment injury-in-fact, would mean the state could hide behind private enforcement to accomplish its unconstitutional ends. That would undermine the First Amendment and the precise objective of chill standing. Thus, Defendants' position has properly been rejected.

V. PLAINTIFFS HAVE ALSO ALLEGED AN INJURY-IN-FACT BASED ON THEIR RISK OF IMMINENT FUTURE HARM.

While Plaintiffs can proceed based on their injury-in-fact from chill, Plaintiffs have also established a non-speculative risk of imminent suit under the Ag-Gag Law that would violate their rights, an independent injury-in-fact.

Multiple courts, unaddressed by Defendants, have held that whether plaintiffs face a risk of imminent harm can only be resolved "with the benefit of an evidentiary record at summary judgment," not at this motion to dismiss stage. *Wikimedia Found.*, 857 F.3d at 212; *see also Schuchardt*, 839 F.3d at 348-49 ("'[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Indeed, analyzing whether Plaintiffs' standing is "speculative" at this stage would be inconsistent with the required "presum[ption] that the general allegations in the complaint encompass the specific facts necessary to support" standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

Nonetheless, Plaintiffs need not rely on the *Steel Co.* presumption because their allegations, treated as true, establish Plaintiffs face a risk of imminent suit under the Law. On summary judgment, *Clapper* explained the plaintiffs' contentions there were "speculative" because they relied on "assumptions" without "specific facts" to support them. 568 U.S. at 411-12 (emphasis removed). Plaintiffs' Complaint substantiates precisely how they will become subject to suit: ALDF and AE have retained an investigator who is prepared and able to investigate Defendants' facilities in the manners prohibited by the Ag-Gag Law—as Plaintiffs' investigators have done at hundreds of other facilities, J.A.24-26, 29; while that act alone could subject them to liability, *see* Ark. Code § 16-118-113(c)(3), Plaintiffs also know they will find information of use to their advocacy there, J.A.27-28; and they are prepared to use that information in their advocacy to build public pressure against Defendants, J.A.29, 33, 36, which will subject them to yet further liability under the Law, *see* Ark. Code § 16-118-113(c)(1)-(2), (5). Plaintiffs do not rely on a single assumption, but provide specific facts about how they can and will face suit under the Law if they proceed, establishing a non-speculative risk of imminent harm.

Defendants' only response is to again engage in premature disputes of fact. For instance, they claim Plaintiffs are incorrect that they will find anything to use in their advocacy. *E.g.* Peco Br. 12, 15; Vaughts Br. 4. Not only is that contrary to

Plaintiffs' allegations, it is also irrelevant. Plaintiffs can violate the Law and be subject to liquidated damages and fee shifting merely by "plac[ing]" a recording device, regardless of what it records. Ark. Code § 16-118-113(c)(3). Defendants also claim Plaintiffs' investigator will not be hired by Defendants. *E.g.* Peco Br. 17; Vaughts Br. 4, 11. Again, this disputes Plaintiffs' alleged facts that their investigator can gain access to Defendants' facilities—which need not be through employment with Defendants to expose Plaintiffs to suit. Ark. Code § 16-118-113(b). Defendants also ignore that Plaintiffs have successfully carried out investigations across the country and the world, including obtaining access to never-before-accessed facilities. J.A.24, 26 (Complaint). Those facts substantiate Plaintiffs will be able to access Defendants' facilities. *See, e.g., Garrison v. New Fashion Pork LLP*, 2019 WL 5586565, at *4 (N.D. Iowa July 1, 2019) (pattern of past conduct can establish imminent future harm).

Of course, this discussion is unnecessary. Because Plaintiffs can establish standing based on chill, they need not prove how they will violate the Law, just that the Law has caused them to "hesitat[e]" from attempting to do so, as it targets the types of activities in which Plaintiffs hope to engage. *Int'l Ass'n of Firefighters of St. Louis v. City of Ferguson*, 283 F.3d 969, 973 (8th Cir. 2002).

Nonetheless, Plaintiffs have also established a non-speculative risk of future suit by Defendants that would violate their rights. Courts regularly hear pre-

enforcement disputes where one private party establishes it faces a risk of suit by another private party. Thus, this distinct injury-in-fact further undercuts Defendants' claim that Plaintiffs' naming them is unusual or improper. *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, 718 F.3d 1350, 1355 (Fed. Cir. 2013); *Monsanto Co. v. Syngenta Crop Prot., Inc.*, 2008 WL 294291, at *3-4 (E.D. Mo. Jan. 31, 2008); *Cimline, Inc. v. Crafco, Inc.*, 2007 WL 4591957, at *4 (D. Minn. Dec. 28, 2007).

VI. PLAINTIFFS HAVE FURTHER ALLEGED AN INJURY-IN-FACT BECAUSE THEY ARE BEING DENIED THE POTENTIAL TO ACCESS INFORMATION.

Providing yet a third basis for standing, Plaintiffs are also suffering an injury-in-fact because the Ag-Gag Law inhibits their access to information. Defendants insist that injury only exists if ALDF and AE separately have standing. Peco Br. 11 n.3; Vaughts Br. 27-28. False. "Putative recipients of speech usually have standing" so long as they have "reason to believe" another person would be willing to provide them that information, but for the challenged law. *United States v. Wecht*, 484 F.3d 194, 202 (3d Cir. 2007) (citing *FOCUS v. Allegheny Cty. Court of Common Pleas*, 75 F.3d 834 (3d Cir.1996)). To establish such standing, plaintiffs merely must allege the existence of a potential "'willing speaker,'" who would be discouraged from providing information to plaintiffs because of the law.

Reynolds, 297 F. Supp. 3d at 916 (quoting *Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 255 (4th Cir. 2011)).

Here, while Plaintiffs allege that ALDF and AE are willing speakers chilled by the Law who would provide information to the other Plaintiffs, ALDF and AE are not the only potential willing speakers Plaintiffs identify. Plaintiffs identify other groups that have successfully investigated Arkansas' industrial agriculture facilities and enabled Plaintiffs to access that information, but whose activities are now prohibited by the Law. J.A.16. Plaintiffs further allege that employees have been willing to gather information and share it with Plaintiffs in the past, but now would be deterred from doing so because that would violate the Ag-Gag Law. J.A.35. Indeed, while workers exposed to COVID-19 at plants like Peco's have come forward in other jurisdictions, *i.e.*, *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 2020 WL 2145350, at *2 (W.D. Mo. May 5, 2020), doing so in Arkansas would subject them to liability under the Law. In this manner, Plaintiffs have alleged the existence of potential willing speakers other than ALDF and AE who would be deterred by the Law. This entitles Plaintiffs to reach discovery to prove they are injured because potential speakers who would share information with Plaintiffs are deterred by Defendants' powers under the Law.

VII. EACH OF PLAINTIFFS' SEPARATE INJURIES-IN-FACT ARE TRACEABLE TO AND REDRESSABLE AGAINST DEFENDANTS.

While Defendants complain that Plaintiffs briefed traceability and redressability, as Plaintiffs explained, these elements flow directly from their injuries-in-fact. Plfs.' Br. 49-51. Thus, there is no independent basis to dismiss Plaintiffs' claim, and remanding for further consideration of these issues would be the height of formalism.

In a pre-enforcement challenge, if the plaintiffs establish they are being injured-in-fact by the defendants, their claims are necessarily traceable to and redressable against those defendants. *E.g.*, *Digital Recognition Network*, 803 F.3d at 958. In fact, this Court has explained where a private defendant is empowered to chill speech, that injury is *only* traceable to and redressable against the private parties empowered to act against plaintiffs who brought about the chill. *Balogh*, 816 F.3d at 543-44.

Defendants' sole response is to assert, once again, that this Court should hold that private parties cannot chill speech and thus cannot thereby injure Plaintiffs, and without any injury-in-fact Plaintiffs cannot establish traceability and redressability. Peco Br. 20-21. However, assuming *arguendo* that a panel of this Court could hold Plaintiffs cannot be chilled, this argument overlooks that Plaintiffs have separately established injuries-in-fact by showing they face a non-

speculative risk of imminent suit by Defendants, and that Defendants' powers under the Law deny Plaintiffs access to information from other potential speakers. Those injuries stem from Defendants' ability to use the Law and would be relieved if Defendants were enjoined from doing so—as Plaintiffs request. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (injuries traceable and redressable if there is "a causal connection between the injury" and the defendant). Plaintiffs have standing under multiple theories.

VIII. THIS COURT HAS A "STATUTORY BASIS" TO HEAR PLAINTIFFS' CONSTITUTIONAL CLAIMS.

Finally, Peco's insistence that no statute allows Plaintiffs to bring their constitutional claim further repeats its disproven arguments. Peco Br. 21. Peco concedes constitutional claims for equitable relief can be raised under 28 U.S.C. § 1331. Peco Br. 24 (citing *Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Davis v. Passman*, 442 U.S. 228 (1979); *Bell v. Hood*, 327 U.S. 678 (1946)); *see also* Plfs.' Br. 55-56.

Peco claims the cases establishing this authority do not apply here because Defendants are "private part[ies]" not "subject to constitutional limitations." Peco Br. 24. However, this Court has already held that private parties can produce a First Amendment injury-in-fact, creating the basis for Plaintiffs' constitutional claim. *Balogh*, 816 F.3d. at 542; *Digital Recognition Network*, 803 F.3d at 957.

Further, Peco's assertion that it can never be "subject to constitutional limitations" is patently incorrect. For instance, "libel laws, although enforced by private parties, remain subject to First Amendment scrutiny." *PETA*, 2020 WL 3130158, at *6 n.5 (citing *Sullivan*, 376 U.S. at 268-69).

The cases Peco cites to support its baseless claim of immunity address wholly different circumstances. Each concerns private defendants being sued for damages for using a *constitutional* law for allegedly unconstitutional motives. *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996) (employee terminated under lawful contract terms claiming "termination was actually in response to" his speech); *Belluso v. Turner Commc'ns Corp.*, 633 F.2d 393, 394 (5th Cir. 1980) (addressing whether lawfully licensed television network can refuse commercial because it dislikes the speech); *Murphy v. Mount Carmel High Sch.*, 543 F.2d 1189, 1190 (7th Cir. 1976) (employee terminated under lawful contract claiming his termination was actually based on personal attributes and speech); *Miller v. Walt Disney Co. Channel 7 KABC*, 2013 WL 12122678, at *1 (C.D. Cal. Oct. 10, 2013) (person suing television station for "not allowing her to participate in the televised mayoral debate" out of "malice"). In each, it is only through focusing on the private party's particular goals that the plaintiff could claim the action was unconstitutional.

Here Plaintiffs allege any use of the Ag-Gag Law, especially against Plaintiffs, is unconstitutional and Defendants should be enjoined from using it. As Defendants' own authority details, where the "governmental policies" behind a statute are challenged, rather than a private defendant's motivation for using that policy, the challenge raises constitutional concerns. *Belluso*, 633 F.2d at 398. This is because, "[w]hen private individuals or groups are endowed by the State with powers," those powers must be consistent with the Constitution. *Id*; *see also Sullivan*, 376 U.S. at 265 ("That the Fourteenth Amendment is directed against State action and not private action … has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press." (cleaned up)). Therefore, Plaintiffs can seek to enjoin the power granted to Defendants under the Ag-Gag Law as inconsistent with the First Amendment and that claim can be heard under 28 U.S.C. § 1331.

Peco's focus on the scope of *Bivens* and 42 U.S.C. § 1983 is just another distraction. Peco ignores that the Supreme Court's reluctance to extend *Bivens*, Peco Br. 22, has nothing to do with limiting constitutional claims like those of Plaintiffs, but that *Bivens* provides for damages against federal officials. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397

(1971). As Peco's authority states, the Supreme Court has declined to extend *Bivens* precisely because it understood that even without a damages remedy, plaintiffs "may seek injunctive relief" for constitutional violations. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). It follows the two other cases Peco cites are inapposite as they concerned a damages action, *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 918 (9th Cir. 2001), and a non-constitutional claim, *Alexander v. Sandoval*, 532 U.S. 275, 278 (2001).

Indeed, Peco simply refuses to acknowledge the landmark examples of constitutional cases seeking injunctive relief that did not require *Bivens* or § 1983. *E.g.*, *Ex Parte Young*, 209 U.S. 123, 145 (1908); *see also* Hon. Marsha Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication In Federal Courts*, 84 N.Y.U. L. Rev. 681 (2009). Schools would not have been desegregated if those procedures needed to be in place. When *Bolling v. Sharpe*, 347 U.S. 497 (1954), was issued against the District of Columbia, 42 U.S.C. § 1983 did not allow suits against that jurisdiction, yet the Court heard the case under its authority to adjudicate constitutional claims.

This Court can hear Plaintiffs' constitutional claims. Should the Court require a "statutory basis" for such a claim, it exists in 28 U.S.C. § 1331.

IX. CONCLUSION.

This Court should hold Plaintiffs have numerous bases for standing. The district court's dismissal should be reversed and this case remanded for further proceedings.

July 17, 2020

Respectfully submitted,

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiffs

Cristina Stella
Kelsey Eberly
Alene Anello
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931
(707) 795-2533
cstella@aldf.org
keberly@aldf.org
aanello@aldf.org
Counsel for Animal Legal Defense Fund

Matthew Strugar
Law Office of Matthew Strugar
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
(323) 696-2299
matthew@matthewstrugar.com
Counsel for Animal Legal Defense Fund

Alan K. Chen
Univ. of Denver Sturm College of Law
2255 E. Evans Avenue, Rm 455E
Denver, Colorado 80208
(303) 871-6283
achen@law.du.edu
Counsel for Animal Legal Defense Fund

Sarah Hanneken
Animal Equality
8581 Santa Monica Blvd. Ste. 350
Los Angeles, CA, 90069
(414) 405-0538
sarahh@animalequality.org
Counsel for Animal Equality

Hannah Connor
Center for Biological Diversity
P.O. Box 2155
St. Petersburg, FL 33731
(202) 681-1676
HConnor@biologicaldiversity.org
Counsel for Center for Biological Diversity

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Date: July 17, 2020 /s/ David S. Muraskin

David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH VIRUS SCAN

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Dated: July 17, 2020

Respectfully submitted,

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the July 17, 2020, the foregoing document was served on all parties or their counsel of record through CM/ECF system. Upon approval by the Court I will arrange for ten (10) copies of this brief to be sent to the Court Clerk's office and one copy to be served on the other parties at the addresses below.

Mark I. Bronson
Newman Bronson & Wallis
2300 West Port Plaza Drive
St. Louis, MO 63146
Counsel for Deans and Professors Amici

Bruce D. Brown
1156 15th Street NW
Suite 1020
Washington, DC 20005
Counsel for Reporters Amici

Steven W. Quattlebaum
Michael B. Heister
Samantha R. Wilson
QUATTLEBAUM, GROOMS & TULL PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
Counsel for Peco Foods, Inc.

Roger D. Rowe
LAX, VAUGHAN, FORTSON,
ROWE & THREET, P.A.
11300 Cantrell Road, Suite 201
Little Rock, AR 72212
Counsel for Jonathan and DeAnn Vaught

Dated: July 17, 2020

Respectfully submitted,

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiffs