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

OPENING BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants do not issue stock and have no parent corporations.

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I. SUMMARY OF THE CASE AND REQUEST FOR ARGUMENT

This case concerns whether Plaintiffs-Appellants ("Plaintiffs"), who engage in and rely upon undercover investigations of industrial agricultural facilities to develop their advocacy, have standing to challenge a law that penalizes those investigations and the communications based on them. The district court held Plaintiffs lack standing because they have not already engaged in their planned investigations, and thus cannot be injured by the law. It also stated the fact that the law provides for civil penalties, rather than criminal fines, informed its conclusion, although it did not explain precisely how.

The decision below contradicts controlling Supreme Court and Eighth Circuit authorities, which establish a law that chills First Amendment freedoms, by causing people to decline to produce their desired speech, creates an injury-in-fact traceable to and redressable against the parties empowered to enforce that law. In reaching its contrary holding, the district court created a significant loophole to First Amendment protections—empowering the state to tilt the marketplace of ideas until a person is willing violate a law and risk sanction to vindicate their free speech rights—and contradicted a variety of precedent that has held plaintiffs, including those in this case, have standing based on equivalent facts.

Given the significance of the error and its implications for constitutional rights, Plaintiffs request oral argument of thirty minutes.

II. JURISDICTIONAL STATEMENT

This action was brought in the Eastern District of Arkansas pursuant to the United States Constitution and 28 U.S.C. § 1331 and § 1343, challenging Arkansas Code § 16-118-113 (the "Ag-Gag Law" or "Law") because it restricts the fundamental right to free speech in violation of the First and Fourteenth Amendments. On February 14, 2020, the district court entered an opinion, order, and final judgment dismissing Plaintiffs' Complaint, because it concluded Plaintiffs are not suffering an injury-in-fact and thus lack standing. Joint Appendix 115-27 ("J.A.115-27"). Plaintiffs filed their notice of appeal from that decision on March 12, 2020. J.A.128-31. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

III. ISSUES PRESENTED

1. Whether Plaintiffs have standing to challenge a law that chills their speech.
    a. Most apposite cases and provisions: *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789 (8th Cir. 2016); *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011); *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 Fed. App'x 122 (4th Cir. 2018) (unpublished); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc); U.S. Const. amend I; Ark. Code § 16-118-113.

2. Whether Plaintiffs have "listener standing" to challenge a law that chills speech on which they regularly rely for their advocacy.

    a. Most apposite cases and provisions: *United States v. Wecht*, 484 F.3d 194, 202-03 (3d Cir. 2007); *In re Application of Dow Jones & Co., Inc.*, 842 F.2d 603 (2d Cir. 1988); U.S. Const. amend I; Ark. Code § 16-118-113.

IV. INTRODUCTION

Since Upton Sinclair wrote *The Jungle* in 1906, investigations of our food system have driven public discourse and policy-making. Plaintiffs Animal Legal Defense Fund ("ALDF") and Animal Equality ("AE") are organizations whose investigators gain employment at industrial animal agriculture facilities and gather information on the hidden ways in which these plants operate; all Plaintiffs then use that information in their advocacy. Plaintiffs have determined documenting Defendants' facilities, and using that information to inform the public about how Defendants operate would be particularly valuable for their work. The sole reason Plaintiffs are not engaging in this speech is they fear the penalties they could face under the Ag-Gag Law. That fear is more than reasonable, as their activities are covered by the Law's plain text, the legislature stated the Law is targeted at Plaintiffs' investigations, and Defendants have indicated they will wield it against Plaintiffs if Plaintiffs proceed.

Despite this chill on Plaintiffs exercising their First Amendment rights, the district court stated Plaintiffs are not suffering an injury-in-fact. In doing so, it acknowledged its decision conflicts with a Fourth Circuit opinion holding Plaintiff ALDF had standing to challenge the North Carolina statute on which the Arkansas Law was modeled, based on identical facts. The district court also disregarded a variety of other controlling and persuasive precedent.

Indeed, Plaintiffs' allegations, which must be taken as true at this stage, lay out the archetypal basis for First Amendment standing. Where a law punishes First Amendment protected activities, and thus discourages people from exercising those rights, individuals who wish to engage in the restricted activities can proactively seek an order declaring the law unconstitutional and enjoining its enforcement, as Plaintiffs do here. The goal of the First Amendment is not merely to protect specific expressions but to facilitate an open marketplace of ideas, which requires courts to evaluate the constitutionality of laws *before* they are applied so that a statute's *potential* enforcement does not intimidate people into self-censoring. Thus, the district court erred in dismissing Plaintiffs' claims.

V. STATEMENT OF THE CASE

A. The Text of Ag-Gag Law Shows it Targets Speech.

Although framed as prohibiting "act[s] that exceed[] one's authority" on commercial property, Arkansas' Ag-Gag Law defines its terms so the "acts"

include the First Amendment protected activities of gathering information to formulate speech, and the actual communication of that information to others. Its penalties for these constitutionally-protected activities are severe: liquidated damages of up to $5,000 a day for "each day, or a portion of a day, that a defendant has acted in violation" of the Law, as well as fee-shifting against a person or entity shown to violate the Law. Ark. Code § 16-118-113(e)(3)-(4).

Specifically, Arkansas' Ag-Gag Law authorizes an "owner or operator" of a "commercial property" to sue anyone who "knowingly gains access to a nonpublic area of [the] commercial property and engages in an act that exceeds the person's authority to enter the nonpublic area." Ark. Code § 16-118-113(b). "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":

> (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; … or
>
> (5) Commits an act that substantially interferes with the ownership or possession of the commercial property.

Id. § 16-118-113(c).[1]

Plaintiffs challenge § 16-118-113(c)(1)-(3), (5) because they define the unauthorized "acts" to include communication. Subsections (c)(1)-(2) prohibit the "us[e]" of information. "An individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (internal quotation marks omitted). Subsections (c)(2)-(3) prohibit "recording," and recording is "an inherently expressive activity." *ALDF v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019) (Plaintiffs' "desire to engage in a course of conduct that includes the production of videos means that their other claims are affected with a constitutional interest too[.]"). And, subsection (c)(5) penalizes "interfer[ing]" with "ownership or possession," which has been interpreted to create penalties for the reputational harm that comes from public criticism, even if

[1] Plaintiffs do not directly challenge the Law's other provisions, although they argue the provisions regulating First Amendment activities render the Law unconstitutionally overbroad, and, because subsection (b) extends the Law to reach the "acts" described in (c)(1)-(3) and (5) even if they are committed by non-employees, that too is unconstitutional. *See*, *e.g.*, J.A. 45-49 (Complaint).

that criticism is accurate. *ALDF v. Kelly*, 2020 WL 362626, at *7 (D. Kan. Jan. 22, 2020) (where law encompasses damage to an "enterprise" rather than its physical structure it encompasses reputational harms).

Subsections (c)(1)-(3) also prohibit the gathering of information to be used in speech, which is another activity protected by the First Amendment. Laws that "control or suppress speech" through "operat[ing] at different points in the speech process" equally "abridg[e] the freedom of speech." *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). Put another way, whether the "regulation applies to creating … or consuming speech makes no difference," the First Amendment applies just as if the law had regulated speaking. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 792 n.1 (2011). By restricting the "gather[ing]" of information so it can be "use[d]," and the creation of recordings so they cannot be shown, subsections (c)(1)-(3) interfere with speech being created. Thereby, they infringe on First Amendment rights.

Further still, in addition to restricting "acts" that encompass speech, the Law creates "joint[] liab[ility]" for "[a] person who knowingly directs" the activities covered by subsections (b) and (c). Ark. Code § 16-118-113(d). In this manner, the Law penalizes communications that facilitate the First Amendment protected activities covered by subsection (c), another restriction on First Amendment rights.

B. The Law's Legislative History Also Establishes it Targets Speech.

The statements and testimony in support of the Law confirm what is evident from its text: the Law's goal is to stop speech. In fact, the legislative history establishes the Law is aimed at stopping a particular type of speech: negative speech about the agricultural industry. It also explains the Law's aim is to discourage the development of speech, not just punish it after the fact.

Representative Vaught, the lead sponsor of the Law—who is named as a defendant in this suit in her personal capacity as the owner and operator of the confined pig feeding operation Prayer Creek Farms—explained to the legislature that the statute derived from her concerns as a "farmer." J.A.38 (Complaint).[2] As a farmer, she stated, she fears "cellphone videos" could document and expose her conduct, and the statute is a means to punish such advocacy. *Id.*

Representative Vaught continued that the Law is designed not just to allow her to seek damages for speech about her operation, but to chill advocates from developing that speech. She explained the Law was crafted to be "enforced through a private right of action," rather than criminal penalties, because she hoped this would "protect this legislation from constitutional challenges," so would-be speakers could not secure their right to speak unless they were willing to risk

[2] The Law goes out of its way to state agricultural operations are part of the "commercial property" it is designed to insulate. Ark. Code § 16-118-113(a)(1)(B).

liability under the Law, thereby decreasing the potential they would speak. J.A.18-19 (Complaint). Indeed, she elaborated that the Arkansas statute "is modeled after a newly enacted law in North Carolina." *Id.* Yet, because the North Carolina law was successfully prospectively challenged by the plaintiffs there (which included ALDF), on the basis that they wished to investigate the University of North Carolina-Chapel Hill and other state facilities, the drafters of the Arkansas Law prohibited its enforcement by "'a state agency [or] a state-funded institution of higher education.'" Ark. Code § 16-118-113(g). Put simply, Representative Vaught drafted the law to try to restrict judicial review, while maintaining its unconstitutional character, so as to deter speech.

Representative Vaught's goals for the Law were echoed by Representative Hillman, who stated on the House floor he supported the Law because of what "those of us who are farmers" know: that people seek to "take pictures or record things" that form the basis of claims that the farms are involved in "animal "cruel[ty]"—statements Representative Hillman believed needed to be stopped. J.A.38-39 (Complaint) (other brackets removed). Nonetheless, he went on to warn his colleagues not to create a legislative record showing the Law was meant to suppress information about "animal things and stuff like that," as that would indicate the Law was aimed at specific types of speech, making it harder to maintain. *Id.*

In addition, a witnesses called in support of the Law stated it was needed "to address corporate espionage and activist employment." J.A.37 (Complaint) (cleaned up). However, Arkansas already has numerous laws that address "corporate espionage," *see, e.g.*, Ark. Code § 4-75-601 *et seq.*, and the legislative record fails to identify any "corporate espionage" that required additional regulation. J.A.20 (Complaint).[3] Thus, the witness effectively explains the Law's purpose is to punish "activist employment," like the employment-based undercover investigations Plaintiffs use to gather information for their and other's advocacy.

C. Arkansas' Ag-Gag Law Targets and Chills Plaintiffs' Speech.

Consistent with the stated goals, the Ag-Gag Law's restrictions track how Plaintiffs and others develop communications about the animal agriculture industry. ALDF and AE regard industrial animal agriculture—whether carried out lawfully or unlawfully—as inherently cruel. Thus, they work to publicize its practices related to animals, workers, and the environment in order to alter consumer choices and build public pressure for increased regulation. J.A.23, 25-27 (Complaint). To accomplish these ends, they have conducted hundreds of employment-based undercover investigations of agricultural facilities across the

[3] The legislative record also fails to identify any "activist employment" of concern. J.A.53-102 (Complaint Exhibit A). In fact, the legislative record is devoid of any factual evidence in support of the law whatsoever. *Id.*

United States and the world, including slaughterhouses and factory farms like those operated by Defendants. *See, e.g.*, J.A.24, 26 (Complaint).

ALDF and AE's investigators use the techniques targeted by the Law, which have proven successful in Arkansas in the past. *See* J.A.16 (Complaint, identifying prior investigations). Their investigators first obtain jobs at facilities of interest. J.A.25, 26 (Complaint). Then, while fulfilling all lawfully assigned tasks, the investigators gather information on these otherwise hidden operations so it can be used in ALDF and AE's advocacy, including by making audiovisual recordings, and potentially leaving recording devices behind to capture scenes. *Id*. ALDF and AE then distribute this information through their own channels, to the media, and to other groups—such as Plaintiffs Center for Biological Diversity ("CBD") and Food Chain Workers Alliance ("FCWA")—to alter public opinion and the owners' conduct. *Id*. In the words of Arkansas' Ag-Gag Law, ALDF and AE "direct[]" investigators to obtain positions as "employees" and "knowingly enter[] a nonpublic area of commercial property," and "without authorization," "capture" information, "record[] image and sounds," or "use[] an unattended camera," so that ALDF and AE can "use[] the" information to expose the operations and thereby build pressure against them. Ark. Code § 16-118-113(c)(1)-(3), (5), (d).

In addition, Plaintiffs CBD and FCWA rely on the information such investigations gather to produce their own media and reports—thus the Law also

inhibits their advocacy. CBD sees industrial animal agriculture as a core driver of environmental degradation. J.A.30 (Complaint). To increase the impact of its environmental advocacy against these facilities, in its briefs and reports CBD aims to connect industrial animal agriculture operations' pollution to their unsafe working conditions and mistreatment of animals by using information obtained from investigations like those of ALDF and AE. J.A.32-33 (Complaint). For its part, FCWA produces reports to highlight the burdens and risks imposed on industrial agricultural workers and thereby alter people's purchasing decisions and press for stronger health and safety regulations, which it does using information from employee whistleblowers and undercover investigations like those of ALDF and AE. J.A.34, 35 (Complaint). Therefore, by punishing the gathering and communication of information about industrial agricultural facilities, Arkansas' Ag-Gag Law undermines CBD's and FCWA's ability to engage in their speech. *See, e.g.*, J.A.33, 36 (Complaint).

D. Arkansas' Ag-Gag Law Has Chilled Specific, Planned Advocacy.

Plaintiffs determined that ALDF and AE investigating Defendants' facilities, which are industrial animal agriculture operations similar to those they have investigated in the past, would be especially valuable for their advocacy. But, while ALDF and AE are situated to carry out those investigations, they are not

moving forward because of the serious risk of liability created by the Law. J.A.29 (Complaint).

Plaintiffs have long focused their advocacy on Arkansas' industrial agricultural operations and an investigation is an important next step for this work. ALDF and CBD filed comments and petitions to curtail the rapid expansion of Arkansas' industrial agricultural facilities, but their requests have been rejected or ignored, making public pressure campaigns one of their few remaining tools. *See* J.A.14-15 (Complaint). CBD is also currently working to highlight pollution in the southeastern United States, and especially Arkansas, which is home to imperiled species CBD aims to protect. J.A.30-32 (Complaint). FCWA is focused on improving working conditions in the state. J.A.35-36 (Complaint). That effort has taken on greater urgency since the Complaint was filed and Arkansas' slaughterhouses became incubators for COVID-19, placing workers and the surrounding communities at risk. *See, e.g.*, Alice Driver, *Arkansas poultry workers amid the coronavirus: 'We're not essential, we're expendable'*, Arkansas Times (May 11, 2020).[4]

Given these ongoing campaigns, Plaintiffs determined documenting the conditions at Defendants' facilities—be they lawful or unlawful—would be

[4] https://arktimes.com/arkansas-blog/2020/05/11/arkansas-poultry-workers-amid-the-coronavirus-were-not-essential-were-expendable.

beneficial to their advocacy. Defendant Peco Foods, Inc. ("Peco") uses a method of slaughter known as "live hang," which inherently involves the inhumane treatment of animals. J.A.28 (Complaint). Further, a Peco Arkansas slaughterhouse recently increased its slaughter line speed, which Plaintiffs oppose, as it has been shown to result in additional worker health and safety violations, food contamination, inhumane treatment, and environmental harms. J.A.15, 28, 31, 35 (Complaint).[5] Yet Peco hides its noxious practices. J.A.27 (Complaint). Therefore, gathering information on Peco's conduct—including its routine slaughter practices and working conditions—and using that material to inform the public is core to Plaintiffs' efforts to increase awareness of the true, horrific nature of industrial animal agriculture. That transparency can only be accomplished through undercover investigations.

Likewise, Prayer Creek Farms is a 1,200-head fully-confined pig production facility that ALDF and AE believe is inherently inhumane, and the public will likewise regard it as such if they can see inside. J.A.21 (Complaint); *see also id.* at 23, 25-26. The size and structure of Prayer Creek Farms also suggest it may be polluting Arkansas' rivers, and that it cages its pregnant and nursing female pigs using a form of "extreme[] confinement" that is especially disturbing to the public.

[5] Peco's facilitates are also similar to those that have spread COVID-19. *See* Driver, *supra*.

J.A.27 (Complaint). Therefore, documenting Prayer Creek Farm's operations and confinement methods will be beneficial to Plaintiffs' advocacy.

Further still, Prayer Creek Farms is owned by DeAnn Vaught, the Representative who sponsored Arkansas' Ag-Gag Law. J.A.13 (Complaint). ALDF has been a leader in opposing Ag-Gag laws across the nation, *see, e.g.*, J.A.16-17 (Complaint, listing examples of cases in which ALDF has been a plaintiff), and all Plaintiffs' work is harmed by such legislative attacks on free speech. Therefore, demonstrating how Representative Vaught used her power to shield the conditions of her private business from scrutiny—proving such laws harm workers, animals, consumers, the public, and the environment by keeping important facts from view—is central to all Plaintiffs' advocacy nationwide, regardless of the particular practices at her facility. *See, e.g.*, J.A.27 (Complaint). However, because Prayer Creek Farms seeks to keep its operations hidden, here too Plaintiffs' goals can only be achieved through undercover investigations. *Id.*

For these reasons, ALDF and AE have retained an experienced investigator to gather information on Defendants' operations. J.A.29 (Complaint). That investigator will employ techniques described by § 16-118-113(c), as ALDF and AE investigators have consistently done in the past. *E.g.*, J.A.29 (Complaint).

However, ALDF and AE have declined to move forward with the planned investigations because of the Ag-Gag Law. *Id.* The organizations continue to

engage in investigations in states where Ag-Gag laws are not present, but they cannot risk the liability created by Arkansas' Law. *Id*. Prior, similar investigations in Arkansas have lasted months to gather all of the desired information, J.A.16 (Complaint, identifying prior investigations), which would result in hundreds of thousands of dollars in liability under § 16-118-113(e).

As a result, ALDF and AE asked Defendants to waive their rights under the Law so that their investigations could proceed without this litigation. J.A.22, 23 (Complaint). Defendants declined to do so. *Id.* In fact, in the proceedings below, Defendants acknowledged receiving ALDF and AE's requests, J.A.103-14 (Defendants' motions to dismiss, attaching ALDF and AE's letters to them as exhibits), and refused to make any additional representations that they would waive their rights under the Law. Therefore, Plaintiffs proceeded with this suit in order relieve the chill created by the Law and be able to gather information on Defendants' facilities in the manners prohibited by the Law, as Plaintiffs desire.

E. The District Court Allowed Plaintiffs' Chill to Continue.

The district court held it need not resolve whether the Ag-Gag Law unconstitutionally suppresses speech because Plaintiffs are not suffering an injury-in-fact and thus lack standing to bring their First Amendment challenge. In its six pages of reasoning, it offered two bases for its conclusion, which its own authority establishes are inconsistent with Supreme Court, Fourth Circuit, and Eighth Circuit

precedent, and which overlook Plaintiffs' allegations, including by failing to address a distinct type of injury-in-fact alleged by Plaintiffs.

The court began by recognizing Plaintiffs can establish an injury-in-fact in two different ways. They can show that: (i) they face an "'imminent'" threat of suit under the Ag-Gag Law; and/or (ii) the Law is producing an "'actual,'" ongoing harm. J.A.119 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). The court initially dismissed the first type of injury-in-fact on the basis that, although Defendants refused to waive their right to enforce the Law against ALDF and AE, Defendants had not made any "concrete threat of financial injury" against Plaintiffs. *See* J.A.120.

It then acknowledged that where a "'statute chills the exercis[e] of [the plaintiff's] right to free expression, the chilling effect alone may constitute injury,'" which requires no imminent threat of suit. J.A.121 (quoting *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006)). So long as the statute's chilling effect is objectively reasonable, that alone establishes an ongoing injury-in-fact. *Id.* This rule, the court recognized, has been applied by the Eighth Circuit when a plaintiff self-censors in light of the risk of criminal *or civil* penalties they would face were they to develop their desired speech. *Id.* (citing *Balogh v. Lombardi*, 816 F.3d 536, 542 (8th Cir. 2016)).

Nonetheless, mixing the two types of standing it had just acknowledged are distinct, the court stated that this case is unlike those where civil statutes generated an actionable chill because Plaintiffs had not "already obtained" the information they wish to "publish[]" in violation of the Law, so they do not face imminent suit under the Law. J.A.122. It also stated "Plaintiffs do not allege … Defendants have engaged in the type of practices Plaintiffs would like to expose"—by which it explained it meant Plaintiffs are not 100-percent certain Peco is engaged in environmental pollution and Prayer Creek Farms uses extreme confinement. *Id*. at 122-23. As a result, it concluded, Plaintiffs do not know what they "would seek to publish" in violation of the Law. *Id*. These facts too led the court to state Plaintiffs are not injured because they have not established they would be subject to "civil action under the challenged law." *Id*.

In this discussion, the court did not address several components of Plaintiffs' allegations that undermine its conclusion Plaintiffs do not face a risk of suit. It ignored ALDF and AE's statements that they wish to document the "tru[e]" conditions at Peco and Prayer Creek Farms, not only specific practices, since Plaintiffs' aim is to expose the reality of industrial animal agriculture. J.A.27 (Complaint). It also overlooked that Plaintiffs highlighted their desire to document the consequences of Peco's "live hang" slaughter process and faster line speeds that Plaintiffs *know* Peco employs, J.A.28 (Complaint), and that Plaintiffs believe

documenting the activities at Prayer Creek Farms will be valuable to undermine Ag-Gag laws because they *know* the facility is owned by Representative Vaught, regardless of what specific conditions Representative Vaught sought to hide with the Law, J.A.27 (Complaint).

Moreover, the district court acknowledged other courts have found standing based on *chill*, rather than imminent suit, where organizations wishing to conduct undercover investigations were stopped from doing so for fear of civil liability, even when they did not know precisely what they would uncover. J.A.124. But it simply refused to follow this law. The court described how in *People for the Ethical Treatment of Animals, Inc. ("PETA") v. Stein*, 737 Fed. App'x 122 (4th Cir. 2018) (unpublished), the Fourth Circuit held both PETA and ALDF had standing because they wanted to investigate facilities, but were not doing so because it could expose them to civil penalties under the North Carolina Ag-Gag Law (on which the Arkansas Law is modeled). J.A.123-24 & n.4. Yet the district court distinguished the facts alleged by PETA from those alleged here because PETA "had previously uncovered illegal and unethical abuse of animals at the UNC-Chapel Hill laboratories," which it alleged it was chilled from investigating again. J.A.124. The district court did not explain why investigations that had occurred more than a decade earlier, *see PETA*, 737 Fed. App'x at 127, were significant to the standing analysis. Moreover, it recognized Plaintiff ALDF's

allegations in North Carolina went "no further" than its allegations "in the present case"—specifically, that ALDF wished to investigate facilities it believed were engaged in animal cruelty but was not doing so because of the law—and that, on this basis, ALDF was held to have standing in North Carolina. *See* J.A.124. Nonetheless, the district court stated it would not reach the same conclusion here. *Id.*

Further still, the district court recognized a district court in Iowa recently held ALDF had standing to challenge that state's Ag-Gag law because ALDF had "'previously conducted undercover investigations at agricultural facilities'" and "'wish[es] to conduct undercover investigations in Iowa but do[es] not presently intend to do so because of [the law].'" J.A.125 (quoting *ALDF v. Reynolds*, 297 F. Supp. 3d 901, 914-15 (S.D. Iowa 2018)). The opinion below further stated *Reynolds* held, "'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.* (quoting *Reynolds*, 297 F. Supp. 3d at 914-15).

The decision below distinguished *Reynolds* because the Ag-Gag Law in Iowa imposed criminal penalties, not civil penalties, *id.*; but it did so without reconciling this conclusion with its earlier acknowledgment that the Eighth Circuit

has held a statute's chilling effect creates standing whether a plaintiff faces civil or criminal penalties. It merely quoted the *Reynolds* court 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.'" *Id.* (emphasis added) (quoting *Reynolds*, 297 F. Supp. 3d at 916, in turn citing *St. Paul Area Chamber of Commerce*, 439 F.3d 481, and *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011)).

Finally, the district court acknowledged CBD and FCWA "regularly use[] information gathered from such investigations [like those of ALDF and AE] to further [their] work" and thus, by suppressing ALDF and AE's investigations, the Ag-Gag Law "thwarts the ability of CBD and FCWA to obtain the information they need to engage in protected speech." J.A.118. But it did not address why this did not establish listener-standing: the First Amendment right to be able to access information that would otherwise be available. Thus, the district court also offered no explanation for why the fact that CBD and FCWA have relied on employee whistleblowers and investigations besides those of ALDF and AE, which are also targeted by the Law, does not establish CBD and FCWA's standing.

VI. STANDARD OF REVIEW

This Court "review[s] *de novo* the grant of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)." *A.J. ex rel. Dixon v. UNUM*, 696

F.3d 788, 789 (8th Cir. 2012). In doing so, it "must accept all factual allegations in the pleadings as true and view them in the light most favorable to the nonmoving party." *Id.*

VII. SUMMARY OF ARGUMENT

In refraining from investigating Defendants' facilities, Plaintiffs are declining to exercise their First Amendment rights, and they are doing so because they fear Defendants will use the Ag-Gag Law against them. That response is objectively reasonable, as the Law's text and history establish it was crafted to allow Defendants to punish Plaintiffs' First Amendment activities. This provides Plaintiffs standing to seek to declare the Law unconstitutional and enjoin Defendants from using it against them. Where a law targets a plaintiff's Frist Amendment activities, the plaintiff's self-censorship is an objectively reasonable response, which is a well-recognized injury-in-fact, traceable to those who are empowered to use the law against the plaintiffs (here Defendants), and redressable by preventing them from doing so. *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011); *see also Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016).

The district court's contrary conclusion derives from the faulty premise that Plaintiffs must know what speech they will be able to generate once the Law is enjoined in order to have standing; but a law's chilling effect creates an injury-in-

fact precisely because it discourages Plaintiffs from taking steps to exercise their rights and determine that information. The en banc Tenth Circuit has explained it is illogical to both recognize standing based on chill, and demand plaintiffs pretend that fear does not exist and proceed as if they would speak. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc). For these same reasons, Plaintiffs do not need to have already engaged in investigations and be prepared to produce speech to have standing based on chill. Indeed, the district court's analysis appears concerned with whether Plaintiffs will face "the threat of [future]" suit, *i.e.*, are experiencing an imminent injury, rather than whether Plaintiffs are chilled, a current, ongoing injury, a different kind of injury-in-fact. *See* J.A. 122.

Moreover, even if the district court's concerns were correct, they would not result in dismissal here. The district court overlooked Plaintiffs' allegations, which must be taken as true, that they wish to use techniques they regularly employ to document the truth of Defendants' operations regardless of their specifics and, in fact, they do know what activities they will uncover. Thus, the district court was wrong to suggest Plaintiffs are uncertain what speech they will be able to produce or that they will be subject to suit under the Law if they proceed. And, to the extent Plaintiffs need to prove they will be able to violate the Law and face the risk of suit

(which they do not), courts have explained whether Plaintiffs can sufficiently do so is an issue for summary judgment, not the motion to dismiss stage.

The district court's alternative holding, that Plaintiffs' chill is insufficient because the statute only imposes civil, not criminal, penalties, has been uniformly rejected. The Supreme Court long ago recognized "[t]he fear of damage awards … may be markedly more inhibiting than the fear of prosecution under a criminal statute." *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964). This Court has similarly explained private enforcement can generate an actionable chill on speech. *Balogh v. Lombardi*, 816 F.3d 536, 542 (8th Cir. 2016). While the nature of the penalties may go to the reasonableness of plaintiffs' fear, numerous courts have held penalties significantly less severe than those authorized by the Ag-Gag Law were sufficient to chill speech.

Further still, Plaintiffs separately have standing as would-be recipients of information the Ag-Gag Law is inhibiting from being developed. The First Amendment not only protects the gathering and using of information, but also the ability to access information that would be provided by others. Here, the Ag-Gag Law suppresses all sorts of investigators and whistleblowers from coming forward with information as they have in the past. All Plaintiffs rely on that type of information. That establishes their injury, even if ALDF and AE did not wish to carry out the investigations.

Finally, there are no alternative bases on which to sustain the district court's outcome. Plaintiffs' injuries-in-fact stem directly from Defendants' authority under the Law and thus can be redressed by enjoining and declaring unlawful Defendants' ability to use the Law, as Plaintiffs request. Defendants suggested in the proceedings below that, because they are private parties whom the state has deputized to wield power under the Law, rather than government actors, Plaintiffs must first violate the Law and be sued under it before a court can entertain their constitutional claims. This is exactly what the chill doctrine was meant to avoid, and thus this Court has rejected that proposition. Indeed, the purpose of the Declaratory Judgment Act, 28 U.S.C. § 2201, is to allow private parties to resolve disputes about their rights without violating the law they wish to challenge. For this reason, courts regularly entertain disputes between private parties based on analogous facts, even when First Amendment freedoms are not at stake.

The district court must be reversed.

VIII. ARGUMENT

A. Plaintiffs Are Suffering an Injury-in-Fact Because They Have Objectively Reasonably Self-Censored in Response to the Ag-Gag Law.

An injury-in-fact from a law's chilling effect on speech exists when plaintiffs have reasonably declined to act in light of the challenged statute. Individuals, like Plaintiffs, who have previously engaged in the type of First

Amendment protected activities regulated by the challenged statute, but now won't undertake those activities because of the law's penalties, are the prototypical example of those who are reasonably chilled, and thereby injured by a law. Thus, contrary to the district court's analysis, under a plethora of controlling and persuasive precedent, Plaintiffs are experiencing an injury-in-fact.

i. A chill on speech is an injury-in-fact.

A First Amendment injury-in-fact exists when people "self-censor[]" in response to a law. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). The First Amendment does not merely prohibit "actual[ly] prosecuti[ng]" constitutionally protected speech, but also guards against laws that skew the marketplace of ideas. *Id.* Accordingly, in light of the First Amendment's objectives, when a law discourages the production of speech, it creates an injury-in-fact.

Put another way, "standing requirements are somewhat relaxed in First Amendment cases." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). If "'there is a possibility that, rather than risk punishment for his conduct in challenging the statute, [a person] will refrain from engaging further in the protected activity[,] [s]ociety as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the

statute challenged.'" *Id.* (quoting *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984)).

Therefore, as this Court has repeatedly recognized, "To establish injury in fact for a First Amendment challenge to a state statute … 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 existence of the statute. Self-censorship can itself constitute injury in fact." *281 Care Comm.*, 638 F.3d at 627; *see also Missourians for Fiscal Accountability*, 830 F.3d at 794 (plaintiff "can establish standing by alleging that it self-censored"). By exercising jurisdiction whenever a law discourages people from generating expressions, courts can fulfill the First Amendment's objective to protect against "manipulat[ing] the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

ii. Actionable chill exists as long as a plaintiff's desired activity falls within the law's reach, which makes the chill objectively reasonable.

To determine whether standing based on chill exists, the "inquiry is whether a party's decision to chill his speech in light of the challenged statute was 'objectively reasonable.'" *281 Care Comm.*, 638 F.3d at 627. While courts frequently state plaintiffs are reasonably chilled because they are threatened by the challenged law, this Court has explained that does not mean actionable chill

requires an actual threat of suit, but merely describes that injury-in-fact existed because the plaintiff logically self-censored in light of the statue's existence. "In the First Amendment context, 'two types of injuries may confer Article III standing to seek prospective relief … [i] there exists a credible threat of prosecution … [*or*] [ii] self-censor[ship]." *Missourians for Fiscal Accountability*, 830 F.3d at 794 (quoting *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003)). The reasonable decision not to speak, and not to be exposed to the actual threat of suit under a statute is an injury-in-fact.

A plaintiff establishes it is reasonable for her to be chilled by showing "she is 'within the class of persons potentially chilled.'" *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 47 (1st Cir. 2011). In other words, if the "statute[] [] facially restrict[s] expressive activity by the class to which the plaintiff belongs," that justifies the plaintiff's "self-censorship" and establishes an injury-in-fact, "absen[t] [] compelling contrary evidence." *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31 (1st Cir. 1999).

As this Court has put it, when a plaintiff states it "wishes" to engage in First Amendment activities regulated by a law, and "objects" to the law because it "prevents" those activities, that alone "demonstrate[s] standing to pursue its First Amendment challenge." *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."); *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 711 (6th Cir. 2015) ("Generally, standing is found based on First Amendment violations where the rule, policy or law in question has explicitly prohibited or proscribed conduct on the part of the plaintiff."); *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)); *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1193-94 (D.C. Cir. 1992) (standing where "statute was 'aimed directly' at" the plaintiffs). Where a statute covers the plaintiff's desired First Amendment activities, and, as a result, the plaintiff refrains from those activities, that is an objectively reasonable chill.[6]

This makes perfect sense, since there is "not reason to assume that the [] legislature enacted [a] statute without intending it to be enforced." *Mobil Oil Corp. v. Attorney Gen. of Va.*, 940 F.2d 73, 76 (4th Cir. 1991). Therefore, if a statute

[6] The district court cited *Eckles v. City of Corydon*, 341 F.3d 762, 768 (8th Cir. 2003), in support of its outcome, J.A.120 (motion to dismiss decision), but that case does not provide a different standard. It recognizes objective chill is a distinct injury-in-fact from "a threat of specific future harm" *Id.* at 767. *Eckles* simply explained neither form of standing was present against defendants there because "Eckles has brought to bear no evidence that the County or Board of Review possessed the authority to enforce the City or State ordinances," so he could neither be chilled by nor did he face an imminent threat of suit by these defendants. *Id.* at 769.

applies to the plaintiff, it is reasonable for the plaintiff to "self-censor[] by complying with the statute." *Id.*

The fundamental goal of pre-enforcement standing is to prevent "plac[ing] the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). Thus, it must be an actionable injury-in-fact when a plaintiff complies with a law, which leads it to cease engaging in First Amendment protected activities so as to avoid being exposed to the risk of suit under the law.

iii. Plaintiffs have alleged an injury-in-fact based on chill.

The allegations in the Complaint, which must be taken as true at this stage, establish Plaintiffs are objectively reasonably chilled by the Ag-Gag Law. Subsections (c)(1)-(3), (5), and (d) cover the exact First Amendment protected investigatory activities and advocacy in which Plaintiffs have engaged in the past and desire to engage in Arkansas, placing them within the class of people targeted by the law. J.A.24-27 (Complaint). Thus, Plaintiffs, who are prepared to carry out investigations in Arkansas, have reasonably declined to exercise their constitutional right to do so because of the Law. *See* J.A.29 (Complaint). Because the Law's penalties for engaging in First Amendment activities have "prevented" Plaintiffs from doing so, they have "standing to pursue [their] First Amendment

challenge." *Iowa Right To Life Comm.*, 717 F.3d at 604; *see also R.I. Ass'n of Realtors*, 199 F.3d at 31 (standing where plaintiffs part of "class" targeted by law and thus are chilled by the law).

In fact, standing is even stronger here than in most cases based on chill, as the Court need not "assume that the [] legislature enacted" the statute with the intent it will be enforced against the covered parties. *Mobil Oil Corp.*, 940 F.2d at 76. Here, the legislature, including one of the Defendants in this matter, admitted the Law's purpose was to empower her and other agricultural businesses to suppress and punish Plaintiffs' First Amendment activities, and both Defendants have refused to waive their rights to pursue penalties under the Law. J.A.22, 23, 37-39 (Complaint).

Lest there be any doubt that Plaintiffs are suffering an actionable chill, the Fourth Circuit held groups had standing to challenge the North Carolina law on which the Arkansas Ag-Gag Law was modeled based on identical allegations to those here. There, like here, the law authorized employers to sue for "compensatory damages" and other civil remedies if an employee "exceed[s] [their] authority to enter the nonpublic areas of another's premises" and (i) "captures or removes" and "uses" information; (ii) leaves "an unattended camera" behind; or (iii) otherwise "substantially interferes with the ownership or possession" of the property. *PETA*, 737 Fed. App'x at 125-26. There, like here, the

plaintiffs (which included ALDF), explained that they "engage in undercover investigations of public and private facilities for the purpose of uncovering acts of animal cruelty" and that the "the Act interferes with their plans to conduct undercover investigations." *Id.* at 126.

The Fourth Circuit held that because the plaintiffs "have in the past conducted actual undercover investigations" like those regulated by the law, and "plausibly alleged that they wish to continue such investigations," but are not doing so "for their fear of liability under the Act," they have an "objectively reasonable" fear. *Id.* at 129, 130. Therefore, they were injured in light of the "chilling effect from the Act." *Id.* at 129.

While the district court is correct that in *PETA* one of the plaintiffs had previously conducted undercover investigations of UNC-Chapel Hill and stated it wished to investigate the University again, this was *not* the basis for the Fourth Circuit's determination that the plaintiffs had standing. *Id.* at 127. In the words of the Fourth Circuit, because North Carolina's Ag-Gag law (just like Arkansas's Law) listed "precisely the types of activities that Plaintiffs engaged in before and intend to engage in again … Plaintiffs have alleged a reasonable and well-founded fear that the Act *will* be enforced against them" and are suffering an injury-in-fact by self-censoring in response. *Id.* at 130 (emphasis in original). Specifically, ALDF alleged it had "conducted undercover investigations at animal facilities around the

country" and that it has a "list of animal facilities … in North Carolina" that it would "target[]" using the techniques listed in the law. *Id.* It did not specify which facilities it would investigate or what information it hoped to uncover; nonetheless, the Fourth Circuit held it was suffering an injury-in-fact because the North Carolina law punished ALDF's desired investigations and thus ALDF was not proceeding to develop them. *Id.* As the district court itself explained, this is no different than ALDF and AE's allegations here. J.A.124 (motion to dismiss decision).

Because, as explained above, Supreme Court and Eighth Circuit law require this Court to apply the same test for standing as that used by the Fourth Circuit, the same result follows. *Am. Booksellers Ass'n*, 484 U.S. at 393; *Missourians for Fiscal Accountability*, 830 F.3d at 794; *Iowa Right To Life Comm.*, 717 F.3d at 604; *281 Care Comm.*, 638 F.3d at 627.

B. The District Court's Dismissal Was Legally and Factually Baseless.

The district court's notion that Plaintiffs must have "already obtained" the information they wish to expose or be certain what advocacy they would generate based on their investigations before they can claim to be chilled is incorrect. J.A.122 (motion to dismiss decision). Plaintiffs need not be in the midst of breaking the law before they can claim a First Amendment injury-in-fact based on

chill. The district court's focus on how quickly Plaintiffs could be sued concerns a different type of injury, the injury-in-fact from the risk of imminent harm; whereas chill is a current, ongoing harm. Moreover, the district court's reasoning is particularly faulty because Plaintiffs *did* allege what type of information they would uncover and that they were prepared to gather it. Therefore, were Plaintiffs' standing based on the risk of imminent harm (it is not), courts have explained the district court could not resolve Plaintiffs' standing until summary judgment. Because Plaintiffs plausibly allege imminent harm, their standing cannot be denied under the deferential standard of review at the dismiss stage. The district court's decision cannot stand.

i. Standing based on chill does not require the plaintiff to be in the process of violating the law.

A party does not need to be positioned to immediately violate the law and be subject to suit, and thus Plaintiffs need not have already identified or obtained the information they seek about Defendants, before they can have standing based on chill. *See Int'l Ass'n of Firefighters of St. Louis v. City of Ferguson*, 283 F.3d 969, 973 (8th Cir. 2002) ("hesitating to exercise … First Amendment rights" is an injury-in-fact). In fact, it is not even "necessary to show that [plaintiffs] have specific plans or intentions to engage in the type of speech affected by the challenged" statute to establish standing based on chill. *Initiative & Referendum*

Inst., 450 F.3d at 1089. "It makes no sense to require plaintiffs simultaneously to say 'this statute presently chills me from engaging in XYZ speech,' and 'I have specific plans to engage in XYZ speech next Tuesday.'" *Id.* Instead, "evidence that in the past they have engaged in the type of speech affected by the challenged" statute, they have a "present desire, though no specific plans[] to engage in such speech," and they have a "plausible claim that they presently have no intention to do so because of" a concern the statute will be enforced against them, establishes standing. *Id.* (emphasis removed).

Therefore, the en banc Tenth Circuit held plaintiffs had standing because they were "the type of party" affected by the challenged law, they stated they "ha[d] the desire" though "no specific plans to" engage in the activities within the law's reach, and they "point[ed] to the existence" of the law as the reason they were not acting. *Id.* at 1091-92. "Taken together" this established "more than an abstract or speculative interest," justifying standing. *Id.* at 1092.

This Court recently held similarly. In *Jones v. Jegley*, it explained that a law preventing donations to candidates could be challenged on the basis that it would chill speech even though the person the plaintiff wished to support "has not yet solicited or accepted contributions for his reelection bid." 947 F.3d 1100, 1104 (8th Cir. 2020). This Court summarized the chill standard by stating the plaintiff

"alleges that she would donate to candidates running in the 2022 election if it were not illegal to do so. This general expression of intent is enough." *Id.* at 1103.

Likewise, a district court in Iowa rejected the defendants' assertion ALDF lacked standing to challenge that state's Ag-Gag law because it merely "allege[d] generally that [it] would like to engage in [] investigations." *Reynolds*, 297 F. Supp. 3d at 913. The defendants in that case argued that to establish standing ALDF needed to identify "a specific facility [it] wish[ed] to investigate, when the investigation will be undertaken and by whom, or any specific advocacy campaigns that have been frustrated," and "advance[] any such undercover investigations further through the planning stage, including by … securing an investigator, obtaining an employment application, and going 'as far as the property line.'" *Id.* The *Reynolds* court disagreed, stating that ALDF had standing because it "previously conducted undercover investigations at agricultural facilities" and "allege[d] that [it] wish[es] to conduct undercover investigations in Iowa but do[es] not presently intend to do so because of" the Ag-Gag law. *Id.* at 915; *see also ALDF v. Herbert*, 263 F. Supp. 3d 1193, 1200 (D. Utah 2017) (standing established where plaintiffs "engaged in uncover operations" elsewhere and "now wish to conduct operations at agricultural facilities" in the state with the challenged Ag-Gag law, "[b]ut they presently have no intention to do so because they fear" the law).

In this manner, Plaintiffs' allegations well exceed what is required to establish their standing. They not only explain they have engaged in investigations in the past and, but for the Law, would do so in Arkansas, J.A.24-26, 29 (Complaint), but they have even gone so far as to identify specific operations they wish to investigate—those of Defendants, J.A.27-29 (Complaint); retained an investigator to do so, J.A.29 (Complaint); and inquired of Defendants whether they will enforce the Law so they could move forward without this litigation, an inquiry to which Defendants refused to respond, J.A.22, 23 (Complaint). If, as in *Jones*, a plaintiff has standing to challenge a prohibition on donating to a candidate who is not even seeking donations, Plaintiffs here can seek to declare unlawful and enjoin a prohibition on gathering and distributing information regarding facilities they have not yet accessed because of the Law. *See Initiative & Referendum Inst.*, 450 F.3d at 1089.

Indeed, the district court's rule—that Plaintiffs must know the exact words they will speak—would allow the state to manipulate public debate in contravention of the First Amendment. If this were the rule, the state could simply prohibit the development of speech, rather than speech itself, and the statute could not be challenged until a person was willing to subject herself to liability—exactly what the chill doctrine is meant to avoid. *See Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015) ("Any … interpretation of the First Amendment" that

allows the government to "simply proceed upstream and dam the source" would deprive freedom of speech of the "force and effect the Supreme Court has told us it deserves.").

ii. The risk of imminent suit is a different type of injury-in-fact than chill.

The district court focused on the wrong facts because it was concerned with the wrong type of injury-in-fact. The district court explained its dismissal stemmed from its belief that if Plaintiffs have not "already obtained" the information they seek about Defendants, they cannot be certain what they "would seek to publish" that would subject them to suit, which it believed was a necessary prerequisite to standing. J.A.122. But "theories of standing [based] on prospective or threatened injury" are "different in kind" than those where a party claims to have "self-censored its speech." *Wikimedia Found. v. NSA*, 857 F.3d 193, 211 (4th Cir. 2017); *see Missourians for Fiscal Accountability*, 830 F.3d at 79 (identifying "two types of injuries" for First Amendment standing: an imminent harm and "self-censorship").

The former injury-in-fact, such as the risk of future suit, requires plaintiffs to establish the potential for "prospective" harm, but self-censorship is an "actual and ongoing injury," so there can be no need to establish the risk of additional, future injury. *Wikimedia Found.*, 857 F.3d at 211; *see also 281 Care Comm.*, 638 F.3d at

631 (An "injury is speech that has already been chilled."); *Nat'l Org. for Marriage*, 649 F.3d at 47 ("The chilling of protected speech may thus alone qualify as a cognizable, Article III injury."); *Mobil Oil Corp.*, 940 F.2d at 76 (self-censorship leads plaintiff to "incur[] harm all the while").

The leading case on standing based on the risk of *prospective* harm instructs courts to consider whether the "chain of possibilities" suggests the injury is truly "impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). This appears to be where the district court gets its notion that Plaintiffs must show they will be imminently sued under the Ag-Gag Law.

However, that requirement is nonsensical when applied to injuries based on chill, because self-censorship is a current inhibition that stems from a law promoting inaction. *Wikimedia Found.*, 857 F.3d at 211. The injury-in-fact exists because the plaintiff is intentionally positioning itself to *not* be sued, and thus it does not need to prove how it will be exposed to suit, as it is already suffering a harm by restraining itself to avoid that outcome. *Int'l Ass'n of Firefighters of St. Louis*, 283 F.3d at 973. Where a law has reasonably induced a plaintiff to "hesitat[e]" in exercising their First Amendment rights, that plaintiff has suffered a constitutional injury-in-fact. *Id*.

iii. Plaintiffs satisfied the district court's erroneous test.

Even so, assuming Plaintiffs need to establish they would be able to produce speech that violates the Law and risk suit if their chill did not exist (they do not), that demand is easily met under the deferential standard of review the district court was required to apply at this stage. Plaintiffs' Complaint describes what facts they will gather and thus the specific type of advocacy they will be able to develop from their investigations—although they also explain that even if those facts were not obtained, they would be satisfied revealing the true conditions at Defendants' facilities. J.A.27. Plaintiffs allege that Peco's Arkansas facilities use a method of slaughter and operate at line speeds that they believe is important to reveal to the public. J.A.28. Moreover, the number of animals confined at Prayer Creek Farms means the public will find the conditions shocking. J.A.27 (Complaint). Further still, Plaintiffs explain they have retained an experienced investigator to carry out this work, and regularly successfully engage in investigations of facilities like those of Defendants' around the nation and world. J.A.24-26, 29 (Complaint).

Thus, while there may be additional speech Plaintiffs hope to develop, the district court erred in stating Plaintiffs are uncertain they will be able to produce speech from their investigations, even though that fact is unnecessary for standing. The facts alleged, which must be taken as true, establish Plaintiffs know they will be able to produce speech that violates the Law. *See N.H. Right to Life Political*

Action Comm. v. Gardner, 99 F.3d 8, 14 (1st Cir. 1996) (plaintiff's past conduct substantiates it will fall within a challenged law); *Reynolds*, 297 F. Supp. 3d at 915 (because ALDF "routinely" succeeds in carrying out its desired investigations, Defendants arguments about the "challenges" of doing so do not undermine ALDF's standing).[7]

iv. The district court's analysis was inappropriate on a motion to dismiss.

Adding yet another layer of error, courts have explained it is improper to dismiss a claim based on the court's concern that suit under the challenged law is not imminent. Where, as here, defendants raise a "facial jurisdictional challenge [] under Rule 12(b)(1)," plaintiffs face a "significantly lighter burden" to establish standing. *Schuchardt v. President of the U.S.*, 839 F.3d 336, 351 (3d Cir. 2016). They are "entitled to any inference in [their] favor that may be 'reasonably' drawn

[7] It is also important to note Plaintiffs' allegations establish their First Amendment rights will be infringed long before they are sued for speaking about Defendants, further confirming the district court's analysis was improper. Plaintiffs allege their investigator is prepared to gather information and make recordings at Defendants' facilities. The First Amendment protects the "creation" of material that can be used in speech, just as it protects speech itself. *Sorrell*, 564 U.S. at 570; *see also Brown*, 564 U.S. at 792 n.1; *Citizens United*, 558 U.S. at 336. This includes gathering "data," *Watersheds Project v. Michael*, 869 F.3d 1189, 1195-96 (10th Cir. 2017); *see also Buehrle*, 813 F.3d at 977, and making "[r]ecord[ings]," *Wasden*, 878 F.3d at 1203; *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Herbert*, 263 F. Supp. 3d at 1208; *Kelly*, 2020 WL 362626, at *15. Therefore, in light of Plaintiffs' allegations, the Law is interfering with their First Amendment freedoms even if they never obtain the information they desire or publically advocate against Defendants.

from [their] pleaded facts." *Id.* at 352. Therefore, where plaintiffs plausibly allege they will be subject to suit, courts should not reach defendants' "preferred inference" that an injury-in-fact is not imminent. *Id.* For a court to "characterize [the] allegation[] as 'speculative' based upon its own observation" that an outcome is "unclear" is "impermissibly injecting an evidentiary issue" that should have been left for summary judgment. *Wikimedia Found.*, 857 F.3d at 212.

As discussed above, had the court taken the facts in the Complaint as true and in the light most favorable to Plaintiffs—as it was required to do—those facts plausibly establish Plaintiffs will face suit under the Law. This means the only way the district court could have held against Plaintiffs was to inject a factual dispute and resolve it against Plaintiffs, which is not proper here.

* * *

Plaintiffs can establish an injury-in-fact if they show they objectively reasonably fear the Law's enforcement against them, which has led them to stop pursing their First Amendment rights. *See* J.A.29 (Complaint). Plaintiffs allege the Law squarely prohibits activities they have undertaken in the past and would engage in at Defendants' facilities but for the Law—a law specifically designed to suppress their advocacy. These allegations go well beyond the showings necessary to establish objectively reasonable chill under Supreme Court, Eighth Circuit, and sister circuit precedent. Plaintiffs are suffering a current, ongoing injury-in-fact,

making the district court's concern about Plaintiffs' risk of future suit irrelevant. However, to the extent Plaintiffs needed to establish they will be able to produce speech about Defendants' operations that would subject them to the Law, they have done so. The district court's analysis is unsustainable.

C. That Plaintiffs Face Significant Civil, Rather Than Criminal Penalties Does Nothing to Alter Their Injury-in-Fact.

The district court's alternative holding—that because the Ag-Gag Law provides for civil rather than criminal penalties, Plaintiffs lack standing—has been repeatedly rejected. This Court has held that civil penalties can establish a chilling effect on speech, and the standing inquiry remains the same: whether the chill is objectively reasonable. As this Court put it, the "chilling effect" that establishes an "injury in fact" can arise when the only concern is that "private parties will enforce a statute." *Balogh*, 816 F.3d at 542 (citing *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015)); *see also Sullivan*, 376 U.S. at 276 ("fear of damage awards … may be markedly more inhibiting than the fear of prosecution").

Likewise, this Court has also stated the "non-criminal consequences contemplated by a challenged statute can also contribute to the objective reasonableness of alleged chill." *Missourians for Fiscal Accountability*, 830 F.3d at 794-95; *see also Free & Fair Election Fund v. Mo. Ethics Comm'n*, 252 F. Supp.

3d 723, 733 (W.D. Mo. 2017) ("Although complaints against plaintiffs may not reach the criminal stage or prosecution may not be threatened, non-criminal consequences contemplated by a challenged statute may contribute to the objective reasonableness of an alleged chill."), *aff'd*, 903 F.3d 759 (8th Cir. 2018).

Here, the Ag-Gag Law provides for liquidated damages of $5,000 per day, as well as fee shifting. Ark. Code § 16-118-113(e). That would potentially result in hundreds of thousands of dollars in liability if Plaintiffs engaged in their planned investigations. *See* J.A.16 (Complaint, identifying prior investigations in Arkansas). Plaintiffs explain they could not afford such an outcome. J.A.29 (Complaint). Therefore, based on the allegations, which must be taken as true, Plaintiffs are objectively reasonably chilled by the Law.

Indeed, this Court and others regularly hold that penalties much less significant than those at issue here can generate an actionable chill on speech. *Dig. Recognition Network*, 803 F.3d at 957-58 (finding injury from chill where statute provides "the greater of actual damages or $1000 in liquidated damages, in addition to the costs of litigation"); *PETA*, 737 Fed. App'x at 131 n.4 ("We have no trouble concluding" civil damages of $5,000 per day and fees and costs creates chill); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) ("That VRLC faces the possibility of civil litigation rather than criminal prosecution here is of no moment" because it risks a "a civil penalty of up to

$10,000 for each infraction" and that "deterrence … is palpable enough."); *Mobil Oil Corp.*, 940 F.2d at 75 ("stiff civil remedy for violation" of "$2,500 liquidated damages, *plus* actual damages and attorney's fees" created actionable chill (emphasis in original)); *Seaton v. Wiener*, 22 F. Supp. 3d 945, 948 (D. Minn. 2014) (chill standing for donors where Minn. Stat. § 10A.27's penalty for political contributions was not to exceed $25,000).

The district court's reasons for failing to apply this controlling precedent collapse on themselves. It distinguished *Balogh*, where this Court held the potential for civil liability could establish standing based on chill, due to the facts of that case: the plaintiffs there had already violated the law and wished to do so again, J.A.121-22 (motion to dismiss decision), whereas Plaintiffs here have not yet conducted their planned investigations in violation of the law. This does nothing to distinguish the other authority cited above. Instead, it is just another version of the district court's earlier faulty analysis, that a plaintiff coerced into following a law and giving up its First Amendment rights lacks standing based on that self-censorship alone. That is wrong. The point of the chill doctrine is that plaintiffs have standing if the law has kept them from developing "specific plans" to violate the law; it does not require Plaintiffs to have already violated the Law. *Initiative & Referendum Inst.*, 450 F.3d at 1089; *see also Jones*, 947 F.3d at 1103-04; *Int'l Ass'n of Firefighters of St. Louis*, 283 F.3d at 973.

In fact, as the district court acknowledged, it is for this reason the Fourth Circuit allowed ALDF to proceed in *PETA*, 737 Fed. App'x at 129-31 & n.4. In that case, ALDF had not even identified a specific facility it wished to investigate and claimed it would not do so because the law—which imposed civil penalties—dissuaded it from undertaking those efforts. The Fourth Circuit recognized this was sufficient for standing. J.A. 124 (motion to dismiss decision).

The district court goes on to acknowledge the proper inquiry is not whether Plaintiffs are already violating the Law, but whether the Law's "chill[ing] effect on speech [is] significant[]" enough that the chill can be considered reasonable, J.A.125 (motion to dismiss decision); but then it claims it could not reach that conclusion here because, in its view, chill is more likely to occur "when a criminal sanction is involved rather than a civil cause of action." *Id.* (citing *Reynolds*, 297 F. Supp. 3d 914-15, in turn citing *St. Paul Area Chamber of Commerce*, 439 F.3d 481, and *281 Care Comm.*, 638 F.3d 621). However, that criminal statutes may be *more* chilling does not mean that civil statutes are not chilling, particularly ones like the Ag-Gag Law that impose significant, even ruinous, fines. Indeed, a misdemeanor criminal offense that imposed a $50 fine is likely less chilling than a law authorizing civil damages of $5,000 per day. *Sullivan*, 376 U.S. at 277. No authority supports that labeling costs "civil" rather than "criminal" has such a dramatic impact, as the case law above confirms.

The Eighth Circuit authority to which the district court cites does not even support the statement that criminal statutes are more chilling. *St. Paul Area Chamber of Commerce* addressed a criminal statute and did not discuss the chilling effect of civil statutes. 439 F.3d at 487-88. *281 Care Committee* addressed a statute that provided for civil and criminal penalties, and held the plaintiffs there were reasonably chilled because *civil* penalties had been sought against them in the past. 638 F.3d at 630.

Courts have held "First Amendment plaintiffs can assert standing based on a chilling effect on speech even where the plaintiff is not subject to criminal prosecution, civil liability, regulatory requirements, or other direct effects." *Initiative & Referendum Inst.*, 450 F.3d at 1096 (citing *Meese v. Keene*, 481 U.S. 465, 473 (1987)). Therefore, as numerous courts and this Circuit have recognized, the district court erred in holding that Plaintiffs' self-censorship in the face of substantial civil sanction cannot establish standing. Their well-pleaded allegations, taken as true, provide they have been objectively reasonably chilled as a result of the Ag-Gag Law's penalties specifically designed to curtail their desired speech activities. That is sufficient.

D. Plaintiffs Have Also Established an Injury-in-Fact Because the Ag-Gag Law Has Denied Them Access to Information.

Separate and apart from Plaintiffs' standing based on the Ag-Gag Law's chilling effect on their investigations and communications (activities for which their allegations also establish they face imminent suit, a distinct basis for standing), Plaintiffs are also injured because the Law stops them from receiving information, an injury-in-fact the district court fully failed to address.

"[P]utative recipients of speech usually have standing" to challenge a law so long as there is "reason to believe [another person] is willing to speak and is being restrained from doing so" by the law. *United States v. Wecht*, 484 F.3d 194, 202 (3d Cir. 2007). If it is established a law is an "obstacle to the [plaintiff's] attempt to obtain access" to information, the plaintiff is suffering an injury-in-fact allowing it to bring a First Amendment claim. *Id.* Plaintiffs do not need to show they have received or would receive information that is subject to the challenged law, just that they are "potential recipients of speech" that is now squelched. *In re Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 607 (2d Cir. 1988).

Here, Plaintiffs explain they all rely on information obtained by other groups that conduct undercover investigations or that is provided by whistleblowers. J.A.23, 26, 32-33, 35-36 (Complaint). Further, facilities like Defendants' have been exposed by such means in the past, and there is particular reason to believe

people—including, but not limited to, Plaintiffs ALDF and AE—would target Defendants' facilities but for the Law, given their inhumane treatment of workers and animals and contamination of the environment. J.A.16, 27-29 (Complaint). However, the Arkansas Ag-Gag Law was specifically designed to—and does—penalize such disclosures and scare people from making them. J.A.18-19, 38-39 (Complaint). Therefore, the Law is "an obstacle" to Plaintiffs obtaining the information on which they would otherwise rely. *Wecht*, 484 F.3d at 203. There are known, willing speakers of this information who would gather it from entities like Defendants. As a result, Plaintiffs are potential recipients of the information the Law is suppressing. Thus, the Law is injuring their right to receive information, which is a distinct injury-in-fact.

E. Plaintiffs' Injuries-in-Fact are Traceable to And Redressable Against Defendants.

The remaining elements of standing flow directly from the fact that Plaintiffs are injured by Defendants' ability to enforce the Ag-Gag Law against them and others who engage in First Amendment protected activities. An injury is traceable to the defendant if there is "a causal connection between the injury" and the conduct sought to be declared unlawful and enjoined. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Put another way, the elements of causation and redressability "substantially overlap where the petitioners seek only the cessation

of the illegal conduct." *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990). If the claimed injury can be redressed through the relief sought against the defendant, it is also traceable to the defendant. *Id.*

Here, an order enjoining and declaring unlawful Defendants' use of the Ag-Gag Law would lift the chill currently placed upon Plaintiffs' desired activities, thereby allowing them and others to move forward with the First Amendment protected activities of gathering information and using it to develop their advocacy. Therefore, Plaintiffs' injuries are both traceable to and redressable against Defendants. *Drutis v. Rand McNally & Co.*, 499 F.3d 608, 612 (6th Cir. 2007) ("Article III standing ultimately turns on whether a plaintiff gets something (other than moral satisfaction) if the plaintiff wins." (emphasis removed)).

Indeed, this Court has explained that where a law provides for civil penalties, and not criminal sanctions, the injury-in-fact created by the law's chilling effect is "'fairly traceable' *only to* the private civil litigants who may seek damages … and thereby enforce the statute.'" *Balogh*, 816 F.3d at 544 (emphasis added) (quoting *Dig. Recognition Network*, 803 F.3d at 958). Therefore, the "injury could [only] be redressed if [the plaintiff] secured an injunction" preventing the private defendant from using the law against the plaintiff. *Balogh*, 816 F.3d at 543. Where there is a "pre-enforcement challenge to the

constitutionality of a particular statutory provision, the causation element of standing requires the named defendant to possess authority to enforce the complained-of provision." *Id.* Those are the precise powers these Defendants have, and the reason why Plaintiffs can proceed against them to vindicate their First Amendment rights. Plaintiffs have standing.

F. Contrary to Defendants' Claims Below, Plaintiffs Need Not Wait to Be Sued Before Bringing This Challenge, for Which They Have Standing.

Because Plaintiffs' standing was never truly in doubt, Defendants' arguments below largely focused on two other purported jurisdictional claims: (1) that Plaintiffs cannot raise their First Amendment claims against enforcement of the Law because it provides private parties the right to seek civil penalties and, in those circumstances, Plaintiffs must wait *until they are sued under the Law* to vindicate their rights; and (2) 42 U.S.C. § 1983 is the *only* mechanism by which Plaintiffs can raise their constitutional claims for prospective relief and, as it only allows parties to proceed against state entities or officials, Plaintiffs cannot proceed here. The district court correctly declined to endorse either theory. Plaintiffs address them briefly to avoid any doubt.

i. Plaintiffs do not need to wait to be sued by these Defendants.

The notion that Plaintiffs could have a constitutional injury-in-fact, fairly traceable to and redressable against these Defendants, but still be unable to seek declaratory and injunctive relief, would effectively negate the chill doctrine and the Declaratory Judgment Act ("DJA"); thus, the claim is untenable. This Court has recognized that private entities' powers to enforce a law can inhibit speech, thereby manipulating the marketplace of ideas in a manner inconsistent with the First Amendment and creating an injury-in-fact. *Balogh*, 816 F.3d at 542. Nonetheless, Defendants' contention is that the government can deputize private parties to enforce a law against speech, thereby generating unconstitutional chill, and those who are chilled lack redress. This would enable the government to generate the exact form of self-censorship the chill doctrine was designed to avoid.

Unsurprisingly, the Supreme Court and Eighth Circuit have held no such constitutional loophole exists. In *Sullivan* the Supreme Court explained, "The 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. at 265. In other words, when the state authorizes a private party to chill speech—as Arkansas has done here—the existence of that authority is actionable, unconstitutional conduct, just as if the state had provided itself with such authority. Courts should focus on the fact

that speech has been chilled by a law, not on the fact that the state has provided for private parties to carry out the law's unconstitutional ends. *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.").

Indeed, in *Digital Recognition Network*, this Court dismissed a case brought by plaintiffs who challenged a law that "provide[d] for enforcement only through private actions for damages," but named "[t]he governor and attorney general" as defendants. 803 F.3d at 958. It explained that to lift the chill a plaintiff needs to identify a private defendant who "enforce[s] the Act," just as Plaintiffs have done here. *Id.*

Therefore, this Court and a district court in this circuit have proceeded with declaratory judgment actions initiated by one private party asking the court to make clear that another private party invoking a law would violate the First Amendment. *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 820, 823-24 (8th Cir. 2007); *CBS Interactive Inc. v. Nat'l Football League Players Ass'n, Inc.*, 259 F.R.D. 398, 420-21 (D. Minn. 2009). Consistent with this, the Supreme Court has explained "equitable relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (quoting *Corr. Servs. Corp. v. Malesko*, 534

U.S. 61, 74, (2001)). The Constitution requires Plaintiffs be allowed to proceed here.

Further, the purpose of the DJA is to enable private parties to establish their rights *before* they are sued. 28 U.S.C. § 2201. As the Supreme Court stated, where an action satisfies Article III, the DJA allows parties "to obtain advanced rulings on matters" such as whether the use of a law would be constitutional. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 & n.7 (2007). This includes instances where the concern is an "enforcement action of a *private party* rather than the government." *Id.* at 130 (emphasis in original).

Even where First Amendment rights are not at issue, and thus where the chill doctrine does not apply, courts have held facts like those alleged here allow DJA actions to proceed between private parties. In *Organic Seed Growers & Trade Association v. Monsanto Co.*, the Federal Circuit explained a party to a patent dispute could resolve its rights before being sued for infringement if it had taken "significant, concrete steps to conduct infringing activity." 718 F.3d 1350, 1359 (Fed. Cir. 2013). This is precisely the case here, where Plaintiffs have identified the specific facilities they wish to investigate (those of Defendants), retained an investigator to conduct the investigations, and are prepared to proceed if and when the court grants their requested relief. *See, e.g.*, J.A.27, 29 (Complaint). Therefore, the DJA should allow Plaintiffs to adjudicate their First Amendment rights without

waiting to be sued, and, given Plaintiffs' standing under the chill doctrine, they should be able to proceed even if there were no DJA.

ii. Federal courts have jurisdiction to adjudicate constitutional claims for declaratory and injunctive relief.

Defendants' other peculiar notion, that constitutional claims can *only* be raised under 42 U.S.C. § 1983, has been expressly rejected by the Supreme Court, which explained courts' inherent powers, and the grant of authority under 28 U.S.C. §1331 both, separately, allow plaintiffs to raise constitutional claims independent of § 1983.

As the Court put it, "it is established practice for th[e] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell v. Hood*, 327 U.S. 678, 684 & n.4 (1946) (citing additional cases); *see also Free Enter. Fund*, 561 U.S. at 491 & n.2 (affirming courts' equitable powers to adjudicate constitutional claims); *Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts," otherwise those rights would "become merely precatory."). Consistent with this, 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); *see also* Hon. Marsha Berzon, *Securing Fragile Foundations:*

Affirmative Constitutional Adjudication in Federal Courts, 84 N.Y.U. L. Rev. 681 (2009) (explaining courts' inherent powers to hear constitutional claims).

The Supreme Court has also stated 28 U.S.C. § 1331 is "a very familiar [statute] grant[ing] jurisdiction to the federal courts over 'all civil actions arising under the Constitution, laws, or treaties of the United States.'" *Whitman v. Dep't of Transp.*, 547 U.S. 512, 513-14 (2006) (quoting 28 U.S.C. § 1331). In fact, it continued, in light of § 1331's broad grant of federal question jurisdiction, courts need not determine whether another law, like § 1983, "confers jurisdiction." *Id.*; *see also Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642 (2002) (holding a constitutional challenge "'presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve'" (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983)). It is standard (and necessary) for courts to hear Plaintiffs' First Amendment claims. Plaintiffs can proceed if they have established standing, as they have done in multiple ways.

IX. CONCLUSION

For the foregoing reasons, the district court's dismissal should be reversed and this case remanded for further proceedings.

May 27, 2020

Respectfully submitted,

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X. ADDENDUM OF STATUTORY TEXT.

Arkansas Code § 16-118-113.
Civil cause of action for unauthorized access to property

(a) As used in this section:

(1) "Commercial property" means:

(A) A business property;

(B) Agricultural or timber production operations, including buildings and all outdoor areas that are not open to the public; and

(C) Residential property used for business purposes; and

(2) "Nonpublic area" means an area not accessible to or not intended to be accessed by the general public.

(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.

(f) This section does not:

(1) Diminish the protections provided to employees under state or federal law; or

(2) Limit any other remedy available at common law or provided by law.

(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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the May 27, 2020, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

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