IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

ANIMAL LEGAL DEFENSE FUND; ANIMAL EQUALITY; CENTER FOR BIOLOGICAL DIVERSITY; and FOOD CHAIN WORKERS ALLIANCE — PLAINTIFFS

v. No. 4:19-CV-00442-JM

JONATHAN and DEANN VAUGHT, D/B/A PRAYER CREEK FARM; and PECO FOODS, INC. — DEFENDANTS

BRIEF IN SUPPORT OF PECO FOODS, INC.'S MOTION TO DISMISS

Plaintiffs are four national groups dedicated to advancing their vision of how farms and meat processing plants should be operated. This lawsuit is not the result of any actual dispute between any of the Plaintiffs and Defendant Peco Foods, Inc. ("Peco") resulting from anything Peco has done to any of the Plaintiffs but because of what they think Peco might do. Plaintiffs seek an advisory opinion that if Plaintiffs undertake certain actions targeted at Peco, and if they succeed, and if Peco is damaged as a result, and if Peco elects to sue one or more Plaintiffs pursuant to the cause of action provided by Ark. Code Ann. § 16-118-113 (the "Trespass Statute"), then the First and Fourteenth Amendments will have been violated. However, a bunch of "ifs" does not create a valid case or controversy that Article III would permit this Court to resolve.

The law in this case is straightforward. Arkansas's 2017 Trespass Statute, Ark. Code Ann. § 16-118-113, provides a civil cause of action for business owners/operators against a person who obtains access to the business under false pretenses and goes into some nonpublic area where they are not allowed to be and commits unauthorized acts (e.g., stealing documents,

planting hidden cameras) that damage the owner/operator. Plaintiffs admit, and Peco agrees, that Peco currently has no claims under the Trespass Statute against any Plaintiff and Plaintiffs have not and cannot allege that Peco would bring such a claim even if it had one in the future.

Plaintiffs could have filed this lawsuit against any one of thousands of innocent businesses in Arkansas. The Trespass Statute does not favor any industry over another, and Plaintiffs' allegations could have just as readily have been made against any poultry producer, any family farm (e.g., co-defendants the Vaughts), or even any pet shop. Indeed, Plaintiffs could have brought this lawsuit based on the same basic facts against a manufacturing facility in Camden, a paper plant in Fort Smith, or a steel plant in Blytheville. There is no actual, specific case or controversy between the Plaintiffs and Peco.

Plaintiffs' lawsuit against Peco is contrived and cannot survive a motion to dismiss. Although Plaintiffs claim the Trespass Statute chills their supposed rights under the First and Fourteenth Amendments, their complaint must be dismissed under Rule 12(b)(1) because they do not have standing to sue Peco for these alleged violations. Plaintiffs' claims against Peco fail under Rule 12(b)(6) because Plaintiffs lack any statutory basis for their causes of action and, in any event, cannot sue a private party for these alleged constitutional violations. Finally, Plaintiffs' claims should be dismissed under Rule 12(b)(1) because they are unripe. Plaintiffs' lawsuit does not arise from anything that has actually happened. Peco cannot be forced to defend a statute it has not invoked and, based on the facts alleged, cannot invoke at this time. The Court should therefore grant Peco's motion to dismiss.

BACKGROUND

The four Plaintiffs – Animal Legal Defense Fund ("ALDF"), Animal Equality ("AE"), Center of Biological Diversity ("CBD"), and Food Chain Workers Alliance ("FCWA") – allege that "factory farms" aiming to "enrich themselves and shareholders" cause "irremediable harms to workers, rural communities, the environment, and the animals" by "hiding" their methods. Complaint, ¶ 1. Plaintiffs believe they have a right to find and expose such practices by, among other things, using "undercover investigators." Complaint, ¶ 2.

Two of the Plaintiffs, ALDF and AE, allege they would like to try to mislead Peco into hiring one or more of their investigators, but they are afraid that Peco might sue them under the Trespass Statute – Act 606 of the Acts of 2017 – for any damage that their investigator causes. Complaint, ¶¶ 65, 73, 74. The other two Plaintiffs – CBD and FCWA – allege that they might like to rely on any information that the ALDF's and AE's investigator might generate to advance their own public interest agendas. Complaint, ¶¶ 84, 86, 94.

Plaintiffs' complaint does not contain any specific allegations of any known animal mistreatment at a Peco facility in Arkansas. ALDF and AE sent a letter to Peco asking it to waive any cause of action it might later have under the Trespass Statute should they violate it. *See* Exhibit A, Exhibit B. Peco was under no obligation to respond and did not do so. *See* Complaint, ¶52.

The statute in question, Ark. Code Ann. § 16-118-113, provides a civil cause of action under the following circumstances: "[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." Ark. Code Ann. § 16-118-113(b).

Plaintiffs characterize it as an "Ag-Gag law," but its scope is broader. Application of the "Trespass Statute" requires gaining access to a "commercial property," which includes any business properties, agricultural/timber operations that are not open to the public, and residential property used for business purposes. Ark. Code Ann. § 16-118-113(a)(1)(A)-(C). The Trespass Statute therefore does not elevate any particular kind of business operation over other kinds of businesses, it just so happens that Plaintiffs' focus is on animals raised for human consumption.

To commit an "[a]ct that exceed a person's authority," a person must enter a non-public area of a commercial property where that person is not authorized to be and conduct an additional act such as stealing documents or records or placing unattended cameras to record images for unlawful purposes. Ark. Code Ann. § 16-118-113(c)(1), (3), (4). A person who does all of this and damages the property owner along with any person who knowingly directs or assists in doing this damage can be held liable for damages. Ark. Code Ann. § 16-118-113(b), (e). All the parties agree that Peco currently has no cause of action against Plaintiffs under the Trespass Statute.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) mandates the dismissal of a case where the court lacks subject matter jurisdiction. The party invoking judicial review bears the "burden of establishing that a cause of action lies within the limited jurisdiction of the federal courts." *Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 816 (8th Cir. 2009). Where a defendant brings a "motion to dismiss for lack of jurisdiction under Rule 12(b)(1) [that] is limited to a facial attack on the pleadings," the action "is subject to the same standard as a motion brought under Rule 12(b)(6)." *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003); *see also Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993).

A complaint should be dismissed under Rule 12(b)(6) for failure to state a claim if it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *See Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1023 (8th Cir. 2008). Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his entitlement to relief requires more than labels and conclusions." *Benton v. Merrill Lynch & Co., Inc.*, 524 F.3d 866, 870 (8th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)). Moreover, "in treating the factual allegations of a complaint . . . as true pursuant to Rule 12(b)(6), the court must 'reject conclusory allegations of law and unwarranted inferences.'" *McLeodUSA Telcomms. Servs. v. Qwest Corp.*, 469 F. Supp. 2d 677, 688 (N.D. Iowa 2007) (quoting *Silver v. H&R Block*, 105 F.3d 394, 397 (8th Cir. 1997)).

ARGUMENT

I. THE PLAINTIFFS LACK STANDING TO BRING A LAWSUIT AGAINST PECO

Peco moves to dismiss pursuant to Rule 12(b)(1) because no Article III case or controversy exists due to Plaintiffs lack of standing. *Spokeo, Inc. v. Robins*, 578 U.S. ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). Article III standing is a "jurisdictional prerequisite" that the Court must address before addressing merits questions. *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007). The plaintiff bears the burden of establishing standing. *Nat'l Right to Life Political Action Comm. (NRLPAC) v. Connor*, 323 F.3d 684, 689 (8th Cir. 2003). "If . . . the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth v. Seldin*, 422 U.S. 490, 501–02, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

"[T]he 'irreducible constitutional minimum' of standing consists of three elements . . . The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo,* 578 U.S. ____, 136 S.Ct. 1540, 1543 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992)). "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved'" to create standing. *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S. Ct. 1361, 1368, 31 L. Ed. 2d 636 (1972) (explaining why the Sierra Club lacked standing to bring a claim under the Administrative Procedure Act).

A. Plaintiffs Have Not Suffered An Injury In Fact.

Plaintiffs have not pleaded any injury in fact. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S.Ct. at 1548, quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Plaintiffs cannot satisfy any of these elements, but this brief focuses on two of them – the absence of a legally protected interest or an imminent invasion of that interest – which suffice to prove the point.

i. Plaintiffs have no legally protected interest in the conduct alleged.

Plaintiffs have not alleged facts establishing that they have any legally protected right that has been injured. They claim that not investigating Peco is that injury, but self-censorship may amount to an injury in fact for purposes of standing only if the plaintiff has been "objectively reasonably chilled from exercising his First Amendment right to free expression in order to avoid enforcement consequences." *Republican Party of Minn. v. Klobuchar*, 381 F.3d

785, 792 (8th Cir. 2004). For Plaintiffs to suffer an injury in fact thus requires two things – a right and an objective chilling of that right – that are both absent in this case.

Plaintiffs have not alleged specific facts establishing a legally-protected "right" in having some investigator obtain paid employment with PECO by lying on his or her job application in order to obtain a job in Peco's facility to spy on Peco's employees without their consent or any basis for believing they have done anything contrary to law. *See United States v. Alvarez*, 567 U.S. 709, 723, 132 S.Ct. 2537, 2547 (2012) (noting the government may criminalize lies where "false claims are made to effect . . . other valuable consideration, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment"). The mere assertion of some general right to hire others to conduct what you call undercover journalism in the hopes of finding something that you can use to garner public attention for a cause you advance and increase donations to support your operations without fear of being held liable for damages is a bare-bones allegation that cannot survive the pleading requirements set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. at 557, 127 S.Ct. at 1955. Allegations that are "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" are not entitled to the "assumption" of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A plaintiff still has to allege concrete injury to a legally protected interest. *See Groshek v. Time Warner Cable, Inc*., 865 F.3d 884, 889 (7th Cir. 2017); *Woods v. Caremark PHC, LLC*, No. 4:15-cv-00535-SRB, 2016 WL 6908108, at *4 (W.D. Mo. July 28, 2016).

In this case, Plaintiffs identify no First Amendment right that exempts them or their agents from state civil laws on trespass, theft, agency, and breach of contract. The Trespass Statute merely addresses those pre-existing common law rights. *See, e.g., Food Lion, Inc., v. Capital Cities/ABC, Inc*., 194 F.3d 505, 521 (4th Cir. 1999) (stating that the First Amendment

did not shield reporters from breach of duty of loyalty and trespass claims when the reporters obtained employment at grocery store under false pretenses and surreptitiously recorded store's food handling practices); *Sanders v. Am. Broad Cos.*, 978 P.2d 67, 77 (Cal. 1999) (recognizing the covert videotaping of employees of business by journalist posing as an employee violated employees' expectation of privacy); *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792-93 (Minn. Ct. App. 1998) (holding that the First Amendment did not shield reporter from a trespass claim when the reporter obtained a volunteer position at a facility for special needs persons and then surreptitiously recorded staffs' care of patients at the facility). The Trespass Statute requires a person to engage in a series of actions before a claim arises, and Plaintiffs have not yet given orders to complete even the first predicate act (sneaking an agent onto Peco's property) let alone all of them. Plaintiffs cannot establish that they have suffered an injury in fact because they cannot identify a specific legal interest protected by the First Amendment that has been taken from them, and they have not alleged any specific ways in which they have been denied equal treatment under the law as required by the Equal Protection Clause, nor could they given the Trespass Statute's neutral scope. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

Peco recognizes that at least one of the Plaintiffs, ALDF, has been granted standing to wage lawsuits against state governments to challenge at least parts of statutes that criminalize ALDF's investigations. *See, e.g., Animal League Defense Fund v. Reynolds,* 353 F.Supp.3d 812 (S.D. Iowa 2019) (allowing ALDF to bring a Section 1983 lawsuit against the state regarding a criminal statute for "agricultural production facility fraud"); *Animal Legal Def. Fund v. Herbert*, 263 F.Supp.3d 1193, 1200 (D. Utah 2017) (allowing ALDF and PETA to challenge an agriculture-specific criminal Utah law where one plaintiff had already been arrested by the state);

Animal Legal Def. Fund v. Otter, 44 F.Supp.3d 1009, 1017–18 (D. Idaho 2014) (finding standing for ALDF to challenge some parts of a new "interference with agricultural production" criminal law in Idaho). In those cases, however, the courts acknowledged that the threat of criminal prosecution could have a chilling effect on activities protected by the First Amendment. The Eighth Circuit, on the other hand, has noted that any concerns over the chilling effects on speech are significantly reduced when only a civil lawsuit is involved. *See St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006). Because the Trespass Statute pertains to civil liability only, it is materially distinguishable from the cases arising from a fear of criminal prosecution.

Plaintiff ALDF was also found to have standing in an unreported decision by the Fourth Circuit in a challenge to a North Carolina statute that created a civil cause of action for private parties. *See People for the Ethical Treatment of Animals, Inc., v. Stein*, 737 Fed.Appx. 122 (2018). The *Stein* plaintiffs sued the State of North Carolina and the University of North Carolina – Chapel Hill (both government actors), which one of them, People for the Ethical Treatment of Animals ("PETA"), had investigated in the past and exposed illegal practices that would have resulted in liability had the statute been in existence. *Id*. at 127.[1] PETA's investigators reported these violations to university officials and university personnel discarded evidence to hide it. *Id*. The National Institute of Health later confirmed PETA's allegations against the university's labs. *Id*. The *Stein* plaintiffs, which included PETA, alleged in their new lawsuit that they believed new illegal conduct was occurring at the same university's labs that they intended to investigate. *Id*. The Fourth Circuit concluded their concern of civil prosecution was objectively reasonable

[1] Plaintiff ALDF relied on 42 U.S.C. § 1983 and 42 U.S.C. § 1988 to sue North Carolina. *See People for the Ethical Treatment of Animals v. Roy Cooper,* Case No. 16-cv-25 (M.D.N.C.) (Doc. 1, ¶ 9). As discussed below, *see infra* Part II, the Plaintiffs in the case against Peco have not pleaded those statutory causes of action and cannot do so.

based on proven past violations at the defendant's specific lab and allegations of ongoing violations at that same lab. The Fourth Circuit's decision was highly fact-specific, which renders it of a little precedential value. Furthermore, the Fourth Circuit did not address whether a plaintiff would have any constitutional interest in having an investigator lie to obtain a paying job at a private facility that is not subject to the First of Fourteenth Amendments. The analysis in *Stein* is therefore of no persuasive value to resolving the case against Peco.

Plaintiffs' professed fear that Peco might bring a cause of action under the statute is objectively unreasonable. The foregoing cases involved civil lawsuits against government officials sued in their official capacity due to their authority and obligation to enforce the law, and it is reasonable to assume these government officials would do so. In *Herbert*, one plaintiff had already been arrested. 263 F.Supp.3d at 1200. This case, on the other hand, is against random private citizens who are being accused of maybe one day bringing a civil cause of action under the Trespass Statute. But, private parties have no obligation to bring a private cause of action against anyone. Plaintiffs' assertion that private defendants would do one thing or another in the future is inherently speculative and unreasonable. Plaintiffs make no allegation of any specific Peco facility that they know to be in violation of any federal or state requirement for the treatment of animals, but even if they did that would not transform their fear of a lawsuit into an objectively reasonable one. Plaintiffs make no allegation of what they intend their investigator to do that will inflict damages on Peco under the statute. Plaintiffs' concern over future civil liability to the private defendants is conjectural and objectively unreasonable.

Plaintiffs' strategy of taking the offensive by picking a private citizen and suing them for what might happen and imposing on that citizen the costly burden of defending a law the private citizen never invoked is no way to manufacture standing. By shooting first (at a bystander, no

less), Plaintiffs surrender any leniency the Courts have traditionally afforded when analyzing standing in First Amendment cases.

ii. No harm is imminent because Plaintiffs' injury is speculative.

Plaintiffs' standing suffers from the additional problem that any injury they might suffer is so speculative that it cannot be considered imminent, which is a prerequisite to having standing. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (quoting *Lujan*, 504 U.S. at 565 n.2, 112 S.Ct. 2130). "In future injury cases, the plaintiff must demonstrate that 'the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.'" *In re SuperValu, Inc*., 870 F.3d 763, 769 (8th Cir. 2017) (some internal quotation marks omitted) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246 (2014)). "[P]ossible future injury" is insufficient. *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138. The Eighth Circuit has noted that "[t]ime and again the Supreme Court has reminded lower courts that speculation and conjecture are not injuries cognizable under Article III." *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1031 (8th Cir. 2014) (citing *Clapper*, 568 U.S. at 410, 133 S. Ct. at 1148).

In *Clapper*, the plaintiffs, who included human rights and media organizations, challenged the constitutionality of a federal statute that they alleged enabled the government to monitor their communications with people overseas. 568 U.S. at 406-07, 133 S.Ct. at 1145-46. The Supreme Court concluded they lacked standing because their fear of surveillance, and any chilling effect that might have had on their communications was speculative because they could

not show that any such surveillance had actually occurred or even that if it did, that would be pursuant to the statutory authority being challenged. *Id*. at 411-414, 133 S.Ct. at 1148-50.

Plaintiffs' claim likewise relies on a pyramid of speculative events. Plaintiffs could only be sued if Plaintiffs undertake certain actions targeted at Peco, and if they succeed, and if Peco is damaged as a result, and if Peco decides to sue one or more Plaintiffs pursuant to the Trespass Statute, Ark. Code Ann. § 16-118-113. Plaintiffs might claim that their inability to send one of their investigators to Peco's plants is their injury, but this is a self-inflicted harm that at best applies to only two of the Plaintiffs – ALDF and AE. *See* Complaint, ¶¶ 52, 73. And, sending an investigator would not be enough to create any civil liability under the Trespass Statute so the statute cannot be cited as a rational, reasonable basis for not sending an investigator. A plaintiff cannot manufacture standing by inflicting harm on themselves based on fear of some hypothetical future harm. *See Auer v. Trans Union, LLC,* 902 F.3d 873, 878 (8th Cir. 2018). Plaintiffs CBD and FCWA allege that they might like to rely on any information that ALDF and AE might generate. Complaint, ¶¶ 84, 86, 94. Their claim to standing is thus even weaker than ALDF's and AE's. The fact that this is a purported First Amendment case does not eliminate the "irreducible" requirement that a plaintiff have suffered an injury in fact before trying to draft an arbitrarily-identified private party to defend the constitutionality of a state law.

B. Plaintiffs Cannot Fairly Trace Any Injury To Peco's Conduct.

The Plaintiffs also have not pleaded and cannot show that they have suffered any injury that is fairly traceable to Peco's conduct. "Article III standing requires "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (alterations in

original) (quoting *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 41–42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)); *Balogh v. Lombardi*, 816 F.3d 536, 543 (8th Cir. 2016). The absence of any causal connection between Peco's action or, in this case, complete inaction, and Plaintiffs' injury is fatal to Plaintiffs' claims against Peco.

The Eighth Circuit addressed this issue in *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952 (8th Cir. 2015), which involved a constitutional challenge to an Arkansas statute that created a private civil cause of action. The Arkansas law made it unlawful for anyone to use an automatic license plate reader system and provided a private cause of action for those damaged by a violation of the act. *Id.* at 955. The plaintiffs, a camera manufacturing company and a company who collects license plate data and sells it, brought suit against Arkansas's governor and attorney general. *Id.* The Eighth Circuit, in affirming the district court's dismissal of the case, explained that "when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained of provision." *Id*. at 957-58 (emphasis added). The Eighth Circuit concluded by stating the plaintiff's "injury is 'fairly traceable' only to the private civil litigants who may seek damages under the Act and thereby enforce the statute against the companies." *Id*. at 958. Peco does not satisfy this test based on the facts alleged because it cannot currently enforce the Trespass Statute.

There is no allegation in the complaint that Peco has been damaged by Plaintiffs or that Peco can somehow plead the elements necessary to bring any claim under the Trespass Statute. Complaint, ¶ 75 ("ALDF and AE have not undertaken these investigations . . . neither organization is prepared to incur the risks of liability the Arkansas Ag-Gag law creates."). Under the facts as now pleaded, Peco cannot seek damages under the Trespass Statute and cannot

enforce it. It is insufficient to argue that Peco might have a claim in the future because the same is true of any business in Arkansas that could be damaged as the result of some trespasser. It defies logic to say that Plaintiffs have suffered an injury traceable to Peco based only on Plaintiffs' desire to mislead Peco into hiring Plaintiffs' agents in the future. In order to show that Plaintiffs' injury is fairly traceable to Peco's action, *Digital Recognition Network* requires that Plaintiffs show that Peco "may" seek damages and "enforce the statute against" the Plaintiffs. In establishing this test, the Eighth Circuit was not instructing the plaintiffs in *Digital Recognition Network* that they needed to pick a random Arkansas driver and pre-emptively sue him or her to have standing, yet that is what Plaintiffs are doing in this case.

According to the complaint, the only arguable action that Peco has taken is not responding to a letter. Plaintiffs allege they sent two letters to Peco asking it to waive any cause of action it might later have under the Trespass Statute and Peco did not respond. *See* Complaint, ¶52; Exhibit A; Exhibit B. Peco has no legal obligation to respond to Plaintiffs' letters, and the Trespass Statute does not give Peco any cause of action because of the letters. So, it is irrelevant to analyzing whether standing exists. Assuming for the sake of argument only that Plaintiffs had suffered some injury, that injury is not fairly traceable to Peco, and Plaintiffs' claims against Peco must be dismissed for lack of standing.

II. THE PLAINTIFFS' CONSTITUTIONAL CLAIMS PROVIDE NO CAUSE OF ACTION AND APPLY ONLY TO STATE ACTORS

Plaintiffs' lawsuit must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure because Plaintiffs have failed to state a claim entitling them to bring federal constitutional claims against a private party (Peco). Plaintiffs' lawsuit alleges violations of the First Amendment (Complaint, ¶¶ 130-150) and Fourteenth Amendments (Complaint, ¶¶ 151-155) of the U.S. Constitution, neither of which creates a private cause of action.

If Congress intends a federal law to be enforced through a private right of action, Congress must create it. *See Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 1519 (2001) (stating that private rights of action to enforce federal law must be created by Congress). Any "litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution[.]" *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001); *Sanders v. Prentice-Hall Corp.,* 178 F.3d 1296 (6th Cir. 1999) ("The Constitution does not directly provide for damages; thus, in order to sustain his constitutional causes of action, [plaintiff] must proceed under one of the statutes authorizing damages for constitutional violations"); *Fredin v. Olson*, 2018 WL 6606249, *1 (D. Minn. Oct. 29, 2018) ("The Complaint's only cause of action contends Defendants violated the First, Fourth, and Fourteenth Amendments, but one cannot bring a cause of action directly under the Constitution.").[2] The Complaint cites no statutory authority that provides Plaintiffs with a cause of action and none exists.

This is not a lawsuit brought under specific statutory authority such as 42 U.S.C. § 1983 to enforce constitutional rights, which is the statutory basis for lawsuits brought against state governments when state laws are alleged to violate the U.S. Constitution. Plaintiffs do not and cannot assert a Section 1983 cause of action because Peco is a private party. And, Plaintiffs cannot rely on the Declaratory Judgment Act, 28 U.S.C. § 2201, to avoid dismissal because it does not provide a separate cause of action, it is merely alternative relief for a pre-existing federal cause of action. *See Air Evac EMS Inc. v. USAble Mutual Ins. Co.*, 2018 WL 2422314, *3 (E.D. Ark. May 29, 2018); *Jones v. Hobbs*, 745 F. Supp.2d 886, 893 (E.D. Ark. 2010).

[2] The only exception is "*Bivens*" claims, which are described as causes of action brought directly under the United States Constitution against federal officials acting in an individual capacity. *See Jones v. Rivera*, 2018 WL 3352979, *4 (E.D. Ark. June 19, 2018). Obviously, this is not such a case.

Plaintiffs have no statutory basis for their private causes of action against Peco for their constitutional claims.

In any event, the First and Fourteenth Amendments serve as a limitation on government action and do not directly apply to private parties. The "First Amendment is a restraint on Government, not on private persons." *Belluso v. Turner Communications Corp*., 633 F.2d 393, 398, 48 Rad. Reg 2d (P & F) 1089 (5th Cir. 1980); *see George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996) (stating the First Amendment protects individuals only against government, not private infringements upon free speech rights). The same holds true for the Fourteenth Amendment. *See Murphy v. Mount Carmel High School*, 543 F.2d 1189, 1193 (7th Cir. 1976) (stating the guaranties of the First Amendment run only against the federal government, not private interference . . . The Fourteenth Amendment erects no shield against merely private conduct, however discriminating or wrongful); *see Miller v. Walt Disney Company Channel 7 KABC*, 2013 WL 12122678 (C.D. Cal. October 10, 2013) (citing *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982) for the contention that the Fourteenth Amendment similarly only applies to state action). Plaintiffs do not and cannot, consistent with Rule 11 of the Federal Rules of Civil Procedure, allege that Peco is a state actor or has done anything that could be characterized as state action or acting under color of state law. Indeed, as of now, Plaintiffs do not allege that Peco has done anything.

Peco is a private business, and Plaintiffs do not have any statutory authority to bring constitutional claims against Peco, and those constitutional claims would not apply to a private actor anyway. Plaintiffs have therefore failed to state any cause of action against Peco, and the Court can dismiss their claims against Peco.

III. PLAINTIFFS' CLAIMS ARE UNRIPE

The Court should dismiss Plaintiffs' claims because they are not ripe. "The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction. Its 'basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.' It requires that before a federal court may address itself to a question, there must exist 'a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037–38 (8th Cir. 2000) (citations omitted) (quotations omitted).

Plaintiffs ask this Court to determine that a state statute is unconstitutional both on its face and as applied, despite the Court having no facts upon which to base these determinations. For example, Plaintiffs cannot seriously contend that the First Amendment gives them the unfettered right to direct "investigators" to sneak into an employee washroom of a restaurant to hide cameras to record staff using the facilities because they might catch a restaurant employee using the toilet and then not washing his or her hands as required by the local health code. Yet, if a fact pattern exists under which a statute could be constitutional, then a facial challenge fails. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184 (2008) ("a plaintiff can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid. . . . . In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.") (citations omitted).

And, there are no actual facts in this case upon which an "as-applied" analysis can be based. "In an as-applied challenge, the challenger must show that the statute is unconstitutional

'because of the way it was applied to the particular facts of their case.'" *United States v. Campbell*, 309 F.Supp.3d 738, 744 (D.S.D. 2018) (quoting *United States v. Salerno*, 481 U.S. 739, 745, n. 3, 107 S.Ct. 2095, 2100 (1987)). As already illustrated, this Court cannot review the "particular facts" of how the Trespass Statute was applied to Plaintiffs because it has not been applied to them and cannot be applied to them based on the actual facts before the Court. Plaintiffs and the Court would have to rely on hypothetical facts to create a scenario in which Peco might have a claim under the Trespass Statute against one or more Plaintiffs, but this hypothetical scenario cannot serve as the basis for a facial or as-applied challenge to a statute. Until the Court can see exactly what damages Plaintiffs' investigator might cause Peco in the future, there is no basis for analyzing whether the application of the statute is constitutional.

Consequently, Plaintiffs' claims are not ripe. The Court should decline Plaintiffs' invitation to rule until Plaintiffs can provide the Court with an actual fact pattern where the Trespass Statute has been or could be invoked.

CONCLUSION

Plaintiffs' lawsuit against Peco is untenable. Plaintiffs lack standing to force Peco, a private party who has done nothing, into federal court to force Peco to defend the legitimacy of a state law that provides a civil cause of action that Peco cannot currently use and may never use. Plaintiffs also have no statutory basis for a cause of action against a private party to enforce a purported right under the U.S. Constitution; private parties are not subject to such claims anyway. Finally, this Court should reject Plaintiffs' invitation to try and resolve unripe claims based on a non-existent record. For the foregoing reasons, this Court should dismiss Plaintiffs' claims against Peco.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to counsel listed below.

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