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 — APPELLANTS

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

HONORABLE JAMES MOODY, JR., UNITED STATES DISTRICT JUDGE
CASE NO. 4:19-CV-00442-JM

PETITION FOR REHEARING *EN BANC* PURSUANT TO RULES 35 AND 40 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE 35(B) STATEMENT IN SUPPORT OF REHEARING *EN BANC*

1. The panel majority's decision on standing conflicts with decisions of this Court to which the petition is addressed and would allow any litigant to obtain pre-enforcement review of any statute they find objectionable. The Court's *en banc* review is therefore necessary to secure and maintain uniformity of the Court's decisions. Specifically, the panel majority's decision to reverse the District Court conflicts with *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011), and *Zanders v. Swanson*, 573 F.3d 591 (8th Cir. 2009), creating an intra-circuit split. The panel majority's decision also conflicts with the Supreme Court's decision in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). And, this Court's separate decision in *Animal Legal Defense Fund, et al. v. Reynolds,* Case No. 19-1364 (filed August 10, 2021 (amended August 13, 2021)) (slip op.), undermines, if not eliminates, the objective reasonableness of Appellants' claim to have a legally cognizable right that is currently being "chilled" by the Arkansas statute at issue.

2. The proceeding involves overlapping questions of exceptional importance because the panel majority's decision grants the Appellants Article III standing to bring their speculative claim against a private party for violating the U.S. Constitution's limits on government action under the First and Fourteenth Amendments even though the private party has taken no action under color of state law and no such statutory cause of action exists. *See Alexander v. Sandoval*, 532

U.S. 275 (2001); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001). A party without a cause of action cannot establish Article III standing, which requires a case or controversy.

BACKGROUND

Appellee Peco Foods, Inc. ("Peco") is a family-owned poultry producer with operations in Arkansas. Appellants Animal Legal Defense Fund ("ALDF"), Animal Equality, and others, are advocacy groups who dislike an Arkansas law, the "Trespass Statute" – Act 606 of the Acts of 2017 (Ark. Code Ann. § 16-118-113). Under the Trespass Act, a person must engage in several acts to face any threat of civil liability to an injured party. *See* Ark. Code Ann. § 16-118-113(b)-(c). However, lying to get hired to work at a business or residence is not an act prohibited by the Trespass Act. A person must do that and then obtain access to a nonpublic area and steal data, paper, or records (or conspire to steal them), take video or audio and use it in a manner that damages the employer, or place an unattended camera or other device and use it for an unlawful purpose. Ark. Code Ann. § 16-118-113(c)(1)-(4).

The Appellants assert the statute violates their First Amendment rights because it has chilled them from sending an investigator to lie to get a job to try and hide cameras or otherwise publish information that damages a business. (J.A. 11, 13). Appellants, however, have yet to do any of these things. (J.A. 27, 29). Appellants did not allege that they know of any unlawful animal treatment at Peco's facility in Arkansas or that Peco has done anything to any of the Appellants. There is nothing in the record suggesting that Peco has ever agreed to defend the constitutionality of the Trespass Statute; and Peco has never represented that it will

do so if the case proceeds to the merits. Peco was sued only because it engages in regulated, lawful commercial activity – poultry production – that the Appellants contend is unethical. The only contact between Appellants and Peco was two of the Appellants sending unsolicited letters to two of Peco's plant managers asking them to agree not to sue under the Trespass Statute when and if Peco ever had a cause of action under it. (J.A. 108-109). Peco's plant managers were under no obligation to respond to this request and did not. Apart from that, Peco has no more connection with the Trespass Statute than any other business in Arkansas.

The District Court analyzed the foregoing and concluded that the Appellants had not pleaded an injury-in-fact that gave rise to a lawsuit against Peco because the Appellants did not yet have an objectively reasonable fear of prosecution. (J.A. 124-125). The panel majority disagreed, holding that the Appellants' fear of being named in a civil action if some of them undertook all of the steps noted above was objectively reasonable because it was "plausible" that if all of this occurred, then Peco "will likely react in predictable ways" and file a lawsuit that presumably would include a claim under the Trespass Statute. *ALDF et al. v. Vaught et al.,* Case No. 20-1538 (filed August 9, 2021) (slip op.) at 8 ("Op.").

The panel dissent pointed out that the Appellants' fears are the product of their own imagination at the current time because they "are not yet, and may never be, in a position to engage in the course of conduct actually proscribed by" the statute. Op.

at 9-10. Because the Appellants' self-censorship was based on mere allegations of subjective chill based on speculation, no injury-in-fact has yet occurred and furthermore the Appellants' claims were not ripe. Op. at 9-10, 11 n.1. The panel dissent concluded that Appellants are attempting to enlist the courts in providing an advisory opinion to purge an Arkansas statute.

ARGUMENT

I. REHEARING *EN BANC* SHOULD BE GRANTED BECAUSE THE PANEL DECISION ON STANDING CONFLICTS WITH THIS COURT'S PRIOR PRECEDENT.

The panel dissent's opinion explains why the majority's decision disregards this Court's precedent on the injury-in-fact component of standing. A plaintiff's self-censorship must be based upon more than "mere allegations of a 'subjective' chill resulting from a statute." *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (citation omitted). Instead, "[t]he relevant inquiry is whether a party's decision to chill his speech in light of the challenged statute was 'objectively reasonable,'" which requires the plaintiff to show "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and [that] there exists a credible threat of prosecution." *Id*. (second alteration in original) (citations omitted). However, the plaintiff suffers no injury when his fears of prosecution are the product of mere imagination or speculation. *See id*. This Court has refined the analysis even further by holding that without the actual ability

to engage in that course of conduct, there can be no credible threat of prosecution. *See Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009).

The panel dissent pointed out that the Appellants in this case have not tried, let alone succeeded, in having an investigator mislead a business into hiring them. Op. at 11-12. The Appellants have to chain together speculation after speculation to establish an environment that they claim "chills" them, but there is nothing objectively reasonable about those speculations. A litigant cannot manufacture standing simply by stringing together enough allegations that, if they all came to pass, would give rise to an injury in fact. A requirement that lenient is no requirement at all. Consequently, the Appellants' claims are, at the current time, wholly speculative and are not yet actionable as explained in *281 Care Comm.* and *Zanders. See supra.*

Moreover, this Court's decision in *Animal Legal Defense Fund, et al. v. Reynolds,* Case No. 19-1364 (filed August 10, 2021 (amended August 13, 2021)) (slip op.), which came one day after the decision in Peco's case, held that entities such as the Appellants have no legally cognizable right to obtain access to a business via false pretenses. *Id*. at 7; *see also United States v. Alvarez*, U.S. 709, 723 (2012) ("it is well established that the Government may restrict speech without affronting the First Amendment" when "false claims are made to effect . . . other valuable consideration, say offers of employment"). In *Reynolds*, this Court observed that a

statute aimed at preventing false claims necessary to secure offers of employment should be constitutional as well. *Id*. at p. 8. That is precisely what Appellants claim they intend to do. Op. at 2. This is significant because to suffer an injury-in-fact, a plaintiff must show the invasion of a legally protected interest that is concrete and imminent, not hypothetical. *Spokeo v. Robins*, 578 U.S. 856 (2016). The Appellants cannot claim to have suffered legal chill by failing to do something that the Trespass Statute allows and that is not a legally cognizable right anyway.

In the alternative, the panel dissent also correctly noted that the District Court's dismissal without prejudice should be affirmed because the Appellants' claims were not ripe. Op at p. 11 n. 1. "The touchstone of a ripeness inquiry is whether the harm asserted has 'matured enough to warrant judicial intervention.'" *Parrish v. Dayton*, 761 F.3d 873, 875 (8th Cir. 2014) (citation omitted). For many of the same reasons noted above, this case is better heard by the courts after the Appellants take more steps towards undertaking the action they claim they will take. For example, Appellants could have their investigator record images and then seek judicial review prior to publishing them.

The standing and ripeness problems inherent in allowing a lawsuit to be brought on such a theoretical basis is evidenced by the assumptions the panel majority makes. For example, the panel majority assumes that Peco would bring a claim under the Trespass Statute absent any evidence Peco ever has or even wants

to. Op. at p. 8. If a Peco facility is being operated contrary to Peco's policies and practices, it is far from obvious that Peco would bring suit against someone for calling that to Peco's attention. Appellants' allegation that Peco "might" is precisely the kind of conclusory allegation the Supreme Court has warned the courts to disregard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Simply put, no Article III case or controversy exists between Appellants and Peco except in Appellants' imagination.

Appellants' complaint could have named any company (or even a home business) engaging in lawful commerce and made the same allegations. And, Appellants could bring the same kinds of pre-enforcement review claims against someone who might theoretically have a traditional trespass, conversion, or breach of privacy claim if Appellants wanted to sneak into their home to plant a camera or steal business information. As such, *281 Care Comm.* and *Zanders* warn against allowing speculative claims to proceed and control the outcome in this case. Peco's petition should be granted, and rehearing *en banc* should be ordered so the District Court's decision can be affirmed.

II. REHEARING *EN BANC* SHOULD BE ORDERED BECAUSE THIS MATTER INVOLVES ONE OR MORE QUESTIONS OF EXCEPTIONAL IMPORTANCE SUCH AS APPLYING THE U.S. CONSTITUTION TO A PRIVATE PARTY.

Appellants' petition should be granted because this proceeding involves one or more questions of exceptional importance. Specifically, the panel majority granted the Appellants Article III standing to bring a non-statutory cause of action to enforce the United States Constitution against a private party in direct conflict with Supreme Court precedent. Op. at 8-9. The Appellants' lawsuit is against a private party for allegedly violating the restrictions imposed on government activity by the First and Fourteenth Amendments even though the private party has not taken any action under color of state law. The Appellants must establish standing to demonstrate that an Article III case and controversy exists, but without a cause of action no case or controversy can exist.

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). Because Peco has not done anything, Peco cannot have done anything that could begin to satisfy the "state action" requirement.

The Appellants did not cite any statutory authority for their lawsuit against Peco either. This is not a lawsuit brought under specific statutory authority such as 42 U.S.C. § 1983 to enforce constitutional rights. Plaintiffs cannot assert a Section 1983 cause of action because Peco is a private party. Appellants tried to rely on the Declaratory Judgment Act, 28 U.S.C. § 2201, but 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).

Appellants test a new theory on appeal – that 28 U.S.C. § 1331 supplies a separate cause of action to assert constitutional claims against a private party. 28 U.S.C. § 1331 is a grant of jurisdiction, it does not supply a cause of action and Appellants cite nothing to support their argument that it does any more than that. No direct cause of action exists under the U.S. Constitution against a private party and Appellants' generic reference to 28 U.S.C. § 1331 does not supply them with one.

The Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), creating a cause of action to enforce the U.S. Constitution against federal agents illustrates that the Supreme Court can create direct constitutional claims, but the Supreme Court has warned against doing so in any other situation. In *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001), the Supreme Court refused to extend *Bivens* to a private party: "[w]e therefore reject the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court. . . . '[t]he creation of a Bivens remedy would obviously offer the prospect of relief for injuries that must now go unredressed.'" *Id*. at 69 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (emphasis added)). The panel majority in this case, however, would allow this lawsuit to proceed, tacitly extending *Bivens* to a private party in direct contravention of the *Corr. Servs. Corp*. holding.

Accordingly, this proceeding is one of exceptional importance. It assumes the existence of an Article III case or controversy based on a cause of action that does not exist under existing, long-standing precedent. The panel majority's decision also disregards *Iqbal* and the Eighth Circuit's holdings in *281 Care Comm.* and *Zanders* to turn the Article III requirement into one that is satisfied by speculative, conclusory allegations.

III. CONCLUSION.

For the foregoing reasons, this Court should grant Peco's Petition and order rehearing *en banc* of the panel decision to reversing the District Court's dismissal of Appellants' Complaint.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(f), 32(g). and 35(b)(2)(A), I hereby certify that the textual portion of the foregoing Petition contains 2,232 words as determined by the word counting feature of Microsoft Word 365 and consists of no more than 15 double-spaced pages in 14 point font.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Petition have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

/s/ Michael B. Heister
Michael B. Heister

Attorney for Appellee Peco Foods, Inc.

Date: August 20, 2021

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Michael B. Heister
Michael B. Heister