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 and DeANN VAUGHT, doing
Business as 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-0042-JM

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

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Animal Legal Defense Fund v. Reynolds, 297 F. Supp. 3d 901 (S.D. Iowa 2018), *aff'd in part, rev'd in part,* Case No. 19-1364 (filed August 10, 2021 (amended August 13, 2021)) (8th Cir. slip op.) 3

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Statutes and Rules

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

Appellees Jon and DeAnn Vaught join in and incorporate by reference the Rule 35(b) Statement of Appellee Peco Foods, Inc. in its contemporaneously-filed Petition for Rehearing *En Banc*.

BACKGROUND

Appellees Jon and DeAnn Vaught (the "Vaughts") own and operate a family farm in Sevier County, Arkansas. DeAnn Vaught is also a member of the Arkansas legislature and was a co-sponsor of the bill that would become Arkansas Code Ann. § 16-118-113 (the "Trespass Statute").

For one of the Appellants to have violated the Trespass Statute, and therefore be subject to a civil remedy thereunder, several distinct elements must be satisfied: A person must (1) knowingly gain access to a (2) nonpublic area of (3) a commercial property and therein (4) engage in an act which exceeds the persons' authority to enter the nonpublic area, including (a) entering the nonpublic area of commercial property for a reason other than a bona fide intent of seeking employment and (b) without authorization (i) removing records or information from the commercial property, recording images or sound in the commercial property, or placing a recording or surveillance device on the commercial property and (ii) using the information, recording or data (iii) to damage the employer. A person who engages in this conduct, and others who knowingly direct and assist that person, may be liable to the owner or operator of the commercial property for damages sustained and reasonable attorney's fees. *See id.* § 16-118-113 (b, c, d, e). The Trespass Statute includes no criminal penalties.

The Appellants bring against the Vaughts as private parties defendant a pre-enforcement challenge to the Trespass Statute under the First and Fourteenth Amendments to the United States Constitution. J.A. 45, 48. However, the Appellants do not allege in their complaint that they have committed any of the operative acts for a claim to be made against them under the Trespass Statute. The Appellants do not allege that the Vaughts communicated with them at all pre-suit and certainly do not allege any threat by the Vaughts of a claim under the Trespass Statute. The Appellants do not allege that any of them or their investigator have set foot on the Vaught's property. The Appellants do not allege that they have obtained any information from the nonpublic areas of Vaught's property which could be published as speech. J.A. 22-23, 27. Most importantly, the Appellants do not allege, and reasonably could not allege, that the Vaughts had ever accepted job applications, were hiring any new employees on their family farm in 2019, or would have hired Appellants' out-of-town investigator. The Appellants do not allege, and reasonably could not allege, that they had the ability to control, or even influence, whether the Vaughts hired anyone to work on their family farm. J.A. 29. It is undisputed that the Vaughts could not sue any of the Appellants under the Trespass Statute.

The District Court analyzed the several distinct acts required for a civil claim under the Trespass Statute and concluded that the Appellants had not pleaded an

injury-in-fact that gave rise to a lawsuit against the Vaughts because the Appellants did not yet have an objectively reasonable fear of prosecution by the Vaughts. J.A. 124-125. The panel majority disagreed, holding that the Appellants' fear of being named in a civil action if they satisfied the several elements of a civil claim under the Trespass Statute was objectively reasonable because it was "plausible" that if all of this occurred, then the Appellees "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, or is threatened to occur, 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 Vaughts join in and incorporate by reference the argument of Appellee Peco Foods, Inc. under Point I of its contemporaneously-filed Petition for Rehearing *En Banc*.

In addition, the Vaughts amplify the absence of Appellants' objectively reasonable fear of being sued by the Vaughts in particular under the Trespass Statute and the absence of a ripe claim of any Appellant against the Vaughts. As the District Court correctly noted, to begin the multi-step process toward potential liability under the Trespass Statute, an investigator of an Appellant must *first* be hired by the Vaughts. J.A. 119. The Appellants do not allege, and could not reasonably allege, that the Vaughts had ever accepted job applications, were hiring any new employees on their family farm in 2019, or would ever have hired Appellants' out-of-town investigator. *Cf. Animal Legal Defense Fund v. Reynolds*, 297 F. Supp. 3d 901, 915, n. 9 (S.D. Iowa 2018) ("Plaintiffs plausibly allege . . . that such jobs [at defendants' facilities] open frequently"), *aff'd in part, rev'd in part,* Case No. 19-1364 (filed August 10, 2021 (amended August 13, 2021)) (8th Cir. slip op.).

Two of the Appellants preceded this suit with a letter to the Vaughts stating that they wished to conduct an undercover investigation on the Vaughts farm. J.A. 113. The Vaughts did not respond to the letter. (There are many legitimate reasons beyond the Trespass Statute for the Vaughts not to respond to the

unsolicited letter.) And then the Appellants sued the Vaughts. If the Vaughts in the future hire *any* new employees, it is patently unreasonable to presume that after receiving the Appellants' letter and then being sued by the Appellants, they would hire a clandestine private investigator who was unknown to them. Yet, the panel majority indulged this very presumption when it assumed an Appellant's investigator would be hired by the Vaughts. Op. at 5.

The Appellants' absence of an objectively reasonable fear of being sued by the Vaughts under the Trespass Statute and lack of a ripe claim set the panel majority's opinion squarely at odds with this Court's decisions in *Zanders v. Swanson,* 573 F.3d 591, 593-94 (8th Cir. 2009) (plaintiffs with standing to bring a pre-enforcement challenge "must face a credible threat of present or future prosecution under the statute for a claimed chilling effect to confer standing" and not merely state "general allegations of possible or potential injury") and *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (same). Moreover, the panel majority's opinion invites pre-enforcement suits naming as defendants the state legislators who sponsored legislation under which those legislators, as private citizens, might conceivably one day have a claim. Op. at 6.

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

The Vaughts join in and incorporate by reference the argument of Appellee Peco Foods, Inc. under Point II of its contemporaneously-filed Petition for Rehearing *En Banc*.

CONCLUSION

This Petition and the Petition for Rehearing *En Banc* of Appellee Peco Foods, Inc. should be granted and this appeal should be reheard *en banc*.

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 35(b)(2)(A) and 40(b)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, table of contents, table of authorities, signature block, and certificates of counsel), this document contains 1,277 words.

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Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Petition have been submitted to the Clerk of this Court via the Court's CM/ECF system.

I further certify that this pdf was scanned for viruses, and no viruses were found on the file.

Date: August 20, 2021 By: /s/ Roger D. Rowe

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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/ Roger D. Rowe
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