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

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. — DEFENDANT

DEFENDANTS' STATEMENT OF OUTSTANDING ISSUES

In accordance with Defendants' unopposed motion for scheduling order, Docket No. 67, and the Court's order granting that motion, Docket No. 68, Defendants Jonathan and Deann Vaught, and Peco Foods, Inc., note that one issue remains for decision on Defendants' motions to dismiss, Docket Nos. 18 & 24. That issue is whether Plaintiffs have stated a plausible claim for relief (that is, a valid cause of action) under recognized law. They have not, and their complaint should be dismissed. The Vaughts should be dismissed for the additional reason that they have waived their right bring an action under Ark. Code Ann. § 16-118-113 against any Plaintiff in this case.

PROCEDURAL BACKGROUND

The Court will recall that this is a novel constitutional suit against private actors who are authorized—but not required—by Arkansas law to seek damages for unauthorized access to their property. Docket No. 1; *see also* Ark. Code Ann. § 16-118-113. The suit is novel in that Plaintiffs preemptively challenge a state law as unconstitutional, but they have not sued any state actor charged with enforcing the law (including state actors in the court system), nor does their suit follow any threat of enforcement by the private actors being sued.

Both Defendants moved to dismiss the complaint for lack of standing and failure to state a plausible claim for relief. Docket Nos. 18 & 24. After extensive briefing, Docket Nos. 19, 25, 28, 35, 36, and 47, the Court granted the motions to dismiss for lack of standing, Docket No. 51. Understandably, the Court did not address the Rule 12(b)(6) arguments because it held "as a threshold matter that Plaintiffs do not have standing." Docket No. 51 at 4.

On appeal, a divided panel of the Eighth Circuit reversed, holding, over Judge Shepherd's dissent, that Plaintiffs had alleged sufficient facts to establish standing at the pleading stage. *Animal Legal Defense Fund v. Vaught*, 8 F.4th 714, 717, 721 (8th Cir. 2021). Having addressed the jurisdictional issue of standing, however, the Eighth Circuit declined to address whether Plaintiffs have a cause of action against these Defendants, remanding for this Court to consider that issue. *Id.* at 721.[1]

Below, Defendants will summarize where things stand after the prior Rule 12(b)(6) briefing. Defendants re-urge the Court to grant the motions to dismiss under Rule 12(b)(6).

SUMMARY OF THE ISSUE REGARDING PLAINTIFFS' FAILURE TO STATE A VALID CAUSE OF ACTION[2]

Plaintiffs' complaint should be dismissed because they have not pleaded a valid cause of action against these Defendants. This is apparent from their failure to invoke the standard procedural mechanism for a pre-enforcement constitutional challenge to a state law, 42 U.S.C. § 1983,

[1] The Eighth Circuit based its standing decision on the fact that "[t]he property owners have declined to disavow an intent to pursue their rights under the law if they are subjected to violations." *Animal Legal Def. Fund*, 8 F.4th at 721. By separate filing, the Vaughts have expressly waived their right to bring a cause of action against Plaintiffs under Ark. Code Ann. § 16-118-113, and are moving to dismiss for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

[2] This summary is not intended to replace the fuller arguments on this issue made in Defendants' motion-to-dismiss briefing.

and from the fact that the laws they *do* invoke do not authorize the procedural path they attempt to walk.

1. For obvious reasons, Plaintiffs have not attempted to sue these private Defendants under 42 U.S.C. § 1983, which suggests at the outset that they lack a constitutional cause of action.

Whether Plaintiffs have pleaded a valid cause of action is suggested more by what is left out of the complaint than by what's in it. The 39-page pleading is long on facts and short on procedural law. It contains two causes of action: one for "(First Amendment)" and one for "(Equal Protection of the Laws)." Docket No. 1 at 35, 38. Yet nowhere does Plaintiffs' constitutional challenge invoke the hallmark mechanism for such challenges, 42 U.S.C. § 1983.

The reason is obvious: Plaintiffs have not sued—or even attempted to sue—any state actor. *Cf. West v. Sullivan*, No. 4:21-cv-16-JM, 2021 WL 190868, at *2 (E.D. Ark. Jan. 15, 2021) (Moody, J.) (complaint failed to state a claim under § 1983 because landlord defendant "is a private actor"). The phrases "state actor," "state action," or "under color of state law" do not appear in the complaint. *See* Docket No. 1. This is significant because the federal constitution does not restrain private action, such as action by the private defendants being sued here. The Supreme Court made this abundantly clear just a few terms ago:

> The text and original meaning of those Amendments [the First and Fourteenth Amendments], as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech.

Manhattan Community Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) (emphasis original); *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) ("The initial question we face is whether a private cause of action for promissory estoppel involves 'state action' within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered. For if it does not, then the First Amendment has no bearing on this case.").

The state-action doctrine that Plaintiffs attempt to bypass in this case serves a vital function in our constitutional order. "By enforcing that constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty." *Halleck*, 139 S. Ct. at 1928; *see also id.* at 1934; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619–20 (1991) (discussing, at length, the role of the state-actor requirement in the context of how the constitution structures the national government and orders individual liberties). It would impose staggering costs—financial and otherwise—on our republic if private parties such as Plaintiffs could unilaterally conscript private defendants to defend the constitutionality of state laws passed and enforced by state actors.[3] As the Supreme Court recognized in *Halleck*, that burden should not—and by constitutional design does not—fall on private citizens. For this reason, aiming constitutional litigation at private citizens, rather than state actors, is not merely a stumble over procedural nicety—it is a "fundamental" problem. *Halleck*, 139 S. Ct. at 1928 ("The producers have advanced a First Amendment claim against MNN. The threshold problem with that First Amendment claim is a fundamental one: MNN is a private entity."). Indeed, not only is the state-action distinction fundamental, it is a "threshold" question in any constitutional challenge. *Id.* at 1930.

Given that Plaintiffs have failed to invoke the "threshold" question in any constitutional challenge to a state law, what might they say in hindsight to cover this omission? They might, as they have done repeatedly, point to the so-called "unique" feature of Ark. Code Ann. § 16-118-113, which, according to Plaintiffs, is that the statute is enforced through a private right of action.

[3] It is little consolation that Plaintiffs do not seek damages or attorneys' fees. Docket No. 28 at 24. The time-and-money costs of merely defending such an action is unreasonably burdensome, as the lengthy proceedings in this case demonstrate.

See Docket No. 28 at 2. "Plaintiffs cannot name state-defendants," they say, "as the state has no right to enforce the [Arkansas] Law." Docket No. 28 at 19.

That assertion is wrong, as demonstrated by multiple Supreme Court precedents. Start with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which Plaintiffs cite early in their response to Defendants' motions to dismiss. Docket No. 28 at 4. *Sullivan* recognized that state courts are state actors, such that they are precluded from applying state law (even state common law) in a way that is contrary to the federal constitution. 376 U.S. at 265 ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press."); *see also id.* at 264 ("We hold that the rule of law applied by the Alabama courts is constitutionally deficient . . . .").

The plain meaning of *Sullivan* also shows that Plaintiffs are wrong to cite *Sullivan* for the proposition that "when private parties are authorized to invoke a law that suppresses free speech the First Amendment applies." Docket No. 28 at 4. That is not what *Sullivan* held. The First Amendment does not apply merely because private parties are *authorized* to invoke a law—if that were true, any citizen could be preemptively sued merely because they are entitled to invoke an arguably unconstitutional law. Instead the First Amendment applies when a court, at a private party's request, *enforces* the law as an exercise of state power. *See Sullivan*, 376 U.S. at 265 ("The test [for state action] is not the form in which state power has been applied but, whatever the form, whether such power has in fact been *exercised*." (emphasis added)).

The Supreme Court's more recent decision in *Cohen v. Cowles Media Co.*—which Plaintiffs do not appear to cite—further elucidates the rule from *Sullivan*: "The rationale of our decision in [*Sullivan*], and subsequent cases compels the conclusion that there is state action

here. Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." 501 U.S. at 668; *see also Edmonson*, 500 U.S. at 622 (quoting *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) ("our cases have found state action when private parties make extensive use of state procedures with 'the overt, significant assistance of state officials.'").

Given this Supreme Court precedent, there is no need for Plaintiffs to drag two private actors into court to defend a state law. There is a ready state actor (the state court) in any enforcement proceeding, should one materialize. The Eighth Circuit implicitly recognized this when it rested its standing decision on the plausibility of the belief that "the defendants 'will likely react in predictable ways' [to statutory violations] by resorting to their *legal remedies*." *Vaught*, 8 F.4th at 721 (quoting *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565–66 (2019)) (emphasis added). It is not the existence of this law that supplies state action through these Defendants—it is the invocation of legal remedies through the court system, which undisputedly has not happened.

Moreover, depending on the outcome of *Whole Women's Health v. Jackson*, No. 21-463 (U.S. 2021), there is also the possibility that Plaintiffs could attempt the sort of preemptive challenge that is currently before the Supreme Court there, where plaintiffs have sued Texas state-court clerks and judges to enjoin enforcement of Texas's abortion law.[4] (Unlike Texas's abortion law, which allows "any person" to bring an action, and requires the issuance of an injunction and at least $10,000 in statutory damages, Tex. Health & Safety Code § 171.208, Arkansas's law ba-

[4] *See Docket, Whole Women's Health v. Jackson*, available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-463.html.

ses liability on "damages sustained *by the owner or operator*" of the commercial property, Ark. Code Ann. § 16-118-113(b) (emphasis added). Arkansas's law is therefore not subject to charges of vigilante-ism and does not delegate general law-enforcement power to private citizens. It is only available to those who have suffered, on an individualized basis, the harm that the law is designed to prevent.)

Because Plaintiffs' complaint fails to allege the requisite state action to support a constitutional claim, it should be dismissed.

2. Plaintiffs' handful of putative state-action cases do not supply, after the fact, a sufficient state-action basis for their complaint.

Faced with the observation that a state-action theory is conspicuously absent from their complaint, Plaintiffs invoked a handful of cases in response to Defendants' motions to dismiss. Docket No. 28 at 20–21. Those cases, though, do not bless the legal theory Plaintiffs' seek to deploy.

Paul v. Watchtower Bible & Tract Soc. of New York, Inc., was an out-of-circuit case in which a constitutional challenge was asserted defensively (as in *Sullivan*), and the court held that "the application of tort law to activities of a church or its adherents in their furtherance of their religious beliefs is an exercise of state power." 819 F.2d 875, 880 (9th Cir. 1987). "When the imposition of liability would result in the abridgement of the [constitutional right at issue]," said the court, "recovery in tort is barred." *Id.* Defendants have not sought to impose liability on Plaintiffs. *Paul* does not support Plaintiffs' theory.

In re Santa Fe Natural Tobacco Co. Marketing Litigation was on the same procedural footing as *Paul*, that is, the constitutional challenge was raised defensively. 288 F. Supp. 3d 1087, 1237 (D.N.M. 2017) ("The Defendants argue that the First Amendment shields them from all liability."). The "state action" snippet that Plaintiffs take from the 191-page decision is about

state-action in the context of invoking the court system. *Id.* at 1239. It does not advance the novel preemptive-challenge theory attempted here.

When Plaintiffs finally reach for decisions from and within the Eighth Circuit, the result is the same. *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, was procedurally complex, but in essence the plaintiff sued to remove uncertainty about its liability regarding baseball players' rights of publicity, and the media-company defendant counterclaimed, which was followed by the players' intervention. 505 F.3d 818, 820 (8th Cir. 2007). The district court held that the plaintiff was not infringing any rights of publicity, and that the First Amendment would preempt any such right that existed. *Id.* at 821. The Eighth Circuit affirmed on the alternative ground that while there was sufficient evidence of a right-of-publicity violation, plaintiff's First Amendment rights superseded the players' rights of publicity. *Id.* at 823, 824. It was in that context—ordinary civil claims with a constitutional overlay—that the Eighth Circuit invoked *Cohen*'s observation that judicial enforcement of state-created obligations provides the requisite state-actor component to raise a constitutional issue. *Id.* at 823.[5]

Balogh v. Lombardi, which Plaintiffs cite in passing, was a suit against an undisputed state actor: the director of the Missouri of Department of Corrections. 816 F.3d 536, 539 (8th Cir. 2016). *Balogh* was a standing case, not a cause-of-action case. *Id.* at 542. The same is true of

[5] The complaint in *C.B.C. Distribution* confirms that the plaintiff brought an ordinary declaratory judgment action seeking a declaration that it was not violating any right of publicity owned by the defendant. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Adv. Media, L.P.*, No. 4:05-cv-252-MLM, Dkt. 1 at 7 (Count III) (E.D. Mo. Feb. 7, 2005). The *C.B.C.* complaint does not mention the First Amendment or the constitution. *Id.* Other similarly non-constitutional counts, such as a request for declaratory relief concerning the Lanham Act, were dismissed by stipulation. *C.B.C. Distrib.*, No. 4:05-cv-252-MLM, Dkt. 127 (E.D. Mo. July 7, 2006) (order dismissing counts I, II, and IV per parties' stipulation). *C.B.C. Distribution* therefore did not come into federal court on the wings of a constitutional claim. *C.B.C. Distribution* provides no support for what Plaintiffs are attempting in this case. Nor does *CBS Interactive Inc. v. Nat'l Football League Players Assoc., Inc.*, 259 F.R.D. 398, 417 (D. Minn. 2009), which, as Plaintiffs note, merely followed *C.B.C. Distribution*

Digital Recognition Network, Inc. v. Hutchinson, 803 F.3d 952 (8th Cir. 2015). That was a suit against Arkansas's governor and attorney general, and was about standing, not a cause of action. *Id.* at 954, 957–58. *Fort Des Moines Church of Christ v. Jackson* raised the same issue: a point about standing in a suit against governmental defendants. 215 F. Supp. 3d 776, 780, 786 (S.D. Iowa 2016).

Perhaps recognizing that these standing cases do not establish their cause of action, Plaintiffs try to bootstrap a cause of action to standing. They contend that the Eighth Circuit's recognition of standing in the First Amendment context means that a First Amendment injury exists and therefore the First Amendment "must apply." Docket No. 28 at 21. But that is not true. In this very case, the Eighth Circuit recognized that "[w]hether a plaintiff has a cause of action . . . goes to the merits of a claim and does not implicate the court's statutory or constitutional power to adjudicate the case." *Vaught*, 8 F.4th at 721 (quotations, citations, and emphasis omitted). In other words, you can have standing without a cause of action. Standing requires an injury, a relationship between the injury and the challenged conduct, and the ability of a favorable decision to redress that injury. *Id.* at 718. Here, the Eighth Circuit held that, on the pleadings, Plaintiffs have alleged those things. But an injury does not inherently supply a cause of action—those are two separate things. *See Harry v. Total Gas & Power N.A., Inc.*, 889 F.3d 104, 110 (2d Cir. 2018) (recognizing that "[i]t is well established in principle that the pleading standard for constitutional standing is lower than the standard for a substantive cause of action," and holding that plaintiffs had pleaded standing but not a cause of action); *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 700 (8th Cir. 2021) (finding standing under "the First Amendment's lenient standing requirement," but being careful to note that "the standing analysis and the substantive [cause of action] analysis are not coextensive"). Put in terms of this case: a speech-related injury (which

Defendants dispute) does not supply a state actor. By concluding that Plaintiffs have alleged standing, the Eighth Circuit did not conclude that "the First Amendment must apply" to Defendants as private actors who have not invoked state enforcement power under state law. A refusal to disavow rights under a law might be enough in the Eighth Circuit's eyes for standing, but a private actor must invoke the law through the court system to create potential state action.

In sum, Plaintiffs have offered no authority for their baseline argument: That "the state's creation of the cause of action that has produced First Amendment harm through Defendants' potential to enforce the Law is sufficient 'state action' to make the First Amendment apply." Docket No. 28 at 21. The "potential" of a private actor to seek enforcement of a state law is not sufficient state action to support a cause of action against that private actor. If that were enough to support a cause of action, it would expose anyone who benefits from a law to litigation. And while the creation of the law itself might or might not be state action, Defendants, as private actors, have not produced that action.

3. The sources of law that Plaintiffs *do* invoke to support their alleged cause of action do not do so.

Given that there's no state actor or state action targeted by Plaintiffs' complaint, they attempt to erect a legal claim on four other sources of law: (1) the federal-question-jurisdiction statute, 28 U.S.C. § 1331; (2) the civil-rights-jurisdiction statute, 28 U.S.C. § 1343; (3) the declaratory-judgment statute, 28 U.S.C. § 2201; and (4) "the Court's inherent equitable powers." Docket No. 1 at ¶¶ 38–40.

In the course of the dismissal briefing, Plaintiffs appear to have dropped 28 U.S.C. § 1343 as a basis for their constitutional claim against Defendants; they have not relied on that statute in seeking to avoid dismissal. Nor could they. The only subsection of § 1343 even arguably relevant here provides jurisdiction "of any civil action authorized by law to be commenced

by any person . . . [t]o redress the deprivation, *under color of any State law* . . . of any right, privilege or immunity secured by the Constitution of the United States . . . .” 28 U.S.C. § 1343(a)(3) (emphasis added). Because no defendant in this case is acting under color of any state law, then this statute cannot apply. Nor does the statute supply a cause of action; it merely provides jurisdiction for civil actions that are separately “authorized by law.” 28 U.S.C. § 1343(a); *see Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618 (1979) (“Under § 1343(3), a civil action must be both ‘authorized by law’ and brought to redress the deprivation of rights ‘secured by the Constitution of the United States or by any Act of Congress providing for equal rights.’) (quoting 28 U.S.C. § 1343(3)).

As far as the declaratory judgment statute, 28 U.S.C. § 2201, Plaintiffs do not appear to dispute that it too requires an underlying cause of action, *see, e.g.*, *Pickrell v. Sorin Group USA, Inc.*, 293 F. Supp. 3d 865, 869 (S.D. Iowa 2018) (noting that “[t]he Declaratory Judgment Act does not create a cause of action without an underlying claim,” and holding that “because there is no cognizable claim for medical monitoring, the Plaintiff cannot bring a claim for declaratory relief”); *Roberts v. Unimin Corp.*, No. 1:15-cv-71-JLH, 2015 WL 8731632, at *9 (E.D. Ark. Dec. 11, 2015) (“declaratory judgment is a procedural device, not a substantive claim”); *see also W. Cas. & Sur. Co. v. Herman*, 405 F.2d 121, 124 (8th Cir. 1968) (“The Declaratory Judgment Act . . . does not create any new substantive right but rather creates a procedure for adjudicating existing rights.” (internal citation omitted).

Instead, Plaintiff brush aside these widely recognized limitations on declaratory judgment actions as a “nonstarter” and a “misdirection,” because they are seeking “to determine and protect *constitutional* rights” rather than statutory rights. Docket No. 28 at 24–25. The problem, as explained above, is that there is no right to “determine and protect constitutional rights” against

private actors who have not invoked state action to enforce state law. There are no constitutional rights at issue in that scenario. So while the declaratory judgment statute can provide a particular form of remedy (a declaratory judgment) when an underlying right is at issue, it does not enlarge the range of rights available as Plaintiffs seek to do here. *See Jones v. Hobbs*, 745 F. Supp. 2d 886, 892 (E.D. Ark. 2010) (declaratory judgment statute "is procedural in nature: it enlarges the range of *remedies* in federal courts" (emphasis added)). In short, the declaratory judgment statute is not an empty shell to be filled with whatever legal theory Plaintiffs want to pursue.[6]

After stepping back from 28 U.S.C. § 1343 and 28 U.S.C. 2201, Plaintiffs put nearly all their weight on an amorphous equitable power to issue injunctive relief, combined with 28 U.S.C. § 1331, the federal-question-jurisdiction statute. These too do not supply a cause of action in this case. As Plaintiffs seem to recognize by putting this discussion under the heading "This Court Has Jurisdiction To Hear Constitutional Claims," the authorities Plaintiffs cite are generally about jurisdiction, not a cause of action. Docket No. 28 at 23.

Bell v. Hood, cited prominently by Plaintiffs, raises and confronts the cause-of-action/jurisdiction distinction head-on: "For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." 327 U.S. 678, 682 (1947). *Davis v. Passman* was about an implied damages remedy under the Fifth Amendment (not the First Amendment), and its reasoning has been severely cabined by later precedent. 442 U.S. 228, 229–30 (1979); *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020) (Sutton, J.) (discussing shift in the implied-right-of-action landscape since 1980). Relevant here, the Supreme Court has rejected an implied damages remedy under the First

[6] Plaintiffs insinuate that Defendants see the declaratory judgment statute as placing "limits" on proceedings. Docket No. 28 at 25. That is not the case. The question is not what the declaratory judgment statute *limits*, but rather what it *allows*. Federal courts are courts of limited jurisdiction.

Amendment. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) ("For example, the [Supreme] Court declined to create an implied damages remedy in the following cases: a First Amendment suit against a federal employer, *Bush v. Lucas*, 462 U.S. 367, 390 (1983) . . . .").

Plaintiffs' chosen line from *Correctional Services Corp. v. Malesko* was about injunctive relief as a remedy, and one to prevent "entities from acting unconstitutionally." 534 U.S. 61, 74 (2001). But an injunctive remedy is not a cause of action, and it makes no sense to speak of Defendants in this case, who are private actors, acting "unconstitutionally." It is unclear why Plaintiffs cite *Whitman v. Department of Transportation*; that case merely quoted 28 U.S.C. § 1331, and focused on whether another statute took away jurisdiction. 547 U.S. 512, 513–14 (2006). Defendants are not disputing that § 1331 says what it says, and no one is arguing that any statute takes away any jurisdiction this Court would otherwise have. The issue, again, is that Plaintiffs have not pleaded a valid underlying cause of action. As for *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, it does indeed say that a federal court would have jurisdiction under § 1331 to entertain a suit seeking to enjoin a state agency's order as unlawful, but Plaintiffs are not suing a state actor. 535 U.S. 635, 642 (2002).

Finally, Plaintiffs' citation to Judge Berzon's article does not advance their point. Docket No. 28 at 23; Docket No. 47 at 2. That article, under the heading "The Supreme Court's Continued Recognition of Three Categories of Direct Constitutional Claims," does not mention the novel suit they are trying to piece together here (a direct constitutional claim against a private actor), but instead notes three types of litigation—supremacy clause preemption cases; dormant commerce clause cases; and suits against federal officers—that all target state action. Hon. Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 708–12 (2009). State actors were also the targets in *Ex*

parte Young, 209 U.S. 123, 129 (1908) (state attorney general as defendant), *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 n.1 (1954) (board of education), and *Bolling v. Sharpe*, 347 U.S. 497 (1954) (president of board of education).

Plaintiffs have failed to supply any legal basis for requiring private actors to preemptively defend a state law.

SUMMARY OF THE ISSUE REGARDING THE VAUGHTS' WAIVER

In addition to failing to plead a valid cause of action, Plaintiffs' claims against the Vaughts must be dismissed because there is no case or controversy between Plaintiffs and the Vaughts. Pursuant to the Waiver and Stipulation filed as Docket No. 70, the Vaughts have irrevocably waived all causes of action that they may now or hereafter have under Ark. Code Ann. § 16-118-113 against Plaintiffs, and further stipulate that they will not bring a cause of action under Ark. Code Ann. § 16-118-113 against any Plaintiff named in this case. Therefore, Plaintiffs' claims against the Vaughts are moot and should be dismissed.

CONCLUSION

After all the briefing, Plaintiffs have not come forward with any authority recognizing a standalone claim for a preemptive constitutional challenge to a state statute in which the only defendant is a private actor.[7] Their attempt to forge a new avenue of constitutional litigation is creative but not sanctioned by existing law. Defendants therefore ask the Court to dismiss Plaintiffs complaint for failure to plead a valid cause of action. The Vaughts should be dismissed for the additional reason that Plaintiffs have no live claim against the Vaughts.

[7] Plaintiffs have not alleged, nor could they truthfully, that any of the private-actor-as-state-actor exceptions apply on these facts. *See Halleck*, 139 S. Ct. at 1928 (noting the "few limited circumstances" in which "a private entity can qualify as a state actor").

Respectfully Submitted,

Steven W. Quattlebaum (84127)
Michael B. Heister (2002091)
QUATTLEBAUM, GROOMS,
& TULL PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
Telephone: (501) 379-1700
Facsimile: (501) 379-1701
quattlebaum@qgtlaw.com
mheister@qgtlaw.com

Attorneys for Peco Foods, Inc.

and

Roger D. Rowe (85140)
LAX, VAUGHAN, FORTSON,
ROWE & THREET, P.A.
11300 Cantrell Road, Suite 201
Little Rock, Arkansas 72212
(501) 376-6565 Office
(501) 376-6666 Facsimile
rrowe@laxvaughan.com

Attorneys for Jonathan and DeAnn Vaught

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November 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 the following counsel of record:

Alan Keith Chen University of Denver Sturm College of Law 2255 East Evans Avenue Denver, CO 80208	Cristina R. Stella Animal Legal Defense Fund 525 East Cotati Avenue Cotati, CA 94931
David Samuel Muraskin Public Justice P.C. 1620 L Street N.W. Suite 630 Washington, DC 20036	John Daniel Hays, Jr. J.D. Hays Law, PLLC 4101 West Huntington Drive Suite 3103 Rogers, AR 72758
Justin Francis Marceau University of Denver Sturm College of Law 2255 East Evans Avenue Denver, CO 80208	Kelsey Rinehart Eberly Animal Legal Defense Fund 525 East Cotati Avenue Cotati, CA 94931
Matthew Glen Liebman Animal Legal Defense Fund 525 East Cotati Avenue Cotati, CA 94931	Matthew Daniel Strugar Law Office of Matthew Strugar 3435 Wilshire Boulevard Suite 2910 Los Angeles, CA 90010
Sarah Hanneken Animal Equality 8581 Santa Monica Boulevard Suite 350 Los Angeles, CA 90069	Hannah Mary Margaret Connor Center for Biological Diversity Post Office Box 2155 St. Petersburg, FL 33731
Steven W. Quattlebaum Chad W. Pekron Michael B. Heister Samantha R. Wilson Quattlebaum, Grooms, & Tull PLLC 111 Center Street, Suite 1900 Little Rock, Arkansas 72201	

By: /s/ Roger D. Rowe
Roger D. Rowe