

United States Court of Appeals
For the Eighth Circuit

No. 20-1538

Animal Legal Defense Fund; Animal Equality; Center for Biological Diversity;
Food Chain Workers Alliance,

Plaintiffs - Appellants,

v.

Jonathan Vaught, doing business as Prayer Creek Farm; DeAnn Vaught, doing
business as Prayer Creek Farm; Peco Foods, Inc.,

Defendants - Appellees.

Reporters Committee for Freedom of the Press; Deans and Law Professors; 23
Media Organizations,

Amici on Behalf of Appellants.

Appeal from United States District Court
for the Eastern District of Arkansas - Central

Submitted: February 25, 2021

Filed: August 9, 2021

Before COLLOTON, WOLLMAN, and SHEPHERD, Circuit Judges.

COLLOTON, Circuit Judge.

Animal Legal Defense Fund, Animal Equality, Center for Biological Diversity, and Food Chain Workers Alliance brought an action against Peco Foods, Inc., and Jonathan and DeAnn Vaught. The complaint sought an order that would prevent Peco Foods and the Vaughts from bringing a civil suit against the plaintiffs under an Arkansas statute, Ark. Code Ann. § 16-118-113. The district court dismissed the action, reasoning that the complaint failed to allege sufficient facts to establish Article III standing. We reach a different conclusion, and reverse and remand for further proceedings.

The statute at issue provides a “[c]ivil cause of action for unauthorized access to property.” Ark. Code Ann. § 16-118-113. The law prohibits a person “who knowingly gains access to a nonpublic area of a commercial property” from engaging in “an act that exceeds the person’s authority.” *Id.* § 16-118-113(b). The plaintiffs, who describe themselves as “nonprofit organizations dedicated to reforming industrial animal agriculture,” claim that the statute violates their rights to free speech under the First Amendment. According to the complaint, defendant DeAnn Vaught was a sponsor of the legislation while serving in the Arkansas legislature.

The two lead organizations, Animal Legal Defense Fund and Animal Equality, allege that they have “specific and definite plans” to investigate Peco Foods’s chicken slaughterhouses and the Vaughts’ pig farm. The organizations allege that they would send undercover investigators to seek employment with the slaughterhouse and the farm, or with third parties who have access to the target facilities. Once employed, the investigators would collect information on the operation of the facilities by personal observation or through the use of unattended recording devices. But the lead organizations have refrained from investigating due to the threat that Peco Foods and the Vaughts, as commercial property owners, will bring a lawsuit against them under the statute. Center for Biological Diversity and Food Chain Workers Alliance engage in advocacy and assert that they have made arrangements with the lead organizations

to receive useful information that would result from their investigations. The plaintiffs argue that they have been “chilled” from engaging in activity that is protected under the First Amendment.

The district court concluded that the plaintiffs failed adequately to allege Article III standing to sue. The court decided that any injury was too speculative, because neither Peco Foods nor the Vaughts had hired an investigator affiliated with the plaintiffs, so no such investigator had developed information that the organizations would seek to publish. The court further reasoned that the complaint failed to allege that Peco Foods and the Vaughts engage “in the type of practices [the plaintiffs] would like to expose.” The plaintiffs appeal, and we review the district court’s decision *de novo*.

To establish Article III standing, plaintiffs must show (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision will likely redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiffs bear “the burden of establishing these elements,” and must support each element “in the same way as any other matter” on which they bear the burden of proof. *Id.* at 561. On a motion to dismiss, therefore, the plaintiffs must allege sufficient facts to support a reasonable inference that they can satisfy the elements of standing. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *Stalley v. Cath. Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007). A plaintiff satisfies the injury-in-fact element if it alleges “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298

(1979)). “An allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk that the harm will occur.’” *Id.* at 158 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410, 414 n.5 (2013)).

We conclude that the complaint adequately alleges the elements of Article III standing. First, the plaintiffs allege that, but for the statute, the lead organizations would send an investigator to gather information and take video and audio recordings in the facilities owned by Peco Foods and the Vaughnts. They assert that all plaintiffs would use the results of the investigations in their advocacy. This conduct is arguably affected with a constitutional interest, because “the creation and dissemination of information are speech within the meaning of the First Amendment.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

Second, the complaint alleges an intention to engage in a course of conduct arguably proscribed by the Arkansas statute. *See Susan B. Anthony List*, 573 U.S. at 162-63; *PETA, Inc. v. Stein*, 737 F. App’x 122, 130 (4th Cir. 2018) (per curiam). The statute prohibits “an act that exceeds” a person’s authority in nonpublic areas of commercial property, and it lists activities in which an employee may not engage. Ark. Code Ann. § 16-118-113(b), (c).

The lead organizations allege that they have retained an experienced investigator to conduct an employment-based investigation into Peco Foods’s facilities and the Vaughnts’ farm. The complaint asserts that the investigator will “apply for and obtain a job through the usual channels,” and “gather information and record audio files and video footage in the facilities’ nonpublic areas” for use in advocacy. In the terms of the statute, the complaint describes an intention to engage in an act that “[c]aptures or removes the employer’s data, paper, [or] records,” or “[r]ecords images or sound” in order to use that information “in a manner that damages the employer.” *Id.* § 16-118-113(c)(1)-(2). The organizations also allege

that by so doing, they would commit “an act that substantially interferes with the ownership or possession” of the property. *Id.* § 16-118-113(c)(5). The complaint further provides that the investigators will place “an unattended camera . . . to record images or data” without authorization and in violation of the statute. *Id.* § 16-118-113(c)(3).

The lead organizations agreed to “share the information they obtain[] from [the] investigations” into the Vaughnts’ farm and Peco Foods’s facilities, so that the Center for Biological Diversity and Food Chain Workers Alliance may advocate against the activities at the facilities. The advocacy organizations thus allege an intent to engage in a course of conduct that arguably “assists” an employee to use a “recording in a manner that damages the employer.” *Id.* § 16-118-113(c)(2), (d).

Third, the complaint sufficiently alleges a credible threat of enforcement. A plaintiff’s fear of enforcement must be objectively reasonable, meaning that the threat of enforcement may not be “imaginary or wholly speculative.” *Susan B. Anthony List*, 573 U.S. at 160 (quoting *Babbitt*, 442 U.S. at 302); *see also 281 Care Comm. v. Arneson*, 638 F.3d 621, 629-30 (8th Cir. 2011). Peco Foods and the Vaughnts first contend that it is speculative that an investigator will be hired by either of them, and the Vaughnts suggest that a family farm “does not frequently hire employees.” But Animal Legal Defense Fund states that it has successfully investigated “facilities like those” owned by Peco Foods and the Vaughnts. Animal Equality alleges that it has filmed inside hundreds of facilities, and that it was “the first organization” to do so at several facilities. These allegations of previous success lend “concreteness and specificity to the plaintiffs’ claims.” *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc). The complaint also explains that investigators need not be placed directly with Peco Foods or the Vaughnts, but could be employed by another business that has access to the target facilities.

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