

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ASSOCIATED BUILDERS AND
CONTRACTORS OF MICHIGAN,

Plaintiff,

v.

JENNIFER A. ABRUZZO, in her
official capacity as GENERAL
COUNSEL NATIONAL LABOR
RELATIONS BOARD,

Defendant.

Case No. 23-cv-00277

Hon. Robert J. Jonker

*** HEARING

Date: July 19, 2023

Time: 3:00 PM EDT

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Grand Rapids, Michigan

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

ABC Michigan is entitled to a preliminary injunction to stop Abruzzo from her illegal jawboning and threats of prosecution in her public Memorandum that chill its employer members' Free Speech rights under the First Amendment.

In her disjointed response unsupported by a declaration, Abruzzo fails to provide a cogent argument or defense to ABC Michigan's *actual* claims. Instead, Abruzzo prefers to make strawman arguments, which mischaracterize ABC Michigan's claims and are unavailing.

First, Abruzzo says, "this case is jurisdictionally improper." ECF No. 17, PageID.195. But as set forth in its opening brief and herein, ABC Michigan has Article III associational standing on behalf of its employer members' irreparable loss of their protected speech under the First Amendment, and this Court has subject-matter jurisdiction over the case.

Second, Abruzzo states that ABC Michigan has "no likelihood of succeeding on the merits of its claim that a non-binding legal theory publicly articulated by the Board's prosecutor violates its First Amendment rights." ECF No. 17, PageID.195. But that is not what this case is about. Rather, ABC Michigan claims Abruzzo is threatening its employer members with prosecution *outside* the NLRB's formal enforcement process with her public Memorandum, which functions as an informal censorship scheme prohibited by the First Amendment under the Supreme Court's decision in *Bantam Books* and its progeny. ABC Michigan also claims that

Abruzzo's non-discretionary and *ultra vires* threat of prosecution in her public Memorandum conflicts with the terms of her statutory authority under the Act.

Third, Abruzzo says an injunction should not be issued since "the public interest in transparent government action and abiding by the congressionally provided scheme" of enforcing the Act cuts in her favor. ECF No. 17, PageID.195-96. But once again, that is not what this case is about. In fact, Abruzzo's argument cuts squarely against *her*. ABC Michigan is claiming Abruzzo is *not acting within* the Act's "congressionally provided scheme" — to use her words — by publishing her Memorandum on the Board's public website outside its formal enforcement process and threatening to prosecute ABC Michigan's employer members. In other words, ABC Michigan is simply saying Abruzzo must act like a prosecutor within the Act's structure, scheme, and formal enforcement process. And stop threatening ABC Michigan's employer members with prosecution like she has — and continues to do — in her public Memorandum, which is continuous, ongoing, and not essential to her investigative or prosecutorial decisions as NLRB General Counsel.

Fourth, Abruzzo asserts that a preliminary injunction "would disturb the existing state of affairs by, in effect, injecting an advisory opinion into the administrative process that is in place to resolve claims like those asserted in [ABC Michigan's] Complaint." ECF No. 17, PageID.196. But the existing "status quo" is that Abruzzo may not *threaten* ABC Michigan's employer members with *prosecution* for their protected speech because such a *threat* violates the First Amendment. Additionally, ABC Michigan has not raised any claims involving the NLRB's

“administrative process.” Rather, its claims involve Abruzzo acting *ultra vires* outside her statutory authority under the Act. Moreover, ABC Michigan has not requested that this Court redress its First Amendment injury that is traceable to Abruzzo and her public Memorandum through injunctive relief that would “disturb the existing state of affairs” of the NLRB “administrative process.” Contrary to her unsupported assertion, ABC Michigan has requested injunctive relief to redress Abruzzo’s continuing and ongoing *ultra vires* threat of prosecution in her public Memorandum that violates the First Amendment.

Fifth, Abruzzo says that if ABC Michigan “seeks nationwide injunctive relief, the request is inappropriate and unsupported.” ECF No. 17, PageID.196. She says if the Court issues a preliminary injunction, it should be cabined to include only ABC Michigan’s employer members and not extend beyond the borders of the State of Michigan. ECF No. 17, PageID.207-209. But ABC Michigan has not requested a “nationwide” preliminary injunction. It seeks injunctive relief “on behalf of its employer members” to protect their Free Speech rights under the First Amendment.

ARGUMENT

I. ABC Michigan has satisfied the four factors for a preliminary injunction to stop Abruzzo from chilling its employer members’ protected speech by threatening them with prosecution.

ABC Michigan has satisfied the four factors required for a preliminary injunction to stop Abruzzo’s intimidation and threats of prosecution in her public Memorandum that chill its employer members’ protected speech under the First Amendment. The Court should grant its motion.

A. Abruzzo fails to respond to ABC Michigan’s central arguments.

Abruzzo’s response fails to meaningfully address ABC Michigan’s key legal theory: that Abruzzo, acting *ultra vires*, published her Memorandum publicly to leverage her official power by inserting *herself* into the discussion to intimidate employers, so they would forgo their Free Speech rights to avoid the risk that she would prosecute them before the Board for an unfair labor practice.

Instead, Abruzzo attacks strawmen by mischaracterizing and distorting ABC Michigan’s claims and arguments. For example, Abruzzo misrepresents ABC Michigan’s Complaint by framing it “as a constitutional challenge to the General Counsel’s articulation of a non-binding legal theory,” in an attempt “to have this Court prematurely opine on the validity of that theory.” ECF No. 17, PageID.198.

Abruzzo sets the table in this fashion so she can then caution the Court that adjudicating ABC Michigan’s claims (supposedly) “would turn the carefully designed, clearly delineated statutory review scheme crafted by Congress upside down.” ECF No. 17, PageID.198. This is because, according to Abruzzo’s distortion of ABC Michigan’s claims, the Act’s “statutory scheme provides the exclusive forum to litigate and assess the legal theory articulated in the General Counsel’s Memorandum, with review available in the circuit courts of appeals following the administrative process, as needed.” ECF No. 17, PageID.198.

But ABC Michigan is not simply challenging a legal theory that Abruzzo might raise someday. It is challenging Abruzzo’s *current threat* to prosecute its members for exercising their Free Speech rights in a manner of which she disapproves. Thus,

contrary to Abruzzo's suggestions, nothing before the Court shows that ABC Michigan's claims are intertwined with the Act itself or involve the NLRB administrative process.

Next, Abruzzo claims that even if the Court finds jurisdiction, "the Complaint would have to be dismissed because it does not state any claims upon which relief can be granted." ECF No. 17, PageID.199. In perhaps her most bizarre argument, Abruzzo says, "Simply put, the regulation of economic conduct — such as by limiting the circumstances under which employees may be fired for participation or nonparticipation in protected activities under the NLRA — does not restrict speech rights; ABC may speak as much as it wants to willing listeners." ECF No. 17, PageID.199. But ABC Michigan's claims do not involve economic conduct; they are about Abruzzo's threat of prosecution that is chilling *speech*.

Finally, Abruzzo's response fails to rebut ABC Michigan's argument that she is a recalcitrant official who acted *ultra vires* of her statutory authority with threats of prosecution in her Memorandum.

For example, Abruzzo fails to address ABC Michigan's claims that: (1) under *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), she may be sued in her official capacity for injunctive relief when she commits a non-discretionary and purely *ultra vires* act and violates the Constitution, ECF No. 6, PageID.83; (2) her Memorandum is an example of illegal jawboning in an attempt to leverage her official power by inserting *herself* into the discussion to intimidate employers, so they will forgo their Free Speech rights to avoid the risk that she will

prosecute them before the Board for an unfair labor practice, ECF No. 6, PageID.86-87; (3) publishing her Memorandum on the Board's website was not essential to her impartial investigative or prosecutorial decisions as NLRB General Counsel, ECF No. 6, PageID.75; (4) publishing her Memorandum on the Board's website was not essential to decide whether a charge against an employer under the Act was meritorious, ECF No. 6, PageID.75; (5) publishing her Memorandum on the Board's website was not essential to decide whether to issue a complaint after a charge was filed under the Act, ECF No. 6, PageID.75; (6) publishing her Memorandum on the Board's website was not essential to decide whether to settle with an employer charged under the Act, ECF No. 6, PageID.75; (7) publishing her Memorandum on the Board's website was not essential to decide whether to prosecute, settle, or dismiss a charge or complaint against an employer under the Act, ECF No. 6, PageID.75; (8) the official flowchart on the Board's website reveals that its formal enforcement process does not require the NLRB General Counsel to post memos on the Board's public website, and her Memorandum GC 22-04 at issue is not listed on the flowchart, ECF No. 6, PageID.75-77; (9) her Memorandum was posted on the Board's website at the time of filing suit, ECF No. 6, PageID.75; (10) she has never publicly disavowed her statements and views that she expressed in her Memorandum, ECF No. 6, PageID.77; (11) she has never retracted her Memorandum from the Board's website, ECF No. 6, PageID.77; (12) her Memorandum was not issued by the Board as proposed rulemaking pursuant to the Administrative Procedure Act, ECF No. 6, PageID.77; (13) her Memorandum was

not subject to public notice and comment, ECF No. 6, PageID.77; and (14) her Memorandum was not published in the Federal Register, ECF No. 6, PageID.77. See ECF No. 17, PageID.190-211.

B. ABC Michigan is likely to prevail on the merits of its constitutional claims in Counts I-IV.

Under the first preliminary injunction factor, a movant must demonstrate at least a meaningful “[p]robability of success.” *Garlock, Inc. v. United Seal Inc.*, 404 F.2d 256, 257 (6th Cir. 1968). ABC Michigan has demonstrated it is likely to succeed on the merits of its constitutional claims in its Complaint.

Count I. ABC Michigan is likely to succeed on the merits of its Free Speech claim. Abruzzo’s Memorandum violates the compelled speech doctrine under the First Amendment because, under threat of prosecution, it impermissibly compels employers to adopt certain words when they speak to their employees about unions during required work meetings. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018).

Count II. ABC Michigan is likely to succeed on the merits of its Free Speech claim. Abruzzo’s Memorandum threatens to punish speech based on its content. “Content-based regulations are presumptively invalid.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion).

Count III. ABC Michigan is likely to succeed on the merits of its Free Speech and Due Process claim. Abruzzo’s Memorandum is unduly vague: a reasonable employer, under threat of prosecution, cannot know what speech is prohibited or

permitted. *NAACP v. Button*, 371 U.S. 415, 433 (1963); *City of Chicago v. Morales*, 527 U.S. 41 (1999).

Count IV. ABC Michigan is likely to succeed on the merits of its Free Speech claim. Abruzzo's Memorandum violates the First Amendment because, under threat of prosecution, it imposes an unconstitutional prior restraint on employers' speech. The effect of Abruzzo's public Memorandum is to impose an informal censorship scheme and prior restraint upon employers through "intimidation and threat of prosecution." See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 52, 64 (1963); see also *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015); *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003). Further, her public Memorandum which is continuous and ongoing, "by way of threat of punishment and intimidation to quell speech," chills ABC Michigan's employer members' protected speech. See *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761, 764-65 (6th Cir. 2019).

1. ABC Michigan has Article III associational standing.

ABC Michigan has associational standing to pursue claims against Abruzzo on behalf of its employer members because they can show: (1) an injury-in-fact that is concrete, particularized, and imminent; (2) fairly traceable to defendant's conduct; and (3) would be redressed by a favorable court decision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Article III standing does not require a plaintiff to engage in "costly futile gestures simply to establish standing, particularly when the First Amendment is implicated." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 406

(6th Cir. 1999) (citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392–93 (1988); *Clements v. Fashing*, 457 U.S. 957, 962 (1982)).

Under controlling Sixth Circuit precedent, an association has standing to bring a First Amendment suit on its members' behalf when (a) its members would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit. *Speech First*, 939 F.3d at 763.

Here, ABC Michigan has demonstrated it has Article III associational standing to sue on behalf of its employer members. Indeed, ABC Michigan's Complaint and opening brief set forth in precise and exacting detail sufficient facts to easily show it has Article III standing to sue on behalf of its employer members. Considering Abruzzo's response, ABC Michigan lists those reasons again.

First, ABC Michigan's employer members are subject to the Act and labor laws enforced by Abruzzo pursuant to the Act. ECF No. 1, PageID.6; ECF No. 6-1, PageID.103. ABC Michigan's employer members' Free Speech rights are infringed and objectively chilled by threats of prosecution in her public Memorandum. ECF No. 1, PageID.6. For example, ABC Michigan and its employer members are on notice that Abruzzo posted her Memorandum GC 22-04 to the Board's public website, where it remained posted at the time of filing the lawsuit. ECF No. 1, PageID.17. ABC Michigan and its employer members are further on notice of Abruzzo's plan to overturn the *Babcock* precedent that she described in her public

Memorandum. ECF No. 1, PageID.17. ABC Michigan and its employer members are on notice that to advance her goal to use her position as General Counsel to overturn the *Babcock* precedent, Abruzzo focused on two lines of attack. First, Abruzzo said, “I will urge the Board to correct that anomaly.” Second, Abruzzo said, “I will propose the Board adopt sensible assurances that an employer must convey to employees in order to make clear that their attendance is truly voluntary.” ECF No. 1, PageID.18. ABC Michigan and its employer members are on notice of Abruzzo’s recent public remarks as reported by Bloomberg Law on March 1, 2023, a few days before filing the lawsuit. ECF No. 1, PageID.18. ABC Michigan and its employer members are on notice that as reported by Bloomberg Law, Abruzzo “is still lacking cases she can use to challenge certain precedents as part of her campaign to shift federal labor law to benefit workers and unions.” ECF No. 1, PageID.18. ABC Michigan and its employer members are on notice that as reported by Bloomberg Law, Abruzzo’s use of memos and speeches to publicly identify those precedents she wanted to overturn would “likely motivate unions to file charges focused on creating the vehicles to change those precedents.” ECF No. 1, PageID.18. ABC Michigan’s employer members’ interpretation of Abruzzo’s public Memorandum is that it is intended: (i) as a threat to intimidate employers and that Abruzzo will prosecute employers before the Board for an unfair labor practice if they express their views, argument, or opinion on unionization during mandatory work meetings; (ii) as a threat to intimidate employers by placing a target on their backs and declaring open season for unions to file unfair labor practice charges

against employers to create a vehicle for Abruzzo to overturn *Babcock*; and (iii) as a threat to intimidate employers by coercing them to “adopt” Abruzzo’s approved words and language—“sensible assurances”— when employers express their opinion on unions at meetings that employees must attend, or risk prosecution by her before the Board. ECF No. 1, PageID.18-19. But for Abruzzo’s threat of prosecution in her public Memorandum by inserting herself into the discussion, ABC Michigan’s employer members would engage in lawful free speech and express to their employees their views, argument, or opinion on unionization during mandatory work meetings. ECF No. 1, PageID.19. These ABC Michigan employer members do not, however, wish to make threats of reprisal or force or promises of benefit during speeches to their employees on unionization at mandatory work meetings. ECF No. 1, PageID.19. Those threats of prosecution in the Memorandum are ongoing and continuous: Abruzzo’s Memorandum remains posted on the Board’s public website. ECF No. 1, PageID.11; ECF No. 1, PageID.17.

Second, ABC Michigan’s employer members’ constitutional injuries can be traced to Abruzzo because she signed the Memorandum with her initials in her official capacity as NLRB General Counsel and it remains posted on the Board’s public website. ECF No. 1-1, PageID.30-33; ECF No. 1, PageID.11; ECF No. 1, PageID.17.

Third, ABC Michigan’s employer members would receive redress from an injunction (i) stopping Abruzzo from threatening to prosecute employers in her Memorandum on the Board’s public website; and (ii) ordering Abruzzo to retract,

delete, and remove her Memorandum from the Board's public website. ECF No. 1, PageID.28; ECF No. 6, PageID.97.

Fourth, ABC Michigan has associational standing to sue because its employer members would otherwise have standing to sue as discussed above and as set forth in the Complaint (ECF No. 1, PageID.1-29), Exhibits (ECF No. 1-1, PageID.30-33; ECF No. 1-2, PageID.34-37; ECF No. 1-3, PageID.38-45), and supporting Declaration of its President Jimmy E. Greene, ECF No. 6-1, PageID.101-105.

Fifth, protecting employers' First Amendment Free Speech rights is germane to ABC Michigan's purpose in accordance with its Merit Shop philosophy and belief that neutrally balanced labor laws for *both* employer and employee are essential to the preservation of our nation's free enterprise system. ECF No. 1, PageID.6; ECF No. 1, PageID.17.

Sixth, neither the claims asserted, nor the relief requested requires the participation of ABC Michigan's employer members in this lawsuit. ECF No. 1, PageID.6.

2. ABC Michigan's claims are ripe.

ABC Michigan's claims are ripe because Abruzzo's threat of prosecution in her Memorandum posted on the Board's public website is occurring *now*.

Courts analyze ripeness under three considerations: (1) whether the alleged injury is likely to occur; (2) whether the factual record is sufficiently developed to resolve the question; and (3) the hardships, if any, to the parties if the court delays resolution of the question. *Carey v. Wolnitzek*, 614 F.3d 189, 196 (6th Cir. 2010). In

some First Amendment contexts, courts apply a “relaxed ripeness” standard. *Id.*; *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 655, 675 (W.D. Mich. Jul. 23, 2010) (Maloney, J.) (finding the case “satisfies the relaxed ripeness standard governing free-speech cases.”).

To argue that ABC Michigan’s Complaint is unripe, Abruzzo says, “the proposed changes to NLRB law contained in the Memorandum are not current NLRB policy, and may never be, at least in their current form.” ECF No. 17, PageID.199. But as discussed, that is not what this case is about. This case is ripe because (1) the alleged First Amendment Free Speech injury — Abruzzo’s threat of prosecution — is occurring *now* because her Memorandum remains posted on the Board’s public website; (2) the factual record is developed, and there is no dispute that her Memorandum remains posted publicly on the Board’s website; and (3) ABC Michigan’s employer members’ loss of their First Amendment rights is irreparable as further discussed below. *See Carey*, 614 F.3d at 196.

C. ABC Michigan’s employer members’ loss of their First Amendment rights is irreparable without an injunction.

Under the second preliminary injunction factor, ABC Michigan has demonstrated its employer members’ loss of their First Amendment rights is irreparable without an injunction.

The Supreme Court held “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality opinion) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). Stated another way, if ABC Michigan shows it

is likely to succeed on the merits of its First Amendment claims — which it has as discussed — then its employer members’ “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” See *Burns*, 427 U.S. at 373-74.

In her response, Abruzzo cites *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), which is inapposite because it did not involve a recalcitrant NLRB official acting *ultra vires* of her statutory authority under the Act, as Abruzzo has here.

In *Myers*, the Supreme Court found the complaint alleged specific Board actions “in the course and conduct of its business.” *Id.* at 45. In other words, the *Myers* complaint challenged Board actions *within* the NLRB’s formal enforcement process. In contrast, ABC Michigan’s Complaint alleges Abruzzo — through her public Memorandum — is threatening its employer members with prosecution *outside* the NLRB’s formal enforcement process. ECF No. 1, PageID.1-29. Thus, *Myers* is irrelevant to this case.

Next, Abruzzo asserts a laches defense, which also fails. ECF No. 17, PageID.203. A party asserting laches must prove (1) that the plaintiff lacked diligence in pursuing its claim and (2) that the party asserting laches suffered prejudice from this lack of diligence. *McKeon Prods, Inc. v. Howard S. Leight & Assocs., Inc.*, 15 F.4th 736, 741 (6th Cir. 2021). “Delay alone cannot warrant laches.” *Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003).

Abruzzo’s argument fails because she only argues the first prong — delay. She claims that ABC Michigan did not exercise “reasonable diligence” in seeking an

injunction since Abruzzo's public Memorandum was published in April of 2022. ECF No. 17, PageID.203. But she failed to allege and prove the second prong — how such delay, if true, prejudiced her. Moreover, Abruzzo failed to show how her laches defense could even overcome the fact that she has unclean hands as a recalcitrant official as alleged by ABC Michigan in its Complaint.

D. The balance of equities and public interest in preventing the violation of ABC Michigan's employer members' constitutional rights favor granting the motion.

Under the merged third and fourth factors, the balance of equities and public interest in preventing the violation of ABC Michigan's employer members' constitutional rights by Abruzzo — a recalcitrant official — favor granting the motion. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

“[T]he public interest is served by preventing the violation of constitutional rights.” *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004). And “[r]ecalcitrant officers enjoy no sovereign immunity from orders commanding them to perform their non-discretionary duties or commanding them to cease performance of purely *ultra vires* acts.” *Larson*, 337 U.S. at 689; *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1041 (6th Cir. 2022).

Abruzzo's reliance on *NLRB v. Sears Roebuck* is misplaced. 421 U.S. 132 (1975). Those documents involved the “investigative process” of the NLRB General Counsel and his staff. 421 U.S. at 144. In contrast, ABC Michigan argues, and Abruzzo has not disputed, that publishing her Memorandum on the Board's public website was

not essential to Abruzzo's impartial investigative or prosecutorial decisions as NLRB General Counsel, ECF No. 6, PageID.75.

II. ABC Michigan seeks an injunction “on behalf of its employer members” to protect their Free Speech rights.

ABC Michigan sought injunctive relief in its brief “on behalf of its employer members” to protect their Free Speech rights. ECF No. 6, PageID.97. Thus, any concerns about a “nationwide” injunction are not present here.

CONCLUSION

The driving force of government must be laws themselves and not the whims of those who govern. John Adams put it this way in the Declaration of Rights of the Massachusetts Constitution: “to the end it may be a government of laws, and not of men.” MASS. CONST. pt.1, art. XXX. By using her position to contort the law to her liking, Abruzzo distorts this foundational principle.

ABC Michigan on behalf of its employer members respectfully requests a preliminary injunction (1) stopping Abruzzo from threatening to prosecute employers in her Memorandum on the Board's public website; and (2) ordering Abruzzo to retract, delete, and remove her Memorandum GC 22-04 from the Board's public website.

June 5, 2023

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CERTIFICATE OF COMPLIANCE

1. This reply brief complies with the type-volume limitation of W.D. Mich. LCivR 7.3(b)(i) because this brief contains 4,038 words, excluding the parts of the brief exempted by W.D. Mich. LCivR 7.3(b)(i).
2. This reply brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, Version 2302 in 12-point Century Schoolbook font.

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