

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

<p>ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN,</p> <p>Plaintiff,</p> <p>v.</p> <p>JENNIFER A. ABRUZZO, in her official capacity as GENERAL COUNSEL NATIONAL LABOR RELATIONS BOARD,</p> <p>Defendant.</p>	<p>Case No. 23-cv-00277</p> <p>Hon. Robert J. Jonker</p> <p>*** ORAL ARGUMENT REQUESTED</p>
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PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Associated Builders and Contractors of Michigan (“ABC Michigan”) files this motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a) and W.D. Mich. LCivR 7.1 and 7.2, against Defendant, Jennifer A. Abruzzo, in her official capacity as General Counsel National Labor Relations Board. In support, ABC Michigan relies upon the: (1) Complaint [ECF No. 1]; (2) Brief [ECF No. 6]; and (3) Declaration of President Jimmy E. Green on behalf of ABC Michigan [ECF No. 6-1].

Plaintiff ABC Michigan states as follows:

1. Supreme Court precedent prohibits a *government official* from making a threat of prosecution that amounts to a censorship scheme abridging First Amendment liberties and infringing free speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 52, 64 (1963) (emphasis provided).

2. The Sixth Circuit applied the *Bantam Books* precedent and held that an association had standing to sue on behalf of its members whose speech were chilled “by way of threat of punishment and intimidation to quell speech.” *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761, 764-65 (6th Cir. 2019).

3. Other sister circuits of the Sixth have applied *Bantam Books* and held that a plaintiff may seek injunctive relief against a public official who has threatened to prosecute them for protected speech.

4. For example, the Seventh Circuit entered an injunction against an official to protect a plaintiff’s First Amendment Free Speech rights stating, “The First Amendment forbids a public official to attempt to suppress the protected speech of private persons by threatening that legal sanctions will at his *urging* be imposed unless there is compliance with his demands.” *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015) (Posner, J.) (emphasis added) (citing, inter alia, *Bantam Books*, 372 U.S. at 64-72).

5. And the Second Circuit explained that the distinction between lawful and unlawful acts is whether the public official’s conduct was an attempt “to convince” or an attempt “to coerce.” *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003).

6. The *Backpage* court held that a sheriff’s letter was deemed a threat and an attempt to coerce when he inserted himself into the discussion in his letter, which violated the First Amendment. *Backpage.com*, 807 F.3d at 232.

7. Here, General Counsel Jennifer Abruzzo’s public Memorandum GC 22-04 is her attempt to coerce and threaten employers with prosecution because she inserted

herself into the discussion when she said *she* would “urge the Board to correct” the *Babcock* precedent.

8. Abruzzo’s Memorandum is not merely an attempt to convince others that *Babcock* is incorrect; it is a threat of prosecution intended to coerce employers subject to the National Labor Relations Act to “adopt sensible assurances” in their speeches during mandatory employee work meetings to avoid prosecution by her before the National Labor Relations Board.

9. By inserting herself into the discussion in her Memorandum, Abruzzo crossed the line into illegal coercive behavior and threatened prosecution.

10. This Court may issue the injunction ABC Michigan seeks because, under *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), a federal official may be sued in her official capacity for injunctive relief when the official commits a purely *ultra vires* act and violates the Constitution.

11. Abruzzo’s threat to prosecute employers subject to the Act by her public Memorandum is a purely *ultra vires* act that conflicts with both the First Amendment and the terms of her statutory authority under the Act.

12. Sovereign immunity does not protect her non-discretionary and purely *ultra vires* threat in her public Memorandum to prosecute employers for their lawful speech. See *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1041 (6th Cir. 2022) (citing *Larson*, 337 U.S. at 689); *Bantam Books*, 372 U.S. at 64; *Speech First*, 939 F.3d at 761, 764-65.

13. Plaintiff ABC Michigan is likely to succeed on the merits of its Free Speech claims because Abruzzo is infringing ABC Michigan employer members' First Amendment rights by threatening prosecution in her public Memorandum.

14. The "status quo" at this posture before the Court is that Abruzzo may not threaten employers with prosecution before the Board for their protected speech because such a threat violates the First Amendment. *See Erbsloeh Aluminum Sols., Inc. v. Mueko Mach., Inc.*, 2022 U.S. Dist. LEXIS 184448, *7 (W.D. Mich. Aug. 11, 2022) (Maloney, J.); *see also Stenberg v. Cheker Oil Co.*, 573 F. 2d 921, 924-25 (6th Cir. 1978).

15. Because relief is sought on behalf of ABC Michigan employer members' loss of their First Amendment rights and Abruzzo has no risk of monetary injury, this Court may waive Rule 65(c)'s bond requirement. *See Appalachian Reg'l Healthcare, Inc. v. Coventry Health and Life Ins. Co.*, 714 F. 3d 424, 431 (6th Cir. 2013).

16. Thus, should the Court issue a preliminary injunction to avoid its employer members' irreparable loss of their First Amendment rights, ABC Michigan requests that it not be required to give "security." *See Fed. R. Civ. P. 65(c)*.

17. Pursuant to W.D. Mich. LCivR 7.1(d), Plaintiff's counsel will be filing the required Certificate of Concurrence with the Court following the filing of this Motion, Brief, and supporting Declaration on behalf of ABC Michigan.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff ABC Michigan respectfully requests that this Court:

A. Issue a preliminary injunction restraining and enjoining Abruzzo (1) to stop her from threatening to prosecute employers in her Memorandum GC 22-04 on the Board's public website; and (2) ordering Abruzzo and all parties acting in concert with her pursuant to Fed. R. Civ. P. 65(d)(2)(B) and (C), to retract, delete, and remove her Memorandum GC 22-04 from the Board's public website; and

B. Grant such further relief this Court deems just, proper, and equitable.

March 17, 2023

Respectfully submitted,

/s/ Keith E. Eastland

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CERTIFICATE OF SERVICE

I certify that, on March 17, 2023, a copy of this Plaintiff's Motion for Preliminary Injunction was served on Defendant Jennifer A. Abruzzo and the United States by registered or certified mail at the following addresses:

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