No. 23-1803

United States Court of Appeals
for the Sixth Circuit

ASSOCIATED BUILDERS &
CONTRACTORS, INC. OF MICHIGAN,

Plaintiff-Appellant,

v.

JENNIFER A. ABRUZZO, in her official capacity
as General Counsel of the National
Labor Relations Board,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Michigan
No. 1:23-cv-00277 - Hon. Robert J. Jonker

APPELLANT'S PRINCIPAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a) and 6th Cir. R. 26.1, Plaintiff-Appellant Associated Builders & Contractors, Inc. of Michigan makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No. Associated Builders & Contractors, Inc. of Michigan is a nonprofit corporation incorporated in Michigan on June 15, 1962. It is a statewide trade association representing the commercial and industrial construction industries.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No, there are none known.

Dated: August 16, 2024

/s/ Buck Dougherty

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REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant respectfully requests oral argument because this case presents an important legal question: whether district courts have jurisdiction over a First Amendment free speech claim based on allegations that the NLRB General Counsel threatened to prosecute lawful speech in order to suppress disfavored expression.

Oral argument would assist in placing this case in proper context among those recent and older authorities under the First Amendment. And it would help explain the framework of the National Labor Relations Act—a statute Congress enacted in 1935 codified at 29 U.S.C. §§ 151-169—including the two independent and separate branches to which Congress expressly delegated certain duties under its statutory scheme: the National Labor Relations Board—a quasi-judicial body—and the NLRB General Counsel—chief prosecutor of unfair labor practice cases before the National Labor Relations Board.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because the claims present federal questions arising under the First and Fifth Amendments of the U.S. Constitution.

And the district court had jurisdiction pursuant to 28 U.S.C. § 2201, § 2202.

On July 31, 2023, the district court issued an opinion and order granting the Defendant-Appellee's motion to dismiss for lack of subject-matter jurisdiction. Opinion, R. 23, Page ID ## 375-89. On the same day, the district court entered a judgment dismissing Plaintiff-Appellant's case. Judgment, R. 24, Page ID # 390.

On August 30, 2023, Plaintiff-Appellant filed its appeal. Notice of Appeal, R. 26, Page ID ## 428-29. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291 because the district court's Judgment was a final decision. *See also* Fed. R. App. P. 4(a)(1)(A) and (B)(iii).

ISSUES FOR REVIEW

1. Do district courts have subject-matter jurisdiction over a First Amendment free speech claim alleging that the NLRB General Counsel has threatened prosecution for lawful speech in order to suppress disfavored expression?

2. Does an association have Article III standing when its regulated employer members' lawful speech is objectively chilled by the NLRB General Counsel's threat of prosecution in a public memorandum, which courts may redress by stopping the threat?

3. Does NLRB General Counsel Abruzzo's threat to prosecute regulated employers to overturn a 75-year-old precedent, when employers lawfully express their views on unions at required work meetings constitute coercion in violation of the First Amendment?

4. Is ABC Michigan likely to succeed on the merits of its First Amendment claim, and that its regulated employer members will be irreparably harmed by the loss of their free speech rights absent a preliminary injunction?

STATEMENT OF THE CASE

A. The Parties

Associated Builders & Contractors, Inc. of Michigan

Plaintiff-Appellant Associated Builders & Contractors, Inc. of Michigan ("ABC Michigan") is a statewide trade association representing the commercial and industrial construction industries. Complaint, R. 1, Page ID ## 6, 17. Its employer members' speech rights are germane to ABC Michigan's purpose. Complaint, R. 1, Page ID # 6.

ABC Michigan and its employer members are subject to regulation under the National Labor Relations Act ("NLRA" or "Act"). Complaint, R. 1, Page ID ## 6, 17. Its President is responsible for the Public Policy and Government Affairs in Michigan on behalf of ABC Michigan and its employer members. Complaint, R. 1, Page ID # 17. Membership in ABC Michigan is available to all private businesses and employers in the construction industry that believe in the Merit Shop philosophy, which means members believe neutrally balanced labor law legislation that embraces fair play for *both* employer and employee is essential to the preservation of our nation's free enterprise system. Complaint, R. 1,

Page ID # 17.

ABC Michigan employer members are dedicated to open competition, equal opportunity, and accountability in the construction industry. Complaint, R. 1, Page ID # 17. ABC Michigan employer members develop people, win work, and deliver that work safely, ethically, profitably, and for the betterment of the communities in which the employer members work. Complaint, R. 1, Page ID # 17.

Jennifer A. Abruzzo, in her official capacity as General Counsel of the National Labor Relations Board

Defendant-Appellee Jennifer A. Abruzzo has been General Counsel of the National Labor Relations Board since July 22, 2021. Complaint, R. 1, Page ID # 6. As General Counsel, Abruzzo is responsible for the impartial investigation and prosecution of unfair labor practice charges under the NLRA once a charge is filed by a union, employee, or employer, and for the general supervision of the regional field offices in processing and prosecuting cases before the National Labor Relations Board ("Board"). Complaint, R. 1, Page ID # 6.

The NLRA seeks to promote the public's interest by eliminating strife and unrest historically associated with labor disputes, and U.S. policy balances the burdens and benefits among these three groups—

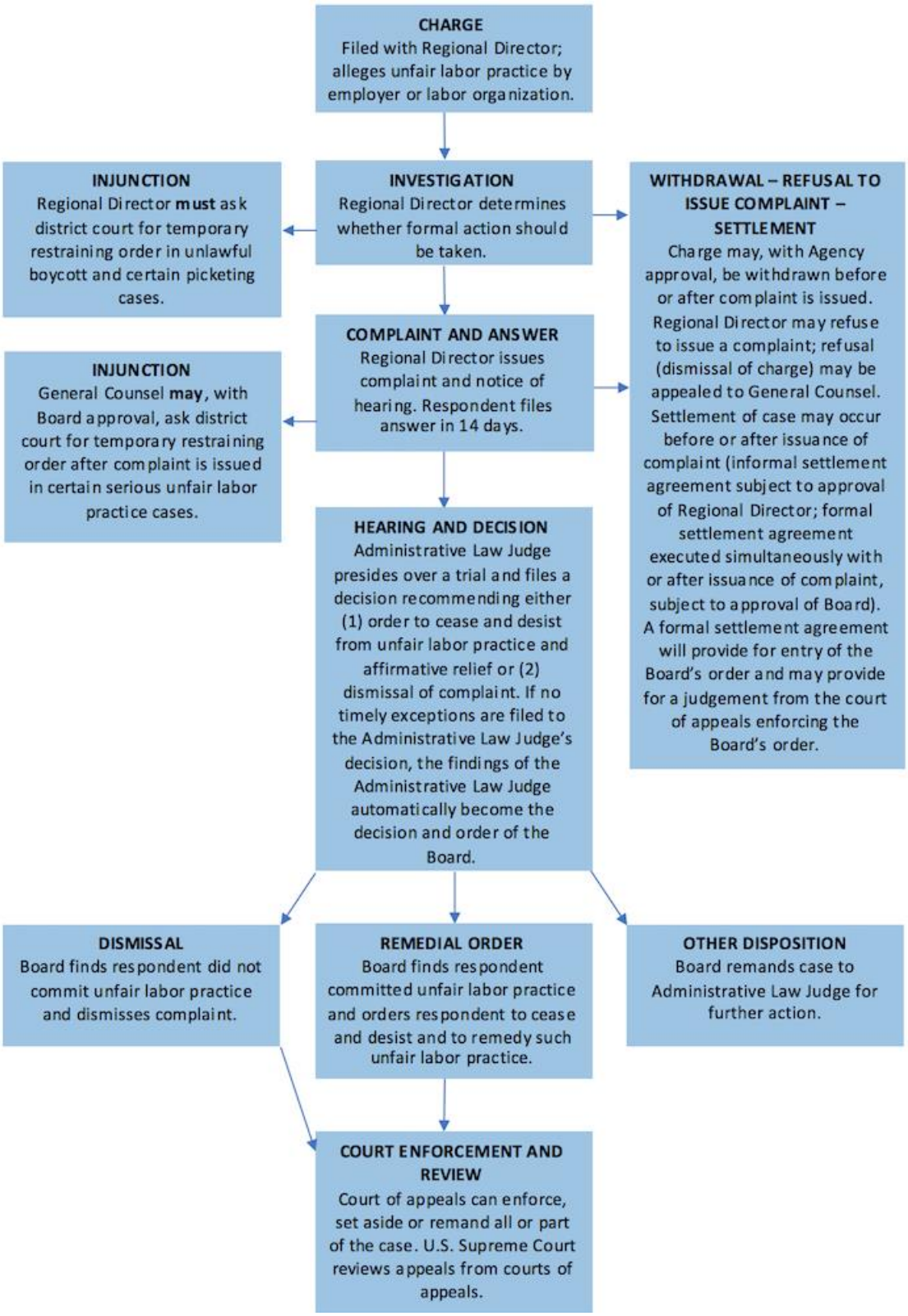
union, employee, and employer. *See* 29 U.S.C. § 151.

Many years ago, the Board "controlled not only the filing of complaints, but their prosecution and adjudication" as well. *NLRB v. Food & Commercial Workers Union*, 484 U.S. 112, 117 (1987). But after 1947, Congress separated the prosecuting function from the adjudication function, placing the former in the General Counsel, and making that individual "an independent official appointed by the President." *Lewis* v. *NLRB*, 357 U.S. 10, 16, n.10 (1958); *see also* 29 U.S.C. § 153(d) (providing for appointment of the General Counsel).

Congress thus separated the Board into "two independent branches," *Food & Commercial Workers*, 484 U.S. at 129, and made the General Counsel "independent of the Board's supervision and review." *Id*. at 118. The General Counsel may not initiate unfair labor practice charges under the NLRA. Complaint, R. 1, Page ID # 9.

The Board maintains an official flowchart showing the essential steps in the unfair labor practice enforcement process. Complaint, R. 1, Page ID ## 11-13. As depicted below, it is not essential to the General Counsel's investigative or prosecutorial decisions to post memoranda: [1]

[1] *See* www.nlrb.gov/resources/nlrb-process. Complaint, R. 1, Page ID #


CHARGE
Filed with Regional Director; alleges unfair labor practice by employer or labor organization.
INVESTIGATION
Regional Director determines whether formal action should be taken.
INJUNCTION
Regional Director must ask district court for temporary restraining order in unlawful boycott and certain picketing cases.
WITHDRAWAL – REFUSAL TO ISSUE COMPLAINT – SETTLEMENT
Charge may, with Agency approval, be withdrawn before or after complaint is issued. Regional Director may refuse to issue a complaint; refusal (dismissal of charge) may be appealed to General Counsel. Settlement of case may occur before or after issuance of complaint (informal settlement agreement subject to approval of Regional Director; formal settlement agreement executed simultaneously with or after issuance of complaint, subject to approval of Board). A formal settlement agreement will provide for entry of the Board's order and may provide for a judgement from the court of appeals enforcing the Board's order.
COMPLAINT AND ANSWER
Regional Director issues complaint and notice of hearing. Respondent files answer in 14 days.
INJUNCTION
General Counsel may, with Board approval, ask district court for temporary restraining order after complaint is issued in certain serious unfair labor practice cases.
HEARING AND DECISION
Administrative Law Judge presides over a trial and files a decision recommending either (1) order to cease and desist from unfair labor practice and affirmative relief or (2) dismissal of complaint. If no timely exceptions are filed to the Administrative Law Judge's decision, the findings of the Administrative Law Judge automatically become the decision and order of the Board.
DISMISSAL
Board finds respondent did not commit unfair labor practice and dismisses complaint.
REMEDIAL ORDER
Board finds respondent committed unfair labor practice and orders respondent to cease and desist and to remedy such unfair labor practice.
OTHER DISPOSITION
Board remands case to Administrative Law Judge for further action.
COURT ENFORCEMENT AND REVIEW
Court of appeals can enforce, set aside or remand all or part of the case. U.S. Supreme Court reviews appeals from courts of appeals.

11 n. 11, 13.

B. Factual Background

Congress delegated to the Board sole authority to decide cases and make rules & regulations

The Board consists of five members and primarily acts as a quasi-judicial body in deciding and adjudicating cases based on formal records in administrative proceedings. Complaint, R. 1, Page ID # 8. Board members are appointed by the President, to five-year terms, with Senate consent. Complaint, R. 1, Page ID # 8. The Board sets agency policy primarily through the adjudication of cases. Complaint, R. 1, Page ID # 8.

Additionally, the Board also sets agency policy through proposed rulemaking subject to public notice and comment in accordance with the procedures of the Administrative Procedure Act ("APA"). Complaint, R. 1, Page ID # 8. Specifically, Congress delegated to the Board sole authority "to make, amend, and rescind [in accordance with the APA] such rules and regulations as may be necessary to carry out the provisions of the [NLRA]." 29 U.S.C. §156.

By contrast, Congress did not delegate to the General Counsel the authority to make, amend, and rescind rules and regulations necessary

to carry out the provisions of the NLRA. *See* 29 U.S.C. §156 (expressly omitting the General Counsel from making rules and regulations in accordance with the APA that are necessary to carry out the NLRA). Complaint, R. 1, Page ID # 8.

General Counsel Abruzzo's public Memorandum GC 22-04

On April 7, 2022, General Counsel Abruzzo issued Memorandum GC 22-04, in which she announced that she would seek to overturn longstanding precedent to prohibit employers from discussing unionization with employees during mandatory meetings. Complaint, R. 1, Page ID # 10. She signed the Memorandum with her initials in her official capacity as General Counsel. Complaint, R. 1, Page ID # 10. The Memorandum, entitled "The Right to Refrain from Captive Audience and other Mandatory Meetings," a true and correct copy of which is attached to the Complaint as Exhibit 1, was directed to all "Regional Directors, Officers-in-Charge, and Resident Officers." Complaint, R. 1, Page ID # 10; R. 1-1, Page ID ## 30-33.

Despite stating in the Memorandum that it was directed internally to certain employees under her charge, General Counsel Abruzzo nevertheless published her Memorandum on the Board's public website,

and it remained posted to the Board's website at the time of filing the lawsuit that forms the basis for this appeal. Complaint, R. 1, Page ID # 11; R. 1-1, Page ID ## 30-33.

In her public Memorandum, Abruzzo characterized the 75-year-old Board decision that she was criticizing, *Babcock V. Wilcox Co.*, 77 N.L.R.B. 577 (1948), as a "license to coerce" employees and "an anomaly in labor law, inconsistent with the [NLRA's] protection of employees' free choice and based on a fundamental misunderstanding of employers' speech rights." Complaint, R. 1, Page ID # 14.

Abruzzo then explained how she would seek to use her position to overturn *Babcock*: by targeting employers with unfair labor practice prosecutions when an employer speaks to an employee about unionization and the employee is either required (1) to "convene" on paid time or (2) "cornered" by management while performing their job duties. Complaint, R. 1, Page ID # 14. To further her goal to use her position as General Counsel to overturn the *Babcock* precedent, Abruzzo focused on two lines of attack. Complaint, R. 1, Page ID # 15. 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." Complaint, R. 1, Page ID # 15.

Abruzzo's public Memorandum was not issued by the Board as proposed rulemaking pursuant to the APA; it was not subject to public notice and comment; and it was not published in the Federal Register. Complaint, R. 1, Page ID # 14. Abruzzo's public Memorandum is not an authorized government communication that is protected speech by the First Amendment. Complaint, R. 1, Page ID # 11. Abruzzo's public Memorandum is not an expression of her opinion to convince others that *Babcock* is an anomaly. Complaint, R. 1, Page ID # 11. Publicly publishing her Memorandum on the Board's website was not essential to Abruzzo's impartial investigative or prosecutorial decisions on (1) whether a charge against an employer under the NLRA was meritorious; (2) whether to issue a complaint against an employer after a charge was filed under the NLRA; (3) whether to settle with an employer charged under the NLRA; or (4) whether to prosecute, settle, or dismiss a charge or complaint against an employer under the NLRA. Complaint, R. 1, Page ID # 11.

Abruzzo has never publicly disavowed her statements and views that she expressed in her public Memorandum. Complaint, R. 1, Page ID # 14. And Abruzzo has never retracted her Memorandum from the Board's public website. Complaint, R. 1, Page ID # 14.

Abruzzo's public Memorandum is an attempt to create a legal vehicle to change precedent to favor unions and disfavor employers

Since her appointment as General Counsel, Abruzzo has embarked on a personal campaign to transform federal labor law under the NLRA to favor unions, and to disfavor employers. Complaint, R. 1, Page ID # 1. Abruzzo's attempt to overhaul federal labor law has not been in accordance with her valid statutory authority as General Counsel to investigate and prosecute cases once unfair labor practice charges are filed. Complaint, R. 1, Page ID # 2. Rather, she has sought to overhaul federal labor law by making public threats in memos, like her Memorandum at issue in this case to overturn *Babcock*. Complaint, R. 1, Page ID ## 2, 3. Even the media have taken notice of Abruzzo's penchant for writing public memos and have dubbed her "The Memo Writer."[2] Complaint, R. 1, Page ID # 2.

[2] Harold Meyerson, *The Memo Writer*, The American Prospect (Apr. 2022), available at https://prospect.org/labor/memo-writer-jennifer-

In public remarks at a conference as reported by Bloomberg Law just a few days before ABC Michigan filed this lawsuit, Abruzzo revealed that she initially targeted over 50 precedents that she disfavored.[3] Complaint, R. 1, Page ID ## 2, 15; R. 1-2, Page ID ## 34-37. She cajoles unions to file unfair labor practice charges against employers because she "is still lacking cases she can use to challenge certain precedents to shift federal labor law to benefit workers and unions."[4] Complaint, R. 1, Page ID ## 2, 15; R. 1-2, Page ID ## 34-37. The article noted that her approach would "likely motivate unions to file charges focused on creating the vehicles to change those precedents."[5] Complaint, R. 1, Page ID ## 2, 15; R. 1-2, Page ID ## 34-37. The conference moderator joked that she "saw union counsel making a Christmas wish list for

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abruzzo. Complaint, R. 1, Page ID # 2 n. 1.

[3] Robert Iofalla, *Abruzzo's Plan to Overhaul NLRB Precedent Still in Need of Cases*, Bloomberg Law (Mar. 1, 2023), available at https://news.bloomberglaw.com/dailylabor-report/abruzzos-plan-to-overhaul-nlrb-precedent-still-in-need-of-cases. Complaint, R. 1, Page ID # 2 n. 2.

[4] *Id.*

[5] *Id.*

Jennifer."[6] Complaint, R. 1, Page ID # 3; R. 1-2, Page ID ## 34-37.

ABC Michigan's employer members' injuries

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. Complaint, R. 1, Page ID # 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. Complaint, R. 1, Page ID # 17.

For example, 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. Complaint, R. 1, Page ID # 18. First, Abruzzo said, "I will urge the Board to correct that anomaly." Complaint, R. 1, Page ID # 18. 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." Complaint, R. 1, Page ID # 18.

Additionally, ABC Michigan and its employer members are on notice of Abruzzo's public remarks as reported by Bloomberg Law on March 1,

[6] *Id.*

2023. Complaint, R. 1, Page ID # 18. Specifically, its employer members are on notice that, as reported, 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." Complaint, R. 1, Page ID # 18. Moreover, ABC Michigan and its employer members are on notice that 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." Complaint, R. 1, Page ID # 18.

ABC Michigan employer members' interpretation of Abruzzo's public Memorandum is that it is intended: (1) 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; (2) 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 (3) 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. Complaint, R. 1, Page ID ## 18-19.

But for Abruzzo's threat of prosecution in her public Memorandum by inserting herself into the discussion, ABC Michigan employer members would engage in lawful free speech and express to their employees their views, argument, or opinion on unionization during mandatory work meetings. Complaint, R. 1, Page ID # 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. Complaint, R. 1, Page ID # 19.

C. Procedural History

On March 16, 2023, ABC Michigan filed its Complaint for Declaratory and Injunctive Relief against General Counsel Abruzzo in her official capacity, seeking prospective injunctive relief. Complaint, R. 1, Page ID ## 1-45. The Complaint included four federal claims under the First and Fifth Amendments to the U.S. Constitution. Complaint, R. 1, Page ID ## 19-28. The following day, ABC Michigan filed a motion for

preliminary injunction. Motion Preliminary Injunction, R. 5, Page ID ## 56-61. And ABC Michigan filed a brief in support of its motion for preliminary injunctive relief, along with its President's declaration. Brief Preliminary Injunction, R. 6, Page ID ## 62-105.

On May 22, 2023, Abruzzo filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject-matter jurisdiction and failure to state a claim, and it was supported by a memorandum of law. Motion to Dismiss, R. 16, Page ID ## 136-189. In support of her 12(b)(1) motion, Abruzzo made a facial attack instead of a factual attack and thus did not present extrinsic factual evidence showing the district court did not have subject-matter jurisdiction. Motion to Dismiss, R. 16, Page ID ## 136-189. ABC Michigan filed a response to Abruzzo's motion to dismiss. Response Motion to Dismiss, R. 20, Page ID ## 235-275.

Abruzzo also filed a response to ABC Michigan's motion for preliminary injunction, which she did not support with extrinsic factual evidence such as declarations or affidavits opposing ABC Michigan's motion, brief, and its President's declaration. Response to Motion Preliminary Injunction, R. 17, Page ID ## 190-211.

On July 31, 2023, the district court issued an opinion and order granting Abruzzo's motion to dismiss and entered judgment against ABC Michigan. Opinion, R. 23, Page ID ## 375-89; Judgment, R. 24, Page ID # 390.

Although Abruzzo mounted a facial attack on subject-matter jurisdiction and did not present extrinsic evidence, the court said the "General Counsel claims that she acted well within her prosecutorial authority in issuing the memorandum." Opinion, R. 23, Page ID # 376. In granting dismissal the district court said that Abruzzo "has the better argument" regarding subject-matter jurisdiction, citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). Opinion, R. 23, Page ID ## 380-81.

With respect to Article III associational standing, the district court said, "The Court is not aware of a binding case that rejects ABC Michigan's broad view of associational standing based on new statutory developments." Opinion, R. 23, Page ID # 387. Nevertheless, it said, "The Court concludes that the factual allegations in ABC Michigan's Complaint fails to assert a *Twombly* plausible claim of standing under the theory it advances." Opinion, R. 23, Page ID # 387.

The district court added that it "need not reach the General Counsel's alternate argument [within 'Abruzzo's Motion to Dismiss (ECF No. 16)' that it fully granted] that ABC Michigan has failed to state a claim upon which relief can be granted with respect to the four counts alleged." Opinion, R. 23, Page ID # 389. The court dismissed ABC Michigan's motion for preliminary injunction as moot. Opinion, R. 23, Page ID # 389.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing Plaintiff ABC Michigan's federal claims that arise under the U.S. Constitution and denying its motion for preliminary injunction.

First, the district court erred in concluding that it lacked subject-matter jurisdiction over ABC Michigan's constitutional claims against General Counsel Abruzzo. ABC Michigan alleged in its Complaint—which the district court was required to accept as true—that Abruzzo's public Memorandum was an unconstitutional threat against its NLRA-regulated employer members to quell their disfavored speech and extended beyond Abruzzo's discretion and statutory authority as General Counsel. Generally speaking, under the framework in *Larson v.*

Domestic & Foreign Com. Corp., 337 U.S. 682 (1949), federal district courts have jurisdiction over allegations involving acts committed by executive branch officials like Abruzzo that are unconstitutional or extend beyond their delegated statutory authority.

The district court departed from the general rule that federal courts have jurisdiction over executive branch officials like Abruzzo who commit acts that are unconstitutional or extend beyond their delegated statutory authority. ABC Michigan's claims are not intertwined with the NLRA and do not seek to enjoin the Board from holding a hearing or conducting official business. Nor do they seek to enjoin General Counsel Abruzzo from prosecuting unfair labor practices in accordance with her statutory authority under the NLRA. Rather, ABC Michigan's claims involve allegations of threats by Abruzzo in her public Memorandum *outside* the formal Board enforcement process in violation of the First Amendment and seek to enjoin her to stop her *threats* of prosecution.

Second, under controlling Sixth Circuit precedent, ABC Michigan has shown that it has associational standing to bring a First Amendment suit on its regulated employer members' behalf. Its employer members would otherwise have standing to sue in their own

right; their free speech rights that ABC Michigan seeks to protect are germane to the organization's purpose; and neither the constitutional claims asserted, nor the relief requested, requires the participation of its individual employer members.

Moreover, Abruzzo's public Memorandum threatening regulated employers with prosecution by way of implicit intimidation to quell speech objectively chills ABC Michigan's employer members' free-speech rights. This objective chill and injury to ABC Michigan's employer members could be redressed by a favorable court decision and injunction ordering Abruzzo to retract, delete, and remove her threatening Memorandum from the Board's public website.

Third, ABC Michigan plausibly pled a free-speech claim because Abruzzo's threat to overturn a 75-year-old precedent when its regulated employer members lawfully express their views on unions at required work meetings is coercion and violates the First Amendment. Viewed in context with reports in Bloomberg Law that she is looking for cases to challenge precedents to shift federal labor law to benefit workers and unions, ABC Michigan's employer members reasonably understood Abruzzo's Memorandum to convey a threat of prosecution if they

expressed to their employees their views, argument, or opinion on unionization during mandatory work meetings.

The district court's opinion is irreconcilable with the U.S. Supreme Court's recent decision reaffirming a longstanding First Amendment principle: "Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." *National Rifle Association of America v. Vullo,* 602 U.S. 175, 180 (2024).

Fourth, ABC Michigan is entitled to a preliminary injunction because it is likely to prevail on its First Amendment claim.

ARGUMENT

I. The district court had subject-matter jurisdiction over ABC Michigan's First Amendment free speech claims.

The district court had subject-matter jurisdiction over ABC Michigan's federal constitutional claims. ABC Michigan alleged in the Complaint that Abruzzo's public Memorandum violated the First Amendment Free Speech Clause because it: (1) was a threat of prosecution and censorship scheme that chilled ABC Michigan's employer members' free speech rights; (2) extended beyond Abruzzo's discretion and statutory authority under the NLRA as General Counsel; and (3) was published outside the formal Board enforcement process.

In analyzing subject-matter jurisdiction, the district court erred in failing to accept as true the allegations in the Complaint. Instead, the court said the "General Counsel claims that she acted well within her prosecutorial authority in issuing the memorandum." Opinion, R. 23, Page ID # 376. The court erred because Abruzzo's motion challenging subject-matter jurisdiction presented a facial attack. Thus, the district court was required to confine its jurisdictional analysis to the four corners of the Complaint, accept as true all material allegations in it, and construe it in ABC Michigan's favor, which the court failed to do.

A. This Court reviews de novo a dismissal under Rule 12(b)(1) for lack of subject-matter jurisdiction.

Where, as here, a "facial" challenge under Fed. R. Civ. P. 12(b)(1) is made, an appellate court reviews the district court's dismissal for lack of subject-matter jurisdiction de novo. *Howard v. Whitbeck*, 382 F.3d 633, 636 (6th Cir. 2004).

A Rule 12(b)(1) motion can challenge lack of subject-matter jurisdiction in two ways: through a facial attack or a factual attack. *Abbott v. Mich.*, 474 F.3d 324, 328 (6th Cir. 2007) (citing *DLX, Inc. v. Ky.*, 381 F.3d 511, 516 (6th Cir. 2004)). "A facial attack on the subject-matter jurisdiction alleged in the complaint questions merely

the sufficiency of the pleading." *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007) (cleaned up). In considering a facial attack, a court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Parsons, v. U.S. Dep't of Just.*, 801 F.3d 701, 710 (6th Cir. 2015) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). And this "analysis must be confined to the four corners of the complaint." *Parsons*, 801 F.3d at 706.

In a facial challenge, "the plaintiff's burden to prove federal question subject-matter jurisdiction is not onerous." *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996) (citing *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996)). The plaintiff is merely required to show that the complaint alleges a claim under federal law, and that the claim is "substantial." *Musson Theatrical, Inc.*, 89 F.3d at 1248. A federal claim is substantial unless "prior decisions inescapably render [it] frivolous." *Id.* (quoting *Transcontinental Leasing, Inc. v. Michigan National Bank of Detroit*, 738 F.2d 163, 165 (6th Cir. 1984)).

Therefore, when faced with a Rule 12(b)(1) motion and facial challenge to subject-matter jurisdiction, "the plaintiff can survive the motion by showing any arguable basis in law for the claim made." *Musson Theatrical, Inc.*, 89 F.3d at 1248.

B. ABC Michigan's claims easily clear the low hurdle of Abruzzo's facial challenge because a plaintiff may sue a federal official for Constitutional violations or acts that extend beyond their statutory authority.

The district court's dismissal of First Amendment claims for lack of subject-matter jurisdiction on a facial attack of the Complaint is an outlier and highly unusual, particularly when ABC Michigan's burden to overcome Abruzzo's facial challenge is not onerous. ABC Michigan cleared this low hurdle because it alleged in the Complaint an arguable basis in law in support of its claims: that Abruzzo's Memorandum violated the U.S. Constitution's Free Speech Clause and extended beyond her statutory authority as General Counsel.

It is well-settled that there is no jurisdictional bar to lawsuits filed in federal courts against a United States officer sued in their official capacity for violating the U.S. Constitution. *United States v. Lee*, 106 U.S. 196 (1882); *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682 (1949); 28 U.S.C. § 1331 (providing that "district courts shall have

original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

In general, acts by federal executive branch officials extending beyond their delegated statutory authority—*i.e.*, *ultra vires* actions—are reviewable in federal court. *Larson,* 337 U.S. at 689-90. In *Larson*, the Court held that an executive official may be sued for actions in "conflict with the terms of [her] valid statutory authority." *Id*. at 695; *Dugan v. Rank*, 372 U.S. 609, 622 (1963); *see also Dalton v. Specter,* 511 U.S. 462, 472 (1994) (emphasizing official capacity suits against federal officers are reviewable by courts when the official acts either "unconstitutionally *or* beyond [her] statutory powers." (quoting *Larson*, 337 U.S. at 691 n.11)).

The *Larson* Court further explained that this framework includes suits for "specific relief" such as an "injunction either directing or restraining the defendant officer's actions." *Larson*, 337 U.S. at 688; *Universal Life Church Monastery Church Storehouse v. Nabors*, 35 F.4th 1021, 1041 (6th Cir. 2022) (applying *Larson* and stating that "recalcitrant 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").

Indeed, many courts, including the Supreme Court, have applied the *Larson* framework in myriad instances to allow suits against federal officials, including federal prosecutors such as the United States Attorney General. *See, e.g. Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 139–40 (1951) (applying *Larson* and finding that the U.S. Attorney General acted outside his constitutional authority and could be subject to an injunction); *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) (applying *Larson* to allow a suit against President Clinton in his official capacity); *E.V. v. Robinson*, 906 F.3d 1082, 1095 (9th Cir. 2018) (applying *Larson* to claims for injunctive relief against a military judge); *Martinez v. Marshall*, 573 F.2d 555, 560-61 (9th Cir. 1977) (applying *Larson* against Secretary of Labor); *Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012) (applying the *Larson-Dugan* exception against the Administrative Office of the U.S. Courts in Washington, D.C. when plaintiff sought injunctive relief); *Strickland v. United States*, 32 F.4th 311, 364–66 (4th Cir. 2022) (applying the *Larson-Dugan* exception against multiple defendants in

their official capacities, including the Circuit Executive of the Fourth Circuit, the FPD, and the Chief Judge for the Fourth Circuit); *Washington v. Udall*, 417 F.2d 1310, 1316 (9th Cir. 1969) (applying the *Larson-Dugan* exception to the Secretary of the Interior of the State of Washington); *Petterway v. Veterans Admin. Hospital*, 495 F.2d 1223, 1225 (5th Cir. 1974) (allowing the *Larson-Dugan* exception to apply against a federal official).

Therefore, the general rule is that a district court has subject-matter jurisdiction over a federal official involving claims that assert—as ABC Michigan's Complaint does—that the official *either* violated the Constitution *or* acted outside the bounds of her statutory authority. ABC Michigan's Complaint alleged that Abruzzo did *both*; therefore, the district court erred in granting her motion and facial attack on subject-matter jurisdiction because ABC Michigan showed an "arguable basis in law for the claim[s] made." *See Musson Theatrical, Inc.*, 89 F.3d at 1248.

First, ABC Michigan alleged that Abruzzo violated the Free Speech Clause by publicly publishing her Memorandum as a censorship scheme, suppressing its regulated employer members' disfavored speech. Complaint, R. 1, Page ID ## 1-45. For legal support of its First

Amendment claims, ABC Michigan relied upon Supreme Court precedent, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 52 (1963). Complaint, R. 1, Page ID ## 5, 19-28. ABC Michigan further relied upon this Court's application of *Bantam Books* in a case brought by an association 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); Complaint, R. 1, Page ID ## 5, 19-28. Notably, since the district court's decision, the Supreme Court recently reaffirmed its *Bantam Books'* holding in a case that is controlling here as further discussed below in Section III. *See National Rifle Association v. Vullo*, 602 U.S. 175 (2024).

Second, ABC Michigan alleged in its Complaint that posting memoranda publicly like Abruzzo's Memorandum is not essential to the General Counsel's investigative or prosecutorial decisions under the NLRA. Complaint, R. 1, Page ID # 11. For factual support, ABC Michigan provided the Board's official flowchart depicting the formal NLRA enforcement process. Complaint, R. 1, Page ID ## 12-13. This flowchart reveals that the enforcement process does not require the General Counsel to issue memoranda like Abruzzo's Memorandum.

Complaint, R. 1, Page ID ## 12-13. ABC Michigan further alleged that Abruzzo's Memorandum is not an expression of her opinion to convince others that *Babcock* is an anomaly. Complaint, R. 1, Page ID # 11. ABC Michigan alleged the Memorandum was not issued by the Board as proposed rulemaking pursuant to the APA; it was not subject to public notice and comment; and it was not published in the Federal Register. Complaint, R. 1, Page ID # 14. And ABC Michigan alleged the Memorandum is not an authorized government communication protected by the First Amendment. Complaint, R. 1, Page ID # 11.

C. The district court departed from the general rule that a plaintiff can sue a federal official for their acts that are unconstitutional or exceed their statutory authority.

The district court departed from the general rule that a plaintiff may sue a government official in federal court for acts of the official that violate the Constitution or extend beyond the official's statutory authority.

Despite ABC Michigan's Complaint's clear allegation that its claims against Abruzzo were for her acts that violated the Constitution or were beyond her statutory authority, the district court pointed to the general structure of the NLRA as a sort of universal bar preventing suits

against the NLRB General Counsel. Opinion, R. 23, Page ID ## 380-82. But neither the NLRA's structure nor the cases cited by the district court deprive federal district courts of subject-matter jurisdiction over the types of claims that are asserted in ABC Michigan's Complaint—such as First Amendment free speech claims for public threats of prosecution. Thus, the district court's analysis was incorrect.

The NLRA does not preclude parties from accessing the courts and filing claims that are not intertwined with the NLRA itself. *See e.g.*, *Glacier Northwest, Inc. v. Int'l Bhd. Of Teamsters Local Union No. 174*, 598 U.S. 771, 774 (2023) (employer's state tort claims were not preempted by the NLRA); *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U. S. 731, 741-42 (1983) ("It has . . . repeatedly been held that an employer has the right to seek local judicial protection from tortious conduct during a labor dispute."); *Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656, 669 (1954) (NLRA does not allow employees to "destroy property without liability for the damage done"); *Electrical Workers* v. *Wisconsin Employment Relations Bd.*, 315 U. S. 740, 748 (1942) (NLRA "was not designed to preclude a State" from regulating threats of property damage).

Here, the claims asserted in ABC Michigan's Complaint are not intertwined with any particular adjudication by the Board, the NLRA structure, or any process under the NLRA. Complaint, R. 1, Page ID ## 1-45. Instead, the claims specifically allege that Abruzzo violated the First Amendment and engaged in *ultra vires* conduct by publicly issuing her Memorandum threatening employers with prosecution for their speech—which is not conduct that falls within the scope of her discretionary authority as General Counsel under the NLRA.

Critically, the district court sidestepped this salient fact from the four corners of ABC Michigan's Complaint by relying instead upon unrelated cases with differing fact patterns that find their "roots in the case that the General Counsel principally relies on," *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). Opinion, R. 23, Page ID # 382. But *Myers*—and cases that follow it—does not control the result here.

In *Myers*, an NLRA-regulated employer filed suit in district court and sought to *enjoin a Board hearing* on a complaint of alleged unfair labor practices filed against the employer. 303 U.S. at 43. Thus, the *Myers* district court complaint challenged actions *within* the Board's formal enforcement process and sought to *enjoin* that process. The

Court held that the district court lacked jurisdiction to hear the employer's case because Congress had given the Board and the Circuit Court of Appeals exclusive jurisdiction over claims pertaining to alleged unfair labor practices. *Id.* at 48.

By contrast, ABC Michigan does *not* seek to enjoin any pending or impending proceedings before the Board. Instead, ABC Michigan's Complaint alleges that Abruzzo has violated its members' First Amendment rights by chilling their speech through *threats* of prosecution before the Board. Complaint, R. 1, Page ID ## 5, 6, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28.[7] Those threats were made outside of the Board's formal enforcement process. And, ABC Michigan alleges, those threats are aimed at chilling, and do chill, employers' speech so that formal enforcement proceedings before the Board will *never occur*.

Thus, it will not suffice to say, as the district court did, that ABC Michigan's employer members can and must make their First Amendment argument in the first instance in proceedings before the

[7] This case is distinguishable from another decision the district court relied on with its roots in *Myers*, Opinion, R. 23, Page ID # 382, for the same reason. *See Mayer v. Ordman*, 391 F.2d 889 (6th Cir. 1968) (per curiam).

Board. Opinion, R. 23, Page ID ## 382-85. Their injury arises out of the chilling of their speech *now* to *avoid* prosecution before the Board. ABC Michigan's members cannot remedy that injury—foregoing free speech rights because their speech is chilled—by going to the Board for preemptive relief. They can only obtain relief through the claims they presented to the district court. Again, under *Larson*, they were entitled to seek that relief in the district court. 337 U.S. 682.

And the district court erred in concluding that, notwithstanding *Larson*, it lacked subject-matter jurisdiction under *Leedom v. Kyne*, 358 U.S. 184 (1958). Opinion, R. 23, Page ID ## 383-85.

The district court's reliance on *Leedom* is wrong at the outset because *Leedom* applies to claims against agencies, such as the Board itself, not to claims against individual federal officers, such as General Counsel Abruzzo, which are governed by *Larson*. After 1947, Congress separated the Board into "two independent branches," *Food & Commercial Workers*, 484 U.S. at 129, and made the General Counsel "independent of the Board's supervision and review." *Id*. at 118. As a result, Abruzzo is not the Board—and an injunction against her is not an injunction against the Board or one of its proceedings—and ABC

Michigan's constitutional claims against her are governed by *Larson* as discussed above, not by *Leedom*, which would be dispositive of claims against the Board.

Leedom recognized an exception to the principle that a litigant must ordinarily exhaust all available administrative remedies before filing in federal court. Under *Leedom*, "a litigant may bypass available administrative procedures where there is a readily observable usurpation of power not granted to the agency by Congress." *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 397 (6th Cir. 2002) (discussing *Leedom*). If there is an alternative method of obtaining judicial review of the agency's conduct, then the district court lacks jurisdiction over a claim that challenges that conduct. *Id*. But if, "absent jurisdiction in the district court, the aggrieved parties will be 'wholly deprived' of meaningful judicial review," then the district court has jurisdiction to review a challenge to the agency's *ultra vires* conduct. *Id*. at 398.

Again, ABC Michigan is not complaining of harmful *ultra vires* conduct by the Board (an agency). It is complaining of harmful *ultra vires* conduct by NLRB General Counsel Jennifer Abruzzo, whose office

is separate and distinct from the Board itself.

And even if *Leedom* did apply, ABC Michigan would be entitled to bring its claims in federal court for lack of any other method of obtaining review of Abruzzo's alleged unlawful conduct. Neither the district court nor Abruzzo has identified any forum in which ABC Michigan's employer members could obtain judicial review of the First Amendment claims alleged in the Complaint.

The district court seems to have reasoned that Abruzzo's decision to publish her threatening Memorandum is not materially different from a decision by Abruzzo to file a brief taking the same position in a pending case before the Board. Opinion, R. 23, Page ID ## 383-84. But there is a crucial difference: if Abruzzo simply made an argument in proceedings against an employer before the Board, the employer could respond; the Board could adjudicate the matter; and the party that did not prevail could appeal to the Court of Appeals. But when Abruzzo makes a *threat* of prosecution *outside* of any Board proceedings—for the purpose of chilling employers' speech, as ABC Michigan alleges, Complaint, R. 1, Page ID ## 5, 6, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28—an employer has no recourse before the Board. The employer's only means of seeking

relief is a complaint filed in a federal district court.

Moreover, the making of such threats through publication of memoranda is outside the scope of Abruzzo's authority as General Counsel under the NLRA, Complaint, R. 1, Page ID # 11, while making legal arguments in the course of prosecuting proceedings before the Board is within her statutory authority.

The district court stated that ABC Michigan's reading of the General Counsel's duties under the NLRA is too narrow because it supposedly would limit them "to investigating and prosecuting cases" while "ignoring" the statute's reference to "other duties." Opinion, R. 23, Page ID # 383. But the district court identified nothing in the NLRA establishing the issuance of threatening memoranda to chill speech as one of these "other duties."

And in fact, ABC Michigan is not seeking to limit Abruzzo's statutory duties under the NLRA; Congress has already done so.

First, Congress cabined Abruzzo's statutory authority as General Counsel to investigating and prosecuting cases before the Board. Had Congress intended for Abruzzo and NLRB General Counsels in general to give their agency policy views or guidance to the public through

memoranda—like her Memorandum at issue—it could have said so in the NLRA. But it did not. Instead, Congress delegated *solely* to the Board—which is independent and separate from the General Counsel—authority to communicate policy views and guidance to the public through the APA's formal process, including a notice and comment period and publication in the Federal Register. 29 U.S.C. §156.

Second, publicly publishing her Memorandum on the Board's website was not essential to Abruzzo's discretionary decisions on (i) whether a charge against an employer under the NLRA was meritorious; (ii) whether to issue a complaint against an employer after a charge was filed under the NLRA; (iii) whether to settle with an employer charged under the NLRA; and (iv) whether to prosecute, settle, or dismiss a charge or complaint against an employer under the NLRA. Complaint, R. 1, Page ID # 11.

Third, Abruzzo's issuance of the Memorandum frustrates Congress's purpose under its statutory scheme. Her Memorandum coerces regulated employers to forgo their free speech rights—rights the NLRA specifically preserved, *Babcock v. Wilcox Co.*, 77 N.L.R.B. 577 (1948). And she is using her Memorandum to create a legal vehicle to change

precedent to favor unions and employees, and disfavor employers like ABC Michigan's regulated members. Instead of balancing the burdens and benefits equally among the three main stakeholders—unions, employees, and employers—as the NLRA requires, *see* 29 U.S.C. § 151, Abruzzo is putting her thumb on the scale to shift the balance of power toward unions and employees, and away from employers. Abruzzo's Memorandum is a censorship scheme and scorched-earth tactic that inverts U.S. policy, which has sought to promote the public's interest by eliminating strife and unrest historically associated with labor disputes. *See id.*

II. ABC Michigan has Article III associational standing.

ABC Michigan has Article III associational standing to bring its First Amendment free speech claims against General Counsel Abruzzo on behalf of its regulated employer members. The Complaint shows that all of ABC Michigan's employer members would otherwise have standing to sue in their own right; their free-speech rights that ABC Michigan seeks to protect are germane to the organization's purpose; and neither the constitutional claims asserted in the Complaint, nor the relief requested, requires participation by its individual employer

members.

The district court acknowledged that it "is not aware of a binding case that rejects ABC Michigan's broad view of associational standing based on new statutory developments." Opinion, R. 23, Page ID # 387. Nevertheless, the district court relied upon *Ass'n of Am. Physicians & Surgeons v. United States Food & Drug Admin.*, 13 F.4th 531 (6th Cir. 2021), in concluding that ABC Michigan did not have Article III standing. Opinion, R. 23, Page ID ## 385-89. That analysis was incorrect. Instead, *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019) is a better fit here and controls this case.

A. Courts review decisions on lack of standing de novo.

Courts review legal conclusions on lack of standing de novo. *Sullivan v. Benningfield*, 920 F.3d 401, 407 (6th Cir. 2019).

B. Abruzzo's threat of prosecution objectively chills ABC Michigan's employer members' lawful speech, and courts may stop her threatening behavior.

Abruzzo's threat in her public Memorandum to prosecute regulated employers chills ABC Michigan's employer members' lawful speech on unions that they would express at required work meetings, but for her

Memorandum. Courts may redress their injury by stopping her threat and removing Abruzzo's Memorandum from the Board's public website.

To establish Article III standing to sue in federal court, a plaintiff must show an injury-in-fact that: (1) is concrete, particularized, and imminent; (2) is fairly traceable to defendant's conduct; and (3) would be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). One example of an injury in fact is "an injury to one's constitutional rights." *FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367, 381 (2024).

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)). It is not necessary for plaintiffs to show a direct prohibition against the exercise of First Amendment rights to establish an objective chill to confer standing. *Speech First*, 939 F.3d at 764. Indeed, a public threat of punishment alone, from an official who even appears to have punitive

authority, can be enough to produce an objective chill. *See Bantam Books*, 372 U.S. at 68; *see also Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003); *Levin v. Harleston*, 966 F.2d 85, 88-89 (2d Cir. 1992).

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.

And it is not necessary for an organization asserting associational standing to identify specific members if all of its members are affected by the challenged activity. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009) (Scalia, J.); *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (finding all organization members were affected by release of membership lists).

In its Opinion, the district court relied on *Ass'n of Am. Physicians & Surgeons v. United States Food & Drug Admin.*, 13 F.4th 531, in concluding that ABC Michigan did not have standing to sue General Counsel Abruzzo. Opinion, R. 23, Page ID ## 385-89.

In that COVID-19-related case, a Sixth Circuit panel determined that an organization did not have associational standing to sue various federal government agencies and officials, including the Food and Drug Administration, on behalf of their physician members. 13 F.4th 531. At issue was the drug hydroxychloroquine and its use to treat COVID-19. *Id.* at 535. At the beginning of the pandemic, the FDA issued emergency authorization permitting hydroxychloroquine's use for treatment of COVID-19, but only in limited circumstances and with certain restrictions. *Id.*

In its lawsuit, the association alleged, on behalf of its physician members, that these restrictions violated the implied equal-protection guarantee in the Fifth Amendment's Due Process Clause, the First Amendment right to associate by limiting access to medication useful for meeting in groups during a pandemic, and the APA. *Id.* To make the factual determination of whether the association had Article III standing on behalf of its physician members, the panel looked to the complaint itself. *Id.* at 544.

After reviewing the specific allegations in the complaint and accepting them as true, the panel concluded that the association did not

have standing because it failed to plausibly plead that any of its members had actually been injured by the FDA. *Id.* at 534, 544. The court's analysis turned on the facts alleged in the complaint, including that the FDA's emergency authorization did not regulate the "practice of medicine" and left the "regulation of doctors to the states." *Id.* at 534. Therefore, the court concluded that the FDA's authorization caused no harm or injury to the association's physician members. *Id.* at 544. And because there was no injury to its physician members, the association did not have associational standing to sue federal government agencies and officials. *Id.*

The district court erred in relying on the case to rule that ABC Michigan lacks associational standing. That case is distinguishable for at least two reasons.

First, in that case the association's physician members failed to plead a concrete injury arising from the FDA's emergency authorization. The FDA and various federal defendants had no regulatory authority or control over physicians and the practice of medicine in general. It logically follows that the association would not have standing on behalf of its physician members to sue federal agencies and officials who had

no authority or control over them. By contrast, ABC Michigan's employer members have suffered a concrete injury. As alleged in the Complaint, 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. Complaint, R. 1, Page ID # 19. And unlike the physician members in the case the district court relied on, ABC Michigan's employer members are subject to regulation under the NLRA, which is enforced by General Counsel Abruzzo. Complaint, R. 1, Page ID ## 6, 17. Therefore, the lack of injury to confer associational standing in the case cited by the district court because the association did not plead a concrete injury and the tenuous connection between its non-regulated physician members and federal government officials, does not exist here between ABC Michigan's NLRA-regulated employer members and General Counsel Abruzzo.

Second, *Ass'n of Am. Physicians & Surgeons* was not even a First Amendment case under the Free Speech Clause. Although one of the claims in that case was brought by the physician members under the

First Amendment, the claim appears to have been under the "freedom to assemble" clause since the complaint referred to the "right to associate" in groups during a pandemic. 13 F.4th at 535. By contrast, ABC Michigan's First Amendment claims are brought under the Free Speech Clause. And constitutional claims brought under the Free Speech Clause are particularly important "[b]ecause free speech is 'essential to our democratic form of government.'" *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (quoting *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018)).

A more appropriate case to assist with the standing analysis is this Court's decision in *Speech First*, 939 F.3d 756. In that case, the organization Speech First brought free speech claims on behalf of its members who attended the University of Michigan, challenging the university's "bias response team," initiative which allegedly stifled student speech. *Id*. at 761. Reversing the district court, this Court found that Speech First had associational standing because its members faced an objective chill based on the functions of the University's bias response team. *Id*. at 765. The panel reasoned that the organization had established associational standing because the complaint alleged that

the bias response team's "acts by way of implicit threat of punishment and intimidation to quell speech" violated the First Amendment. *Id.*

Here, ABC Michigan has associational standing on behalf of its employer members to sue Abruzzo because the members have suffered a concrete injury to their constitutional rights—the chilling of their First Amendment free speech rights. The Complaint alleges that all of its NLRA-regulated employer members face an objective chill because of Abruzzo's public Memorandum—a censorship scheme to intimidate and quell NLRA-regulated employers' speech—and her enforcement powers as General Counsel and chief prosecutor under the NLRA. Complaint, R. 1, Page ID ## 16-19; *see Speech First*, 939 F.3d at 765.

There is no dispute that General Counsel Abruzzo is the chief prosecutor with formal statutory authority under the NLRA to investigate, prosecute, and punish unfair labor practices. As NLRA-regulated parties, ABC Michigan's employer members recognize her authority as General Counsel, and they understand that, pursuant to her Memorandum, she will prosecute regulated employers before the Board for an unfair labor practice if they express their views, argument, or opinion on unionization during mandatory work meetings.

Complaint, R. 1, Page ID ## 17-19. They further understand that her Memorandum is being used to attract unions to file unfair labor practice charges against NLRA-regulated employers, which Abruzzo can then use as a vehicle to overturn *Babcock* as she outlined in her Memorandum. Complaint, R. 1, Page ID # 18. In other words, each one of ABC Michigan's employer members is in Abruzzo's crosshairs, because the Memorandum could cause unfair labor practice charges to be formally filed against each of them if they lawfully express their views and opinions on unions to their employees at required meetings.

In its standing analysis, the district court failed to construe the allegations in the Complaint in the light most favorable to ABC Michigan as it was required to do. *See Parsons*, 801 F.3d at 710 (In considering a Rule 12(b)(1) facial attack, a court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party"). Instead, the district court construed the allegations in the Complaint *against* ABC Michigan, even though Abruzzo did not present extrinsic evidence on her Rule 12(b)(1) facial attack challenging jurisdiction.

In the district court's view, Abruzzo's public Memorandum does not

cause harm to ABC Michigan's employer members, and it is no different than her filing a brief in a formal Board proceeding that takes aim at *Babcock*. The court's reasoning on this issue clearly did not construe the allegations in the Complaint in the light most favorable to ABC Michigan as it was required to do.

When construing the allegations in the Complaint in the light most favorable to ABC Michigan, the Memorandum serves as Abruzzo's recruiting tool, advertising to the world that she is looking for individuals or unions to file unfair labor charges against employers when they give speeches to their employees during "captive audience meetings"—even lawful speeches. Abruzzo does not like employers giving speeches during "captive audience meetings" as she refers to them in her Memorandum even though they've been lawful for 75 years. And the Memorandum serves a very different and nefarious purpose than Abruzzo's formal briefing before the Board and causes ABC Michigan's employer members to suffer a different type of harm—a *threat* of prosecution which chills their speech.

Consider that if the Memorandum did not accomplish anything for Abruzzo that her formal brief had not already achieved, then she

presumably would have not felt the need to draft and publicly post her Memorandum (addressed internally to her inferiors) in the first place. And she presumably would be willing to take it down. At minimum, the district court erred in failing to properly credit the factual allegations in the Complaint in the light most favorable to ABC Michigan.

And Abruzzo has never publicly disavowed her statements and views that she expressed in her Memorandum. Complaint, R. 1, Page ID # 14. Nor has she ever retracted her Memorandum from the Board's public website, where it remained posted upon the filing of this lawsuit. Complaint, R. 1, Page ID ## 14, 17.

ABC Michigan established associational standing to bring a First Amendment suit against Abruzzo on its employer members' behalf.

First, ABC Michigan's employer members have standing to sue in their own right. Its members suffered a concrete injury and the chilling of their free speech rights as a result of Abruzzo's public Memorandum. But for Abruzzo's threat of prosecution in her public Memorandum by inserting herself into the discussion, ABC Michigan's members would engage in lawful free speech and express to their employees their views, argument, or opinion on unionization during mandatory work meetings.

Complaint, R. 1, Page ID # 19. Their injury is fairly traceable to Abruzzo because she signed the Memorandum with her initials. Complaint, R. 1, Page ID # 10. Their injury and chilled speech would be redressed by a favorable court decision and injunction ordering Abruzzo to retract, delete, and remove her threatening Memorandum from the Board's public website. Complaint, R. 1, Page ID # 28.

Second, ABC Michigan's employer members' speech rights are germane to ABC Michigan's purpose. Complaint, R. 1, Page ID # 6. For example, all of ABC Michigan's employer members believe in the Merit Shop philosophy, which means members believe neutrally balanced labor law legislation that embraces fair play for *both* employer and employee is essential to the preservation of our nation's free enterprise system. Complaint, R. 1, Page ID # 17. Thus, its members' ability to freely exercise their speech rights and express to their employees their views, argument, or opinion on unionization during mandatory work meetings is germane to ABC Michigan's purpose.

Third, neither the claims asserted in the Complaint on behalf of its members, nor the relief requested require ABC Michigan's employer members' participation in the lawsuit. Complaint, R. 1, Page ID # 6. For

example, declaratory and injunctive relief have been requested in the Complaint on behalf of all its members to remedy their chilled speech, and monetary damages have not been requested as relief in the Complaint for certain specific individual employer members.

III. Abruzzo's threat to prosecute employers who lawfully express their views on unions at required work meetings is coercion and violates the First Amendment.

General Counsel Abruzzo's threat to overturn the 75-year-old *Babcock* precedent in her public Memorandum when regulated employers, like ABC Michigan's employer members, lawfully express their views on unions at required work meetings is coercion and violates the First Amendment.

Although the district court said that it "need not reach the General Counsel's alternate argument that ABC Michigan has failed to state a claim upon which relief can be granted with respect to the four counts alleged," the court nevertheless granted "Defendant Abruzzo's Motion to Dismiss (ECF No. 16)." Opinion, R. 23, Page ID # 389. And "Abruzzo's Motion to Dismiss (ECF No. 16)" included a request to dismiss under Rules 12(b)(1) *and 12(b)(6)*. Motion to Dismiss, R. 16, Page ID ## 136-189. The district court also analyzed "the factual allegations in ABC

Michigan's Complaint" based on the *Twombly* plausibility standard with respect to "standing under the theory it advances." Opinion, R. 23, Page ID # 387. Because the *Twombly* plausibility standard is applicable to motions to dismiss under Rule 12(b)(6), Abruzzo's Motion to Dismiss that included a dismissal request under Rule 12(b)(6) was arguably before the district court, which this Court may review.

A. Rule 12(b)(6) motions to dismiss are reviewed de novo.

Motions to dismiss for failure to state a claim under Rule 12(b)(6) are reviewed de novo. *McGlone v. Bell*, 681 F.3d 718, 728 (6th 2012). At the Rule 12 motion to dismiss stage, "the Court assumes the truth of 'well-pleaded factual allegations' and 'reasonable inference[s]'" from the complaint. *National Rifle Association of America v. Vullo*, 602 U.S. 175, 181 (2024) (citing *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-679 (2009)).

B. ABC Michigan plausibly pled a First Amendment claim, and the district court's opinion is irreconcilable with the Supreme Court's recent decision in *National Rifle Association of America v. Vullo*.

The district court erred because ABC Michigan plausibly pled a First Amendment free speech claim supported by longstanding precedent, as well as the Supreme Court's recent decision in *Vullo*, 602 U.S. 175 (2024). As plausibly alleged in the Complaint and viewed in context

with reports that she is looking for cases to challenge precedents to shift federal labor law to benefit workers and unions, ABC Michigan's employer members reasonably understood Abruzzo's Memorandum to convey a threat of prosecution if they expressed to their employees their views, argument, or opinion on unionization during mandatory work meetings.

To state a claim that a government official violated the First Amendment, "a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff 's speech." *Id.* at 191 (citing *Bantam Books*, 372 U.S. at 67-68). The First Amendment "prohibits government officials from wielding their power selectively to punish or suppress speech," either directly or indirectly. *Vullo*, 602 U.S. at 198.

Although a government official can criticize particular beliefs, she cannot "use the power of the State to punish or suppress disfavored expression." *Id*. at 188 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 830 (1995)) (explaining that governmental actions seeking to suppress a speaker's particular views are

presumptively unconstitutional). "Generally speaking, the greater and more direct the government official's authority, the less likely a person will feel free to disregard a directive from the official." *Vullo*, 602 U.S. at 191-92.

"Six decades ago, [the Supreme] Court held that a government entity's 'threat of invoking legal sanctions and other means of coercion' against a third party 'to achieve the suppression' of disfavored speech violates the First Amendment." *Vullo*, 602 U.S. at 180 (citing *Bantam Books*, 372 U.S. at 58, 67). *Bantam Books* "explored the distinction between permissible attempts to persuade and impermissible attempts to coerce." *Vullo*, 602 U.S. at 180.

In *Bantam Books*, a state commission sent official notices to a book distributor noting the commission's "duty to recommend to the Attorney General" certain violations of state obscenity laws. 372 U.S. at 62-63. These notices informed the distributor that lists flagging objectionable books "were circulated to local police departments," and that the distributor's cooperation in removing the books would prevent referral for prosecution. *Id*. The police department undertook follow-up visits to the distributor to ensure compliance. And the distributor stopped

publishing copies of the flagged books out of fear of facing "a court action." *Id.* at 63.

The publishers of these flagged books sued the commission, alleging an informal censorship scheme that violated their First Amendment rights. The Supreme Court held that the First Amendment prevents government officials from employing the "threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression" of disfavored speech. *Id.* at 67. The Court explained that the book distributor "reasonably understood" the state commission threatened adverse action and thus the distributor's compliance with stopping distribution of the flagged books "was not voluntary." *Id.* at 66-68.

The Court analyzed the context of the state commission's written notices "phrased virtually as orders" containing "thinly veiled threats to institute criminal proceedings" if the distributor did not stop distributing the books; its coordination with police; and its authority to refer matters to the state attorney general for prosecution. *Id.*, at 68.

Since *Bantam Books* before the Supreme Court's recent decision in *Vullo*, the Circuit Courts have considered similar cases where a

government official employed an informal censorship scheme designed to suppress disfavored speech.

For example the Seventh Circuit applied *Bantam Books* in a case and said, "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).

The *Backpage* case involved the Cook County sheriff's efforts "intended to crush" a business that hosted an online forum for classified advertising involving "adult" sex-related services. *Id*. at 230. The sheriff wanted to "shut down an avenue of expression of ideas and opinion," which he could not do legally as sheriff based on existing laws. *Id*. So instead, he wrote a letter to credit card companies used on the website—on official letterhead, with his signature as "Cook County Sheriff." It began: "As the Sheriff of Cook County, a father and a caring citizen, I write to request that your institution immediately cease

and desist from allowing your credit cards to be used to place ads on websites like Backpage.com." *Id.*

The Seventh Circuit held that the sheriff's letter violated Backpage's First Amendment rights and reversed the district court's denial of a preliminary injunction. *Id.* at 238-39. The court noted that the letter "was not merely an expression of Sheriff Dart's opinion" but "was designed to compel the credit card companies to act"—and thus suppress Backpage's speech—"by inserting Dart into the discussion." *Id.* at 232. The letter was not merely an "attempt[] to convince" but an "attempt to coerce[]." *Id.* at 230 (quoting *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003)). And "[a] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less direct form." *Id.* (quoting *Okwedy*, 333 F.3d at 344).

In the Supreme Court's recent decision in *Vullo*, a state government official with authority to regulate insurance companies sent guidance

letters to various regulated companies criticizing their history of providing insurance to gun advocacy groups. *Vullo*, 602 U.S. at 184. In response to the guidance letters, the companies entered into consent decrees, accepted fines, and further agreed "not to provide any NRA-endorsed insurance programs (even if lawful)." *Id.* at 185.

The NRA sued the state official under the First Amendment. *Id.* The Court held that the NRA plausibly stated a First Amendment violation. *Id.* at 187. The Court considered the context of the guidance letters and reasoned that the official "had direct regulatory and enforcement authority" over all insurance companies. *Id.* at 192. Like in *Bantam Books*, the official "could initiate investigations and refer cases for prosecution." *Id.* She also "had the power to notice civil charges" and "enter into consent decrees that impose significant monetary penalties." *Id.*

Here, Abruzzo is the chief prosecutor of unfair labor practices under the NLRA. She has direct regulatory and enforcement authority over ABC Michigan's NLRA-regulated employer members. And like in *Bantam Books* and *Vullo*, General Counsel Abruzzo can initiate

investigations and refer cases for prosecution once an unfair labor practice charge has been made.

Against this backdrop in her authoritative role as chief labor prosecutor, General Counsel Abruzzo also made it publicly known a few days prior to this lawsuit being filed, as reported by Bloomberg Law, that she "is still lacking cases she can use to challenge certain precedents to shift federal labor law to benefit workers and unions." Complaint, R. 1, Page ID ## 2, 15; R. 1-2, Page ID ## 34-37. The article noted that her approach would "likely motivate unions to file charges focused on creating the vehicles to change those precedents." Complaint, R. 1, Page ID ## 2, 15; R. 1-2, Page ID ## 34-37. And the article further noted that the conference moderator at the conference where Abruzzo gave public remarks joked that she "saw union counsel making a Christmas wish list for Jennifer." Complaint, R. 1, Page ID # 3; R. 1-2, Page ID ## 34-37.

Moreover, like the Seventh Circuit's *Backpage* case, Abruzzo "inserted" *herself* "into the discussion" when she said that *she* would "urge the Board to correct" the *Babcock* precedent. Her Memorandum is not merely an attempt "to convince" others that *Babcock* is incorrect; it

is a threat of prosecution intended "to coerce" and intimidate NLRA-regulated employers to "adopt sensible assurances" in their speeches during mandatory work meetings to avoid prosecution by her before the Board. The language Abruzzo used in her Memorandum is similar in *Backpage* because she said that she would "urge" the Board to correct *Babcock*, which she viewed as an anomaly.[8]

And like the threatening guidance letters in *Vullo*, the notices in *Bantam Books*, and the letter in *Backpage*, Abruzzo's public Memorandum is a classic example of illegal jawboning. "Jawboning is the use of official speech to inappropriately compel private action. Jawboning occurs when a government official threatens to use his or her power—be it the power to prosecute, regulate, or legislate—to compel someone to take actions that the state official cannot."[9] "The term 'jawboning' was first used [during World War II] to describe

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[8] The word "urge" is defined as "[t]o advocate earnestly the doing, consideration, or approval of; press for[.]" *Urge*, *The American Heritage Dictionary of the English Language* (5th ed. 2022).

[9] *See* Will Duffield, *Jawboning against Speech*: *How Government Bullying Shapes the Rules of Social Media*, Policy Analysis no. 934, at p. 2, Cato Institute, Washington D.C. (Sep. 12, 2022), *available* at https://www.cato.org/policy-analysis/jawboning-against-speech.

official speech intended to control the behavior of businessmen and financial markets."[10] "Jawboning is dangerous because it allows government officials to assume powers not granted to them by law. The capriciousness of jawboning by officials in power to unlawfully regulate speech is "uniquely harmful to a free and democratic society." Individual officials can jawbone at will and engage in viewpoint and content speech discrimination, without any sort of due process, by, for example, drafting memos, notices, and guidance letters, opening their mouths, taking up a pen, or communicating on social media.[11]

Abruzzo knows that—absent her coercive jawboning in her Memorandum—it is unlikely that a union would file a charge against an employer for an unfair labor practice when they lawfully exercise their speech rights during mandatory work meetings. She knows that is unlikely because the 75-year-old *Babcock* precedent, which is well-settled law, would foreclose such a charge. So, since the law is against her liking, Abruzzo resorts to writing public memos like her

[10] *Id.*
[11] *Id.*

Memorandum—jawboning—to leverage her official power to control and coerce private employers' behavior and suppress their protected speech.

Abruzzo's public memo-writing approach like in her Memorandum at issue here allows her to intimidate employers—such as ABC Michigan's employer members—through threat of prosecution to forgo their free-speech rights to avoid being dragged through a prosecutorial process before the Board. Her issuance of memoranda—such as Memorandum GC 22-04—is particularly troubling because Abruzzo is vested with authority to enforce labor laws under the NLRA *within* the Board's formal enforcement process. But she is wielding that power *outside* the Board's formal enforcement process, rather than impartially addressing specific charges that arise of alleged unfair labor practices through the NLRA's administrative scheme enacted by Congress.

Apart from her public Memorandum, Abruzzo has no legal power to stifle employers' speeches to their employees during mandatory work meetings, which are protected by the First Amendment, the NLRA, and longstanding precedent. But Abruzzo has sought to coerce businesses and employers to stifle their speech through her Memorandum.

ABC Michigan employer members reasonably understood Abruzzo's

public Memorandum to mean that she published it: (1) 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; (2) 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 (3) 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. Complaint, R. 1, Page ID ## 18-19.

ABC Michigan's regulated employer members' understanding of Abruzzo's Memorandum as being coercive is reasonable, particularly when her Memorandum is placed in context with the Bloomberg Law article that was published a few days before this lawsuit was filed. Accordingly, ABC Michigan plausibly stated a First Amendment claim in its Complaint. *See Vullo*, 602 U.S. at 187.

IV. ABC Michigan is entitled to a preliminary injunction.

ABC Michigan is entitled to a preliminary injunction. Some of the Sixth Circuit's sister courts have either rendered a preliminary injunction or ordered the district court to issue an injunction. This Court should do so here as well.

In light of granting Abruzzo's Motion to Dismiss, the district court dismissed ABC Michigan's Motion for Preliminary Injunction as moot. Opinion, R. 23, Page ID # 389.

A. Standard of review.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Courts consider four factors on a motion for preliminary injunction:

> (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.

Speech First, 939 F.3d at 763. Plaintiffs bear the burden of establishing entitlement to a preliminary injunction. *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

In First Amendment cases, "the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits." *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007).

An appellate court may either render a preliminary injunction or order the district court to do so. *Boudreaux v. La. State Bar Ass'n*, 86 F.4th 620, 640 (5th Cir. 2023) (rendering "a preliminary injunction preventing the LSBA from requiring Boudreaux to join or pay dues to the LSBA pending completion of the remedies phase"); *Backpage.com*, 807 F.3d at 239 (reversing "the judge's ruling with directions that he issue the following injunction" given the strength of plaintiff's case).

B. ABC Michigan satisfied the Rule 65 factors.

The record shows that ABC Michigan is entitled to a preliminary injunction on behalf of its employer members and has satisfied the four preliminary injunction factors under Fed. R. Civ. P. 65.

ABC Michigan's Motion for Preliminary Injunction is not moot because, as previously discussed in Sections I, II, and III, the issues are still live and it has a legally cognizable interest in the outcome of this case on behalf of its employer members. See *Powell*, 395 U.S. at 496.

And it is likely to succeed on the merits of its claim under the first

preliminary injunction factor and thus is also likely to succeed on the second factor—irreparable harm absent a preliminary injunction—because those factors are intertwined here as a result of ABC Michigan's First Amendment claim.

Accordingly, ABC Michigan requests that this Court follow the Fifth or Seventh Circuits and either render a preliminary injunction, or order the district court to issue one.

Likelihood of Success on the Merits

Count I. ABC Michigan plausibly pled a Free Speech claim in Count I of its Complaint. 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,* 138 S. Ct. at 2486.

Count II. ABC Michigan plausibly pled a Free Speech claim in Count II. Abruzzo's Memorandum threatens to punish speech based on its content or viewpoint. Content and viewpoint regulations are presumptively invalid. *Vullo*, 602 U.S. at 187; *Rosenberger*, 515 U.S. at

830; *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 plausibly pled a Free Speech and Due Process claim in Count III. 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 plausibly stated a 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." *Vullo*, 602 U.S. at 187; *Bantam Books*, 372 U.S. at 64; *Backpage.com,* 807 F.3d at 231; *Okwedy*, 333 F.3d at 344.

Irreparable Harm

Because ABC Michigan has established that it is likely to prevail on the merits of its Free Speech claims, it has thus also shown that its injury is irreparable without an injunction because "[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)).

Balance of Equities

"The government's and the public's interests merge when the government is a party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The Sixth Circuit has held that "the 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). Because of the loss of its employer members' First Amendment Free Speech rights and to serve the public interest by preventing the violation of constitutional rights, issuing an injunction would outweigh any potential harm to General Counsel Abruzzo.

CONCLUSION

For these reasons, ABC Michigan respectfully requests that the Court reverse the district court's decision and vacate its Judgment.

With respect to Issue 4 presented for review, ABC Michigan respectfully requests that this Court: render a preliminary injunction,

or order the district court to issue one, ordering General Counsel Abruzzo to retract, delete, and remove her Memorandum from the Board's public website. Alternatively, this Court may also remand to the district court for determination on issuing a preliminary injunction.

Dated: August 16, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 6 Cir. R. 32(b) because it contains 12,918 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: August 16, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2024, the foregoing Principal Brief was filed through the Court's Electronic Filing System, which will send notice to all counsel appearing in this matter.

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ADDENDUM

Appellant's Designation of Relevant District Court Documents

Case No. 1:23-cv-00277 District Court for the Western District of Michigan			
District Court Record Entry No.	Date	Description	PageID Range
1	3/16/23	Complaint	1-45
5	3/17/23	ABC's Motion for Preliminary Injunction	56-61
6	3/17/23	Brief in Support of Motion for Preliminary Injunction	62-105
12	4/7/23	Order Setting Briefing Deadlines	123-126
16	5/22/23	Defendant's Motion to Dismiss	136-189
17	5/22/23	Defendant's Response in Opposition to Motion for Preliminary Injunction	190-211
19	6/5/23	ABC's Reply in Support of Motion for Preliminary Injunction	213-234
20	6/19/23	ABC's Response in Opposition to Motion to Dismiss	235-275
21	7/10/23	Defendant's Reply in Support of Motion to Dismiss	276-373
23	7/31/23	Opinion and Order Granting Motion to Dismiss	375-389
24	7/31/23	Judgment	390
25	8/4/23	Transcript of Hearing on Motion to Dismiss and Motion for Preliminary Injunction	391-427
26	8/30/23	Notice of Appeal	428-429