

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 REPLY BRIEF

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INTRODUCTION

General Counsel Abruzzo's response brief fails to address many of ABC Michigan's arguments.

First, Abruzzo incorrectly asserts that the district court properly interpreted the facts in favor of ABC Michigan. As ABC Michigan notes in specific detail in both its principal brief and below in this brief, the district court failed to properly construe the facts alleged in the Complaint in the light most favorable to ABC Michigan as it was required to do.

Second, ABC Michigan cleared the low hurdle of Abruzzo's facial challenge, and the district court had subject-matter jurisdiction over ABC Michigan's First Amendment free speech claims.

Third, ABC Michigan established Article III associational standing on behalf of all its employer members: they have standing to sue in their own right; their speech rights are germane to ABC Michigan's purpose; and its First Amendment claims, and requested relief do not require its employer members' individual participation in the lawsuit.

Fourth, this Court may either render, or direct the district court to render, a preliminary injunction ordering Abruzzo to retract, delete, and remove her Memorandum from the Board’s public website.

ARGUMENT

I. The district court failed to construe the factual allegations in the Complaint in the light most favorable to ABC Michigan as it was required to do.

The district court failed to construe in ABC Michigan’s favor the factual allegations it pled in the Complaint to support its First Amendment free speech claims.

General Counsel Abruzzo’s brief begins by arguing that “it is important to clear up ABC’s repeated assertions in its brief that the lower court failed to construe allegations in its complaint in favor of ABC.” Abruzzo Br. at 14. As she must, Abruzzo acknowledges “[i]t is of course true that” a district court must accept the non-conclusory factual allegations in ABC Michigan’s Complaint as true and determine whether the Complaint has stated a plausible claim for relief—in this case whether those alleged facts support four claims under the First Amendment Free Speech Clause. Abruzzo Br. at 14. But what follows in her brief unnecessarily muddies the issue.

Indeed, Abruzzo attempts to show that the district court is not required to accept conclusory allegations or legal conclusions “masquerading as factual allegations” in ABC Michigan’s Complaint. Abruzzo Br. at 14. But instead of citing to ABC Michigan’s Complaint to show examples of these purportedly offensive “masquerading factual allegations,” Abruzzo cites to one of ABC Michigan’s *brief headings* stating that the Complaint cleared the low hurdle of a motion to dismiss because the Memorandum violated the U.S. Constitution’s Free Speech Clause. Abruzzo Br. at 15. And Abruzzo similarly cites to other portions of ABC Michigan’s *brief* in arguing that a “threat” designed to “chill employers’ speech,” is a legal conclusion. Abruzzo Br. at 15.

But these are strawman arguments and do not show “masquerading factual allegations” in the *Complaint*, nor do they refute ABC Michigan’s claim that the district court failed to construe the facts alleged in the Complaint in the light most favorable to ABC Michigan, as it was required to do. More importantly, General Counsel Abruzzo fails to identify in her brief any specific paragraphs in ABC Michigan’s Complaint that are improper conclusory allegations or legal conclusions “masquerading as factual allegations.” Abruzzo Br. 14-17.

When the focus is properly trained on the Complaint itself, the defects in Abruzzo's argument become clear. ABC Michigan's Complaint alleged specific *facts* to support its First Amendment free speech claims, which the district court failed to properly construe in its favor.

For example, the Complaint alleged that: posting memoranda like Abruzzo's publicly is not essential to the General Counsel's investigative or prosecutorial decisions under the NLRA (Complaint, R. 1, Page ID # 11); the Board's official flowchart depicting the formal NLRA enforcement process does not require the General Counsel to issue memoranda like Abruzzo's Memorandum (Complaint, R. 1, Page ID ## 12-13); Abruzzo's Memorandum is not an expression of her opinion to convince others that *Babcock* is an anomaly (Complaint, R. 1, Page ID # 11); the Memorandum was not issued by the Board as proposed rulemaking pursuant to the APA, was not subject to public notice and comment, and was not published in the Federal Register (Complaint, R. 1, Page ID # 14); and the Memorandum is not an authorized government communication protected by the First Amendment (Complaint, R. 1, Page ID # 11). ABC Michigan Br. 28-29.

These facts alleged in the Complaint are not improper conclusory allegations or legal conclusions, nor does General Counsel Abruzzo specifically question their sufficiency.

And as further discussed in its brief, ABC Michigan's regulated employer members' understanding of Abruzzo's public Memorandum as being coercive in violation of the First Amendment 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. *See National Rifle Association v. Vullo*, 602 U.S. 175, 187 (2024). ABC Michigan Br. at 63.

II. Abruzzo's mere facial challenge to subject-matter jurisdiction cannot defeat ABC Michigan's First Amendment free speech claims.

General Counsel Abruzzo's facial challenge to subject-matter jurisdiction cannot defeat ABC Michigan's First Amendment free-speech claims because ABC Michigan alleges in the Complaint that publicly publishing her Memorandum was outside of her statutory authority as NLRB General Counsel. ABC Michigan Br. 21-38.

Generally, Abruzzo's brief argues that ABC Michigan's claims are precluded by precedent establishing that any challenge to the NLRB

General Counsel’s exercise of her statutory authorities must occur through the NLRA’s exclusive statutory review scheme. Her argument misses the point. ABC Michigan’s Complaint alleges that Abruzzo’s public publishing of her Memorandum was *outside* of her statutory authority as NLRB General Counsel. There is no requirement that a plaintiff who claims that the NLRB General Counsel is acting *outside* the scope of her statutory authority must assert that challenge *within* the NLRA’s statutory review scheme. And Abruzzo does not cite any legal authority in her brief showing otherwise.

Specifically, Abruzzo argues that “the exclusive statutory review scheme of the NLRA, combined with the fact that ABC is challenging the unreviewable prosecutorial actions of the NLRB’s General Counsel, defeat any claims of subject-matter jurisdiction.” Abruzzo Br. at 17. This is incorrect. The “exclusive statutory review scheme of the NLRA” does not include First Amendment free-speech claims alleging that the NLRB General Counsel acted *outside* her statutory authority by issuing the public Memorandum. Nor do the allegations in the Complaint involve General Counsel Abruzzo’s “prosecutorial actions.”

As ABC Michigan argued in its brief, 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.” ABC Michigan Br. at 21. Abruzzo’s response brief mistakenly characterizes the Complaint as alleging a challenge that ABC Michigan did not assert. Thus, there is a disconnect between what ABC Michigan alleged in its Complaint and argued in its brief, versus what Abruzzo attempts to defend in her response brief.

As discussed in ABC Michigan’s brief, when 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)). 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). And “the plaintiff can survive the motion by showing any arguable basis in law for the claim made.” *Id.* ABC Michigan Br. at 23.

Here, the Complaint is clear that 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. Complaint, R. 1, Page ID ## 1-45. 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. Nor does ABC Michigan 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 challenge Abruzzo’s *threats* of prosecution in her public Memorandum as its employer members reasonably understood them. And these *threats* of prosecution in her public Memorandum occurred outside the formal Board enforcement process and violate the First Amendment.

Thus, none of the cases cited by Abruzzo are on point with respect to what ABC Michigan has actually alleged, i.e., that Abruzzo’s public

Memorandum was outside her statutory authority and not part of the formal enforcement process before the Board. *Abruzzo Br.* 17-39.

Contrary to *Abruzzo's* argument, 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.”).

These cases make clear that the district court had subject-matter jurisdiction over ABC Michigan’s First Amendment free-speech claims.

III. ABC Michigan has standing on behalf of its members because they have standing to sue in their own right, their speech rights are germane to ABC Michigan’s purpose, and their participation is not required.

ABC Michigan established Article III associational standing on behalf of its employer members. *ABC Michigan Br.* 38-51. Its members have standing to sue in their own right; their speech rights are germane to ABC Michigan’s purpose; and its First Amendment claims and relief do not require their employer members’ participation.

Despite the district court’s acknowledgment 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, Abruzzo argues, nonetheless, that “ABC’s associational standing claim falters at the start, as it does not show that it or any of its members suffered the requisite injury-in-fact.” Abruzzo Br. at 40. That is incorrect because *all* of ABC Michigan’s employer members suffered an injury in fact. And like the district court, Abruzzo does not cite any new binding case that rejects ABC Michigan’s view of associational standing. Abruzzo Br. 39-56.

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, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019).

In its brief, ABC Michigan argued that its employer members have standing to sue in their own right because its members suffered a

concrete injury and the chilling of their free speech rights as a result of Abruzzo's public Memorandum. ABC Michigan Br. at 49. 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. ABC Michigan Br. at 49; Complaint, R. 1, Page ID # 19. Their injury is fairly traceable to Abruzzo because she signed the Memorandum with her initials. ABC Michigan Br. at 50; Complaint, R. 1, Page ID # 10. And 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. ABC Michigan Br. at 50; Complaint, R. 1, Page ID # 28.

ABC Michigan further argued that its employer members' speech rights are germane to ABC Michigan's purpose. ABC Michigan Br. at 50; 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. ABC Michigan Br. at 50; 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. ABC Michigan Br. at 50.

Finally, ABC Michigan argued that neither the claims asserted in the Complaint on behalf of its members, nor the relief requested require its employer members' participation in the lawsuit. ABC Michigan Br. 50-51; 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. ABC Michigan Br. 51.

IV. ABC Michigan is entitled to a preliminary injunction, which this Court may redress.

Because ABC Michigan plausibly established a First Amendment free speech claim on the merits, to which Abruzzo failed to respond, ABC Michigan Br. 51-63, it has also established that its employer members have suffered irreparable harm from the loss of their free speech rights under the First Amendment. Therefore, it is appropriate

for this Court to either render a preliminary injunction or order the district court to issue one. ABC Michigan Br. 64-68.

Abruzzo argues that it would be “wholly inappropriate” for this Court to issue a preliminary injunction because the district court “dismissed ABC Michigan’s claims for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).” Abruzzo Br. 56-57. But as ABC Michigan argued in its brief, the merits of its First Amendment claims were before the district court because “Abruzzo’s Motion to Dismiss (ECF No. 16)” included *both* jurisdictional and substantive legal arguments, and the district court analyzed these substantive arguments on the merits in reaching its final decision. ABC Michigan Br. 51-52; Opinion, R. 23, Page ID # 387.

In determining whether to issue a preliminary injunction 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

[state bar association] from requiring [the plaintiff] to join or pay dues to [it] pending completion of the remedies phase”); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 239 (7th Cir. 2015) (reversing “the judge’s ruling with directions that he issue the following injunction” given the strength of plaintiff’s case).

Here, contrary to Abruzzo’s contention that ABC Michigan’s “claims were dismissed solely on subject matter jurisdiction and standing grounds,” Abruzzo Br. at 59, the district court actually granted “Abruzzo’s Motion to Dismiss (ECF No. 16)” under *both* Rules 12(b)(1) and 12(b)(6) and applied *Twombly*’s plausibility pleading standard in dismissing the case. ABC Michigan Br. 51-52; Motion to Dismiss, R. 16, Page ID ## 136-189.

Therefore, the merits of ABC Michigan’s First Amendment free speech claims were before the district court, and this Court may follow its sister courts in either rendering a preliminary injunction or ordering the district court to issue one.

CONCLUSION

For these reasons, ABC Michigan respectfully requests the relief set forth in its principal brief, including that the Court reverse the district court's decision, vacate its Judgment, and either render a preliminary injunction or order the district court to issue one. Alternatively, this Court may also remand to the district court for determination on issuing a preliminary injunction.¹

Dated: December 4, 2024

Respectfully submitted,

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¹ In a footnote, Abruzzo submits that the Court should order supplemental briefing if it addresses the merits of issuing a preliminary injunction. Abruzzo Br. at 59, n. 11. Likewise, ABC Michigan submits that, should the Court determine the Board's recent decision in *Amazon.com Services, LLC, et al*, 373 NLRB 136 (Nov. 13, 2024) is relevant to the underlying First Amendment claims, subject-matter jurisdiction, or standing, though ABC Michigan does not believe it is, then the Court should order supplemental briefing to that extent.

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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 2,874 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: December 4, 2024

/s/ Buck Dougherty

M.E. Buck Dougherty III

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2024, the foregoing Reply Brief was filed through the Court's Electronic Filing System, which will send notice to all counsel appearing in this matter.

/s/ Buck Dougherty

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