UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN, Plaintiff, v. JENNIFER A. ABRUZZO, in her official capacity as GENERAL COUNSEL NATIONAL LABOR RELATIONS BOARD, Defendant.	Case No. 23-cv-00277 Hon. Robert J. Jonker *** HEARING Date: July 19, 2023 Time: 3:00 PM EDT Location: 699 Federal Building Grand Rapids, Michigan

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Keith E. Eastland
Stephen J. van Stempvoort
Brett Swearingen
MILLER JOHNSON
45 Ottawa Ave. SW
Grand Rapids, MI 49503
Telephone: (616) 831-1700
eastlandk@millerjohnson.com
vanstempvoorts@millerjohnson.com
swearingenb@millerjohnson.com

M. E. Buck Dougherty III, application forthcoming
Jeffrey Jennings, Admitted
Noelle Daniel, Admitted
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
Telephone: 312-637-2280
bdougherty@libertyjusticecenter.org
jjennings@libertyjusticecenter.org
ndaniel@libertyjusticecenter.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Plaintiff Associated Builders and Contractors of Michigan responds in opposition to the motion to dismiss filed by Defendant Jennifer Abruzzo, in her official capacity as General Counsel National Labor Relations Board. ECF No. 16, PageID.136-137. Abruzzo's motion to dismiss should be denied in its entirety.

Abruzzo's reliance on an 80-year-old case as the cornerstone of her motion — *Myers v. Bethlehem Shipbuilding Corp.* — is a nonstarter. Despite Abruzzo's desperate attempts in her brief to cling to *Myers* as a lifeline (ECF No. 16-1), it is inapposite to this case. Moreover, ABC Michigan has pled robust and plausible facts in its Complaint to show that this Court has subject-matter jurisdiction over its constitutional claims under the *Larson* framework.

First, Abruzzo's statutory authority as General Counsel under the National Labor Relations Act is expressly confined to investigating and prosecuting cases; it does not include issuing memoranda to the public on her views on agency policy.

Second, publicly publishing her Memorandum on the Board's website was not essential to Abruzzo's investigative or prosecutorial decisions as General Counsel.

Third, ABC Michigan has Article III associational standing on behalf of all its employer members, and its constitutional claims are ripe because Abruzzo's threat of prosecution in her Memorandum is occurring now.

Fourth, Abruzzo inserted herself into the discussion in her Memorandum — vowing she would "urge" changes to employers' protected speech rights through her prosecutorial powers — chilling ABC Michigan's employer members' Free Speech.

STATEMENT OF RELEVANT FACTS

ABC Michigan incorporates into this response all factual allegations in its Complaint and attached Exhibits as if fully restated. ECF No. 1, PageID.1-29; ECF No. 1-1, PageID.30-33; ECF No. 1-2, PageID.34-37; ECF No. 1-3, PageID.38-45.

A. Congress did not delegate to the General Counsel statutory authority to issue memoranda to the public regarding their views on agency policy.

Under the National Labor Relations Act ("NLRA" or "Act"), Congress delegated to the National Labor Relations Board (the "Board") the authority to set agency policy primarily through the adjudication of cases.[1] ECF No. 1, PageID.8, ¶40. Additionally, the Board sets agency policy through proposed rulemaking subject to public notice and comment in accordance with the Administrative Procedure Act. ECF No. 1, PageID.8, ¶41. Congress delegated to the Board 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. ECF No. 1, PageID.8, ¶42. 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. ECF No. 1, PageID.8, ¶43.

Although the Office of General Counsel is under the executive branch like the Board, the General Counsel position is independent and separate from the Board. ECF No. 1, PageID.9, ¶44. Many years ago, the Board "controlled not only the filing of complaints, but their prosecution and adjudication" as well. *NLRB v. Food &*

[1] *See* https://www.nlrb.gov/reports/agency-performance/board-decisions-issued.

Commercial Workers Union, 484 U.S. 112, 117 (1987). ECF No. 1, PageID.9, ¶45. 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). ECF No. 1, PageID.9, ¶46. 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. ECF No. 1, PageID.9, ¶47.

B. Congress delegated to the General Counsel statutory authority to investigate and prosecute cases.

The General Counsel serves as a prosecutor whose responsibilities include impartially investigating and prosecuting unfair labor practices under the NLRA and before the Board, once a charge is filed by a union, employee, or employer. ECF No. 1, PageID.9, ¶48. Neither the General Counsel, Board, Regional Directors nor field office employees may initiate unfair labor practice charges under the NLRA. ECF No. 1, PageID.9, ¶49. The General Counsel further serves in a supervisory role over the Regional Directors and field offices in processing those cases where charges are brought under the NLRA and in those cases the office prosecutes before the Board. ECF No. 1, PageID.9, ¶50.

A charge deemed meritorious can result in the issuance of a complaint that could lead to an administrative hearing before the Board (unless there is a settlement). ECF No. 1, PageID.10, ¶51. A complaint may include any unfair labor practice that

occurred within the past six months of filing a charge. *See* 29 U.S.C. § 160(b). ECF No. 1, PageID.10, ¶52. After issuing a complaint, the General Counsel becomes a representative for the charging party throughout settlement discussions and the adjudicative process before the Board. ECF No. 1, PageID.10, ¶53. Although the Board cannot assess penalties, the General Counsel and Regional Directors may seek make-whole remedies, such as reinstatement and backpay for discharged workers, and informational remedies, such as requiring an employer to post notice promising to not violate the law. ECF No. 1, PageID.10, ¶54.

C. Under the NLRA's formal enforcement process, posting memoranda on the Board's public website is not essential to the General Counsel's investigative and prosecutorial decisions.

On April 7, 2022, Abruzzo issued Memorandum GC 22-04, in which she announced that she would seek to overturn longstanding labor precedent to prohibit employers from discussing unionization with employees during mandatory meetings. ECF No. 1, PageID.10, ¶55. The Memorandum, entitled "The Right to Refrain from Captive Audience and other Mandatory Meetings," was directed to all "Regional Directors, Officers-in-Charge, and Resident Officers." ECF No. 1, PageID.10, ¶56; ECF No. 1-1, PageID.30-33.

But Abruzzo's Memorandum was published to the public on the Board's website, and it remained posted at the time of filing this lawsuit. ECF No. 1, PageID.11, ¶57. Abruzzo's public Memorandum is not an expression of her opinion to convince others the labor precedent she seeks to overturn is an anomaly. ECF No. 1, PageID.11, ¶58. Abruzzo's public Memorandum is not an authorized government

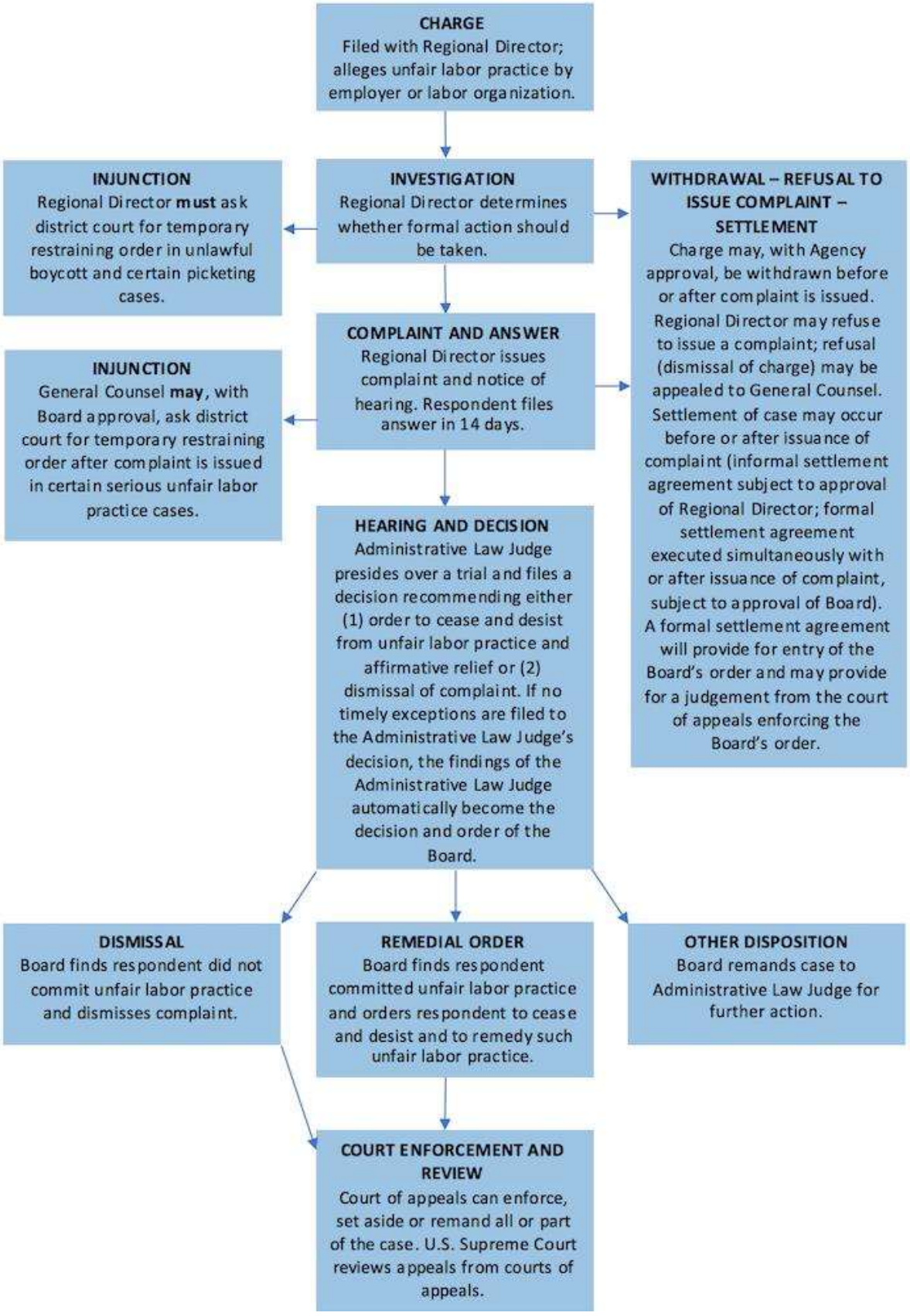
communication or speech protected by the First Amendment. ECF No. 1, PageID.11, ¶59.

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. ECF No. 1, PageID.11, ¶60.

The Board maintains on its public website[2] an official flowchart containing the essential steps in the Board's formal unfair labor practice enforcement process. ECF No. 1, PageID.11, ¶61. The Board's flowchart reveals that the formal process does not require the General Counsel to post memos on the Board's public website. ECF No. 1, PageID.11, ¶62. Nor does the Board's formal enforcement process make posting memos essential to the General Counsel's investigative or prosecutorial decisions. ECF No. 1, PageID.11, ¶63. General Counsel memos — including Abruzzo's Memorandum GC 22-04 — are not listed on the Board's official flowchart, which details the formal NLRA enforcement process. ECF No. 1, PageID.12, ¶64.

The Board's official flowchart is set forth below:

[2] *See* https://www.nlrb.gov/resources/nlrb-process.


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.

ECF No. 1, PageID.12-13, ¶65.

Abruzzo has never publicly disavowed her statements and views that she expressed in her Memorandum. ECF No. 1, PageID.14, ¶66. Abruzzo has never retracted her Memorandum from the Board's public website. ECF No. 1, PageID.14, ¶67. Abruzzo's Memorandum was not issued by the Board as proposed rulemaking pursuant to the Administrative Procedure Act; it was not subject to public notice and comment; and it was not published in the Federal Register. ECF No. 1, PageID.14, ¶68.

D. Abruzzo inserted herself into the discussion as General Counsel in her Memorandum, vowing she would "urge" changes to employers' protected speech rights through her prosecutorial powers.

In her public Memorandum, Abruzzo provided a brief history of the basic principles of labor law but then rejected one of those longstanding principles, stating: "[T]he Board years ago incorrectly concluded that an employer does not violate the Act by compelling its employees to attend meetings in which it makes speeches urging them to reject union representation." ECF No. 1-1, PageID.32. Abruzzo characterized the 75-year-old Board decision 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 Act's protection of employees' free choice and based on a fundamental misunderstanding of employers' speech rights." ECF No. 1-1, PageID.32.

Abruzzo then explained how she would seek to use her position as General Counsel 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. ECF No. 1-1, PageID.32.

To further her goal to use her position to overturn the *Babcock* precedent, Abruzzo focused on two lines of attack. First, Abruzzo said, "I will urge the Board to correct that anomaly." ECF No. 1-1, PageID.32. Second, Abruzzo said, "I will propose the Board adopt sensible assurances that an employer must convey to employees in order to make clear that their attendance is truly voluntary." ECF No. 1-1, PageID.33.

E. But for Abruzzo inserting herself into the discussion in her Memorandum, ABC Michigan's employer members would express to their employees their views, argument, or opinion on unionization at meetings that employees must attend.

Jimmy E. Greene is the President and CEO of Associated Builders and Contractors of Michigan.[3] ECF No. 1, PageID.16, ¶83. As President and CEO, Greene is responsible for the Public Policy and Government Affairs in Michigan for ABC Michigan and its employer members. ECF No. 1, PageID.17, ¶84.

ABC Michigan is a statewide trade association representing the commercial and industrial construction industries. ECF No. 1, PageID.17, ¶85. Membership in ABC Michigan is available to all private businesses and employers in the construction industry who believe in the Merit Shop philosophy, which means members believe neutrally balanced labor law legislation that embraces fair play for *both* employer

[3] *See* https://www.abcmi.com/Who-is-ABC/About-ABC-of-MI/ABC-Staff.

and employee is essential to the preservation of our nation's free enterprise system. ECF No. 1, PageID.17, ¶86. ABC Michigan and its employer members are subject to the NLRA. ECF No. 1, PageID.17, ¶87.

ABC Michigan employer members are dedicated to open competition, equal opportunity, and accountability in the construction industry. ECF No. 1, PageID.17, ¶88. ABC Michigan employer members develop people, win work, and deliver that work safely, ethically, profitably, and for the betterment of the communities in which ABC Michigan and its employer members work. ECF No. 1, PageID.17, ¶89.

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 this lawsuit. ECF No. 1, PageID.17, ¶90. ABC Michigan and its employer members are further on notice of Abruzzo's plan to overturn the *Babcock* precedent that she described in her public Memorandum. ECF No. 1, PageID.17, ¶91. For example, ABC Michigan and its employer members are on notice that to advance her goal to use her position as General Counsel to overturn the *Babcock* precedent, Abruzzo focused on two lines of attack. First, Abruzzo said, "I will urge the Board to correct that anomaly." Second, Abruzzo said, "I will propose the Board adopt sensible assurances that an employer must convey to employees in order to make clear that their attendance is truly voluntary." ECF No. 1, PageID.18, ¶92.

ABC Michigan and its employer members are on notice of Abruzzo's recent public remarks as reported by Bloomberg Law on March 1, 2023. ECF No. 1, PageID.18, ¶93. For example, ABC Michigan and 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." ECF No. 1, PageID.18, ¶94. Moreover, ABC Michigan and its employer members are on notice that as reported by Bloomberg Law, Abruzzo's use of memos and speeches to publicly identify those precedents she wanted to overturn would "likely motivate unions to file charges focused on creating the vehicles to change those precedents." ECF No. 1, PageID.18, ¶95.

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. ECF No. 1, PageID.18-19, ¶96.

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. ECF No. 1, PageID.19, ¶97.

These ABC Michigan employer members do not, however, wish to make threats of reprisal or force or promises of benefit during speeches to their employees on unionization at mandatory work meetings. ECF No. 1, PageID.19, ¶98.

LEGAL STANDARDS

I. Rule 12(b)(1)

" Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction generally come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prods. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007) (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)).

A facial attack on the subject-matter jurisdiction alleged in the complaint questions merely the sufficiency of the pleading. *Gentek*, 491 F.3d at 330. When reviewing a facial attack, a district court takes the allegations in the complaint as true under the same analysis as employed in a Rule 12(b)(6) motion to dismiss. *Id.* "If those allegations establish federal claims, jurisdiction exists." *Id.*

A factual attack on the subject-matter jurisdiction alleged in the complaint presumes no truthfulness to the allegations. *Id.* Under a factual attack, the district court has wide discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve jurisdictional facts. *Id.* "But a district court engages in a factual inquiry regarding the complaint's allegations only when the facts necessary to sustain jurisdiction do not implicate the merits of the plaintiff's claim." *Id.* "When an attack on subject-matter jurisdiction also implicates an element of the cause of action, then the district court should *find that jurisdiction exists* and deal

with the objection as a direct attack on the merits of the plaintiff's claim." *Id.* (emphasis in original).

II. Rule 12(b)(6)

A complaint may not be dismissed under Rule 12(b)(6) for failure to state a claim when it contains sufficient facts, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Plaintiff's complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). And a district court must "construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff." *Universal Life Church Monastery Church Storehouse v. Nabors,* 35 F.4th 1021, 1031 (6th Cir. 2022) (quoting *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016)).

III. Rule 12 and Rule 65 interplay

"When a defendant raises arguments in its motion for dismissal that overlap with those asserted in opposition to a pending motion for a preliminary injunction, a court may resolve both motions at once." *McCaleb v. Long*, 2023 U.S. Dist. LEXIS 48496, *5 (M.D. Tenn. Mar. 22, 2023) (Richardson, J.) (citing *Tenn. v. United States Dep't of Educ.*, 615 F. Supp. 3d 807, 820 (E.D. Tenn. Jul. 15, 2022)).

ARGUMENT

I. This Court has subject-matter jurisdiction over ABC Michigan's constitutional claims under the *Larson* framework because Abruzzo's public Memorandum threatening prosecution is *ultra vires* of her statutory authority as General Counsel.

This Court has subject-matter jurisdiction over ABC Michigan's constitutional claims under the *Larson* framework because Abruzzo's public Memorandum threatening prosecution is *ultra vires* of her statutory authority as General Counsel. Because ABC Michigan's factual allegations in its Complaint must be accepted as true, Abruzzo's facial attack on the Court's subject-matter jurisdiction fails. *See Gentek*, 491 F.3d at 330. The Court should deny Abruzzo's Rule 12(b)(1) motion.

The general rule is that sovereign immunity bars lawsuits against the United States and its officers sued in their official capacity unless Congress has expressly waived immunity by statute. *Lane v. Pena*, 518 U.S. 187, 192 (1996). But this bar does not exist for court orders enjoining federal officials from violating the United States Constitution. *United States v. Lee*, 106 U.S. 196 (1882). Nor does the bar exist when a federal official is sued for acts taken outside her statutory authority.

The U.S. Supreme Court has held that acts by executive branch officials extending beyond their delegated statutory authority — *i.e.*, *ultra vires* actions — are reviewable. *See Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689-90 (1949). In *Larson*, the Court held that an executive officer 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 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; *Nabors*, 35 F.4th at 1041 (Bush, J., joined by Sutton, C.J. and Stranch, J.) (Sixth Circuit panel applying *Larson* and stating "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").

Courts have applied the *Larson* framework in myriad instances to allow suits against federal officials. *See, e.g. Missouri v. Biden,* 2023 U.S. Dist. LEXIS 46918, *70-74, *110 (W.D. La. Mar. 20, 2023) (applying *Larson* in First Amendment Free Speech action against several executive branch officers in their official capacities including President Biden and partially denying Rule 12 motion to dismiss); *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) (applying the *Larson* framework to President Clinton in his official capacity; ("If Swan's removal violated the NCUA statute, the *Larson-Dugan* exception would be triggered and hence no waiver of sovereign immunity is required")); *E.V. v. Robinson*, 906 F.3d 1082, 1095 (9th Cir. 2018) (applying the *Larson* framework to claims for injunctive relief against a military judge); *Martinez v. Marshall*, 573 F.2d 555, 560-61 (9th Cir. 1977) (applying the *Larson* framework against Department of Labor Secretary, F. Ray Marshall); *Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012) (applying the *Larson-Dugan* exception against the Administrative Office of the United States

Courts in Washington, D.C. after the plaintiff attorney 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 to 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); *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).

Here, ABC Michigan is not simply challenging a legal theory in the Memorandum that Abruzzo might raise someday. It is challenging Abruzzo's *current threat* to prosecute its members for exercising their Free Speech rights in a manner of which she disapproves. Thus, contrary to Abruzzo's unsupported suggestions, nothing before the Court shows that ABC Michigan's claims are intertwined with the NLRA itself or involve the Board's administrative process.

ABC Michigan alleges in its Complaint that Abruzzo acted *ultra vires* of her statutory authority under the NLRA as General Counsel by publicly publishing her Memorandum on the Board's website, chilling its employer members' Free Speech rights under the First Amendment. ECF No. 1, PageID.6, ¶25, ¶26. Indeed, ABC Michigan alleges "facts sufficient to establish that [Abruzzo] was acting without any

authority whatsoever, or without any colorable basis for the exercise of authority," when she published her Memorandum on the Board's public website. *See Danos v. Jones*, 652 F.3d 577, 583 (5th Cir. 2011).

And contrary to her misguided arguments, this Court has subject-matter jurisdiction over ABC Michigan's claims under *Larson* because: (1) Abruzzo's statutory authority under the NLRA is expressly confined to investigating and prosecuting cases and does not include issuing memoranda to the public on her views on agency policy; (2) publicly publishing her Memorandum on the Board's website was not essential to Abruzzo's impartial investigative or prosecutorial decisions as General Counsel; and (3) ABC Michigan has Article III associational standing on behalf of all its employer members, and its claims are ripe since Abruzzo's threat of prosecution in her public Memorandum is occurring now.

A. Under the NLRA, Abruzzo's statutory authority is expressly confined to investigating and prosecuting cases; not issuing memoranda to the public on her views on agency policy.

The NLRA expressly confines Abruzzo's statutory authority to investigating and prosecuting cases. *See* 29 U.S.C. § 153(d). It does not authorize Abruzzo to issue public memoranda regarding her views on agency policy.

"Unique among major federal agencies, the [Board] sets almost all of its policy through adjudications rather than rules." *AFL-CIO v. NLRB,* 57 F.4th 1023, 1026-27 (D.C. Cir. 2023). In addition to adjudicating cases, Congress delegated to the Board 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. 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 id*.

The Administrative Procedure Act requires agencies such as the Board to publish notice of proposed rules in the Federal Register and to accept and consider public comments on such proposed rules. *See* 5 U.S.C. § 553(b)-(c). This is a central tenet of the APA's "commitment to public notice and participation." *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980). Having the public's participation ensures that the Board is factually well informed and has the benefit of alternative solutions that public commenters may suggest. *See id*. at 703-04.

To be sure, the APA does provide some exceptions to the requirement that Board communications occur through notice and public comment. *See AFL-CIO,* 57 F.4th at 1034. For example, communications related to "internal house-keeping measures" are not subject to notice and public comment. *Id*. (citing *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (quoting *Batterton*, 648 F.2d at 702)). This is "to ensure that agencies retain latitude in organizing their internal operations." *AFL-CIO,* 57 F.4th at 1034. (citing *Mendoza v Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (quoting *Batterton*, 648 F.2d at 707); accord *Bowen*, 834 F.2d at 1047. Abruzzo does not argue in her brief that her Memorandum is related to "internal operations," nor does she argue that her Memorandum is an "internal house-keeping measure." *See generally* ECF No. 16-1.

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

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

Next, in her brief Abruzzo asserts without any record factual support or legal citation that NLRB General Counsels "routinely" issue "policy guidance" memoranda to the public. This improper statement is as follows:

> For many decades, NLRB General Counsels have routinely issued policy guidance to NLRB staff and the public through General Counsel memoranda. From time to time, that guidance includes recitations of the General Counsel's legal interpretations and positions on bringing new theories before the Board and seeking reversal of extant Board precedent.

ECF No. 16-1, PageID.151. The unsupported statement by Abruzzo must be disregarded because she failed to raise a Rule 12(b)(1) "factual attack," and thus, the Court must take ABC Michigan's factual allegations in its Complaint as true under the same analysis as employed in a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Gentek*, 491 F.3d at 330.

And the record before the Court makes clear that Abruzzo does not have statutory authority under the NLRA to issue public memoranda such as the Memorandum here regarding her views on agency policy.

First, Congress confined Abruzzo's statutory authority as General Counsel to investigating and prosecuting cases. Had Congress intended for Abruzzo and NLRB General Counsels in general to give their agency policy views to the public through memoranda, it could have said so in the statute. It did not. Instead, Congress *exclusively* delegated to the Board — which is independent and separate from the General Counsel — statutory authority to communicate agency policy views to the public through the APA's formal structure and procedure.

Second, Abruzzo's purely *ultra vires* issuances of public memoranda like her Memorandum here frustrates Congress's express statutory intent to have *only* the Board communicate agency policy views to the public through public notice and comment in accordance with the APA.

Third, Abruzzo does not argue that her Memorandum is an "internal house-keeping measure" as recently discussed by the D.C. Circuit Court of Appeals in *AFL-CIO v.* NLRB. Nor does the Memorandum itself suggests it is related to "internal operations." And Abruzzo posted it publicly on the Board's website where it remains, evidencing her Memorandum is not related to "internal operations."

B. Publicly publishing her Memorandum on the Board's website was not essential to Abruzzo's impartial investigative or prosecutorial decisions as General Counsel.

Publicly publishing her Memorandum on the Board's website was not essential to Abruzzo's impartial investigative or prosecutorial decisions as General Counsel.

In her brief, Abruzzo cites *Jackman v. NLRB*. 784 F.2d 759, 764 (6th Cir. 1986). ECF No. 16-1, PageID.160. But she fails to say why *Jackman* supports her prosecutorial discretion argument and fails to identify alleged facts in the Complaint that are on point with *Jackma*n. In fact, *Jackman* weighs in ABC Michigan's favor since that case simply discusses pre-trial prosecutorial discretion when the NLRB General Counsel issues a complaint, which is not an issue here. Indeed, ABC Michigan alleges that publicly publishing her Memorandum on the Board's website was *not essential* to Abruzzo's impartial investigative or prosecutorial decisions as General Counsel.

First, publicly publishing her Memorandum on the Board's website was not essential to Abruzzo's decision on whether a charge against an employer under the NLRA was meritorious Second, it was not essential to Abruzzo's decision on whether to issue a complaint against an employer after a charge was filed under the NLRA. Third, it was not essential to Abruzzo's decision on whether to settle with an employer charged under the NLRA. Fourth, it was not essential to Abruzzo's decision on whether to prosecute, settle, or dismiss a charge or complaint against an employer under the NLRA. ECF No. 1, PageID.11, ¶60. Fifth, the official flowchart

confirms the formal NLRA enforcement process does not require the General Counsel to post memos on the Board's public website. ECF No. 1, PageID.11, ¶62.

C. ABC Michigan's Complaint presents a justiciable controversy.

The facts alleged in ABC Michigan's Complaint present a justiciable controversy. ABC Michigan has Article III associational standing on behalf of all its employer members, and its constitutional claims are ripe.

1. ABC Michigan has Article III associational standing on behalf of its employer members because Abruzzo's threatening Memorandum affects all its members.

ABC Michigan has Article III associational standing on behalf of its employer members because Abruzzo's threatening Memorandum affects all its members.

The Supreme Court has repeatedly held that when courts analyze an associational standing claim, naming specific members may be dispensed with where *all* the members of the organization are affected by the challenged activity. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009) (Scalia, J.) (emphasis in original); *see NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (finding all organization members were affected by release of membership lists).

Here, ABC Michigan's President and CEO "is responsible for the Public Policy and Government Affairs in Michigan for ABC Michigan and its employer members." ECF No. 1, PageID.17, ¶84. Accepting the allegations in ABC Michigan's Complaint as true as the Court is required to do, the constitutional claims are being brought on behalf of *all* ABC Michigan employer members. Thus, ABC Michigan is not required to name specific members in the Complaint because *all* ABC Michigan employer

members are affected by Abruzzo's *ultra vires* public Memorandum that chills their Free Speech rights. *See NAACP*, 357 U.S. at 459.

ABC Michigan has associational standing to pursue claims against Abruzzo on behalf of its employer members because they can show: (1) an injury-in-fact that is concrete, particularized, and imminent; (2) fairly traceable to defendant's conduct; and (3) would be redressed by a favorable court decision. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Article III standing does not require a plaintiff to engage in "costly futile gestures simply to establish standing, particularly when the First Amendment is implicated." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 406 (6th Cir. 1999) (citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392–93 (1988); *Clements v. Fashing*, 457 U.S. 957, 962 (1982)).

Under controlling Sixth Circuit precedent, an association has standing to bring a First Amendment suit on its members' behalf when (a) its members would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019).

ABC Michigan has demonstrated it has Article III associational standing to sue on behalf of its employer members.

First, ABC Michigan's employer members are subject to the Act and labor laws enforced by Abruzzo pursuant to the Act. ECF No. 1, PageID.6. ABC Michigan's

employer members' Free Speech rights are infringed and objectively chilled by threats of prosecution in her public Memorandum. ECF No. 1, PageID.6. For example, ABC Michigan and its employer members are on notice that Abruzzo posted her Memorandum GC 22-04 to the Board's public website, where it remained posted at the time of filing the lawsuit. ECF No. 1, PageID.17. ABC Michigan and its employer members are further on notice of Abruzzo's plan to overturn the *Babcock* precedent that she described in her public Memorandum. ECF No. 1, PageID.17. ABC Michigan and its employer members are on notice that to advance her goal to use her position as General Counsel to overturn the *Babcock* precedent, Abruzzo focused on two lines of attack. First, Abruzzo said, "I will urge the Board to correct that anomaly." Second, Abruzzo said, "I will propose the Board adopt sensible assurances that an employer must convey to employees in order to make clear that their attendance is truly voluntary." ECF No. 1, PageID.18. ABC Michigan and its employer members are on notice of Abruzzo's recent public remarks as reported by Bloomberg Law on March 1, 2023, a few days before filing the lawsuit. ECF No. 1, PageID.18. ABC Michigan and its employer members are on notice that as reported by Bloomberg Law, Abruzzo "is still lacking cases she can use to challenge certain precedents as part of her campaign to shift federal labor law to benefit workers and unions." ECF No. 1, PageID.18. ABC Michigan and its employer members are on notice that as reported by Bloomberg Law, Abruzzo's use of memos and speeches to publicly identify those precedents she wanted to overturn would "likely motivate unions to file charges focused on creating the vehicles to

change those precedents." ECF No. 1, PageID.18. ABC Michigan's employer members' interpretation of Abruzzo's public Memorandum is that it is intended: (i) as a threat to intimidate employers and that Abruzzo will prosecute employers before the Board for an unfair labor practice if they express their views, argument, or opinion on unionization during mandatory work meetings; (ii) as a threat to intimidate employers by placing a target on their backs and declaring open season for unions to file unfair labor practice charges against employers to create a vehicle for Abruzzo to overturn *Babcock*; and (iii) as a threat to intimidate employers by coercing them to "adopt" Abruzzo's approved words and language—"sensible assurances"— when employers express their opinion on unions at meetings that employees must attend, or risk prosecution by her before the Board. ECF No. 1, PageID.18-19. But for Abruzzo's threat of prosecution in her public Memorandum, inserting herself into the discussion, ABC Michigan's employer members would engage in lawful free speech and express to their employees their views, argument, or opinion on unionization during mandatory work meetings. ECF No. 1, PageID.19. These ABC Michigan employer members do not, however, wish to make threats of reprisal or force or promises of benefit during speeches to their employees on unionization at mandatory work meetings. ECF No. 1, PageID.19. Those threats of prosecution in the Memorandum are ongoing and continuous: Abruzzo's Memorandum remains posted on the Board's public website. ECF No. 1, PageID.11; ECF No. 1, PageID.17.

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

Third, ABC Michigan's employer members would receive redress from an injunction (i) stopping Abruzzo from threatening to prosecute employers in her Memorandum on the Board's public website; and (ii) ordering Abruzzo to retract, delete, and remove her Memorandum from the Board's public website. ECF No. 1, PageID.28.

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

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

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

2. ABC Michigan's claims are ripe because Abruzzo's threat to prosecute its employer members is occurring now.

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

Courts analyze ripeness under three considerations: (1) whether the alleged injury is likely to occur; (2) whether the factual record is sufficiently developed to resolve the question; and (3) the hardships, if any, to the parties if the court delays resolution of the question. *Carey v. Wolnitzek*, 614 F.3d 189, 196 (6th Cir. 2010). In some First Amendment contexts, courts apply a "relaxed ripeness" standard. *Id.*; *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 655, 675 (W.D. Mich. Jul. 23, 2010) (Maloney, J.) (finding the case "satisfies the relaxed ripeness standard governing free-speech cases.").

This case is ripe because (1) the alleged First Amendment Free Speech injury — Abruzzo's threat of prosecution — is occurring *now* since her Memorandum remains posted on the Board's public website; (2) the factual record is developed, and there is no dispute that her Memorandum remains posted publicly on the Board's website; and (3) ABC Michigan's employer members' loss of their First Amendment rights is irreparable as discussed in ABC Michigan's opening brief and reply brief in support of its motion for preliminary injunction. *See Carey*, 614 F.3d at 196.

II. ABC Michigan has plausibly stated a claim for relief under the First Amendment.

ABC Michigan has plausibly stated constitutional claims for relief including its First Amendment Free Speech claims on behalf of its employer members in Counts

I-IV of the Complaint. When construing the Complaint in the light most favorable to ABC Michigan, accepting all well-pleaded factual allegations as true, and drawing all reasonable inferences in its favor, the Court should deny Abruzzo's Rule 12(b)(6) motion to dismiss. *See Nabors,* 35 F.4th at 1031.

Abruzzo's brief cavalierly says, "ABC throws four First Amendment theories—prior restraint, content-based regulation, compelled-speech, and vagueness—at the wall. None sticks. The First Amendment grants the right to speak, not to force others to listen." ECF No. 16-1, PageID.173. But that is not what this case is about. Contrary to this brash (and incorrect) statement, the First Amendment grants the right to be free from government officials' threats of prosecution for engaging in protected speech, which is the essence of ABC Michigan's Complaint and what Abruzzo's brief cannot avoid.

A. The Memorandum is a prior restraint under *Bantam Books*.

The Memorandum is a prior restraint that violates the First Amendment under *Bantam Books* and its progeny.

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." *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 52, 64 (1963); *see also Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015) (Posner, J.); *Okwedy v. Molinari*, 333

F.3d 339, 344 (2d Cir. 2003). Her public Memorandum on the Board's website which is continuous and ongoing, "by way of threat of punishment and intimidation to quell speech," chills ABC Michigan's employer members' protected Free Speech rights. *See Speech First*, 939 F.3d at 761, 764-65.

"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*, 807 F.3d at 231. (emphasis added) (citing, inter alia, *Bantam Books*, 372 U.S. at 64-72). That is what Abruzzo has done here: In her Memorandum, Abruzzo vowed *she* would "urge the Board to correct" *Babcock* which she viewed as an "anomaly."[4]

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.*

[4] 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).

The court 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*, 333 F.3d at 344). 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).

Here, like Sheriff Dart, Abruzzo wants to "shut down an avenue of expression of ideas and opinion" to prevent employers from giving employees their opinion on unionization during mandatory work meetings. 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. And just as Sheriff Dart attempted to coerce businesses and stifle speech through a letter, Abruzzo has sought to coerce businesses and stifle speech through a memo. Like Dart's letter, Abruzzo's Memorandum includes all the indicia of its official nature: it bears the

heading "OFFICE OF THE GENERAL COUNSEL," states that it is from "Jennifer A. Abruzzo, General Counsel," and is signed by Abruzzo with her initials.

Abruzzo "inserted" *herself* "into the discussion" by saying *she* would "urge the Board to correct" the *Babcock* precedent. The Memorandum is not merely Abruzzo's attempt "to convince" others that *Babcock* is incorrect; it is a threat of prosecution intended "to coerce" employers subject to the NLRA to "adopt sensible assurances" in their speeches during meetings that employees must attend to avoid prosecution by her before the Board for an unfair labor practice.

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."[5] "The term 'jawboning' was first used [during World War II] to describe official speech intended to control the behavior of businessmen and financial markets."[6] "Jawboning is dangerous because it allows government officials to assume powers not granted to them by law. The capriciousness of jawboning is also cause for concern. Individual officials can jawbone at will, without any sort of due process, by opening their mouths, taking up a pen, or tweeting."[7]

---

[5] *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.
[6] *Id.*
[7] *Id.*

Abruzzo knows that—absent her illegal jawboning—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, Abruzzo resorts to writing public memos—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 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, alleged unfair labor practices through the NLRA's administrative scheme enacted by Congress.

B. ABC Michigan has plausibly stated constitutional claims for relief in Counts I-III of its Complaint.

Count I. ABC Michigan plausibly pled a Free Speech claim. Abruzzo's Memorandum violates the compelled speech doctrine under the First Amendment because, under threat of prosecution, it impermissibly compels employers to adopt certain words when they speak to their employees about unions during required

work meetings. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018).

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

Count III. ABC Michigan plausibly pled a Free Speech and Due Process claim. Abruzzo's Memorandum is unduly vague: a reasonable employer, under threat of prosecution, cannot know what speech is prohibited or permitted. *NAACP v. Button*, 371 U.S. 415, 433 (1963); *City of Chicago v. Morales*, 527 U.S. 41 (1999).

CONCLUSION

For these reasons, ABC Michigan on behalf of its employer members respectfully requests that the Court deny in its entirety Abruzzo's Rule 12(b)(1) and 12(b)(6) motion to dismiss.

June 19, 2023

Respectfully submitted,

/s/ Keith E. Eastland

Keith E. Eastland
Stephen J. van Stempvoort
Brett Swearingen
MILLER JOHNSON
45 Ottawa Ave. SW
Grand Rapids, MI 49503
Telephone: (616) 831-1700
eastlandk@millerjohnson.com
vanstempvoorts@millerjohnson.com
swearingenb@millerjohnson.com

M. E. Buck Dougherty III, application forthcoming
Jeffrey Jennings, Admitted
Noelle Daniel, Admitted
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
312-637-2280-telephone
312-263-7702-facsimile
bdougherty@libertyjusticecenter.org
jjennings@libertyjusticecenter.org
ndaniel@libertyjusticecenter.org

Attorneys for Plaintiff Associated Builders and Contractors of Michigan

CERTIFICATE OF COMPLIANCE

1. This opposition response brief complies with the type-volume limitation of W.D. Mich. LCivR 7.2(b)(i) because this brief contains 7,837 words, excluding the parts of the brief exempted by W.D. Mich. LCivR 7.2(b)(i).

2. This opposition response brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, Version 2302 in 12-point Century Schoolbook font.

/s/ Keith E. Eastland
Keith E. Eastland
Stephen J. van Stempvoort
Brett Swearingen
MILLER JOHNSON
45 Ottawa Ave. SW
Grand Rapids, MI 49503
Telephone: (616) 831-1700
eastlandk@millerjohnson.com
vanstempvoorts@millerjohnson.com
swearingenb@millerjohnson.com

M. E. Buck Dougherty III, application forthcoming
Jeffrey Jennings, Admitted
Noelle Daniel, Admitted
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
312-637-2280-telephone
312-263-7702-facsimile
bdougherty@libertyjusticecenter.org
jjennings@libertyjusticecenter.org
ndaniel@libertyjusticecenter.org

Attorneys for Plaintiff Associated Builders and Contractors of Michigan