No. 23-40629

In the United States Court of Appeals For the Fifth Circuit

BURNETT SPECIALISTS, STAFF FORCE, DOING BUSINESS AS STAFF FORCE PERSONNEL SERVICES, ALLEGIANCE STAFFING CORPORATION; LINK STAFFING; LEADINGEDGE PERSONNEL, LIMITED,

Plaintiffs-Appellants,

v.

JENNIFER A. ABRUZZO, IN HER OFFICIAL CAPACITY, UNITED STATES OF AMERICA; NATIONAL LABOR RELATIONS BOARD

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Texas

APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

No. 23-40629; *Burnett Specialists v. Abruzzo*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants and Counsel	Defendants-Appellees and Counsel
• Burnett Specialists • Staff Force, Inc., d/b/a Staff Force Personnel Services • Allegiance Staffing Corp. • Link Staffing • LeadingEdge Personnel, Ltd. • Robert Henneke • Chance Weldon • Matthew Miller • Nate Curtisi • Texas Public Policy Foundation	• Jennifer Abruzzo • National Labor Relations Board • United States of America • Adrian Garcia • Aaron Samsel • Christine Flack • Tyler Wiese • Daniel Aguilar • Kwame Samuda

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STATEMENT REGARDING ORAL ARGUMENT

This case involves important questions about federal standing and the First Amendment. Appellants believe that oral argument would materially help the Court in resolving these issues.

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INTRODUCTION

This case raises fundamental questions about when, if ever, a constitutional challenge to the NLRB General Counsel's publicly announced enforcement policy can survive a motion to dismiss.

For over 75 years, Employers have enjoyed a First Amendment right to speak to their employees about unionization while on company time. The NLRB, the Supreme Court, and every court to consider the issue has held that an employer's noncoercive speech is protected. In fact, that right is "firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

This changed abruptly in April 2022 when NLRB General Counsel Abruzzo, who serves as the chief prosecutor of unfair-labor-practice complaints, announced in a memorandum that she was creating a *per se* rule that any employer speech regarding unionization when employees were required to be present was, in her view, a violation of the NLRA and she planned to prosecute businesses consistent with that view. The memorandum was quickly followed by a brief at the NLRB arguing an employer committed an unfair labor practice by requiring employees to attend meetings where the employer discussed unionization. Abruzzo has since issued dozens more unfair-labor-practice complaints for the same conduct.

Appellants are staffing agencies with thousands of employees across the United States. In their complaint, they allege that Abruzzo's new enforcement policy creates a chilling effect on employer speech. Employers are rightly fearful of being subject to an unfair-labor-practice complaint and the lengthy and expensive proceeding that would ensue. They argue that Abruzzo's memorandum violates the First Amendment

because it restricts speech based on (1) content—it only applies to one subject: unionization; (2) speaker—it only applies to employers; and (3) viewpoint—Abruzzo's only concern was meetings where the employers made "speeches urging [employees] to reject union representation." Appellants brought two claims, one under the Administrative Procedure Act and one at equity.

Despite Abruzzo's clearly unconstitutional enforcement policy, the district court dismissed Appellants complaint. It held that Abruzzo's actions are unreviewable and Appellants lacked standing. In its view, the only hope for Appellants, and any other employers, is to wait for Abruzzo to file a complaint and then to vindicate their rights in the administrative process or after seeking judicial review of that process. That conclusion ignores the chilling effect of Abruzzo's enforcement policy and gives her free range to continue threatening employer speech without any recourse for Appellants or any other employer.

Thankfully, that is not the law. Abruzzo's clearly unconstitutional enforcement policy constitutes final agency action, which the court has jurisdiction to review. Further, nothing in the NLRA indicates that there is no jurisdiction for courts to consider lawsuits caused by the chilling effect of Abruzzo's publicly announced enforcement policy. Appellants also have standing for the simple reason that they are subject to Abruzzo's enforcement, and, in addition, the threat of enforcement is evidenced by Abruzzo's actions and the chilling effect of her enforcement policy is sufficient to establish the injury in fact requirement of standing.

The district court's judgment dismissing Appellants complaint should be reversed.

JURISDICTIONAL STATEMENT

Because this case involves claims under the Constitution and Administrative Procedure Act, the district court had jurisdiction and authority to grant the requested relief under 28 U.S.C. §§ 1331, 2202, and 5 U.S.C. § 701 *et seq*.

This Court has jurisdiction under 28 U.S.C. § 1291. On August 31, 2023, the district court entered a Memorandum Opinion & Order and a Final Judgement. ROA.774-96. The order granted Defendants' Motion to Dismiss and constituted a final judgment of a United States District Court. The Notice of Appeal was timely filed on October 25, 2023. ROA.797.

ISSUES PRESENTED

On April 7, 2022, the General Counsel of the National Labor Relations Board Jennifer Abruzzo issued a memorandum announcing that she intended to prosecute employers under the National Labor Relations Act for speaking about unionizing when employees are required to "convene on paid time" or "cornered by management while performing their job duties." Since then, Defendant Abruzzo has brought dozens of cases alleging unfair labor practices against employers for discussing unionization with their employees on paid time.

1. Is Defendant-Appellee Abruzzo's enforcement policy that discriminates on the basis of speaker, content, and viewpoint unreviewable?
2. Do Plaintiffs-Appellants have standing to challenge the policy because it applies to what they can say and do?

STATEMENT OF THE CASE

For over 75 years, employers were able to speak with their employees about the merits of unionization on company time and on the company dime. ROI.334. According to the National Labor Relations Board's (the "Board" or the "NLRB") own precedent, employer speech that "does not contain any threat of reprisal or force or promise of benefit" has long been "protected by the guaranty of the free speech amendment." ROI.334 (quoting *Babcock & Wilcox Co.*, 77 NLRB 577 (May 13, 1948)). Nevertheless, Appellees are now prosecuting employers for unfair labor practices when Employers speak to employees about unionization on paid time. The district court held that this blatant infringement on First Amendment rights is beyond judicial review. That cannot be the case.

A. Abruzzo publicly announces a change in her enforcement policy regarding employer speech.

Appellees' about-face publicly began on April 7, 2022, when NLRB General Counsel Jennifer Abruzzo ("Abruzzo") issued Memorandum GC 22-04, *The Right to Refrain from Captive Audience*[1] *and other Mandatory Meetings* (the "Memorandum"). *See* ROA.22-24. The three-page Memorandum announced Abruzzo's new enforcement policy and goal of reversing NLRB's long-settled precedent in *Babcock*. Specifically, she would "urge the Board to reconsider such precedent and find mandatory meetings" where employers discuss the exercise of employees' statutory labor rights to be *per se* "unlawful." ROA.354. She was concerned that some employers make "speeches urging [employees] to reject union representation." ROA.355. It is her view that the National Labor

[1] Mandatory meetings where employers discuss unionization are sometimes called "captive audience" meetings. ROI.23-24.

Relations Act ("NLRA") prohibits employers from discussing unionization when employees are "forced to convene on paid time" or "cornered by management while performing their job duties," and the Memorandum served as a warning to employers that she planned to prosecute them if they expressed their opinion to employees on paid time under either of these circumstances. ROA.355.

B. Abruzzo's role as General Counsel of the NLRB.

Abruzzo's release of the Memorandum immediately caused real world consequences for employers because the NLRB General Counsel serves as the chief prosecutor of unfair labor practices under the NLRA. 29 U.S.C. § 153(d). She is independent of the Board and the "final authority" concerning unfair-labor-practice investigations and complaints. *Id.* In other words, she has the capability to summon employers into costly and time-consuming administrative proceedings without any prior input from the Board.

An unfair-labor-practices prosecution proceeds similarly to many other administrative processes. A charging party files a charge with any of the NLRB's regional offices against an employer or union alleging that the employer or union engaged in unfair labor practices. ROA.180. Abruzzo, or her agents, then review and investigate the charge. ROA.180-81. If they conclude the charge is "meritorious and worthy of prosecution," Abruzzo issues an unfair-labor-practice complaint. ROA.181. The complaint kicks off an adversarial proceeding in front of an administrative law judge ("ALJ"). ROA.14, 181, 336. The parties can call witnesses, submit briefs, and engage in oral arguments. ROA.14 (citing 29 C.F.R. § 101.10). As exemplified in the *Cemex Construction* case

discussed below, this process can take years to resolve. *See Cemex Construction Material Pacific, LLC*, NLRB Case No. 28-CA-230115, docket available here: https://www.nlrb.gov/case/28-CA-230115. There, it took almost five years from the time of the initial charge to the resolution of the NLRB proceedings.

Abruzzo's release of the Memorandum and subsequent prosecutions (discussed below) accordingly alerted all potential charging parties that employers would be prosecuted for unfair labor practices if they discuss unionization in mandatory employee meetings or when employees are performing their duties. ROA.15. Of course, employers also understand this enforcement change and are refraining from speaking about unionization to avoid the threat of prosecution. ROA.14-15. Their fear is particularly acute because Abruzzo is attempting to establish this rule by adjudication, which allows it to be applied retroactively. *See Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017).

C. Abruzzo begins prosecuting employers for protected speech.

On April 11, 2022, Abruzzo made good on her promise to prosecute employers for discussing unions when she filed a brief urging the NLRB to overturn *Babcock* and hold that requiring employees to attend meetings where employers discuss unionization. ROA.15. The brief was submitted in a case before the NLRB called *Cemex Construction Materials*. It laid out an entire regulatory scheme. *See* ROA.15, 83-101. In it, Abruzzo explained her interpretation of Section 7[2] of the NLRA as

[2] Section 7 concerns employees rights to organize, form, join, or assist labor unions and is codified in 29 U.S.C. § 157. For convenience, this brief will refer to such activity as "unionizing" or "unionization."

limiting employer speech when discussing employees unionizing. *See* ROI.94-95. Her "framework" prohibits employers' speech regarding unionization unless they comply with certain requirements. The brief set out specific rules for what employers can say to "convened employees" and "cornered employees" and what conditions they had to meet in order to speak to their employees:

> **Convened Employees.** If an employer convenes employees for a Section 7 meeting on paid time, it must satisfy the following requirements to make the meeting voluntary. First, the employer must explain the purpose of the meeting. Second, the employer must assure employees:
>
> a. that attendance is voluntary,
> b. that if they attend, they will be free to leave at any time,
> c. that nonattendance will not result in reprisals (including loss of pay if the meeting occurs during their regularly scheduled working hours), and
> d. that attendance will not result in rewards or benefits.
>
> If an employer announces a meeting in advance, it must reiterate the explanation and assurances set forth above at the start of the meeting. Finally, the meeting must occur in a context free from employer hostility to the exercise of Section 7 rights.
>
> **Cornered Employees.** If an employer corners employees to address them concerning their exercise of Section 7 rights, it must satisfy the following requirements to ensure that the meeting is voluntary. First, the employer must explain the purpose of the encounter. Second, the employer must assure employees:
>
> a. that participation is voluntary,
> b. that nonparticipation will not result in reprisals (including loss of pay), and
> c. that participation will not result in rewards or benefits.
>
> Furthermore, because employees cannot ordinarily choose to leave their work area, the employer must obtain affirmative consent to talk to the employees there and assure them that they may end the encounter at any time without loss of pay (either by leaving or by asking the employer to stop). Finally, the encounter must occur in a context free from employer hostility to the exercise of Section 7 rights.

ROA.94-95.

The *Cemex Construction* Brief, somewhat perplexingly, only asked the NLRB to issue a "prospective rule that, going forward, the Board will find that captive-audience meetings are unlawfully coercive absent the prophylactic measures set forth above." ROA.101. Despite that, the Memorandum and subsequent brief received national attention and resulted in employers being chilled from freely expressing their views regarding unionization to their employees. ROI.15. Employers' fears were well-founded, as the *Cemex Construction* Brief merely marked the beginning of Abruzzo's prosecutions of employer speech.[3]

D. Abruzzo escalates prosecutions under her new enforcement policy.

Abruzzo's promise of only seeking a prospective rule was quickly broken, however, as she filed a complaint alleging an employer violated the NLRA by requiring "employees to attend mandatory meetings for the purpose of exposing employees to [Employer's] statements in opposition to the Union" on May 31, 2022. ROA.234-35, 251-59. After the ALJ dismissed this charge, Abruzzo continued to prosecute the employer at the Board. ROA.395. She laid out the same framework in that brief for restricting employer speech during times that employees are "convened" or "cornered." *See* ROA.332, 392-411. That case is still pending. *See Amazon.com Services, Inc.*, NLRB Case No. 29-CA-280153, docket available here: https://www.nlrb.gov/case/29-CA-280153.

[3] The NLRB eventually resolved the *Cemex Construction* case without reaching the *Babcock* First Amendment issue due to procedural concerns. *See Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, at *11 n. 15 (Aug. 25, 2023). As discussed below, however, she continues to prosecute employers for speaking about unionization in dozens of other cases.

In addition to these cases, Abruzzo has made clear that her office will aggressively prosecute unfair labor practices according to the Memorandum and the framework she laid out for convened or cornered employees in the *Cemex Construction* Brief. In an April 11, 2023, report to the American Bar Association's Labor and Employment Law Section, Abruzzo wrote that there are "*more than two dozen* cases pending at various post-complaint stages" where she has taken the position outlined in the Memorandum. ROA.611 (emphasis added). The report also listed seven cases that were before the Board where she raised the issue, including both *Cemex Construction* and *Amazon Services*. ROA.611-12. It further informed that regional offices were "authorized to proceed" in bringing complaints consistent with the Memorandum and other guidance. ROA.602, 652.

Employers have thus far failed to obtain any meaningful review of the Memorandum. For instance, in one case, an employer filed a motion to dismiss only the allegations that it required employees to attend meetings during paid time at which the supervisors addressed employees unionization attempts. *Apple Inc.*, Case No. 10-CA-295915, Motion to Dismiss (May 2, 2023), case docket available: https://www.nlrb.gov/case/10-CA-295915. The Board summarily denied the motion without explanation. *Apple Inc.*, Case No. 10-CA-295915, Order (June 1, 2023).

E. Appellants challenge Abruzzo's enforcement policy.

Appellants are staffing agencies with thousands of employees throughout the United States. ROA.12-13, 16. They do not believe that unionizing is generally in the best interest of their employees and have

historically opposed unionization of their workforce. ROA.16. In the past, Appellants have discussed concerns about unionization openly with employees on paid time. ROA.16 For example, when an electricians' union attempted to unionize several hundred of one Appellant's employees, that Appellant simply shared factual information about the union. ROA.16. If future attempts were made to unionize Appellants' workforces, Appellants would hold meetings to discuss the harm of unionization and hear from workers how to improve the workplace. ROA.16. Due to the threat of prosecution, Appellants have not discussed unionization in meetings nor spoken to employees about unionization. ROA.16.

Wanting to clarify and vindicate their First Amendment rights, Appellants filed suit on July 18, 2022. ROA.11-119. They brought two claims: (1) an Administrative Procedure Act ("APA") claim that the Memorandum violated the First Amendment by chilling their speech and discriminating on the basis of viewpoint, speaker, and content; (2) an equitable claim seeking to enjoin Abruzzo from prosecuting under the enforcement policy. ROA.17-19. Appellants' prayer for relief included a request for a declaratory judgment that Abruzzo's enforcement policy violates the constitution and to set it aside. ROA.19-20.

F. The district court dismisses the complaint holding that Abruzzo's actions are not reviewable and Appellants lack standing.

Appellees Abruzzo and NLRB filed a motion to dismiss the complaint for lack of jurisdiction, which Appellee United States of America joined. ROA.171-215. They argued: (1) the NLRA entirely precludes any judicial review of Abruzzo's enforcement policy; (2)

Abruzzo's enforcement policy was not a final agency action and merely an exercise of prosecutorial discretion; (3) alleged constitutional violations do not establish jurisdiction; and (4) plaintiffs failed to show an injury in fact and the case is not yet ripe. ROI.171-208. Appellees did not address Appellants' equitable claim (Count II) in their motion to dismiss. Appellees' view of Abruzzo's prosecutorial authority was breathtaking, at one point not even objecting to a hypothetical that her enforcement policy would not be subject to judicial review even if she instituted an enforcement policy where she only chose to enforce the NLRA against Muslim-owned businesses. ROA.238-39.[4] After the case was fully briefed, including a response, reply, and sur-reply, the district court held a hearing on the motion.[5]

At the hearing, the district court rightfully was taken aback by Appellees' argument: "You know, what's troubling the court about all this is your answer to my questions regarding is there any avenue for someone—if there truly is a chilling effect based on the memorandum, it's troubling the Court is there no avenue for that constitutional right to be asserted. And so it's hard for the Court to say—if someone has a constitutional right, there has to be a mechanism for them to be able to assert that. And if there isn't, that's what troubles the Court." ROA.839. Nevertheless, the district court held exactly that.

Despite noting that Abruzzo operates as the "final authority" for prosecution decisions, the district court ultimately held that her

[4] Appellees' response was that review of such an enforcement policy would be "routed through the administrative process." ROA.276.

[5] While the motion to dismiss was pending, the parties both also filed motions for summary judgment. *See* ROA.325-428, 449-532, 536-85,645-99, 745-69.

enforcement policy is unreviewable. ROA.779-80. In its view, the district court saw Abruzzo's prosecution of employer speech as "quintessential prosecutorial functions, and they cannot be reviewed." ROA.781. The district court also recognized that Abruzzo's decisions "are not without limits," but held the equitable claim allowing suits to proceed against federal officials under *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) does not apply in this case. ROA.782-83. The district court also held that the NLRA prevented judicial review because its statutory scheme seems to limit judicial review to final orders from the Board that are then appealed to an appropriate circuit court of appeals. ROA.784-85. Lastly, the district court held that Appellants lacked standing. ROA.792-94.

SUMMARY OF THE ARGUMENT

The district court should not have dismissed Appellants' Complaint. When Abruzzo announced her enforcement policy in the Memorandum, it immediately chilled employer speech. Appellants allege that this constitutes final agency action and is reviewable under the APA. Additionally, even if it is not final agency action, it is reviewable as a *Larson/ultra vires* claim. Under Supreme Court and this Court's precedent, Appellees actions are reviewable and should be set aside or enjoined because they are speaker-, content-, and viewpoint-based restrictions on speech.

The district court, instead, dismissed the complaint. It held that Abruzzo's enforcement policy is merely an exercise of unreviewable prosecutorial discretion and the NLRA precludes review. It also held that Appellants lacked standing because there was not a credible threat of enforcement. These conclusions fundamentally misunderstand the role

of Abruzzo as the prosecutor of unfair-labor-practice complaints and the chilling effect of her enforcement policy.

Abruzzo's publicly announced enforcement policy in the Memorandum announces a rule—no discussion of unionization during mandatory meetings or conversations—complete with a framework she articulated in briefs before the NLRB. That is, it creates *per se* illegal speech for employers. Prosecutorial discretion is weighing the merits of a particular case based on the relevant and deciding appropriate charges and resolutions. It is not "discretion" to create a *per se* category of illegal speech.

The NLRA also does not preclude review of this case. The NLRA's framework does not show that Congress intended to make chilling injuries caused by the NLRB General Counsel's prosecution policies only reviewable after she issues a complaint. The chilling injury is different in kind than any that can be remedied after review, because the injury occurs *prior* to prosecution. Such a scheme is untenable, because it puts employers in the position of foregoing their rights or acting at their peril. Accordingly, the *Thunder Basin* factors weigh against preclusion, because it forecloses all meaningful review when speakers censor themselves, this issue is wholly collateral because it concerns whether an employer can speak at all, and it is outside the NLRB's area of expertise.

The district court also wrongly dismissed Appellants' *Larson*/*ultra vires* claim. A *Larson* claim is available when plaintiffs seek an injunction to stop a federal official from violating their constitutional rights. Appellants' alleged that the Memorandum directly violates Supreme Court precedent and discriminates based of content, speaker, and

viewpoint. It is therefore constitutionally void. That is all that is required to have a viable *Larson* claim.

Appellants also established standing and the district court wrongly held that they failed to show a threat of enforcement. As a preliminary matter, under *Contender Farms*, Appellants have standing for the simple reason that the Memorandum announces a rule that applies to them. Second, under *Speech First v. Fenves*, Appellants have standing because they showed (1) an intention to engage in conduct arguably affected with a constitutional interest—speaking to employees about unionization during mandatory meetings; (2) that conduct is arguably proscribed by the Memorandum; and the threat of future enforcement is substantial because Abruzzo has already started prosecuting employers under the rule. In fact, Abruzzo herself has announced that, as of April 2023, there were already over two dozen prosecutions based on the rule announced in the Memorandum. Further, it is well-established precedent that government chilling of speech is an adequate constitutional harm to satisfy the injury in fact requirement.

STANDARD OF REVIEW

The Court reviews a dismissal for lack of subject matter jurisdiction *de novo*. *Flores v. Pompeo*, 936 F.3d 273, 276 (5th Cir. 2019). In ruling on a motion to dismiss for lack of subject-matter jurisdiction, the Court may consider: (1) the complaint; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The party asserting jurisdiction bears the burden of proving it. *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014). In a facial attack under Rule 12(b)(1),

which is what occurred in this case, the court accepts all material allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "Ultimately a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming*, 281 F.3d at 161.

ARGUMENT

The trial court wrongly held that Abruzzo's Memorandum and ensuing change in enforcement policy are entirely unreviewable. Contrary to its holding, the Memorandum is not an exercise of prosecutorial discretion but an enforcement policy that creates an entirely new category of forbidden conduct. The Memorandum publicly threatens unfair-labor-practice complaints against employers who speak about unionization when employees are required to convene or are cornered while performing job duties. This violates Appellants'—and all employers'—free speech rights.

I. Appellants established that they have a redressable controversy.

A. Appellants established jurisdiction under the APA because the publicly announced Memorandum constitutes final agency action.

The district court wrongly held that the Memorandum did not constitute final agency action. To determine finality, courts take a "pragmatic approach," viewing the requirement as "flexible." *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019). Courts apply the two-part test

from *Bennett v. Spear*: (1) does the action "mark the consummation of the agency's decision-making process"? and (2) do "legal consequences flow" from the action? 520 U.S. 154, 177-78 (1997). The answer to both of these questions here is a straightforward "yes."

With respect to the first prong, Abruzzo has "final authority" to investigate charges and issue complaints. 29 U.S.C. § 153(d). The NLRB General Counsel is, as the Supreme court has put it, an "independent branch[]" of the agency. *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, (1987) ("*UFCW*"). She issued the Memorandum to all Regional Directors, Officers-in-Charge, and Resident Officers. ROA.22. She explicitly described the forbidden conduct as "mandatory meetings, including those termed as 'captive-audience meetings.'" ROA.23-24. She authorized regional offices "to proceed" in bringing unfair-labor-practice complaints consistent with the Memorandum and guidance. ROA.685. She published a "framework" instructing employers exactly what "requirements" they must satisfy "to make the meeting voluntary" before discussion unionization with their employees. ROA.94-95. Then, she began prosecuting cases consistent with her announced policy change. ROA.694. In other words, she developed an entirely new enforcement policy, announced that policy, and immediately started enforcing it. *See Walmart Inc. v. United States DOJ*, 21 F.4th 300, 308 (5th Cir. 2021) ("Agencies make rules when they announce principles of general applicability and future effect."). Any rational employer—like Appellants—would take this seriously and change their conduct as a result.

Second, legal consequences flow from the Memorandum's restrictions. The district court's description of the Memorandum as a

"nonbinding policy letter with no legal effect" is mistaken. ROA.775. "Courts consistently hold that an agency's guidance documents binding it and its staff to a legal position produce legal consequences or determine rights and obligations, thus meeting the second prong of *Bennett*." *Texas v. EEOC*, 933 F.3d at 441; *Biden v. Texas*, 142 S. Ct. 2528, 2544-45 (2022) (Memoranda that bound staff constituted final agency action). That is exactly what occurred here. Abruzzo announced a new legal position, which is being followed by the prosecutors she oversees. Appellants, like many employers, are understandably reacting to it for fear of being the subject of an unfair-labor-practices complaint by refraining from making constitutionally protected speech.

Accordingly, the Memorandum is reviewable under 5 U.S.C. § 704, because it constitutes final agency action.

B. The district court wrongly held that Abruzzo's actions are unreviewable.

The district court also erred by holding that the Memorandum constitutes unreviewable prosecutorial discretion and that the NLRA's statutory scheme precludes a district court from hearing Appellants' claims. Neither of those concerns overcomes the "'heavy burden' to rebut the 'strong presumption favoring judicial review of administrative action." *United Nat. Foods, Inc. v. NLRB*, 66 F.4th 536, 542 (5th Cir. 2023) (quoting *Salinas v. United States RRB*, 141 S. Ct. 691 (2021) .

1. <u>This case is about a publicly declared change in policy, and not individualized prosecutorial decision.</u>

The district court mischaracterizes the Memorandum as implementing "quintessential prosecutorial functions." ROA.781. As discussed above, the Memorandum is not a "prosecutorial decision," but

a full-fledged change in decades of enforcement policy governing employer speech. A judge on this Court has warned against allowing the Government to invoke "'prosecutorial discretion'" in order to "distort the rule of law." *United Nat. Foods, Inc.*, 66 F.4th at 557-58 (The Board "appears to think that the ["prosecutorial discretion"] operates as a magical invisibility cloak, a shroud that makes the Board's decisions disappear behind a gauzy veil of unreviewability.") (Oldham, J., dissenting). Unfortunately, that is exactly what happened here.

The district court's decision rests on a fundamental misunderstanding of what prosecutorial discretion is. Generally, the government is given "discretion to decide which individuals to prosecute, which offenses to charge, and what measures of punishment to seek." *United States v. Lawrence*, 179 F.3d 343, 348 (5th Cir. 1999); *accord United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."). The Memorandum is different in kind than any sort of prosecutorial decision. It does not explain how the General Counsel will decide which individuals to prosecute or which offenses to charge. Rather*, it creates a whole new category of forbidden conduct*—conduct that has been constitutionally protected for over 70 years.

The district court's reliance on *UFCW*, 484 U.S. 112, demonstrates this error. In *UFCW*, the NLRB General Counsel dismissed an unfair-labor-practice complaint pursuant to an informal settlement. 484 U.S. at 114. A union sued seeking to obtain an evidentiary hearing to review the settlement. *Id.* at 117. The Court explained that the congressional framework is to divide the final authority of the General Counsel and the

Board between prosecutorial and adjudicatory functions. *Id.* at 125. The prosecutorial function includes filing, withdrawing, and investigating complaints *Id.* at 118, 125. That is, the General Counsel was within his rights to weigh the merits of *that one particular case* and decide if settlement or continued prosecution was the better course of action. Fittingly, the Court also noted that the Board is the primary entity in adjudicating contested unfair-labor-practice complaints and "in interpreting its authorizing statute and in developing new regulations to meet changing needs." *Id.* at 128.

This conclusion is exactly in line with what Appellants argued to the district court.[6] Abruzzo is acting beyond her statutory and constitutional limitations by creating a new category of forbidden conduct and chilling employers' constitutionally protected speech. This includes publishing an entire framework for enforcing the Memorandum. In essence, Abruzzo announced that some employer speech was *per se* unlawful based on her interpretation of the NLRA, and then started prosecuting under that theory. Creating new unlawful acts is not a "prosecutorial function," and Abruzzo's acts are accordingly judicially reviewable.

2. The NLRA scheme does not preclude jurisdiction.

The trial court also erred by holding that the NLRA's structure precludes jurisdiction. As noted by the district court, the default rule is that it would have jurisdiction over Appellants' First Amendment claims

[6] Inexplicably, the district court wrote that Appellants did "not even attempt to argue that Abruzzo's Memorandum is outside of her prosecutorial functions" and that "concession is fatal." ROA.781. This is demonstrably not the case, as Appellants expressly made a similar argument below that they make here. *See* ROA.246-47.

because federal district courts have "jurisdiction over all civil actions arising under the Constitution." ROA.783 (quoting *Cochran v. United States SEC*, 20 F.4th 194, 199 (5th Cir. 2021)). The government must overcome a "strong presumption favoring judicial review" in order to preclude jurisdiction. *See Salinas*, 141 S. Ct. at 698. Appellees have not carried this "heavy burden." *Id.*

The district court's confusion seems to come from its misunderstanding of the Appellants' injury and the failure to appreciate Abruzzo's prosecutorial role. Appellants' speech is chilled by the Memorandum's threat of an unfair-labor-practices complaint for constitutionally protected speech. In the district court's telling of the NLRA's statutory scheme, Appellants' only hope for review is to wait for prosecution and then argue its claims before an ALJ, and then the Board, and then finally in the appropriate circuit court. ROA.784-85. But the decision whether to violate the Memorandum comes long before then. Under the district court's understanding, employers are faced with the "Hobson's choice of foregoing their rights or acting at their peril." *Union Pac. R.R. Co. v. City of Palestine*, 41 F.4th 696, 708 (5th Cir. 2022) (discussing the purpose of the Declaratory Judgement Act).

That Congress intended to put employers in such a predicament cannot be the case. "The First Amendment 'does not leave us at the mercy of *noblesse oblige*.'" *Seals v. McBee*, 898 F.3d 587, 598 (5th Cir. 2018) (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). It is hard to imagine Congress intended to "limit jurisdiction" over chilling injuries caused by the General Counsel's publicly announced enforcement policy. *See Cochran*, 20 F.4th at 206 (explaining that preclusion is only appropriate when it's "fairly discernable" that Congress intended to limit

jurisdiction and the claims at issue are the ones intended to be reviewed within the statutory structure).

Consider the General Counsel's statutory authority:

> The General Counsel shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

29 U.S.C. § 153(d). Congress gave the General Counsel "final authority" to act "on behalf of the Board" to investigate charges and issue unfair-labor-practices complaints. Accordingly, any public announcement of a change in enforcement policy by the General Counsel signals to those regulated by the NLRB that they should adapt their behavior to the new enforcement policy or risk prosecution.

Unlike many other possible injuries from a change in enforcement policy, a chilling injury occurs immediately and prior to enforcement. Nowhere is that more obvious than in this case. As businesses became aware that what was once common practice—mandatory meetings and one-on-one discussions with employees about unionization—would now be considered *per se* NLRA violations by the person charged with prosecuting the NLRA, they inevitably changed their practice. In other words, the Memorandum is essentially the same as a final rule promulgated by the Board which can be challenged in district court because it announced a new rule and the effect on the regulated parties is immediate.

The district court also wrongly applied *Axon Enter. v. FTC*, 143 S. Ct. 890 (2023). While *Axon* concerned collateral attacks on ongoing agency proceedings, its reasoning regarding preclusion largely applies here. *See Axon*, 143 S. Ct. at 897. When there is a special statutory review scheme, the key question is whether the claim brought in district court is "of the type Congress intended to be reviewed within this statutory structure." *Id.* at 900 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994)). "The ultimate question is how best to understand what Congress has done—whether the statutory review scheme, though exclusive where it applies, reaches the claim in question." *Id.* at 900-01.

Congress did not intend to keep Appellants' claims solely within the NLRA review scheme. The *Thunder Basin* factors, as explained by *Axon*, show why. The three factors are: (1) would preclusion "foreclose all meaningfully judicial review"? (2) Is the claim "wholly collateral" to the statute's review process? And (3) "is the claim outside the agency's expertise?" *Id.* at 900 (internal quotations omitted). "When the answer to all three questions is yes, 'we presume that Congress does not intend to limit jurisdiction,'" though not all three factors need to be affirmative for the court to conclude Congress did not intend to limit jurisdiction. *Id.* (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010)).

The answer to the first factor is yes, Appellants will be deprived of all meaningful judicial review. Like in *Axon*, Appellants claim that the injury here is constitutional. *Id.* at 904. In *Axon*, the alleged injury was plaintiffs being subjected to an unconstitutional agency proceeding. *Id.* That is, once the proceeding was over, it would be impossible to remedy the harm. *Id.* The same is true here. Appellants are self-censoring in

order to avoid liability under the Memorandum. That's the constitutional injury, and there is no avenue for Appellants to obtain relief without violating the Memorandum and subjecting themselves to NLRA charges. Additionally, the NLRA's judicial review provision, 29 U.S.C. § 160(f), only provides review of the Board's action. There is no route under the NLRA to bring a claim against Abruzzo. *Cf. Free Enterprise*, 561 U.S. at 490. (holding petitioners could not meaningfully pursue their claims because the review statute only provided for review of "Commission action, and not every [Accounting Oversight] Board action is encapsulated in a final Commission order or rule).

Appellants' claim is also wholly collateral. Appellants claim is that the Memorandum, which announces a *per se* prohibition on mandatory meetings and discussions with employees concerning unionization is an unconstitutional restriction on their speech that results in them self-censoring. The Memorandum is unconstitutional because it discriminates on the basis of speaker, content, and viewpoint. *See* ROA.339-49. That is, Appellants' claim is that the Memorandum prohibits them from saying anything at all about unionization during mandatory meetings and discussions.

The NLRA, on the other hand, is largely concerned with conduct, not speech. The NLRB's statutory scheme is meant to prevent unfair labor practices. 29 U.S.C. § 160. Section 8 of the NLRA lists what constitutes unfair labor practices by employers. 29 U.S.C. § 158(a). They include: (1) interfering with, restraining, or coercing employees when employees are exercising their section 7 (unionization) rights; (2) interfering with or dominating the formation of a labor organization; (3) discriminating in hiring or tenure of employment to encourage or

discourage membership in a labor organization; (4) discriminating or terminating an employee for filing charges or testifying under the NLRA; and (5) refusing to collectively bargain with representatives of employees. *Id.* Certainly speech can be used to interfere with, coerce, communicate hiring and firing decisions, and many other things, but the question Appellants seek to vindicate is whether they can speak at all. That issue is wholly collateral to the NLRA's review provisions.

This issue is also outside the scope of Abruzzo and the NLRB's expertise. NLRB and Abruzzo might have expertise with whether particular statements amount to coercion or certain discharges could be in retaliation, but the speech the Memorandum regulates here is not yet said. There is nothing about Abruzzo or the NLRB that gives them any sort of specialized knowledge or skill to determine that all statements made in mandatory meetings or conversations are "inherently" threatening. ROA.22. In order for any of Appellees alleged expertise to come into play, they would have to know what employers have said. Prohibiting all speech in a mandatory meeting is not a knowledgeable exercise of agency expertise, but an unconstitutional infringement of employers' free speech rights.

Accordingly, Appellees have not carried their heavy burden to show preclusion in this case. The Memorandum operates the same way a final rule would, and the NLRA does not give Appellants a route to vindicate their rights. Additionally, as *Axon* and *Free Enterprise* show, the *Thunder Basin* factors weigh in favor of not finding preclusion in this case, as Appellants are deprived of judicial review for wholly collateral claims that are outside of agency expertise.

3. The district court improperly dismissed Appellants' *Larson* claim (Count II).

Appellants' second count is an equitable claim for relief against Abruzzo. ROA.18-19. These are sometimes called "*Larson* claims" after *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) or *ultra vires* claims because they allege federal officials are acting beyond their authority. "Long before the APA, the 'main weapon in the arsenal for attacking federal administrative action' was a suit in equity seeking injunctive relief." *Fed. Express Corp. v. United States DOC*, 39 F.4th 756, 763 (D.C. Cir. 2022) (quoting Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 18.4, at 179 (3d ed. 1994)). *Larson* claims are essentially *Ex Parte Young* claims brought against federal officials, which exist independently of any statutory remedies created by the APA or the NLRA. *See Alabama Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1226 (5th Cir. 1976).

Under *Larson*, federal courts have inherent equitable authority to enjoin federal officials from engaging in ongoing violations of the Constitution. *Armstrong v. Exceptional Child Ctr. Inc.*, 575 U.S. 320, 327 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England."). *Larson* recognizes that a plaintiff may maintain suits against officers when those officers act *ultra vires*[7] of statutorily delegated

[7] After Appellants filed their lawsuit here, the Court considered *ultra vires* claims in the context of an APA case. *See Apter v. HHS*, 80 F.4th 579 (5th Cir. 2023). The Court held that plaintiffs "can use the APA to assert their *ultra vires* claims as a non-statutory cause of action." *Id.* at 587. Because it held the claims can proceed under the APA, it declined to consider whether plaintiffs could also use the common law version *ultra vires* claims. *Id.* at 593.

authority or take actions that "are constitutionally void." 337 U.S. at 689-90, 701-02; *see also Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Danos v. Jones*, 652 F.3d 577, 581-82 (5th Cir. 2011); *E.V. v. Robinson*, 906 F.3d 1082, 1090 (9th Cir. 2018).

Larson claims are not bound by APA rules. *Leal v. Azarii*, No. 2:20-CV-185-Z, 2020 U.S. Dist. LEXIS 241947, at *17-18 (Dec. 23, 2020), *vacated and remanded on other grounds in Leal v. Becerra*, No. 21-10302, 2022 App. LEXIS 20803 (July 27, 2022). To maintain a claim under *Larson* (and *Ex parte Young*), all that is required is to allege an ongoing violation of federal law. *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 195393, at *17-18 (N.D. Tex. July 19, 2021); *Azarii*, 2020 U.S. Dist. LEXIS 241947, at *17-19. "Through this line of cases, individuals have 'a right to sue directly under the [C]onstituiton to enjoin . . . federal officials from violating [their] constitutional rights.'" *Anibowei v. Barr*, Civil Action No. 3:16-CV-3495-D, 2019 U.S. Dist. LEXIS 24105, at *10-11 (N.D. Tex. Feb. 14, 2019) (quoting *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979)).

Appellants have done just that. The Complaint alleged that the Memorandum discriminates based on content, speaker, and viewpoint and results in a chilling effect on Appellants' speech as employers. ROA.18. Further, the Memorandum directly contradicts Supreme Court precedent. *See Gissel Packing Co.*, 395 U.S. at 617 ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board."); *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 67 (2008) (Employers have a right "to engage in noncoercive speech about unionization."); *accord Southwire Co. v. NLRB*, 383 F.2d 235, 240 (5th

Cir. 1967) (showing anti-union film as part of new employee orientation program is "encompassed in the employer's right to free speech."). Therefore, such an enforcement policy is constitutionally void and beyond Abruzzo's authority. Appellants' harm can be remedied by an injunction that enjoins Abruzzo from enforcing a *per se* rule that mandatory meetings violate the NLRA. Accordingly, an equitable claim against Abruzzo enjoining her from enforcing the Memorandum is proper.

II. Appellants established standing under *Speech First v. Fenves*.

The district court wrongly held that Appellants failed to establish standing. ROA 792-94. Standing requires: (1) an injury in fact; (2) that is fairly traceable to the challenged regulation; and (3) likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). When, as in this case, a plaintiff is the object of the agency regulation he challenges, these three criteria are easily met because "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015). Plaintiffs need not await enforcement to challenge the restriction on their rights, as the "increased regulatory burden" of being subject to the challenged regulation "typically satisfies the injury in fact requirement." *Id.* at 266.

Here, there is no dispute that Appellants are the object of the regulation. They are businesses subject to the restrictions of the NLRA and subject to prosecution under Abruzzo's enforcement policy. Nevertheless, the district court held that Appellants failed to establish

the injury in fact requirement.[8] ROA.792-94. This Court's recent decision *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020), however, shows why the district court erred.

A. Appellants satisfied each element demonstrating chilling of their speech.

In the context of a free speech chilling injury, the Supreme Court has established a three-part test to determine whether there is an injury in fact. *Speech First*, 979 F.3d at 330. A plaintiff has suffered chilling, and therefore an injury in fact, "if he (1) has an 'intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) his intended future conduct is 'arguably . . . proscribed by [the policy in question],' and (3) 'the threat of future enforcement of the [challenged policies] is substantial.'" *Id.* (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161-64 (2014)) (alterations in *Speech First*). This Court has also "repeatedly held, in the pre-enforcement context, that '[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.'" *Id.* (quoting *Hous. Chronicle Publ'g Co.*, 488 F.3d 613, 618 (5th Cir. 2007)). Appellants meet all three requirements to show a chilling injury in this case.

1. Appellants showed an intent to engage in a course of conduct arguably affected with a constitutional interest.

The Memorandum prohibits employers from discussing unionization during mandatory meetings or while employees are "cornered." ROA.23. Such speech has long been protected First

[8] Neither the district court nor Appellees argued that Appellants failed to establish the other two standing requirements. *See* ROA.201-207 (Appellees only argued that Appellants did not sufficiently allege an injury.).

Amendment expression. *See Gissel Packing Co.*, 395 U.S. at 617 ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board."); *Chamber of Commerce*, 554 U.S. at 67 (Employers have a right "to engage in noncoercive speech about unionization."); *Southwire Co.*, 383 F.2d at 240 (showing anti-union film as part of new employee orientation program is "encompassed in the employer's right to free speech."); *FDRLST Media, LLC v. NLRB*, 35 F.4th 108, 126 (3rd Cir. 2022). Appellants alleged that they have discussed unionization in the past and would like to do so in the future while employees are on paid time. ROA.16.[9] That their intended conduct is arguably affected with a constitutional interest cannot be seriously doubted.

2. Appellants showed that their intended future conduct is "arguably proscribed" by Appellees' new policy.

Appellants communications with their employees are subject to the Memorandum's rule. The Memorandum's restrictions "sweep[] broadly." *See Susan B. Anthony List*, 573 U.S. at 162. It regulates large meetings, smaller discussions, one-on-one casual conversations, and prevents Appellants from discussion unionization with their employees without explicitly giving employees the option to leave the meeting. ROA.94-95. Even an off-the-cuff remark by employers could violate Abruzzo's regulations governing "cornered" employees, a term she problematically fails to define. *See Ctr. for Ind. Freedom v. Carmouche*, 449 F.3d. 655, 661 (5th Cir. 2006) ("Controlling precedent thus establishes that a chilling of

[9] During summary judgment briefing, each Appellant also submitted declarations that they would want to hold mandatory meetings on paid time to discuss unionization and be able to freely discuss while employees are performing work duties. ROA.333-34. Appellees did not dispute those facts. ROA.456.

speech because of the mere existence of an allegedly vague or overbroad statute can be sufficient injury to support standing."). It also prevents employers from discussing unionization as part of a more general meeting. In other words, Appellants could require employees to attend meetings that discuss safety concerns, human resources policies, birthday, promotions, or harassment, but they cannot speak about unionization without risking an unfair-labor-practices complaint.

Their speech regarding unions in meetings and conversations is facially proscribed by the Memorandum. This certainly meets *Speech First*'s bar of "arguably proscribed," but *Speech First* goes a step further by pointing out speech need to be only "arguably regulated." 979 F.3d at 332 (citing *Susan B. Anthony*, 573 U.S. at 162, and *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). In fact, it held that it was sufficient to chill speech when a university entity merely has the ability to refer a possible violation of the university's policies to "the appropriate entity." *Id.* at 333. That ability to make referrals to an entity that then enforces laws or policies "is a real consequence that objectively chills speech." *Id.* (quoting *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019))

Appellants here face the same problem that the students in *Speech First* did. If they violate the Memorandum, a charging party could file charges against them for expressing their views on unionization in meetings or while employees are performing work duties. Abruzzo could then issue a complaint against the employer and then an employer would be wrapped up in a full-blown adversarial proceeding that could take years to resolve and involve substantial expense. It is easy to see why Appellants would rationally choose to self-censor rather than risk violating the Memorandum.

3. Appellants showed that there is a substantial threat of enforcement.

The district court erred by holding there was not a threat of enforcement. *Speech First* again controls this inquiry. In facial challenges to speech restrictions, "courts will assume a credible threat of prosecution" when restrictions "facially restrict expressive activity by the class to which the plaintiff belongs." *Speech First*, 979 F.3d at 335 (quoting *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996)); *See also Nat'l Press Photographers Ass'n v. McCraw*, No. 22-50337, 2024 U.S. App. LEXIS 683, at *16, (5th Cir. Jan. 10, 2024). In *Speech First*, the students belonged "to a class arguably facially restricted by the University policies" and used evidence of previous complaints to show a credible threat of enforcement. *Id.* The same is true here, Appellants belong to a class governed by the Memorandum and there is evidence that Abruzzo or her agents have filed *dozens*[10] of complaints under the Memorandum.

The district court recognized that it must presume a credible threat of prosecution but believed that "compelling contrary evidence" rebutted it. ROA.794. It also held that the Memorandum does not facially restrict any of Appellants' conduct. ROA.794 Neither of these things are true. The Memorandum states that Employers cannot speak about unionization when employees are required to convene or are cornered. Accordingly, on its face, the Memorandum warns employers that they could subject themselves to an unfair-labor-practices complaint if they violate that rule. That undoubtedly restricts, or at least chills, their speech.

[10] It is worth noting that the "more than two dozen" number of prosecutions is from April 2023 and the number now is likely even higher. ROA.694.

The district court's argument that there is not a credible threat of prosecution, because there are too many contingencies before Appellees would file an unfair-labor-practices complaint also misses the mark. *See* ROA.793-94 (citing *Tex. State LULAC v. Elfant*, 52 F.4th 248, 257 (5th Cir. 2022). In its view, Appellants would only be threatened with harm if:

> (1) Plaintiffs' employees begin a unionization effort;
> (2) Plaintiffs hold a type of employee meeting that is touched on in the Memorandum;
> (3) an employee takes offense to the meeting and institutes an unfair-labor-practice charge against Plaintiffs;
> (4) the General Counsel's Office investigates the complaint and determines charges should be filed;
> (5) the General Counsel's Office prosecutes the case; and
> (6) the NLRB reverses course on its current interpretation of what types of meetings qualify as an unfair labor practice.

ROA.793. This is wrong both factually and fails to understand the chilling effect of the Memorandum.

First, nothing in the Memorandum nor in Abruzzo's subsequent prosecutions indicates that there must be a unionization effort underway for the Memorandum to apply. It simply announces that she would prosecute mandatory meetings and discussions with cornered employees where unionization was discussed as unlawful, and thereby invites unfair-labor-practice charges against companies that do so. ROA.23-24. Second, because of the breadth of Abruzzo's enforcement policy, Appellants need not hold a meeting about unionization. Simply *discussing* unionization without first releasing employees to be free from hearing their speech would violate the Memorandum. Third, both employees and unions can be charging parties. An employee need not take offense to employer speech for someone else to file a charge with the NLRB regional the office.

Lastly, the Board need not "reverse[] course on its current interpretation" of protected employer speech for Appellants' speech to be chilled. Here, the process is the punishment. The threat of a complaint alone by the General Counsel is enough to chill employers from speaking about unionization. A reasonable employer will often self-censor to avoid a costly, years-long administrative process.

This, again, is what *Speech First* recognizes when discussing the threat of prosecution. When the "'effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights'" is to deter or chill speech, standing exists for plaintiffs that "belong[] in a class subject to the challenged policies." *Speech First*, 979 F.3d at 335-36 (quoting *Laird v. Tatum*, 408 U.S. 1, 10 (1972)). Further, evidence of previous enforcement can show a substantial threat of future enforcement. *Id.* at 336 (citing *Carmouche*, 449 F.3d 655). In other words, a Plaintiff can establish standing if they are subject to a regulation or proscription, or they can show a history of past enforcement. *Id.*; *see also Susan B. Anthony List*, 573 U.S. at 161 ("[T]he threat of future enforcement . . . is 'substantial' [where] there is history of past enforcement."); *Braidwood Mgmt. v. EEOC*, 70 F.4th 914, 927 (5th Cir. 2023) ("But one case, especially one landmark case, . . . can be considered a history of enforcement, even if the facts would not be precisely the same[.]").

B. If affirmed, the district court ruling would eliminate chilling of speech as a constitutional harm.

1. Chilling is one of the most pernicious constitutional harms due to its widespread impact.

The chilling of constitutionally protected speech has long been recognized as a constitutional harm of the utmost significance. Speech is "chilled" when the speaker declines to speak out of fear that his speech would result in prosecution by the government. And as to any given individual or business, chilling is, by definition, a *pre-enforcement* harm. Indeed, "[t]his court has repeatedly held, in the pre-enforcement context, that chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." *Speech First*, 979 F.3d at 330-31 (internal quotation marks omitted).

Once an anti-speech law has been enforced against someone, the harm is affirmative censorship. Prior to enforcement, the harm is chilling. Thus, the only way to bring a chilling claim is to do so pre-enforcement, yet the district court opinion expressly precludes this possibility. "That the [law] has not been enforced and that there is no certainty that it will be does not establish the lack of a case or controversy. This is particularly so when, as here, the State has not disavowed any intention of invoking the law against Plaintiffs." *McCraw*, No. 22-50337, 2024 U.S. App. LEXIS 683, at *18-19 (internal citations and quotation marks omitted).

This chilling effect is so threatening to First Amendment rights that "standing rules are relaxed for First Amendment cases so that citizens whose speech might otherwise be chilled by fear of sanction can prospectively seek relief." *McCraw*, No. 22-50337, 2024 U.S. App. LEXIS

683 at *15 (quoting *Justice v. Hosemann*, 771 F.3d 285, 294 (5th Cir. 2014)). "Government action will be sufficiently chilling when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Cooksey v. Futrell*, 721 F.3d 226, 235 (5th Cir. 2013). That is, there is a reason that "[i]t is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech." *Speech First*, 979 F.3d at 331. Additionally, it undermines the purpose of the NLRA in this context because, as in many cases, free speech serves to inform the electorate. *See Assoc. Builders & Contr. Of Tx. v. NLRB*, 826 F.3d 215, 224 (5th Cir. 2016) (noting the Board's concern for an "informed electorate"); *Excelsior Underwear Inc.*, 156 NLRB 1236 (Feb. 4, 1996) (purpose of the NLRA is to give both sides an opportunity to reach all the employees for a fair and informed election). Threatening employers with lengthy and expensive administrative proceedings before they can vindicate their speech rights is exactly what pre-enforcement challenges are meant to combat.

2. Eliminating chilling as a constitutional harm would greenlight expansive pre-enforcement censorship of speech.

As illustrated by this case, there are many ways for the government to encourage people to censor themselves. Pre-enforcement facial challenges serve a vital role in curtailing government regulations that result in citizens self-censoring. To allow Appellees to continue prosecuting under the Memorandum for years until an employer finally is able to seek judicial review ignores decades of Supreme Court and Fifth Circuit case law. *See, e.g.*, *Susan B. Anthony List*, 573 U.S. 149, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("In these circumstances, it is not

necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 215-16 (5th Cir. 2023) (holding a plaintiff had pre-enforcement standing to challenge a Louisiana food labeling law); *Speech First*, 979 F.3d at 333 (threat of administrative investigation and disciplinary proceedings at a university constituted a chilling effect). If the district court decision is upheld, the government will continue to find ways to chill speech while avoiding judicial review of their actions.

C. Appellants satisfied all remaining elements of standing and any other justiciability issues.

Though Appellees did not challenge the traceability and redressability prongs of standing in their motion to dismiss, Appellants meet both of those requirements. The injury is traceable, as it a direct result of Abruzzo's actions. This prong merely requires a "causal connection between the plaintiff's injury and the defendant's challenged conduct." *The Inclusive Cmtys. Project, Inc. v. Dep't of Treasury,* 946 F.3d 649, 655 (5th Cir. 2019). This does not mean that Appellants must establish "proximate" cause. *Bennett*, 520 U.S. at 167 (1997). The traceability prong is also met when it relies on "the predictable effect of Government action on the decisions of third parties." *DOC v. New York*, 139 S. Ct. 2551, 2566 (2019)). No matter which way one slices it, Appellants' injuries are fairly traceable to Abruzzo's Memorandum because it sets out the proscribed behavior that chills Appellants' speech, and traceability is met even if the Court buys Defendants' argument that they still rely on receiving complaints from third parties.

If Appellants win on either count brought in the Complaint, the court can fashion an appropriate remedy. Count I is Appellants' APA claim. Count II is Appellants' equitable claim brought under *Larson*. Under the APA claim, the remedy would simply be to declare the Memorandum unlawful and to set it aside. *See* 5 U.S.C. § 706. Under *Larson*, the remedy would be to declare the Memorandum unlawful and enjoin Abruzzo from bringing enforcement actions under the Memorandum against Appellants. These are well established narrow remedies that can be easily crafted to comply with Federal Rule of Civil Procedure 65(d)(1)(C).

As discussed above, any argument that Abruzzo cannot be enjoined because she has "final authority" over her "prosecutorial functions" is unavailing. Such an argument was rejected more than a century ago in *Ex parte Young*. In that case, the government likewise argued that a challenged law left the government agent with discretion to decide when to prosecute, and that an injunction preventing that prosecution would be contrary to that statute. The Supreme Court flatly rejected this argument, holding that:

> The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.

Ex parte Young, 209 U.S. 123, 159 (1908).

More recently, the Court rejected similar arguments under the APA in *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). In that case, the government argued that the Secretary's decision regarding critical habitat was unreviewable because the statute gave the Secretary final authority to make those decisions. The Court rejected this argument as contrary to the "basic presumption of judicial review for one suffering legal wrong because of agency action." *Id.* at 370 (cleaned up).

This case is also ripe for review. "The ripeness inquiry hinges on two factors: the fitness of the issues for judicial decision; and the hardship to the parties of withholding a court consideration." *Cochran*, 20 F.4th at 212. It focuses on "whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *Lower Colo. River Auth. v. Papalote Creek II, LLC*, 858 F.3d 916, 924 (5th Cir. 2017). "A matter is fit for review when it presents pure legal questions that require no additional factual development." *Gulfport Energy Corp. v. FERC*, 41 F.4th 667, 679 (5th Cir. 2022). Like standing, "ripeness requirements are also relaxed in First Amendment cases." *Cooksey*, 721 F.3d at 240. Regarding the hardship inquiry, review is appropriate when hardship is "sufficiently direct and immediate." *Id.*

Both the fitness and hardship prongs are met here. The first is met because the issue is purely legal and ready for resolution. Appellants bring a facial challenge to Defendant Abruzzo's Memorandum. The only question is whether Defendant Abruzzo can bring complaints under her interpretation NLRA without violating the First Amendment. There is no additional factual development needed. *Id.*

The second prong is met because Appellants are suffering a hardship—a chilling effect on their constitutionally protected speech. This is "sufficiently direct and immediate" on Appellants to warrant judicial review. Because the Memorandum is already being implemented, and Appellants are being chilled, the issue is ripe for review. Appellants need not await prosecution to ripen these claims. *Susan B. Anthony List*, 573 U.S. at 165 ("We take the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review."); *cf. Stevens*, 559 U.S. at 480 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibility.").

CONCLUSION

Employers have a First Amendment right to speak to their employees about unionization. Precedent could not be any clearer in that regard. Nevertheless, Abruzzo's enforcement policy chills that protected speech by threatening employers with prosecution under the NLRA. That chilling injury occurred immediately with the announcement of the Memorandum.

Without judicial review prior to enforcement, Appellants' rights are left up to the whims of federal officials and they are left with the choice of silencing themselves or speaking at their peril. The district court's decision below makes it impossible for Appellants to vindicate their First Amendment rights. In so deciding, it errored. This Court should reverse the district court's judgment granting Appellees' motion to dismiss.

Dated: February 6, 2024,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2024, a copy of the foregoing document was electronically filed and served via CM-ECF on all counsel who are registered CM/ECF users.

/s/ Matthew Miller
Matthew Miller

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface, type-style, and length requirements in 5th Circuit Rule 32.1 and Federal Rules of Appellate Procedure 32(a)(5)-(7) because it is in 14-point Century Schoolbook font (except for the footnotes that are in 12-point font) and contains 10,469 words, excluding the parts exempted by Federal Rules of Appellate Procedure 32(f).

/s/ Matthew Miller
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