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' REPLY BRIEF

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INTRODUCTION

Appellees' response is more remarkable for what it does not dispute than for what it does. Appellees do not dispute that Abruzzo has absolute final authority to determine prosecution policy for the agency. They do not dispute that she announced a change in policy that regulates precisely the sort of behavior that Appellants are engaged in. And they do not dispute that Abruzzo has since prosecuted other businesses under that policy.

Instead, Appellees argue, at bottom, that Appellants must violate the law and await prosecution before bringing suit to protect their fundamental constitutional rights. But, as explained below, this is contrary to binding precedent from this Court—much of which Appellees' response fails to address at all. If taken seriously, Appellees' arguments would allow Abruzzo—alone amongst all federal actors—to actively chill protected speech without any judicial recourse. Fortunately, this is not the law, as shown below. We do not require plaintiffs to "bet the farm" by violating an unconstitutional law before challenging it. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010).

ARGUMENT

I. Appellants Have Standing.

A. Appellees completely ignore this Court's controlling decision in *Contender Farms* regarding their standing and ripeness arguments.

Despite the length of Appellees' brief, they completely evade discussion of this Court's dispositive decision in *Contender Farms, L.L.P. v. U.S. Department of Agriculture*, 779 F.3d 258 (5th Cir. 2015), not

mentioning it once. This is telling. That opinion, which Appellants provided in their opening brief, determines the fundamental issue of this case: whether Appellants have standing to bring their claim.

This Court held in *Contender Farms* that where a plaintiff is the object of a regulation, he has standing to challenge it. 779 F.3d at 264-67. Whether a plaintiff is the object of a regulation is a matter "rooted in common sense." *Id.* at 265. And where this is the case, an "increased regulatory burden typically satisfies the injury in fact requirement." *Id.* at 266. This is true even if the plaintiff is not engaged in and "not 'forced'" to participate in the regulated conduct. *Id.* The Court affirmed that where the plaintiff "is the object of the regulation, 'there is ordinarily little question that the [government] action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'" *Id.* at 264 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

Here, Appellants are the objects of the regulation. "By its terms," the National Labor Relations Act ("NLRA") "requires," *id.* at 265, that the General Counsel exercise "final authority . . . in respect of the prosecution of" that law, and therefore that she direct the prosecution of covered companies according to her judgment. 29 U.S.C. § 153(d); *see also* Appellees' Br. at 3. There is no dispute that in her judgment, it is "necessary" to find unlawful "mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights." ROA.22-24. And there is no dispute that Appellants have both engaged in such meetings, and intend to "hold [future] meetings on paid time to explain the harm of unionization." ROA.16. Additionally, there is no dispute that Appellees are prosecuting

similar companies according to Abruzzo's memorandum in at least "two dozen cases pending at various post-complaint stages." ROA.589, 611.

Appellants are therefore the "object[s] of the regulation" and "may challenge it." *Contender Farms*, 779 F.3d at 266. Like the plaintiffs in *Contender Farms*, Appellants are "bound by the terms" of the NRLA and the General Counsel's judgment regarding how to enforce it. 779 F.3d at 266. And as with the plaintiffs in *Contender Farms*, this is true despite Appellants' having not yet been prosecuted, and despite the fact that they are not forced to engage in the proscribed activity. Appellants find themselves within regulatory crosshairs, despite having done nothing yet to trigger a shot, facing an "increased regulatory burden" due to Abruzzo's memorandum and Appellees' prosecutorial actions under it. *Id.* They are "objects of the [r]egulation" and there is "little question" that Abruzzo's memorandum "has caused [them] injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 264.

Appellees do not address *Contender Farms*. Indeed, they do not mention it a single time. It alone is sufficient to resolve this case.

B. Appellants have standing under binding First Amendment caselaw, as well.

Aside from ignoring *Contender Farms*'s standing "floor," Appellees and the district court erred in their standing analysis for First Amendment harms. Where the harm is the chilling of speech, as it is here, the standing requirements are even more "relax[ed]" than those annunciated in *Contender Farms*. *See Fairchild v. Liberty Independent School District*, 597 F.3d 747, 754 (5th Cir. 2010).

1. The chilling of speech is a distinct constitutional harm.

The U.S. Supreme Court has recognized the chilling of speech as a distinct constitutional harm for the better part of a century. *See, e.g. Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). This recognition has permitted litigants "to challenge a statute . . . because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (recognizing chilling as a cognizable harm independent of insidious governmental purposes). Although it is true that the "chilling effect must have an objective basis," *Texas State LULAC v. Elfant*, 52 F.4th 248, 256 (5th Cir. 2022), impermissible bases have typically involved purely subjective concerns, have been abstract and attenuated, and have in context not warranted fear of reprisal. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 13 (1972) (finding that the mere existence of an Army program that gathered lawfully available data and did not threaten prosecution for lawful speech was an insufficient basis for a chilling claim because the chilling effect arose simply from plaintiffs' "very perception of the system as inappropriate").

In all other cases, however, courts have admonished that "First Amendment freedoms need breathing space to survive" and "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of [them]." *NAACP v. Button*, 371 U.S. 415, 432 (1963). Even where prosecution has not been threatened, the existence of other obstacles to speech has been sufficient. *See, e.g., NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (holding that a discovery order for an association to produce a list of its members and agents was likely to

substantially restrain First Amendment freedom of association by "induc[ing] members to withdraw from the Association and dissuad[ing] others from joining it because of fear of exposure of their beliefs . . . and the consequences of this exposure").

Chilling claims are rooted in the precept that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990); *see also Missouri v. Biden*, 80 F.4th 641, 659-60 (5th Cir. 2023) (affirming that social-media companies' chilling and "self-censorship[, which] is a cognizable, ongoing harm," were caused by both direct and indirect pressure from the government). Accordingly, chilling is analytically distinct from the direct harm of prior restraint, for example, and the direct harm of censorship. *See, e.g.,* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 61 (1975) ("A criminal statute chills, prior restraint freezes.").

As such, chilling is a unique basis for protecting First Amendment rights, attended by equally unique procedural rules and standards. *See, e.g., Speech First, Inc. v. Fenves*, 979 F.3d 319, 331 (5th Cir. 2020) (providing that "[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement" and noting the First Amendment's "unique standing issues") (quotations omitted); *Houston Chronicle Pub. Co. v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007) (recognizing chilling as an independent harm sufficient for standing even where the ordinance at issue ultimately did not violate the First Amendment, and where plaintiff newspaper only needed to "demonstrate[] it engage[d] in sales in the City that would subject its vendors to prosecution under the [o]rdinance").

2. Appellants have standing to bring their speech-chilling claim.

This Court recently reversed a district court that had failed to find standing in a pre-enforcement chilling challenge. To establish chilling as an injury in fact, this Court explained that plaintiffs must show they (1) have an "intention to engage in a course of conduct arguably affected with a constitutional interest"; (2) their intended future conduct is "arguably . . . proscribed by [the policy in question]"; and (3) "the threat of future enforcement of the [challenged policies] is substantial." *Speech First*, 969 F.3d at 330 (citing *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 161-64 (2014)) (alterations in *Speech First*). Appellants did so here.

Neither the district court nor Appellees appear to take much issue with the first two elements. As for the first element—intention to engage in the conduct—Appellants alleged in their complaint that "[i]f future attempts were made to unionize [their] work forces, [they] would hold meetings on paid time to explain the harm of unionization and hear from workers about how [Appellants] could improve the workplace." ROA.16. They supported this by asserting that they "have historically opposed unionization of their work force" and had to "hir[e] legal counsel to help navigate a proper response" when "an electricians' union attempted to unionize several hundred of [their] workers." *Id.* *See also Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) ("review[ing] de novo the district court's grant of a motion to dismiss" and "constru[ing] facts in the light most favorable to the nonmoving party").

That Appellants' statement of intention is both deliberate and conditional does not make it "wholly speculative," ROA.202, and Appellees made no effort to conduct discovery on this claim or otherwise

probe its accuracy. Further, there has been no dispute whatsoever that their intended course of action implicates a First Amendment interest. Appellants' *intention* is to engage in the described speech; this is true even if the catalyzing event is not set to occur with absolute certainty. Mandating absolute certainty, again, would contradict the fundamental principles behind allowing chilling claims, *see supra,* Section I(B), and is not required by the language of *Speech First*, 979 F.3d at 330, or *Susan B. Anthony*, 573 U.S. at 161-64.

As for the second element—that Appellants' intended future conduct is arguably proscribed by the challenged policy—there is equally little dispute that Abruzzo's memorandum would prohibit Appellants' intended "meetings on paid time to explain the harm of unionization." ROA.16. Abruzzo's memorandum states that "[f]inding such mandatory meetings . . . to be unlawful is . . . necessary to ensure full protections of employees' statutory rights." ROA.22-24.

There is a one-to-one match between the conduct in which Appellants intend to engage and the conduct the General Counsel desires the NLRB to find unlawful. Appellants have provided that "[d]ue to the threat posed by Defendant Abruzzo's new interpretation of unfair labor standards . . . [they] have not held such meetings nor spoken to employees about unionization." ROA.16. The second element is therefore satisfied.

The final *Speech First* element requires that the threat of prosecution be substantial. Appellees acknowledge that "when dealing with pre-enforcement challenges to recently enacted . . . statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the

absence of compelling contrary evidence." Appellees' Br. at 51-52 (citing *Barilla v. City of Houston*, 13 F.4th 427, 432 (5th Cir. 2021) (quoting *Speech First*, 979 F.3d at 335)). However, Appellees then proceed to emphasize that the chain of contingencies regarding Appellants' *individual* prosecution is too great. Appellees' Br. at 52-56.

Appellees argue that, for the threat of prosecution to be sufficiently "objective" under *LULAC*, the chain of contingencies must be short, echoing the district court's statements that individual prosecution of Appellants should be "certainly impending." Appellees' Br. at 10. But both the "objective" and "certainly impending" standards are red herrings because they pass over the relevant underlying standard articulated in *Barilla* and *Speech First*. It is clear that Appellants belong to the class that engages in the expressive activity sought to be restricted. The inquiry ends there. *See, e.g., Speech First*, 797 F.4th at 335-37 (finding that "[the plaintiffs] plainly belong to a class arguably facially restricted by the University policies" and providing that "[w]here the policy remains non-moribund, the claim is that the policy causes self-censorship among those who are subject to it, and the [plaintiff's] speech is arguably regulated by the policy, there is standing."). *See also Barilla*, 13 F.4th at 433 ("[w]e have not been presented with evidence at this early stage contravening [the plaintiff's] assertions that the . . . [o]rdinances remain in force and that he faces a substantial threat of enforcement. . . . [The plaintiff] has thus adequately pleaded a justiciable injury and has standing to maintain his lawsuit"); *Speech First*, 797 F.4th at 335-37 (noting that even cases where "the [c]ourt looked for a history of enforcement or specific facts about the government's targeting practices that might yet give rise to a substantial threat of enforcement" do not

suggest "that if the plaintiffs had been the subject of the challenged policies, such evidence would have been necessary"). Moreover, although Appellees articulate the "chain of contingencies" in a belabored list, the likelihood of each one's occurrence is actually high.

The threat of prosecution against Appellants is all-the-more substantial in light of multiple recent prosecutions following the guidance of Abruzzo's memorandum. *See, e.g.,* ROA.251-59, *Order Consolidating Cases, Consolidating Complaint and Notice of Hearing*, National Labor Relations Board, Region 29, Case No. 29-CA-280153, at *4-5 (May 31, 2022) ("Consolidation Order"). In that consolidated suit, an employer faced prosecution for allegedly having "held mandatory meetings for the purpose of exposing employees to [the employer's] statements in opposition to the Union[,]" ROA.254, during which the employer "promised employees improved benefits to discourage employees from selecting the Union as their collective-bargaining representative; . . . promised to remedy [employees'] grievances to discourage employees from selecting the Union as their collective-bargaining representative[; and] . . . stat[ed] that the Union would charge employees dues, fees, fines, and/or assessments in exchange for their representation," ROA.255. In reaction, the General Counsel sought to require the employer to "physically post the Board's Notice to Employees[, and] . . . schedule mandatory training session(s) for all [the employer's] supervisors, managers, and agents (including third-party security personnel and all outside labor or management consultants) covering the rights guaranteed to employees under Section 7 of the Act and submit an attendance list to the Regional Director within 7 days of the training session(s)." ROA.256-57.

The theory of prosecution in the ongoing cases is directly in line with Abruzzo's memorandum "[f]inding such mandatory meetings . . . to be unlawful." ROA.22-24. This prosecution of similarly situated plaintiffs "is ample demonstration that [Appellants'] concern with [prosecution] has not been chimerical," and leaves little doubt that Appellants' controversy is justiciable. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (quotation omitted) (finding that the prosecution of one pamphlet distributor portended the prosecution of plaintiff, another pamphlet distributor); *see also Holder v. Humanitarian Law Project,* 561 U.S. 1, 16 (2010) (finding that the concurrent prosecution of 150 unrelated people under the same law created a "credible threat of prosecution" for plaintiffs). Appellants have standing.

3. Appellants must bring their claim now because the chilling of speech is inherently a pre-enforcement harm.

Appellees nowhere acknowledge the *necessity* of adjudicating a chilling claim prior to actual enforcement. The trait that distinguishes the chilling of speech from other First Amendment harms is that it necessarily occurs before there is any enforcement—its pre-enforcement posture *defines* the claim. As this Court has stated, "in the pre-enforcement context . . . '[t]he First Amendment challenge has unique standing issues because of the chilling effect, self-censorship, and in fact the very special nature of political speech itself.'" *Speech First*, 979 F.3d at 331 (quoting *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2010)). Courts recognize the reality that citizens may curb their own speech before any prosecution or other negative ramifications have taken place. This can be due to the simple threat of

prosecution of policies "that facially restrict expressive activity." *Speech First*, 979 F.3d at 335. It can also be due to fear of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Patterson*, 357 U.S. at 462. For this reason, it is a glaring logical necessity that chilling claims be brought *before* any enforcement has begun.

Recognizing the reality of the chilling injury, for "First Amendment facial challenges, federal courts relax the prudential limitations and allow yet-unharmed litigants to attack potentially" infringing government action. *Fairchild*, 597 F.3d at 754. This both allows citizens to vindicate their own First Amendment rights, and "prevent[s] the [government action] from chilling the First Amendment rights of other parties not before the court." *Id.* (citing *Secretary of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-58 (1984)). Consequently, "[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.

Due to the very nature of a chilling claim, Appellants need not wait to bring the First Amendment as an "affirmative defense" against an "unfair-labor-labor practice charge against them." Appellees' Br. at 28 n.9. And in fact, they must not. Here, as the district court acknowledged, Appellants "fear an unfair labor practice may be filed against them" under Abruzzo's new policy. Aug. 31 Order at 7. Therefore, now is the only possible time for Appellants to bring their claims.

a. This Court has long recognized pre-enforcement standing to bring chilling claims.

In *Speech First*, this Court held that a set of vague university policies created a "credible threat[] of enforcement" that students' "speech may be deemed 'harassment,' 'rude,' 'uncivil,' or 'offensive'" because "their views [did] not mirror those of many on campus." 979 F.3d at 330. This provided the basis for a speech-chilling claim—even after the school had agreed to cease investigations based on these policies. *Id.* at 229, 338. Even though there was little indication as to whether, or how, these policies would be enforced, "the *prospect* of adverse application" sufficed as a basis for the chilling claim. *Id.* at 330 (emphasis added). It was "not hard" for the Court to see the importance of vindicating the plaintiffs' speech rights prior to any enforcement. *Id.* at 331. Here, not only have Appellees not ceased from their conduct, they have both published specific guidance for future enforcement and started to prosecute in line with this guidance. Appellees have indicated that they have taken the position outlined in Abruzzo's memorandum in "more than two dozen cases pending at various post-complaint stages[,]" seven of which are currently before the NLRB, such as *Cemex Construction Materials*, NLRB 28-CA-230115 (April 22, 2022). ROA.589, 611. Others have presumably not yet been transferred to the NLRB, such as *Apple, Inc.*, NLRB 10-CA-295915 (Dec. 21, 2022). ROA.589, 617-22. Appellees have "not disavowed any intention of invoking the law against" Appellants. *National Press Photographers Ass'n v. McCraw*, 90 F.4th 770, 784 (5th Cir. 2024). In fact, they acknowledge that *Apple, Inc.*, for example, "show[s] . . . that the General Counsel is . . . identifying appropriate cases in which she will litigate her captive-audience theory."

ROA.624. There is accordingly no more proper a time to bring Appellants' chilling claim.

In *Carmouche*, this Court similarly held that "a chilling of speech because of the mere existence" of a government policy that *might* result in prosecution "can be sufficient injury to support standing." 449 F.3d at 660. There, an advocacy group "opted to refrain from running any ads," fearing they "would be deemed as intended to influence an election and that therefore [the group] would be forced to make certain disclosures under" state law. *Id.* at 658. Where the appellant stated it "[was] not willing to expose itself and its staff to civil and criminal penalties . . . and thus it [had] been forced to refrain from speaking," the Court found the pre-enforcement posture of the group's chilling claim to be proper. *See infra* Section II(A) (further explaining the proper standing analysis).

The opinion incorporated the Supreme Court's recognition that "the alleged danger of [such a statute] is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Carmouche*, 449 F.3d at 660 (quoting *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988)). And it reiterated that this Court has "avoided making vindication of freedom of expression await the outcome of protracted litigation." *Carmouche*, 449 F.3d at 660 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965)). This is because a "criminal prosecution under a statute regulating expression *usually* involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." *Id.* (emphasis added). Here, Abruzzo's memorandum and subsequent enforcement actions offer an even better illustration of the need for Appellants' First Amendment claims to be brought pre-enforcement.

b. The Supreme Court has long recognized pre-enforcement standing to bring chilling claims.

In *Susan B. Anthony List*, from which *Speech First* drew heavily, the Supreme Court rejected arguments that pre-enforcement First Amendment challenges to a state prohibition on "'false statements' during the course of a political campaign" were premature, and it provided a framework to ensure such claims could be brought. 573 U.S. 149, 152-53, 158-59 (2014). There, the plaintiff advocacy group challenged a state law prohibiting "certain false statements during the course of any campaign for nomination or election to public office." *Id.* at 152. The group "pleaded specific statements they intend[ed] to make in future election cycles." *Id.* at 161. Although the group intended to make true statements, the Court nevertheless found them to be "arguably . . . proscribed by [the] statute" because the "false statement law sweeps broadly." *Id.* at 162. The Court then unanimously opined that "[i]t 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," and that "[w]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *Id.* 158-59 (quotations omitted).

Susan B. Anthony List elaborated on the Supreme Court's tradition of recognizing the justiciability of pre-enforcement First Amendment claims. *Id.* at 159-61. For example, in *Holder v. Humanitarian Law Project*, the Court held that a First Amendment challenge to a statute prohibiting "material support or resources to a foreign terrorist organization" could be brought pre-enforcement. 561 U.S. 1 (2010).

There, the plaintiffs merely claimed that they had provided support to such organizations prior to the law's enactment and would provide similar support in the future. *Id.* at 15-16. At the same time, the government had prosecuted 150 people under the law and declined to disavow prosecution if the plaintiffs resumed their support of the designated organizations. *Id.* at 16. The Court found the claims were justiciable because plaintiffs faced a "credible threat" of enforcement and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."[1] *Id.* at 15.

In *American Booksellers*, the Court allowed pre-enforcement review of a law that criminalized "knowingly display[ing] for commercial purposes in a manner whereby juveniles may examine and peruse material that is harmful to juveniles." 484 U.S. at 386 (quotations omitted). In that suit, the plaintiffs merely introduced a number of books in their possession that they believed were subject to the statute and testified as to the costly compliance measures necessary to avoid prosecution. *Id.* at 389-91. The Court was "not troubled by the pre-enforcement nature of [the] suit" and "conclude[d] that plaintiffs [had] alleged an actual and well-founded fear that the law [would] be enforced against them." *Id.* at 393. The government "ha[d] not suggested that the

[1] In *Babbitt v. Farm Workers*, which was discussed at length in *Susan B. Anthony List*, the Court considered a pre-enforcement challenge to a statute that made it an unfair labor practice to encourage consumers to boycott an "agricultural product . . . by the use of dishonest, untruthful and deceptive publicity." 442 U.S. 289, 301 (1979). Even though the plaintiffs there had no intention of engaging in the proscribed conduct, and even though "the criminal penalty provision ha[d] not been applied and may never be applied to commissions of unfair labor practices," the plaintiffs nevertheless successfully alleged a chilling effect. *Id.* at 301-02. The Court found that they were "not without some reason in fearing prosecution for violation of the ban on specified forms of" communication. *Id.* at 302.

newly enacted law [would] not be enforced, and [the Court saw] no reason to assume otherwise." *Id.* Notably, the Court provided that "the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Id.*

In each of these Supreme Court cases, the Court recognized not only the justiciability of pre-enforcement First Amendment claims, but that being subjected to the looming threat of prosecution required immediate review.

4. Appellees' theory of the case would completely bar chilling claims.

Despite this long judicial tradition of recognizing the inherently pre-enforcement nature of chilling claims, Appellees insist on a variety of reasons the Court should jettison it here. Appellees argue that Appellants' claims are precluded by statute and otherwise non-justiciable. If that were true, however, it would mean that chilling claims should simply disappear from the landscape of constitutional litigation against the NLRB and similarly structured agencies. Moreover, it is contradictory both to acknowledge that chilling claims exist to preempt government abuse, and to find that they should remain dormant when the government has, at its own convenience, limited plaintiffs to a post-enforcement scheme for opposing that abuse.

Chilling is a particularly pernicious constitutional harm due to its widespread impact and ability to evade review. Whereas direct censorship is likely to have a known impact, chilling implicates the untold multitude of fears and concerns that prompt people to self-censor. *See also Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (suggesting that chilling constitutionally

harms audiences as well). Recognizing this outsized and unmanageable impact, courts have "fashioned this exception to the usual rules governing standing because of the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute of sweeping and improper application." *Carmouche*, 449 F.3d at 660.

Appellants reasonably fear reprisal due to the "mere existence" of Abruzzo's memorandum and ongoing prosecutions. *Carmouche*, 449 F.3d at 660. The memorandum need not be binding on the NLRB to achieve this; that is not the touchstone. Rather, Abruzzo's memorandum—and subsequent prosecution of various companies—elicits a chilling claim because it is "not imaginary or wholly speculative," *id.* (quotation omitted), and "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 (4th Cir. 2013).

A "person of ordinary firmness" running a business is likely to be deterred from engaging in constitutionally protected speech because the General Counsel of the NLRB has designated that speech as an unfair labor practice. "Potential enforcement" is enough. *Carmouche*, 449 F.3d at 661. Appellants' situation is the paradigmatic example of speech chilling. Disallowing Appellants, and all similarly situated plaintiffs, from addressing this reasonable chilling of their speech when it actually matters would radically distort the relevant thresholds and prohibit individuals from bringing claims that were designed to give them voice.

II. Appellants' Claims Are Otherwise Justiciable.

Appellees argue that Appellants' claims are otherwise non-justiciable because Appellants have not pled a proper cause of action

under either the Administrative Procedure Act ("APA") or in equity. Appellees further argue that Appellants' claims are precluded by the NLRA. Both are incorrect. Appellants have soundly pled statutory and equitable causes of action, and the contention that the NLRA precludes Appellants' claims is contrary to logic and the statutory text.

A. Appellants have a cause of action under the APA.

Appellees argue that the APA does not provide jurisdiction because Abruzzo's memorandum does not constitute final agency action. For the multitude of reasons already discussed in Appellants' opening brief, it does. The memorandum both (1) "mark[s] the consummation of the agency's decision making process" and (2) establishes "rights or obligations" or leads to "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

It is plain to see that legal consequences flow from the memorandum, *see, e.g.,* ROA.251-59 (illustrating ongoing prosecution), and Appellees' assertion that "it is the Board alone which can issue final orders that establish legal consequences" does not contemplate the unique context of speech chilling, the core of this case. However, Appellees argue that the decision-making process "can only be consummated by the issuance of a final Board order (or rule)." Appellees' Br. at 41. This is not supported. In fact, in *Texas v. EEOC*, both parties agreed that "guidance" for which "the scope" was "purportedly broad," and for which the agency had "limited rulemaking and enforcement power" and could "issue only procedural regulations," was the consummation of the agency's decision-making process. 933 F.3d 433, 437-38, 441 (5th Cir. 2019); *see also* 29 U.S.C. § 153(d) (the General

Counsel "shall have final authority" over investigatory and prosecutorial matters in unfair-labor-practice cases). Here, Abruzzo's memorandum is strikingly similar legal guidance to that in *Bennett*, and consummates the judgment of the General Counsel, who oversees the actual enforcement of the issues described in the memorandum. Moreover, Appellees' reading that the memorandum is only "subject to review on the review of [some later] final agency action" would again undermine decades of case law on speech chilling. *See* Appellees' Br. at 39.

B. Appellants have a cause of action in equity.

Appellees also mischaracterize this Court's equitable jurisprudence. Appellees acknowledge that *Larson v. Domestic & Foreign Commerce Corporation* "allows for suits against federal officials who act *ultra vires* or take actions that" offend the Constitution. 337 U.S 682, 689-90, 701-02 (1949). They argue, however, that *Leedom v. Kyne*, 358 U.S. 184 (1958) somehow restricts the *Larson* doctrine to situations in which "(1) an agency exceed[s] the scope of its delegated authority or violate[s] a clear statutory mandate; and (2) the aggrieved party [is] deprived of a meaningful opportunity for judicial review." Appellees' Br. at 22-23 (citing unpublished *Sanderson Farms, Inc. v. NLRB*, 651 F. App'x 294, 297 (5th Cir. 2016)). But *Larson* is not limited by the way it *applied* in a subsequent case merely because it formed the basis for *jurisdiction* in that case. Appellants do not "point to any statutory mandate that the General Counsel violated by filing the Memorandum," Appellees' Br. at 23, for the simple reason that that is not what Appellants claim she did. They claim she violated *the Constitution*, a

context in which *Larson*'s application is all-the-more crucial, and which Appellees almost entirely neglect.

C. The NLRA does not preclude Appellants' claims.

Lastly, Appellees spend a significant portion of their response brief explaining why the National Labor Relations Act purportedly precludes speech-chilling claims entirely. They argue that the APA exempts agency action from review if "statutes preclude judicial review," Appellees' Br. at 38 (quoting 5 U.S.C. § 701(a)(1)), and that "the NRLA does just that" because it only establishes district court and appellate jurisdiction for limited situations, Appellees' Br. at 14. But the chilling of speech is an axiomatically pre-enforcement constitutional harm, *see supra* Section I(B), and therefore *requires* pre-enforcement review. This review cannot be sought, in the first instance, before the NLRB because there is no ongoing proceeding for the Board to review. Thus, chilling claims definitionally cannot be precluded by the statute.

"'[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.' . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (quoting William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND 23 (1765)). The Court should not construe the absence of a statutory avenue for raising a constitutional concern as precluding the possibility of doing so at all. Appellees' discussion of NLRA preclusion, despite its length, is inapposite and misleading.

In light of these principles, the Court should not accept Appellees' invitation to reject *Axon Enterprise v. F.T.C.*, 143 S. Ct. 890 (2023). *Axon* is instructive in its application of the factors set forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994), which presumes Congress does not intend to limit jurisdiction where (1) the statutory regime "foreclose[s] all meaningful review of the claim" at issue, (2) the claim is "wholly collateral to [the] statute's review provisions[,]" and (3) the claim is "outside the agency's expertise." *Axon* acknowledges that where "the nature of the claims and accompanying harms" are such that they cannot be remedied by the provided statutory regime, the regime should not be read to preclude jurisdiction. 143 S. Ct. at 904. *Cf. Devillier v. Texas*, No. 22-913, 2024 U.S. LEXIS 1812 (U.S. Apr. 16, 2024) (finding that a constitutional provision was not self-executing where there was a statutory regime that facilitated an adequate remedy for the alleged harm).

Appellees attempt to distinguish *Axon* on the basis that its constitutional claim was structural and not a "merits" issue. This distinction is not present in the case. The touchstone there was not that the claim was structural, but that its "nature" (whether due to its structure or its "merits") did not allow it to be reviewed by the regime provided, emphatically because it involved "a here-and-now-injury." *Id.* at 903. Speech chilling is a "here-and-now injury"—by definition this recognized constitutional harm only takes place before enforcement. Not only is it "impossible to remedy once the proceeding is over . . . when appellate review kicks in[,]" but it is also impossible to remedy once prosecution underway, because it has already taken place. *Id.* Like the claim in *Axon*, the pre-enforcement nature of Appellants' claims is such

that the NRLA's post-enforcement regime both forecloses all meaningful review and renders the claims wholly collateral to the statute's review provisions. As for the third factor, the NRLB is no more an expert on the First Amendment as the Federal Trade Commission is on the separation of powers. *See id.* at 905.

It is true "Congress . . . may substitute for . . . district court authority an alternative scheme of review." *Axon*, 143 S. Ct. at 900. However, because the NRLA, even as Appellees depict it, provides no substitute for jurisdiction over speech-chilling claims, this point is irrelevant here. Congress may provide for *alternative* schemes of constitutional review, but it may not eliminate them. Appellees' brief therefore presents a deeply problematic reading of *Axon* and *Thunder Basin*. It is an impossible result—one that Congress would not have intended and the Constitution cannot permit.

Dated: April 25, 2024,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 25, 2024, a copy of the foregoing document was electronically filed and served via CM-ECF on all counsel who are registered CM/ECF users.

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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 5935 words, excluding the parts exempted by Federal Rules of Appellate Procedure 32(f).

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