IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

BURNETT SPECIALISTS, STAFF FORCE d/b/a STAFF FORCE PERSONNEL SERVICES, ALLEGIANCE STAFFING CORP., LINK STAFFING, and LEADINGEDGE PERSONNEL, LTD., *Plaintiffs*,	§	Civil Action No. 4:22-cv-00605-ALM
v.	§	
JENNIFER A. ABRUZZO, in her official capacity, UNITED STATES OF AMERICA, and NATIONAL LABOR RELATIONS BOARD, *Defendants*.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DIMISS COMPLAINT FOR LACK OF JURISDICTION

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RESPONSE TO STATEMENT OF ISSUES TO BE DECIDED

1. The National Labor Relations Board ("NLRB") General Counsel is not immune from review for memoranda that result in the prosecution of employers for constitutionally protected speech.

2. Memorandum GC 22-04 (the "Memorandum") is a final agency action because General Counsel Abruzzo is an independent and final authority concerning what cases will be prosecuted before the NLRB, and legal consequences flow from her decision to prosecute employers.

3. The Complaint alleges a justiciable case or controversy because Defendants are actively prosecuting employers under the Memorandum, and the threat of prosecution against Plaintiffs chills their constitutionally protected speech.

Plaintiffs Burnett Specialists, Staff Force d/b/a Staff Force Personnel Services, Allegiance Staffing Corp., Link Staffing, and LeadingEdge Personnel, Ltd. (collectively, "Plaintiffs") herein respond to Defendants National Labor Relations Board and General Counsel Jennifer A. Abruzzo's Motion to Dismiss Complaint for Lack of Jurisdiction (ECF No. 16, herein after "Motion") and Defendant United States of America's joinder (ECF No. 17) (collectively, "Defendants").

The Court should deny Defendants' motion for two simple reasons: Defendant Abruzzo is *already* prosecuting companies under the Memorandum and these prosecutions create a legally cognizable harm for Plaintiffs—namely, the chilling effect it has on their speech. As shown below, these two facts—which Plaintiffs properly pled—defeat every basis on which Defendants allege dismissal to be proper. Furthermore, Defendants have completely failed to engage with Plaintiffs' *Larson* claim, which alleges that federal officers have violated the U.S. Constitution by their actions. Defendants' failure to move for dismissal on an entire count of the Complaint is further reason to deny the motion.

I. Legal Standard

Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of sub-matter jurisdiction. The party asserting jurisdiction bears the burden of proving jurisdiction exists. *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014). In a facial attack under Rule 12(b)(1), 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 v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

II. Defendants' motion is without merit and should be denied.

Defendants move to dismiss on the grounds of ripeness, no final agency action, no injury-in-fact, and a claim that the new policy is statutorily exempted from review. As shown below, the ripeness and agency action grounds are defeated by the fact that Defendant Abruzzo is currently prosecuting companies under the new policy. The injury-in-fact ground is defeated by the fact that the threat of prosecution naturally chills Plaintiffs' speech, and chilling is a cognizable First Amendment injury. And the claim that the Policy is statutorily insulated from review falls short for at least two reasons: namely, that it fails to address Plaintiffs' *Larson* claim at all, and that the cases cited by Defendants do not actually show that this Court's review under the Declaratory Judgments Act and Administrative Procedures Act ("APA") is improper.

A. Defendant Abruzzo's ongoing prosecutions under the Memorandum show that this case is ripe, and that the agency action is final.

1. *The Complaint alleges a justiciable controversy.*

Defendant Abruzzo is actively prosecuting companies under the Memorandum. For instance, in a complaint filed in Brooklyn, Regional Director Kathy Drew King alleged unfair labor practices against an employer for, among other things, "requir[ing] its … employees to attend mandatory meetings for the purpose of

exposing employees to Respondent's statements in opposition to the union." *See, e.g.*, *Order Consolidating Cases, Consolidated Complaint and Notice of Hearing*, National Labor Relations Board, Region 29, Case No. 29-CA-280153, at *4-5 (May 31, 2022) (attached as Exhibit A). This is exactly the type of prosecution that Defendant Abruzzo promised to engage in under the Memorandum, (ECF no. 1-1 at 3-4, Ex. A ("Finding such mandatory meetings, including those termed as 'captive-audience meetings' to be unlawful is therefore necessary to ensure full protections of employees' statutory labor rights.")), and exactly the unconstitutional legal consequences that Plaintiffs seek to avoid by bringing this lawsuit.

These ongoing prosecutions show that this case is ripe. "The ripeness inquiry hinges on two factors: the fitness of the issues for judicial decision; and the hardship to the parties of withholding court consideration." *Cochran v. United States SEC*, 20 F.4th 194, 212 (5th Cir. 2021). 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 v. Futrell*, 721 F.3d 226, 240 (5th Cir. 2013). 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. Plaintiffs bring a facial challenge to

Defendant Abruzzo's Memorandum. The only question is whether Defendant Abruzzo can bring complaints under her new interpretation of the National Labor Relations Act ("NLRA") without violating the First Amendment. There is no additional factual development needed. *Id.*; *accord Associated Builders and Contractors of Tex, Inc. v. NLRB*, 2015 U.S. Dist. LEXIS 78890, at *10 (W.D. Tex. June 1, 2015) (noting that facial challenges are "a purely legal attack").

The second prong is met because Plaintiffs are suffering a hardship—a chilling effect on their constitutionally protected speech. This is "sufficiently direct and immediate" on Plaintiffs to warrant judicial review. Because the Memorandum is already being implemented, and Plaintiffs are being chilled, the issue is ripe for review. *Associated Builders*, 2015 U.S. Dist. LEXIS 78890, at *10-11. Plaintiffs need not await prosecution to ripen these claims. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014) ("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.") *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[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."). *cf. United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 299 (1979) ("When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there

exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.") (Internal quotation marks omitted).

Defendants do not challenge the redressability prong of standing, and so Plaintiffs will not address it. Defendants only challenged traceability in a footnote; thus, it is waived. *White Glove Staffing, Inc. v. Methodist Hosps. Of Dallas*, 947 F.3d 301, 308 (5th Cir. 2020). In any case, the injury is traceable, as it is a direct result of Defendant Abruzzo's actions. Further, this prong merely requires a "causal connection between the plaintiff's injury and the defendant's challenged conduct." *The Inclusive Comtys. Project, Inc. v. Department of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019). This does not mean Plaintiffs must establish "proximate" cause. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). The traceability prong is also met when it relies on "the predictable effect of Government action on the decisions of third parties." *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). No matter which way one slices it, Plaintiffs' injuries are fairly traceable to Defendant Abruzzo's Memorandum because it sets out the proscribed behavior that chills Plaintiffs' speech, and traceability is met even if the Court buys Defendants' argument that they still rely on receiving complaints from third parties.

2. *Defendant Abruzzo's actions constitute final agency action.*

There can likewise be no doubt that Defendant Abruzzo's actions constitute a final agency action. As described by both the NLRA and Defendants themselves, Defendant Abruzzo is the "final authority" on investigating, issuing, and prosecuting

complaints before the board. (Motion at 10 (citing 29 U.S.C. § 153(d)). And "final authorities" can, naturally, implement final agency actions. *See Dhakal v. Sessions*, 895 F.3d 532, 540 (7th Cir. 2018). That is, Defendant Abruzzo is, in her official capacity, an independent agent created by the NLRA that can create her own legal consequences for employers. The NLRA further grants her supervision over all attorneys employed by the Board. 29 U.S.C. § 153(d). But perhaps most importantly, Defendant Abruzzo is *already* prosecuting employers based on the Memorandum. Therefore, legal consequences flow from this. Employers' speech is naturally chilled by the threat of prosecution and that chilling is a legal consequence. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 331 (5th Cir. 2020) ("It is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech.").

Defendant Abruzzo's independent and final authority to investigate, issue, and prosecute complaints is the consummation of her decision-making process and this produces "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). She is wholly separate from the rest of the Board and can act without their oversight when deciding which companies to prosecute. *Overstreet ex rel. NLRB v. El Paso Disposal, L.P.*, 625 F.3d 844, 852 (5th Cir. 2010) (citing 29 U.S.C. § 153(d)). Accordingly, her enforcement decisions and guidance become final agency action when they operate in a way to chill constitutionally protected speech.

The truth of this proposition becomes obvious when analogized to other rights. Say the General Counsel of the NLRB chose to only enforce the NLRA against

Muslim-owned employers. Under Defendants' theory, Muslim employers would have no recourse until the General Counsel filed a complaint, *and* prevailed before the NLRB, (Motion at 18-25 (arguing that the General Counsel's prosecutorial discretion is unreviewable, and no agency action is final until the Board rules on a complaint)), even though such a policy is obviously unconstitutional and creates legal consequences for any Muslim-owned company. An unconstitutional policy can be challenged by those entities that are subject to that policy, even if those entities are not presently being prosecuted. *Union Pac. R.R. Co. v. City of Palestine*, 41 F.4th 696, 708 (5th Cir. 2022) (The purpose of the Declaratory Judgment Act is "to provide a means to grant litigants judicial relief from legal uncertainty in situations so that they would no longer be put to the Hobson's choice of foregoing their rights or acting at their peril.") (Internal quotation marks omitted).

B. The threat of litigation for constitutionally protected speech is an injury in fact.

Contrary to Defendants' argument (Motion at 33-37), the threat of legal action is exactly the type of injury that is recognized as chilling First Amendment rights. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120 (11th Cir. 2022) ("[T]o determine whether a First Amendment plaintiff has standing, we simply ask whether the operation or enforcement of the government policy would cause a reasonable would-be speaker to self-censor—even where the policy falls short of a direct prohibition against the exercise of First Amendment Rights.") (Internal citations, alterations, and quotation marks omitted). This is only made more concrete by the NLRB's ability to make some new rules effective retroactively, *Browning-Ferris Indus. of Cal. v.*

NLRB, 911 F.3d 1195, 1222 (D.C. Cir. 2018), and that complaints can be based on any practice that occurred within six months of a complaint, 29 U.S.C. § 160(b). A complaint filed against Plaintiffs would result in the large expenditure of time, money, and other resources in hiring counsel and preparing a defense. Accordingly, they fear doing anything that could trigger a complaint.

To have standing, a plaintiff must have suffered an injury in fact, fairly traceable to the challenged conduct of the defendant, and that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Standing requirements are "somewhat relaxed in First Amendment cases." *Cooksey v. Futrell*, 721 F.3d 226, 235 (5th Cir. 2013). This is especially true when it comes to the first prong: an injury in fact. *Id.* "Government action will be sufficiently chilling when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Id.* "Plaintiffs [may state] an injury based on their allegation that Defendants' enforcement of [a law] has a chilling effect on future" speech in which Plaintiffs may engage. *Hat v. Landry*, No. 6:20-CV-00983, 2021 U.S. Dist. LEXIS 86868, at *16 (W.D. La. May 5, 2021).

The Fifth Circuit has explained that when it comes to the chilling of First Amendment rights, Plaintiffs need only show they have an (1) "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." *Fenves*, 979 F.3d at 330 (internal quotations and alterations omitted).

Defendants' argument that Plaintiffs do not meet this burden fails. As a preliminary matter, they ignore the sheer breadth of the new rule. It covers both "convened" and "cornered" employees. (ECF No. 1-2, Ex. B at 59-62). That is, Plaintiffs cannot speak about unionization in organized meetings, nor in small groups, nor in one-on-one casual conversations—all things they have done in the past—without first disclaiming that any discussion is voluntary. Neither can a discussion of unionization make up a part of a larger required meeting, such as one where employees are receiving other training, discussing social events, or celebrating promotions. Plaintiffs are forced instead to stifle their speech regarding an important business matter. Additionally, this is occurring at a time when unionization and unfair labor practice charges are surging[1] and Plaintiffs do not necessarily know about a unionization effort until it is well underway.

In other words, during a time of increased unionization efforts, Plaintiffs' intent is to be able to quickly and directly respond to such efforts by speaking to their employees about it. The time to decide Plaintiffs' rights under the Constitution is now. Defendant Abruzzo's Memorandum limits their ability to do that by forbidding employers from discussing unionization at mandatory meetings and many small group and one-on-one settings. This speech is more than "arguably affected with a

[1] NLRB, *Correction: First Three Quarters' Union Election Petitions Up 58%, Exceeding All FY21 Petitions Filed* (July 15, 2022) ("By May 25, FY2022 petitions exceeded the total number of petitions filed in all of FY2021. At the same time, unfair labor practice charges have increased 16%—from 11,082 to 12,819.") available at: https://www.nlrb.gov/news-outreach/news-story/correction-first-three-quarters-union-election-petitions-up-58-exceeding.

constitutional interest," as it discriminates on the basis of viewpoint, speaker, and content. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). They are now threatened with prosecution if such a circumstance would occur.

The time, expense, and other resources that would go into defending a complaint in an administrative hearing is an injury and creates a chilling effect concerning Plaintiffs' intended speech. *See Speech First*, 979 F.3d at 319 (holding that the threat of investigations and disciplinary sanctions of students by a university for protected speech constituted chilling effect). Defendants' argument otherwise ignores the "relaxed" standard for standing in First Amendment cases.

Plaintiffs' intended speech is also "arguably proscribed." Indeed, Defendants do not deny that Plaintiffs communications with their employees would be subject to Defendant Abruzzo's interpretation of the NLRA as found in the Memorandum. Nor could they. The Memorandum "sweeps broadly." *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014). It encompasses large meetings and smaller discussions and prevents Plaintiffs from discussing unionization with their employees without explicitly giving employees the option to leave the meeting. In other words, Plaintiffs could require meetings that discuss safety training, human resources policies, birthdays, promotions, or harassment, but they cannot speak about unionization at required meetings without opening themselves up to a complaint to the NLRB. Their speech is facially proscribed by the Memorandum and certainly meets the lower standard of being "arguably" proscribed. *See Fenves*, 979 F.3d at 332.

Plaintiffs' risk of future enforcement is substantial. Defendant Abruzzo, or her agents, have already brought a complaint under the new Memorandum, and the Motion itself indicates Defendant Abruzzo intends to bring the same complaints in the future. (Motion at 28 n.123). Plaintiffs are employers that span multiple states, many large metro areas, employ thousands of workers, and work in diverse sectors of the economy. (ECF No. 1, at 2-8, hereinafter "Complaint"). They have experienced unionization efforts in the past and expect to experience more in the future. (Complaint at 6). When that happens, they intend to hold meetings, on company time, to discuss unionization with their employees.[2] (*Id.*). The risk of being subject to a complaint, if Plaintiffs were to speak on the topic of unionization, is very high. Plaintiffs have properly pled a cognizable First Amendment injury.

[2] Defendants also appear to argue that Plaintiffs have not alleged that they would hold required meetings about unionization when the issue arises. (See Motion at 33-34). However, the context of the Complaint makes clear that Plaintiffs would not only hold the meetings, but would hold them on paid time. Defendants may have gotten confused. The section that Defendants refer to concerns Defendant Abruzzo's Memorandum forbidding required meetings, not Plaintiffs own meetings. (Complaint at 5-6). Further, the Complaint alleges that "Plaintiffs have discussed concerns about unionizing openly with their employees on paid time" in the past. (Complaint at 6 ¶ 31). It is clear that these paragraphs concerning meetings and discussions on paid time are being contrasted with Defendant Abruzzo's Memorandum which requires all discussions and meetings to be explicitly voluntary. And, in any case, all inferences must be drawn in favor of Plaintiffs. *In re Moncla Marine, LLC*, 2019 U.S. Dist. LEXIS 216317, at *5 (M.D. La. Dec. 17, 2019) ("A facial attack analysis mirrors the analysis used for a Rule 12(b)(6) motion.")

C. Defendants' motion does not address Plaintiffs' *Larson* claims at all, and otherwise fails to show that this Court is precluded from asserting jurisdiction.

Defendants' remaining alleged grounds for dismissal are a basket of assertions that this Court is precluded from asserting jurisdiction over this case. In every instance, however, Defendants are incorrect. Most glaringly, Defendants fail to show why this Court would lack jurisdiction over Plaintiffs' *Larson* claim, and thus have not successfully moved to dismiss that claim. Furthermore, Defendants' assertion that the NLRA precludes this Court from hearing Plaintiffs' APA claims flies in the face of numerous cases showing otherwise. *Associated Builders*, 2015 U.S. Dist. LEXIS 78890, at *7-9; *Nat'l Fedn. of Indep. Bus. v. Perez*, No. 5:16-cv-00066-C, 2016 U.S. Dist. LEXIS 89694, at *68 (N.D. Tex. June 27, 2016); *AFL-CIO v. NLRB*, 466 F.Supp.3d 68, 73 (D.C. Dist. June 7, 2020); *Baker DC, LLC v. NLRB*, 102 F.Supp.3d 194, 196-97 (D.C. Dist. April 22, 2015).

Defendants' failure to address an entire section of Plaintiffs' complaint should alone suffice to defeat their motion to dismiss. In Count II of the Complaint, Plaintiffs allege that Defendants have violated the First Amendment to the U.S. Constitution by enacting the new policy. This is not a claim under the APA, but rather a claim at equity to "enjoin federal officers from violating the Constitution," or what is commonly known as a *Larson* claim. *See Texas v. Biden*, No. 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 195393, at *17 (N.D. Tex. July 19, 2021) (*citing Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327-28, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015) and *Larson v. Domestic & Foreign Com. Co.*, 337, U.S. 682, 689-90, 69 S. Ct. 1457, 93

L. Ed. 1628 (1949). *Larson* claims "can be brought apart from the APA[,]" *Texas v. Biden*, U.S. Dist. LEXIS 195393, at *16, which is what Plaintiffs have done here, and this Court has equitable power to hear them. *See Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 475 (5th Cir. 2020). Defendants do not challenge any of this in their motion and that motion must, accordingly, fail.

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 U.S. App. LEXIS 20803 (July 27, 2022). They are the federal equivalent to claims raised under *Ex parte Young*, 209 U.S. 123 (1907). 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*, 2021 U.S. Dist. LEXIS 195393, at *17-18 *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]onstitution to enjoin . . . federal officials from violating [their] constitutional rights.'" *Anibowei v. Barr*, 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). These claims allow for injunctive relief and are appropriate in cases like this one, where a federal official is conducting an ongoing violation of the First Amendment. *Id.; see also Green Valley*, 969 F.3d at 472.

Plaintiffs have alleged Defendant Abruzzo's actions violate their First Amendment rights, and Defendants have offered no argument to warrant dismissing that claim. Defendant Abruzzo is the "final authority" regarding investigation of

charges and issuing complaints. (Motion at 10). She is acting in her official capacity and infringing on Plaintiffs' constitutionally protected speech. The *Larson* claim allows the Court to enjoin her from prosecuting under the Memorandum.

But even separate from the *Larson* claim, this Court has the authority to hear Plaintiffs' APA claims. In Defendants' telling of the law, courts are without power to stop their stifling of First Amendment rights until after Plaintiffs have been prosecuted for their speech because the Memorandum is merely an exercise of prosecutorial discretion. (Motion at 14-18). Therefore, employers subject to the NLRA can only challenge Board action in the court of appeals after they have "been aggrieved by a final order." (*Id.* citing 29 U.S.C. § 160(f)). This cannot be the case.

Defendants' argument rests on a fundamental mischaracterization of the Memorandum being an exercise of prosecutorial discretion. Generally, the government is given "discretion to decide which individuals to prosecute, which offenses to charge, and what measure 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 legal for over 70 years.

Accordingly, all the cases cited by Defendants are inapposite. They concern attempts to avoid collateral attacks of NLRA prosecutions that are already underway. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) ("The question for decision is whether a federal district court has equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices[.]"); *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 669 (1966) ("The broad question in this case is whether the District Courts throughout the Circuit are to be open to police the procedural purity of the NLRB's proceedings long before the administrative process is over[.]") Further, these cases' interest in "administrative finality" largely focused on whether courts should micromanage the NLRB's procedures. *Bokat*, 363 F.2d at 671. Those concerns are not present here.

Those cases stand in stark contrast to the issue here: whether Defendant Abruzzo's Memorandum chills constitutionally protected speech prior to prosecution. The Memorandum makes all employers subject to the new interpretation and chills their speech. Accordingly, it is appropriate to challenge it under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, the Administrative Procedure Act, 5 U.S.C. §§ 702, 706, and the Little Tucker Act, 28 U.S.C. § 1346, as Plaintiffs have done. *Cf. Associated Builders*, 2015 U.S. Dist. LEXIS 78890, at *7-9 (holding district court had jurisdiction to consider an NLRB final rule).

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied. Plaintiffs respectfully request oral argument on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on October 25, 2022, with the Clerk of the Court for the Eastern District of Texas using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/Matthew Miller
MATTHEW MILLER

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

AMAZON.COM SERVICES INC.

and **Case No. 29-CA-280153**

(b) (6), (b) (7)(C), an Individual

and

AMAZON LABOR UNION **Case Nos. 29-CA-286577**
29-CA-287614
29-CA-290880
29-CA-292392

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

This Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing is based on the following charges, each alleging that Amazon.com Services, LLC ("Respondent") has engaged in unfair labor practices affecting commerce as set forth in the National Labor Relations Act ("Act"), 29 U.S.C. § 151 et seq.: a charge filed in Case No. 29-CA-280153 by (b) (6), (b) (7)(C), an individual ("Charging Party (b) (6), (b) (7)(C)"); and charges filed in Case Nos. 29-CA-286577, 29-CA-287614, 29-CA-290880 and 29-CA-292392by Amazon Labor Union ("Union"). . Based thereon and pursuant to Section 102.33 and 102.45 of the Rules and Regulations of the National Labor Relations Board ("Board") and to avoid unnecessary costs or delay,

IT IS ORDERED THAT Case Nos. 29-CA-280153, 29-CA-286577, 29-CA-287614, 29-CA-290880, and 29-CA-292392, are hereby consolidated.

This Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing is issued pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations and alleges that Respondent has violated the Act as described below.

1. (a) The charge in Case No. 29-CA-280153 was filed by Charging Party [redacted] on July 16, 2021, and a copy was served on Respondent by U.S. mail on July 20, 2021.

(b) The charge in Case No. 29-CA-286577 was filed by the Union on November 19, 2021, and a copy was served on Respondent by U.S. mail and email on November 22, 2021.

(c) The charge in Case No. 29-CA-287614 was filed by the Union on December 13, 2021, and a copy was served on Respondent by U.S. mail and email on December 14, 2021.

(d) The charge in Case No. 29-CA-290880 was filed by the Union on February 17, 2022, and a copy was served on Respondent by U.S. mail and email on February 18, 2022.

(e) The charge in Case No. 29-CA-292392 was filed by the Union on March 16, 2022, and a copy was served on Respondent by U.S. mail and email on March 17, 2022.

(f) The first amended charge in Case No. 29-CA-292392 was filed by the Union on April 12, 2022, and a copy was served on Respondent by U.S. mail and email on April 14, 2022.

2. (a) At all material times, Respondent, a Delaware limited liability company with a Fulfillment Center (the "JFK8 Facility") located in Staten Island, New York has been engaged in providing online retail sales throughout the United States.

(b) During the past twelve-month period, which period is representative of its operations in general, Respondent, in conducting its business operations described above in subparagraph 2(a), derived gross revenues in excess of $500,000 and purchased and received at its JFK8 Facility goods valued in excess of $5,000 directly from suppliers located outside the State of New York.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, (b) (6), (b) (7)(C) held the position of Respondent's (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) and has been a supervisor within the meaning of Section 2(11) of the Act and agent of Respondent within the meaning of Section 2(13) of the Act.

6. On the dates set forth opposite their respective names, the following individuals were agents of Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act:

(a) Currently unidentified (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) – on or about November 10, 2021;

(b) (b) (6), (b) (7)(C) – on or about November 11, 2021;

(c) (b) (6), (b) (7)(C) – on or about February 16, 2022; and

(d) (b) (6), (b) (7)(C) – on or about March 15, 2022.

7. On various dates since about May 2021, Respondent posted and/or distributed to JFK8 Facility employees written messages, which:

(a) threatened employees with the loss of benefits if they chose to be represented by the Union; and

(b) threatened to withhold or reduce employees' wages.

8. On various dates since about May 2021, Respondent distributed to its employees via text message and/or the "Amazon A to Z" web application written messages, which:

(a) threatened employees with the loss of benefits if they chose to be represented by the Union;

(b) threatened to withhold or reduce employees' wages by stating that signing a Union authorization card may obligate employees to pay the Union a monthly fee deducted from their paychecks.

9. About July 9, 2021, Respondent's employee (b) (6), (b) (7)(C) concertedly complained to Respondent regarding employees' wages, hours, and working conditions by posting on Respondent's

Voice of the Associates ("VOA") Board a demand that Respondent make the Juneteenth holiday a paid holiday and asking employees to sign a petition requesting Respondent to make Juneteenth a paid holiday.

10. Since on or about a date within the 10(b) period, a more specific date presently unknown, Respondent has maintained the following rule, in relevant part:

> "The orderly and efficient operation of Amazon's business requires certain restrictions on solicitation of associates and the distribution of materials or information on company property. This includes solicitation via company bulletin boards or email or through other electronic communication media… Examples of prohibited solicitation include the sale of merchandise, products, or services (except as allowed on forsale@Amazon alias), soliciting for financial contributions, memberships, subscriptions, and signatures on petitions, or distributing advertisements or other commercial materials."

11. On or about July 12, 2021, Respondent engaged in the following conduct:

(a) discriminatorily enforced its "No Solicitation" rule, described above in paragraph 10, against (b) (6), (b) (7)(C)

(b) by (b) (6), (b) (7)(C), in the office of (b) (6), (b) (7)(C) at JFK8, threatened (b) (6), (b) (7)(C) with discipline for posting on the VOA Board regarding Amazon paying employees for the Juneteenth holiday;

(c) revoked (b) (6), (b) (7)(C) authorization to post on the VOA Board.

12. Respondent engaged in the conduct described above in paragraph 11 because (b) (6), (b) (7)(C) engaged in the conduct described above in paragraph 9, and to discourage employees from engaging in these or other concerted activities.

13. On or about the following dates, Respondent required its JFK8 Facility employees to attend mandatory meetings for the purpose of exposing employees to Respondent's statements in opposition to the Union:

(a) November 10, 2021;

(b) November 11, 2021;

(c) February 16, 2022; and

(d) March 15, 2022.

14. On or about November 10, 2021, at the JFK8 Facility, Respondent, by an Unidentified (b) (6), (b) (7)(C), during a mandatory meeting described above in paragraph 13(a):

(a) promised employees improved benefits to discourage employees from selecting the Union as their collective-bargaining representative; and

(b) solicited grievances from employees and promised to remedy those grievances to discourage employees from selecting the Union as their collective-bargaining representative.

15. On or about November 11, 2021, at the JFK8 Facility, Respondent, by (b) (6), (b) (7)(C) during a mandatory meeting described above in paragraph 13(b):

(a) promised employees improved benefits in order to discourage employees from selecting the Union as their collective-bargaining representative;

(b) solicited grievances from employees and promised to remedy those grievances to discourage employees from selecting the Union as their collective-bargaining representative; and

(c) threatened to withhold or reduce employees' wages by stating that the Union would charge employees dues, fees, fines and/or assessments in exchange for their representation.

16. On or about February 16, 2022, at the JFK8 Facility, Respondent, by (b) (6), (b) (7)(C), during a mandatory meeting described above in paragraph 13(c):

(a) threatened to withhold or reduce employees' wages; and

(b) threatened employees with the loss of existing wages and/or benefits if they select the Union as their collective-bargaining representative.

17. On or about March 15, 2022, at the JFK8 Facility, Respondent, by (b) (6), (b) (7)(C), during a mandatory meeting described above in paragraph 13(d):

(a) threatened employees with unlawful discharge if they select the Union as their collective-bargaining representative; and

(b) threatened to withhold wage increases and/or benefits from employees if they select the Union as their collective-bargaining representative.

18. By the conduct described above in paragraphs 7, 8, and 11 through 17, Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

19. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

20. As part of the remedy for the unfair labor practices alleged above in paragraphs 7, 8 and 11through 17, the General Counsel seeks an order requiring that Respondent:

(a) physically post the Board's Notice to Employees ("Notice") in all locations where Respondent typically posts notices to employees at each of its facilities in Staten Island, New York, including in all employee bathrooms and bathroom stalls, and that Respondent electronically distribute the Notice by all methods that Respondent communicates with its employees, including but not limited to email, text message, social media, Voice of Associates (VOA) board, and web applications, including the Amazon A to Z app and "JFK8 inSites." The physical and electronic Notice shall be in English and in Spanish and any other languages deemed necessary to apprise employees of their Section 7 rights;

(b) read the Notice, in English and Spanish and any other languages deemed necessary, in the presence of a Board agent and the Charging Parties, at a meeting(s) convened by Respondent for all employees at the JFK8 Facility; and

(c) with Region 29 of the Board, schedule mandatory training session(s) for all Respondent 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).

(d) hand deliver and email to each supervisor, manager and agent regularly assigned to work at any of Respondent's facilities located in Staten Island, New York the signed Notice, along with written instructions, signed by the site manager for the facility at which each supervisor, manager or agent is regularly assigned to work, directing each supervisor, manager and agent to comply with the provisions of the Notice, and provide the Regional Director with written proof of compliance.

(e) Rescind the unlawfully-applied "No Solicitation" rule described above in paragraph 10 at all Respondent facilities where those policies are in effect and provide appropriate notification to all employees at those facilities of such recission. Should Respondent wish to reinstate the policies, Respondent must include a disclaimer that Respondent will not apply the policies to Section 7 activities.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Consolidated Complaint. The answer must be **received by this office on or before June 14, 2022 or postmarked on or before June 13, 2022.** Respondent also must serve a copy of the answer on each of the other parties.

The answer must be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. Responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the

answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Consolidated Complaint are true.

Pursuant to Section 102.22 of the Board's Rules and Regulations, any request for an extension of time to file an answer must be filed by the close of business on June 14, 2022. This request should be in writing and addressed to the Regional Director of Region 29.

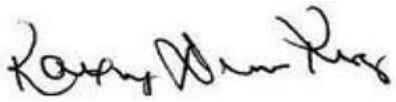
NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **September 19, 2022**, at 10:00 a.m., and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Consolidated Complaint. Pursuant to the Board's rules at 102.35(c), due to "compelling circumstances" created by the current Coronavirus Disease (COVID-19) pandemic and CDC guidelines on mitigating the risk of contracting

Coronavirus, the trial in this matter may be conducted remotely by videoconference using Zoom technology. *See Morrison Healthcare*, 369 NLRB No. 76 (2020).

Details regarding how to connect to the hearing will follow. The parties are urged in the meantime to consult and cooperate with the Division of Judges or the assigned Judge regarding how the Judge will conduct the hearing, including how the parties will prepare witnesses, number and offer of documents and exhibits, and whether there will be public access to the hearing. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: May 31, 2022



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Attachments