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' SUR-REPLY TO DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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Plaintiffs Burnett Specialists, Staff Force d/b/a Staff Force Personnel Services, Allegiance Staffing Corp., Link Staffing, and LeadingEdge ("Plaintiffs") hereby file this Sur-Reply to Defendants' Reply in Support of Motion to Dismiss (Doc. 23).

Defendants' Reply continues to demonstrate the weakness of their motion. First, this Court has jurisdiction over civil actions arising under the Constitution (*see* 28 U.S.C. § 1331), and that jurisdiction has not been displaced by any other act. Second, Plaintiffs do not have to wait for enforcement of a policy that clearly applies to them and infringes on their constitutional rights before seeking review in federal court. And to the extent final agency action is required, that burden is met because the General Counsel has announced her intention to prosecute and has independent final authority to issue complaints. Lastly, Plaintiffs have shown an injury in fact because Defendants' threat of prosecution is real and chills their constitutionally protected speech.

I. The Complaint shows that this Court has subject-matter jurisdiction under *Larson*.

Count II of Plaintiffs' Complaint raises a claim under *Larson v. Domestic & Foreign Comm. Co.*, 337 U.S. 682 (1949). *Larson* claims are essentially *Ex parte Young* claims brought against federal officials, which exist independently of any statutory remedies created by the Administrative Procedures Act (APA) or the National Labor Relations Act (NLRA). *See Alabama Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1225 (5th Cir. 1976); *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 195393, at *17 (N.D. Tex. July 19, 2021) (*Larson* claims "do not arise within the APA context."). 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.").

Defendants' Motion to Dismiss did not address this claim. However, for the first time in their Reply Brief, Defendants raise two challenges to the availability of *Larson* remedies. First, Defendants argue that Congress has "displace[d] any equitable relief" that might be available through a *Larson* claim by adopting the NLRA. (Reply at 6). But courts will not "construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland v. Florida*, 560 U.S. 631, 646 (2010); *see also Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010); *Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012) (*Larson* claim could proceed because the "sole allegation [wa]s that the named officers acted unconstitutionally, and she request[ed] only injunctive and declaratory relief.").

Here, there is no "clear[] command" or discernible intent in the NLRA to strip district courts of their traditional equitable jurisdiction—and Defendants point to none. Instead, Defendants point to two cases, *Leedom v. Kyne*, 358 U.S. 184 (1958) and *Sanderson Farms, Inc. v. NLRB*, 651 F. App'x 294 (5th Cir. 2016). But neither of those cases even discuss *Larson* claims, much less meet the high burden of establishing a "clear command" that traditional equitable claims are precluded.

Kyne concerned whether a separate section of the NLRA allowed workers to challenge an NLRB determination on what constituted a "bargaining unit." 358 U.S.

at 186-87. The Board argued that the determination was not a final order and the workers couldn't challenge it. *Id.* at 188. The Court held that the workers could file suit because the Board was acting "in excess of its delegated powers and contrary to a specific prohibition in the Act." *Id.* Further, the Court emphasized that it would not lightly infer that Congress meant to strip "general jurisdiction" from the courts the ability to "protect and enforce" rights. *Id.* at 190. The Court did not discuss, much less hold, that *Larson* claims seeking to protect First Amendment rights are somehow precluded by the NLRA.

Sanderson Farms, Inc. v. NLRB, 651 F. App'x 294, is an unpublished decision involving a plaintiff's attempt to collaterally attack ongoing administrative proceedings in district court. Again, *Larson* was not at issue or discussed.[1] Far from undermining Plaintiffs' claims in this case, *Sanderson Farms* just stands for the uncontroversial proposition that someone who is already in an administrative proceeding must complete that proceeding, rather than launching a collateral attack. Perhaps that is why the case has never been cited by a court in the seven years since it was written.

Defendants also argue that Plaintiffs must wait until they are under the proverbial gun "by litigating their constitutional challenge in any unfair-labor-

[1] Defendants' reliance on *NLRB v. United Food & Com. Workers Union, Loc. 23*, 484 U.S. 112 (1987) ("UFCW") is also misplaced. Defendants' continue to paint their actions as merely an exercise of prosecutorial discretion such as that exercised in *UFCW*, where the General Counsel chose not to bring charges. The issue here is not a matter of similar prosecutorial discretion, but the General Counsel's creation of an entirely new category of offense. (Doc. 19, hereafter the "Response," at 21). Further, "[a]n injunction to prevent [an officer] 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).

practice case involving them." (Reply at 8). But the Supreme Court has been clear that individuals need not wait until they are actively being prosecuted before bringing equitable claims under *Larson*. As noted *supra*, *Larson* claims are the federal equivalent to claims brought under *Ex parte Young*, 209 U.S. 123 (1908). *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 195393, at *17 (N.D. Tex. July 19, 2021). And *Ex parte Young* directly rejected Defendants' argument that one must wait for enforcement in order to challenge a government actions. 209 U.S. at 165 ("To await proceedings against the company in a state court grounded upon disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take."). Plaintiffs are not required to wait for enforcement of a regulation that clearly applies to them to file suit. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("When an individual is subject to [threatened enforcement of a law], an actual [] prosecution … or other enforcement action is not a prerequisite to challenging the law.").

II. Defendants' final agency action argument is a red herring.

Defendants next argue that the rule that Plaintiffs are challenging is not a final agency action and is therefore not subject to challenge. (Reply at 9-11). First, it is worth noting that this argument only applies to Plaintiffs' APA claim. To the extent that Plaintiffs' *Larson* claim go forward, final agency action is irrelevant.

Second, Defendants are simply wrong that Abruzzo's Memorandum is not final agency action. Defendants acknowledge that Abruzzo has "final authority, on behalf

of the Board, in respect of the investigation of charges and issuance of [administrative] complaints." (Motion at 10 (quoting 29 U.S.C. § 153(d)). Consistent with that authority, "Defendant Abruzzo is actively prosecuting companies under the Policy." (Response at 13). "Legal consequences" flow from this decision, so it is final agency action. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997)." (Response at 13). [2]

The Reply attempts to gloss over Defendant Abruzzo's active prosecutions under the rule by claiming that "the General Counsel's 'final authority' to decide how and whether to prosecute unfair-labor-practice cases does not change the fact that final agency action interpreting the NLRA occurs only when the five-seat Board acts." (Reply at 9) But this sort of sophistry has previously been rejected by the Supreme Court. In *Frozen Food Express v. United States*, 351 U. S. 40 (1956), the Court considered the finality of an order specifying which commodities the Interstate Commerce Commission believed were exempt by statute from regulation, and which it believed were not. Although the order had no authority except to give notice of how the Commission interpreted the relevant statute and would have effect only if and when a particular action was brought against a particular carrier, the Court held that the order was nonetheless immediately reviewable. *Frozen Food*, 351 U. S., at

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[2] Defendants also argue that Plaintiffs need not be worried about retroactive application of the rule, because only the Board can decide if its rules will be retroactive. Defendants, however, do not deny that they are currently prosecuting unfair labor practices based on Defendant Abruzzo's new policy. *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 to the Response). Defendants' failure to provide clarity actually underscores the need for judicial review. Under Defendants' theory, they can both say the rule is not in effect (and it is not retroactive) while simultaneously prosecuting companies under it.

44-45. The order, the Court explained, "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Id.* at 44.

So too here. While it is true that Abruzzo's letter is not the same as a final adjudication of the NLRB, it nonetheless warns every business owner that if they fail to comply with her declared interpretation of the NLRA, they risk incurring penalties. And since she has unilateral authority to bring such actions, her threats—like the Commission in *Frozen Food*—constitute final agency action.

None of the cases offered by Defendants prove otherwise. In *Dhakal v. Sessions*, 895 .3d 532, 540 (7th Cir. 2018), for example, the immigration official is not like the General Counsel. The General Counsel can prosecute without the authority of the NLRB and bring unfair labor charges, which stands in stark opposition to the immigration official in *Dhakal*'s "tentative recommendation." *Id.* at 540. *Freedom Path v. Lerner*, No. 3:14-CV-1537-D, 2015 U.S. Dist. LEXIS 22025 (N.D. Tex. Feb. 24, 2015), similarly emphasizes the NLRB General Counsel's independent role. In *Freedom Path*, the plaintiff accused IRS officials of having a policy of discriminating against certain applicants for tax-exempt status. *Id.* at *3. The court held that the policy did not culminate in a final agency action until it was applied against an applicant resulting in legal consequences. *Id.* at *35.

The General Counsel's powers here are different. By announcing she would prosecute captive audience meetings (and then making good on that promise), she immediately chills and stifles constitutionally protected speech. These are immediate and very real legal consequences. *See, e.g., Speech First, Inc. v. Fenves*, 979 F.3d 319

(5th Cir. 2020) (holding that the threat of investigations and disciplinary sanctions of students by a university for protected speech constituted chilling effect).

III. This matter is justiciable.

Defendants spend the third and final section of the Reply arguing that Plaintiffs have not "established an injury-in-fact." But the Reply ignores the three-part test established by the Fifth Circuit to determine whether there has been an injury-in-fact in a First Amendment case. *See Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020). As explained in Plaintiffs' Response, 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.

As to the first factor, Plaintiffs have pled that they fully intend to engage in speech with their employees about unionization any time a unionization effort arises. In their Reply, Defendants claim that "these events may never occur." But the certainty of the events occurring is not the proper test—credible allegations are. In the Complaint, Plaintiffs allege the following:

- That they "do not believe that unionization is generally in the best interest of their employees or their business model."
- That they have "historically opposed unionizing their work force."
- That they have, in the case, of Plaintiff Burnett Specialists, been required in the past to secure legal counsel "to help navigate a proper response" to the attempted unionization of "several hundred" of their employees; and

that Plaintiff Burnett Specialists shared factual information about unionization with those employees of the sort that would be prohibited under the new rule.

- That Plaintiffs have in the past "discussed concerns about unionizing openly with their employees on paid time."
- That, when future attempts at unionization are made by their employees, they "would hold meetings on paid time to explain the harm of unionization and hear from workers how Plaintiffs can improve the workforce."
- And that "Plaintiffs have not held such meetings nor spoken to employees about unionization" out of fear of being prosecuted under the rule.

These allegations—which the Court must accept as true at this time—are more than sufficient to satisfy the first prong of the standing test. "This requirement is typically satisfied by alleging past actions and an intent to continue to engage in such actions proscribed by the policy." *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 U.S. Dist. LEXIS 151142, at *35-36 (N.D. Tex. Aug. 23, 2022); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301-03 (1979) (sufficient that union members engaged in boycott activities in the past and alleged an intention to continue to do so). Defendants have completely failed to show otherwise. All Defendants argue in response is that Plaintiffs' phrasing is somehow "hypothetical." A plain reading of the facts alleged in the Complaint shows that that is not the case.

The second prong is hardly in dispute. Plaintiffs allege that they will speak to their employees about unionization, on company time, any time that issue arises—as

it has in the past. Defendants do not even dispute that this behavior would violate the rule. The second prong of standing is therefore satisfied.

Finally, with regard to the third factor—a threat of enforcement—"the First Amendment plaintiff must meet an evidentiary bar that is extremely low." *Skynet Corp. v. Slattery*, No. 06-cv-218-JM, 2007 U.S. Dist. LEXIS 18842, at *15 (D.N.H. Mar. 13, 2007). And, "[w]hile a subjective or irrational fear of prosecution would not suffice to confer standing on the plaintiff, the existence of a credible threat that the challenged law will be enforced does suffice." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003). Not only that, but "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Fenves*, 979 F.3d at 335 (*quoting N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996). "Without evidence to the contrary, [courts must] assume that formally announced changes to official governmental policy are not mere litigation posturing." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009).

Fenves is especially helpful because the threat of prosecution was actually weaker in that case than it is here. It concerned an official system of reporting "hate and bias incidents" at the University of Texas. *Fenves*, 979 F.3d at 325. There, a showing that student intended to speak on topics that resulted in previous complaints of "bias incidents" against other students constituted a substantial threat of future enforcement. *Id.* at 335. Additionally, in a pre-enforcement challenge, the existence alone of policy that forbids the desired speech shows that the "threat is latent." *Id.* (quoting *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003). The University's promise to only enforce their policy consistent with the First Amendment was not enough to

remove the credible threat of prosecution. *Id.* at 337. Further, *Fenves* shows that the alleged injury and threat of prosecution does not need to involve criminal sanctions to support an injury in fact, as stated by defendants. (Reply at 13). Simple university disciplinary proceedings were enough to create an injury in fact. *Fenves*, 979 F.3d at 338. The harm has already occurred from the chilling pressure created by the unconstitutional rule.

CONCLUSION

For the reasons stated here and in Plaintiffs' Response, the Court should deny Defendants' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on November 18, 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