Case No. 23-40629

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BURNETT SPECIALISTS, et al.,

Plaintiffs – Appellants

v.

JENNIFER A. ABRUZZO, et al.,

Defendants – Appellees

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

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR EN BANC REHEARING AND IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the proposed amicus hereby moves the Court for leave to file the attached brief amicus curiae in support of Plaintiffs-Appellants' Petition for En Banc Rehearing. Counsel for all parties have consented to the filing of this brief.

I. Interest of amicus curiae.

Prospective amicus respectfully submits that its brief will assist the Court, because amicus has experience with cases involving the issue of standing in the speech-chill context, an issue that has bedeviled several courts of appeal. *See, e.g., Rio Grande Found. v. City of Santa Fe*, 7 F.4th 956 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1670 (2022); *AFP v. Bonta*, 594 U.S. 595 (2021).

The Goldwater Institute (GI) is an Arizona-based nonprofit organization devoted to the advancement of constitutional protections for freedom, including the freedom of speech. Established in 1988, the Institute litigates and files amicus briefs through its Scharf-Norton Center for Constitutional Litigation when its or its clients' objectives are implicated. Among GI's priorities is the equality of rights in matters involving unionization. To that end, it has appeared in numerous courts to vindicate that principle. *See, e.g., Janus v. AFSCME,* 585 U.S. 878 (2018); *McLaughlin v. Bennett*, 238 P.3d 619 (Ariz. 2010). Another GI priority is the defense of free speech, and to that end it has litigated cases such as *Rio Grande Found*., and *Center for Arizona Policy v. Arizona of State,* No. Case No. CV-24-

0295-PR (Ariz. filed Dec. 9, 2024) (pending), which concern rules that chill free speech. Because this case involves the Executive Branch's infringement of employers' right to speak about unionization, this case implicates matters central to GI's mission.

II. The proposed amicus brief will aid the Court.

This amicus brief is desirable because the proposed amicus has substantial expertise with the relationship between speech-chill allegations and standing. Here, the panel held that the Plaintiffs-Appellants lacked standing because they had not shown that an effort at unionization was underway, so that no injury was imminent. GI's proposed brief contends that this misses one of the crucial elements of standing in a chill case, which can force a plaintiff into the Catch-22 of speaking when the challenged regulation is intimidating or into not speaking in the first place—thus rewarding the government for chilling the plaintiff's speech. Instead, the brief contends, the proper inquiry is an *objective* one: would the regulation in question deter a reasonable person from speaking? To demand more of a plaintiff is not only to demand that it prove a negative, but, in this case, to implement a kind of prior restraint because the Plaintiffs-Appellants want to speak to *prevent* the thing from happening, yet the panel opinion forces them to prove that the thing is happening before Plaintiff-Appellants can speak.

III. The brief complies with all applicable rules.

Counsel for all parties were informed of amicus's intent to file this motion and consented thereto. The brief complies with all applicable rules, and its filing will prejudice no party. For these reasons, the proposed amicus asks that the Court grant this motion for leave to file the attached brief.

RESPECTFULLY SUBMITTED this 7th day of August 2025 by:

/s/ *Timothy Sandefur*
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Scharf-Norton Center for
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at the GOLDWATER INSTITUTE

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2025, the foregoing brief was filed and served on all counsel of record via the ECF system.

/s/ *Timothy Sandefur*
Timothy Sandefur

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BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITION FOR EN BANC REHEARING AND IN SUPPORT OF PLAINTIFFS-APPELLANTS

FILED WITH CONSENT OF ALL PARTIES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

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

/s *Timothy Sandefur*
TIMOTHY SANDEFUR
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INTEREST OF AMICUS CURIAE

The interest of amicus is set forth in the accompanying motion for leave to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel declined to apply the *Contender Farms* standing rule on the grounds that that rule only applies to a person or an entity that is "an object of a regulation," *Burnett Specialists v. Cowen,* 140 F.4th 686, 696 (2025) (quoting *Contender Farms, LLP v. U.S. Dep't of Agriculture,* 779 F.3d 258, 264 (5th Cir. 2015)), and the Plaintiffs here aren't the object of the regulation at issue. But in *Diamond Alternative Energy, LLC v. EPA*, No. 24-7, 145 S. Ct. 2121 (2025), the Supreme Court clarified how the "object of a regulation" concept operates. Applying a "common sense" approach rather than a technical analysis, *id*. at 2137, it held that even where a plaintiff is not the "object" of a regulation, that plaintiff can still have standing if the operation of the regulation will—as a matter of "predictable, commonsense inferences," *id.* at 2136—inflict some redressable harm on the plaintiff, however minor. Applying that test here, there can be no doubt that Plaintiffs-Appellants are the objects of the regulation.

More importantly, the panel misapplied the threat-of-enforcement principle in the context of a regulation that chills free speech. A plaintiff in a chill case cannot be required to prove a definite risk of enforcement or a specific intention to

act in a way that's being deterred, because it's in the nature of a "chill" that it causes self-censorship. Requiring too much definiteness from the Plaintiff is therefore a Catch-22, particularly where the plaintiff wants to speak to *deter* or *prevent* something. To require too much specificity, as the panel did, effectively forces the plaintiff to wait for that thing to be imminent, or even to actually happen, before it has standing—whereupon it is, of course, too late.

ARGUMENT

I. The common-sense view of "object of a regulation"

In *Diamond Alternative Energy*, the Court held that the concept of "object of regulation" should be applied through a common-sense approach. It made two observations relevant here.

First, what counts as the "object" of a regulation may depend on commonsense recognition of that regulation's consequences, as opposed to the formalistic inquiry into which entities are identified as the regulation's targets. The Court gave a number of examples. "If the government bans hot dog sales in stadiums, then hot dog manufacturers, not just stadiums, might be considered objects of the regulation," it said. *Id.* at 2135. "If the government prohibits aluminum bats in Little League, then aluminum bat manufacturers, not only Little League, might be objects of the regulation. If the government bans bookstores

from selling certain publishers' books, then those publishers, not just bookstores, might be objects of the regulation." *Id.*

In other words, the scope of a regulation isn't determined solely by who's targeted; if it encompasses common enterprises or multi-party undertakings, those who experience its effects are regulated parties even if not specifically subjected to the regulation. Thus "when a regulation targets the provider of a product or service by limiting another entity's use of that product or service, the targeted provider ordinarily has standing." *Id.* at 2136. (The Court cited *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 422 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510, 535–36 (1925), as examples.) In the Little League case, there's no transaction, but the regulation targets a practice that will obviously inflict significant harm on parties who focus their energies and resources on that practice.

Second, the Court found that even where a plaintiff is *not* within the circle of "object of the regulation," she can still have standing based on the ripple effects of the regulation. If the regulation of the object "'may be likely' to cause injuries to other linked businesses," then those "linked businesses" also have standing to sue. *Diamond Alternative Energy*, 145 S. Ct. at 2136 (quoting *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 384 (2024)). And in deciding what "may be likely," courts should employ "predictable, commonsense inferences." *Id*. These

can extend beyond even the indirect effects of the regulation to the behaviors of still *other* parties. In *Diamond Alternative Energy* itself, the regulations were likely to have consequences for car sales, and those sales were likely to have consequences for fuel manufacturers. *Id.* at 2137. That was enough.

This rule is not limitless; "surprising and unusual" consequences, or alleged consequences, of a regulation won't suffice, *id*., but courts can and should base standing decisions on "commonsense economic inferences about the operation of the … market." *Id*. at 2138.

II. The panel's "credible threat of enforcement" analysis was fallacious.

The panel held that Plaintiffs-Appellants lack standing because there's no credible threat of enforcement against them. But even if that's true, lack of credible threat "is not decisive" for the standing inquiry. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120 (11th Cir. 2022). It's only one part of the analysis. If a prohibition on expression *objectively* chills speech, a plaintiff can still have standing. Where "the challenged exercise of governmental power [is] regulatory, proscriptive, or compulsory in nature, and the complainant [is] either presently or prospectively subject to the regulations, proscriptions, or compulsions," she has standing. *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

Obviously a purely subjective fear of hypothetical enforcement won't suffice for standing purposes. *Id.* at 13–14. But given the distinct nature of "chill," the

required showing of risk is not extensive. Plaintiffs cannot prove a negative, so courts cannot reasonably demand that they definitively prove the existence of a speech chill. They instead require proof of an *objective* chill—which means, a threat or burden sufficient to deter a person of ordinary firmness from speaking. *See, e.g., Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) ("The question is not whether the plaintiff herself was deterred, though how plaintiff acted might be evidence of what a reasonable person would have done.").

Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019), is instructive. It involved a public university's speech restrictions, under which a "response team" was empowered to refer certain forms of disapproved speech to university officials, and thereby trigger an investigative process that could eventually lead to punishment. *See id.* at 765. The plaintiffs had not been particularly targeted for penalties, or even investigated. But the court found that they had standing based on the *objective* chill: "The Response Team's ability to make referrals … objectively chills speech," it said. "The referral itself does not punish a student … [but] initiates the formal investigative process, which itself is chilling . … Additionally, the invitation from the Response Team to meet could carry an implicit threat of consequence should a student decline." *Id*. In other words, the threat to speakers would deter a *reasonable person* from speaking. And because the threat did apply to the plaintiffs, they had standing.

This Court reached the same conclusion in a similar case, *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020), finding that a university's speech restrictions were severe enough to objectively chill speech. As far as the risk of enforcement was concerned, this Court found it sufficient that plaintiffs testified that they "'want[ed] to engage in open and robust intellectual debate,'" and "wish[ed] to engage in debates and discussions covering 'a wide array of different views.'" *Id.* at 331. This testimony is at least as broadly worded as the testimony provided by the Plaintiffs here.

Yet here, the panel declined to apply the *Speech First* rulings, on the theory that they don't apply where there is "'contrary evidence' that there is no credible threat of enforcement." 140 F.4th at 694. In reaching that conclusion, the panel relied on cases that are entirely different. For example, it cited *Texas State LULAC v. Elfant*, 52 F.4th 248, 257 (5th Cir. 2022), where the court found no credible threat that the challenged law would be enforced—but in that case, the law at issue "[did] not facially restrict Plaintiffs' ability to engage in their expressive conduct," which was why "the presumption of a credible threat of prosecution [from *Speech First*] [did] not apply." *Id*. at 257. Here, it's undisputed that the guidance facially restricts these Plaintiffs' ability to speak.

The panel also cited *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018), but its reliance on *Zimmerman* was fallacious for two subtle but crucial reasons.

First, the law challenged there was only violated based on the actions of third parties, which isn't true here. "Soliciting funds from persons outside of the Austin area" wasn't illegal—rather, it was only illegal "if more than 100 such persons contributed the maximum allowable $350 (and if Zimmerman accepted all such contributions)." *Id.* at 390. In other words, the law there imposed a threshold amount that Zimmerman would have had to exceed in order to trigger the prohibition. Here, by contrast, there's no dispute that the policy forbids mandatory meetings. Even a single meeting would trigger the prohibition.

In other words, in *Zimmerman*, several contingent events would have to happen in order for *a violation* to occur. But here, a number of different things would have to happen in order for *a prosecution* to occur. (As the panel put it, "future *enforcement* would depend upon a third party (an employee) filing an unfair labor practice charge enabling the General Counsel to file a complaint." 140 F.4th at 694). That makes this case more like the *Speech First* cases than like *Zimmerman*. In *Zimmerman*, the regulated party would have to act, followed by several other people's actions, for the rule to be violated. But in both *Speech First* cases, and here, a student speaking in certain ways would empower the authorities

to refer the case to an enforcement process which was tantamount to punishment—and that meant there was an objective chill, which satisfied the Article III requirement. A single action—an employer holding a meeting that violates the guidance—would be enough to trigger enforcement.

The second reason reliance on *Zimmerman* was fallacious is found in the panel's implicit assumption that one of the "'stars that would have to align before Plaintiffs could be prosecuted'" is the fact that "future enforcement would depend upon a third party (an employee) filing an unfair labor practice charge." *Id*. & n.30 (citations omitted). But referral to the authorities can't count as one of the "stars" in this analysis. If it were, nobody would *ever* have standing to seek prospective relief until (so to speak) someone actually calls the cops. A court could always find that a plaintiff lacks standing because the authorities haven't initiated enforcement proceedings. That's not the rule.[1] *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 711 (1977) ("The Maynards seek only to be free from prosecutions for future violations."). The rule is that the plaintiff must show injury, and in a chill case, that means the plaintiff would like to speak but is being deterred by some statute or policy that would cause a reasonable person to self-censor.

[1] Indeed, if it were, abstention doctrines such as *Younger* would combine with such a rule to block plaintiffs from *ever* seeking prospective relief.

The *whole point* of "chill" doctrine is that free speech needs "breathing room." *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc*., 538 U.S. 600, 620 (2003). The mere existence of a threat can cause people to self-censor, thus accomplishing the goal of silencing speech without the need to prosecute. Raising the Article III standing bar, as the panel decision does, accomplishes the same end. It tells speakers that the safest course is to remain silent. But that's just what the *Speech First* cases said isn't the law.

III. Requiring plaintiffs to plead a unionization effort is self-contradictory.

Finally, the panel said the Plaintiffs must prove the existence of a unionization effort to show imminence of enforcement. 140 F.4th at 694. Yet the whole point of the speech in which Plaintiffs would like to engage is to persuade employees that no unionization effort is necessary, or that the costs of unionization outweigh the benefits. To require them to wait for such an effort to begin (and be provable) before enabling them to take action to defend their speech rights is to require them to wait until it's too late. At that point, Plaintiffs can at best hope to *undo* something they would like to *prevent*—which is to say, the panel's standing rule changes the *kind* of speech in which Plaintiffs are allowed to engage. But the Constitution protects the right to express opinions that one hopes will prevent *X* even before *X* becomes a likely possibility.

In fact, the panel's ruling effectively operates as a prior restraint, because it makes Plaintiffs' right to speak contingent upon submitting proof of a certain kind, so as to get, as it were, the court's seal of approval. In *Thomas v. Collins*, 323 U.S. 516, 540 (1945), the Court held that a Texas law requiring a person to register and obtain a government license before engaging in speech to encourage people to join a union was unconstitutional because

> [i]f the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them … . [A] requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.

By the same principle, it cannot be a precondition of Plaintiffs' speech that they prove to a court that a unionization effort is underway. To impose such a precondition as a matter of judicial interpretation "function[s] as the equivalent of prior restraint" by forcing "a speaker who wants to avoid threats of criminal liability" to effectively ask the Court "for prior permission to speak." *Citizens United v. FEC*, 558 U.S. 310, 335 (2010).

CONCLUSION

The petition for rehearing should be *granted* and the panel's decision *reversed*.

RESPECTFULLY SUBMITTED this 7th day of August 2025 by:

/s/ *Timothy Sandefur*
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2025, the foregoing brief was filed and served on all counsel of record via the ECF system.

/s/ *Timothy Sandefur*
Timothy Sandefur

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and Fed. R. App. P. 29(a)(5), I certify that this Brief:

(a) was prepared using 14-point Times New Roman font;

(b) is proportionately spaced; and

(c) contains 2,361 words.

Submitted this 7th day of August 2025,

/s/ *Timothy Sandefur*
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