No. 26-940

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNECTICUT BUSINESS & INDUSTRY ASSOCIATION,
Plaintiff / Appellant,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ASSOCIATED BUILDERS & CONTRACTORS, ASSOCIATED BUILDERS & CONTRACTORS OF CONNECTICUT, COALITION FOR A DEMOCRATIC WORKPLACE, CONNECTICUT RETAIL MERCHANTS ASSOCIATION, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INC., NATIONAL RETAIL FEDERATION,
Plaintiffs,

v.

DANTE BARTOLOMEO, in her official capacity as the Commissioner of the Connecticut Department of Labor, WILLIAM TONG, Attorney General, in his official capacity as Attorney General of Connecticut,
Defendants / Appellees,

CONNECTICUT DEPARTMENT OF LABOR,
Defendant.

On appeal from the
United States District Court for the District of Connecticut

APPELLANT'S OPENING BRIEF

Bryan Killian
Pranav Mulpur
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, D.C. 20004
T: 202-739-3000
bryan.killian@morganlewis.com

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, Counsel for Plaintiff-Appellant Connecticut Business & Industry Association (CBIA) certifies that CBIA is not a publicly traded company and no publicly held corporation owns more than 10% of CBIA.

/s/ Bryan Killian

Bryan Killian

Counsel for Plaintiff-Appellant
Connecticut Business & Industry Association

CONTENTS

AUTHORITIES

Cases

STATUTES

OTHER AUTHORITIES

GLOSSARY

CBIA	Plaintiff / Appellant Connecticut Business & Industry Association
NLRA	National Labor Relations Act
Section 31-51q	the statute at issue, Conn. Gen. Stat. § 31-51q
the State	Defendants Dante Bartolomeo and William Tong, in their official capacities

JURISDICTION

This district court had jurisdiction over this civil-rights action under 28 U.S.C. § 1331. On February 13, 2026, the court granted the defendants partial summary judgment, holding that CBIA lacks organizational standing. SPA1–18. On March 16, the district court entered final judgment dismissing the entire action. SPA19.

On April 10, CBIA filed a timely notice of appeal. JA437–38. This Court has appellate jurisdiction over the district court's final judgment under 28 U.S.C. § 1291.

CBIA's organizational standing is the primary issue on appeal, and it is addressed in the Argument section of this brief. *See* pp. 19–41.

QUESTION PRESENTED

CBIA is a Connecticut employer that has long required, through actual and threatened discipline, all employees to attend meetings where CBIA discusses its political opinions. In 2022, Connecticut amended Section 31-51q to impose penalties on employers who hold mandatory meetings on politics and unionization. Since then, the risk of State enforcement and penalties has chilled CBIA's speech. To vindicate its rights, CBIA sued the State to enjoin enforcement of Section 31-51q on First Amendment and preemption grounds. Years later, after discovery closed, the State submitted a declaration—premised on a disputed interpretation that Section 31-51q does not regulate speech—in which a former employee of the Department of Labor asserted that he would not enforce the law against CBIA. Without addressing the disputed statutory question, the district court accepted the declaration and held that CBIA no longer faced a credible threat of enforcement. And, without requiring the State to prove mootness, the court dismissed CBIA's claims on Article III standing grounds.

1. Whether the district court erred in holding that, owing to the declaration, CBIA lacks standing.

INTRODUCTION

Since its amendment in 2022, Section 31-51q imposes content- and viewpoint-discriminatory burdens on the speech of Connecticut employers. It subjects them to penalties for holding mandatory meetings on "political matters." What an employer says during a meeting—the topics addressed and the viewpoints expressed—determines whether the employer can make the meeting mandatory or discipline absent employees.

CBIA used to hold regular mandatory meetings on political matters. For years, CBIA required all employees to attend meetings where CBIA discussed its opinions on a range of political topics, as well as its advocacy and lobbying efforts. But no more. Since 2022, CBIA has refrained from discussing political matters at its mandatory meetings out of concern for Section 31-51q penalties.

To vindicate its speech rights, CBIA sued the State to enjoin enforcement and argued that Section 31-51q infringes on rights protected under the First Amendment and the National Labor Relations Act (NLRA). Despite acknowledging the strength of CBIA's arguments on the merits, SPA17 n.12, the district court held that CBIA lacked standing to challenge the Act, crediting a declaration, submitted at summary judgment, in which a former state employee purported to disavow enforcement against CBIA. The district court's holding primarily rests on two legal errors and must be reversed.

First, the district court erroneously collapsed standing and mootness. Whereas standing measures a party's personal interest at the start of litigation, mootness measures whether that interest continues thereafter. The two doctrines are distinct, with sharply different standards. By treating the State's post-filing enforcement disavowal as bearing on standing rather than mootness, the district court ignored that fundamental distinction and relieved the State of its burden to prove mootness.

Second, the district court erroneously collapsed jurisdiction and the merits by crediting an enforcement disavowal that rested on a disputed interpretation of Section 31-51q that is contrary to CBIA's interpretation. Article III standing, including the plaintiff's credible fear of enforcement, accepts the plaintiff's arguable interpretation of the challenged law. Defendants cannot undercut a plaintiff's standing by advancing an alternative construction of the law and then promising not to enforce it on that basis. The district court should not have accepted the State's contested reading of the law to defeat standing. Rather, the court should have found that CBIA has standing and should have resolved the parties' dispute over Section 31-51q's meaning on the merits.

The district court's legal errors had tangible results. Confusion about when and how to weigh standing, mootness, jurisdiction, and merits arguments threatens pre-enforcement challenges to unconstitutional state laws and jeopardizes constitutional rights. Left uncorrected, it will be state governments, not courts, who decide whether a plaintiff can seek a remedy. That is not what our Constitution contemplates. This Court should set the record straight and reverse.

BACKGROUND

I. The Connecticut General Assembly amends Section 31-51q to burden employer speech.

State governments across the country have been pursuing a new version of an old strategy: restricting employer speech about unionization. At least a dozen States have enacted laws subjecting employers to private suits or civil penalties (or both) if they require employees to attend meetings where the employer presents its views on political matters, including unionization.[1]

1 Most of the States ban mandatory workplace meetings on "religious matters" and "political matters," specially defined to include unionization: Alaska (Alaska Stat. § 23.10.450); California (Cal. Lab. Code § 1137); Connecticut (Conn. Gen. Stat. § 31-51q); Illinois (Ill. Pub. Act 103-0722 (July 31, 2024)); Maine (Me. Rev. Stat. tit. 26, § 600-B); Maryland (Md. Code Ann., Lab. & Empl. § 3-718 (eff. Oct. 1, 2026)); Minnesota (Minn. Stat. § 181.531); New Jersey (N.J. Stat. §§ 34:19-9–19-11); New York (N.Y. Lab. Law § 201-D); Oregon (Or. Rev. Stat. § 659.785); Vermont (Vt. Stat. tit. 21, § 495o); and Washington (Wash. Rev. Code § 49.44.250). Hawaii's ban applies only to unionization and political matters. *See* Haw. Rev. Stat. § 377-6. A district court has preliminarily enjoined enforcement of California's law, holding it likely violates the First Amendment and is preempted. *See Cal. Chamber of Com. v. Bonta*, 802 F. Supp. 3d 1227 (E.D. Cal. 2025), *appeal pending*.

Connecticut moved early on this trend. In 2018 and 2019, the Connecticut General Assembly took up a series of bills targeting employers' speech to employees about unionization and politics. *See* House Bill 5473, *An Act Concerning Captive Audience Meetings* (Conn. 2018); Senate Bill 64, *An Act Concerning Captive Audience Meetings* (Conn. 2019); Senate Bill 440, *An Act Protecting Employee Freedom of Speech and Conscience* (Conn. 2019). Recognizing the legal issues implicated, then-Attorney General George Jepsen and later Attorney General William Tong each opined that various iterations of the bills were likely unconstitutional. *See* Conn. A.G. Opinion No. 2018-02, 2018 WL 2215260 (Apr. 26, 2018); Conn. A.G. Opinion No. 2019-03, 2019 WL 2246103 (May 17, 2019). None of the bills passed.

During the 2022 legislative session, the Assembly picked up the issue again. Senate Bill 163 would make it unlawful for any Connecticut employer to "subject[] or threaten[] to subject an employee to discipline or discharge" based on the employee's "refusal to (A) attend an employer-sponsored meeting" or "(B) listen to speech or view communications" when "the primary purpose" of the meeting or communications was "to communicate the employer's opinion concerning … political matters." *See* Senate Bill 163, *An Act Protecting Employee Freedom of Speech and*

Conscience (Conn. 2022). Forbidden "political matters" were defined broadly to include matters relating to "labor organization." *Id.* CBIA and others warned that the bill would violate the First Amendment and be preempted by the National Labor Relations Act. *See* JA121 (¶¶ 21–23). The bill nevertheless passed, was signed in May 2022, and went into effect as Public Act 22-24 in July 2022. *See* Conn. Pub. Act No. 22-24.

Section 31-51q's new prohibitions on employer speech are enforceable in two ways. Employees can sue for damages. *See* Conn. Gen. Stat. § 31-51q(b). And, the Commissioner of Labor and Attorney General can seek penalties from employers. Section 31-69a authorizes the Commissioner to investigate violations of state labor laws, seek penalties or fines from employers who violate them, and charge employers for employees' unemployment benefits related to such violations. *See id.* § 31-69a(a). In its official analysis of the law, the Assembly specifically noted that the new prohibitions on employers' speech will be enforced under Section 31-69a. An Act Protecting Employee Freedom of Speech and Conscience, OLR Bill Analysis, at 3, 7 (Conn. Apr. 14, 2022), https://www.cga.ct.gov/2022/FC/PDF/2022SB-00163-R000482-FC.PDF (explaining in section of analysis entitled "Enforcement" that Department of Labor can impose civil penalties). The same Section further authorizes the Attorney General to bring a civil action to recover penalties the Commissioner assesses. *Id.* § 31-69a(c).

II. CBIA stops communicating about "political matters" during mandatory all-staff meetings.

With roots running back to 1815, CBIA is Connecticut's oldest and largest business association. *See* JA112 (¶ 1). Most of its members are employers from across the Constitution State. CBIA engages in a wide range of activities for its employer members, from providing insurance and benefit plans to advocating and lobbying on their behalf. JA112 (¶ 3).

CBIA is not just a membership association for Connecticut employers; it also is a Connecticut employer itself, with dozens of employees. For a long time, CBIA has regularly required *all* its employees—from insurance salesmen and office staff to graphic designers and lobbyists—to attend meetings about CBIA's activities and CBIA's political positions. *See* JA112–13 (¶¶ 4–6). CBIA wants all its employees to know all of its opinions on political issues of the day, even if those employees do not need to know those opinions to do their jobs. *See id.*; *see also* JA332 (¶¶ 58–59).

To that end, CBIA requires all employees to attend regular all-staff meetings. Before Section 31-51q's amendment, CBIA's mandatory all-staff meetings were the primary means of ensuring that all CBIA employees were aware of its political opinions. During those meetings, CBIA leadership would present a "Policy Update" that included CBIA's latest institutional opinions on pending legislation, regulatory matters, candidates for office, and the like. JA113–14 (¶¶ 11–12). All staff were required to attend. JA113 (¶ 7–9). CBIA instructed employees to attend, and CBIA could (and did) discipline employees who missed a meeting, consistent with its progressive discipline policy. JA113 (¶ 10), JA115 (¶ 19).

Since Section 31-51q's amendment, CBIA still holds mandatory meetings but has stopped discussing its political opinions during the meetings. CBIA completely removed public-policy updates from the agendas of its regular all-staff meetings. JA114 (¶ 13). CBIA refrains from discussing "political matters" out of concern for penalties. *Id.* (¶ 14). CBIA wants to return to its prior practice of discussing politics with all employees—including those who aren't involved in CBIA's public-policy activities—at mandatory meetings. *Id.* (¶ 15). And because it believes that employees should be aware of the risks of unionizing, CBIA wants to hold mandatory meetings to communicate its opposition to labor organizations. *Id.* (¶ 16). Any CBIA employee who refuses to attend all-staff meetings will be subject to discipline. JA115 (¶ 19).

III. CBIA sues the State to enjoin enforcement of Section 31-51q's amendments and for declaratory relief.

On November 1, 2022, CBIA and a coalition of national and state trade associations brought this suit for declaratory and injunctive relief against the Connecticut officers who enforce Section 31-51q. The complaint alleges that Section 31-51q is unconstitutional for two reasons: (1) the law's content- and viewpoint-discriminatory regulation of discipline in connection with meetings on political matters violates the First Amendment, *see* JA32–35 (¶¶ 37–46); and (2) the NLRA preempts the law's regulation of employers' speech to employees on unionization, *see* JA35–37 (¶¶ 47–55). The complaint asserts two claims, each encompassing both theories: (1) the statutory right of action created by 42 U.S.C. § 1983, and (2) the equitable cause of action recognized in *Ex parte Young*, 209 U.S. 123 (1908). *See* JA25 (¶ 6).

IV. The State's initial attack on CBIA's standing fails.

The State moved to dismiss for lack of subject-matter jurisdiction, challenging CBIA's standing, among other things. *See* JA9 (Dkt. 36). Several of the State's standing objections proceeded from its interpretation that Section 31-51q applies *only* to conduct (discharge, discipline, or threats) and does not even *arguably* burden employers' speech. *See* JA9

(Dkt. 36, at 16, 19); *see also* JA64, JA66–68. The State accompanied its motion with a declaration from Thomas Wydra, then-director of the DOL division with delegated authority to enforce Section 31-51q. *See* JA40–49. Wydra did not disavow the State's authority to enforce Section 31-51q. He confirmed it. *See* JA41, JA42, JA44(¶¶ 5, 10, 18–19).

In an oral opinion in June 2023, the district court rebuffed the State's standing objections *See* JA95. The court held that CBIA adequately alleged organizational standing in connection with its all-staff meetings. *See* JA93–97. The court rejected the State's strained interpretation of Section 31-51q as covering only conduct, not speech, such that the law is inapplicable to mandatory meetings. *See* JA96. The court also correctly observed that the proper interpretation of Section 31-51q is not a *standing* concern but rather "goes … to the *merits* of plaintiffs' claims." JA96 (emphasis added).

V. The State submits another Wydra declaration to attack CBIA's standing.

After discovery, the plaintiffs moved for summary judgment, relying on CBIA's standing. *See* JA17 (Dkt. 97). The State opposed and cross-moved, relying on a brand-new declaration from Wydra. *See* JA205–19. Unlike in his first declaration, Wydra purported to disavow seeking penalties against CBIA for discussing political matters or unionization at its mandatory all-staff meetings. JA210 (¶ 24). Wydra linked his purported disavowal to his own interpretation of Section 31-51q and his belief that "CBIA's intended activities do not violate the Act" for two reasons. *Id.* (¶ 25).

First, repeating the strained interpretation the district court rejected at the motion-to-dismiss stage, Wydra insisted that Section 31-51q prohibits only actual or threatened discipline (*i.e.*, conduct) and does not regulate or burden employer speech. *See* JA211 (¶ 29); *see also* JA214–15 (¶ 37) ("Merely characterizing a meeting as 'mandatory' or 'required,' or directing employees to attend, does not amount to a threat of discipline within the meaning of the Act … .").

Second, Wydra contended that, "even if" CBIA's all-staff meetings are covered by Section 31-51q, one of the exemptions—for meetings and communications "necessary for … employees to perform their job duties"—would apply. JA211–12 (¶¶ 30–31) (quoting Conn. Gen. Stat. § 31-51q(c)(2)). Contrary to CBIA's evidence about its employees' job responsibilities, as well as CBIA's evidence that it provides insurance and benefits for its members, *see* JA118–19 (¶¶ 2, 9); JA242–44, Wydra assumed that CBIA is an "advocacy organization" that "does not provide a product or service to the general public" and whose employees presumably need to know CBIA's political opinions in order to do their jobs. JA205–19 (¶ 34).

Wydra did not disavow enforcement of Section 31-51q broadly. He confirmed the State's enforcement power, as the State itself had confirmed repeatedly throughout the litigation. *See, e.g.*, JA68 (T. Holzman); JA137 (Nos. 10–11). Wydra's purported disavowal applies only to CBIA.

VI. At summary judgment, the district court holds that Wydra's second declaration defeats CBIA's standing.

The district court credited Wydra's second declaration and found that it "fatally extinguished" CBIA's standing by removing any credible threat of enforcement. For the court, "even assuming that Section 31-51q proscribes CBIA's intended conduct, and that CBIA's resulting 'self-censorship' was initially reasonable," "DOL's disavowal" removes any threat of enforcement "at this juncture" and deprives CBIA of standing. SPA12–13. The court found it "of no consequence which party has the most accurate legal interpretation of Section 31-51q" "insofar as DOL has explicitly indicated that it will not enforce Section 31-51q against CBIA for its intended conduct." SPA16. But the court acknowledged that the requirements for standing "might well be met" "if the DOL were to reverse course and retract its disavowal under the guidance of a new Commissioner." SPA15 n.9.

The district court dismissed the entire case for lack of standing, without prejudice as to all plaintiffs. After dismissal, the State celebrated with a statement that simultaneously confirmed its intent to enforce Section 31-51q and demonstrated that its earlier disavowal was based on a malleable reading of the law. The Attorney General announced that "Connecticut's captive audience statute is both lawful and necessary, and the Office of the Attorney General will continue to defend the state's ability to protect workers' rights." *See* Press Release, Conn. Off. of the Att'y Gen., *Attorney General Tong Statement on Major Win in Challenge to Connecticut Captive Audience Law* (Feb. 13, 2026), https://portal.ct.gov/ag/press-releases/2026-press-releases/attorney-general-tong-statement-on-major-win-in-challenge-to-connecticut-captive-audience-law. In defense of the law, the Attorney General stated that "[w]orkers should not be forced to listen to their employer's religious or political views"—in direct contrast to the State's earlier promise that the law did not prevent CBIA from exercising its free-speech rights at mandatory meetings. *Id.*

This timely appeal followed.

SUMMARY OF ARGUMENT

I. The district court confused standing and mootness. Standing doctrines focus on a plaintiff's stake in a controversy as of filing, whereas mootness doctrines govern subsequent events that arguably eliminate that stake. The district court acknowledged that CBIA substantiated standing as of commencement of this case but treated an intervening event—Wydra's purported enforcement disavowal—as defeating CBIA's standing. By failing to assess Wydra's second declaration through the mootness lens, the court relieved the State of its burden to prove mootness—a formidable burden to show it is clear that the alleged injury will not recur. The State did not carry its burden. Wydra's disavowal is non-binding, conditional, contradictory, and tied to one former employee's interpretation of the law.

II. The district court also confused jurisdiction with the merits. Both standing and mootness turn on a plaintiff's arguable interpretation of the law, and a defendant cannot defeat a plaintiff's standing by assuming an alternative interpretation. CBIA adduced evidence that it faced a credible threat of enforcement under its arguable interpretation of Section 31-51q as applying to its all-staff mandatory meetings on political matters and unionization. Wydra disavowed enforcement against CBIA based on a contrary interpretation that Section 31-51q targets and applies only to conduct, not speech or mandatory meetings. By accepting the disavowal premised on Wydra's misguided interpretation of the law, the district court erred as a matter of law. The parties' dispute over the scope of Section 31-51q is fundamentally a merits question, not a jurisdictional one.

STANDARD OF REVIEW

Standing and summary judgment are reviewed *de novo*. *See NRDC v. FDA*, 710 F.3d 71, 79 (2d Cir. 2013).

ARGUMENT

The district court erred by granting the State's cross-motion on Article III standing grounds, based solely on Wydra's second declaration and his purported disavowal of enforcement against CBIA. Several errors of law undermine the court's ruling. *First*, the court collapsed standing and mootness and erroneously relieved the State of its burden to prove mootness. *Second*, while the court correctly recognized that CBIA established a credible threat of enforcement as of the time of filing, the court erred as a matter of law in finding that Wydra's second declaration alleviates that threat.

I. The district court failed to distinguish between standing and mootness.

A. Mootness is the appropriate framework for analyzing Wydra's enforcement disavowal.

Standing and mootness are related yet distinct frameworks for evaluating a plaintiff's personal stake in a controversy. The key difference between them is temporal. *See Conn. Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439 (2d Cir. 2021). Standing is the framework for measuring a plaintiff's personal stake " 'at the commencement of the litigation.' " *Davis v. FEC*, 554 U.S. 724, 732 (2008) (quoting *Friends of the Earth v.*

Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 570 nn.4–5 (1992). Mootness is the framework for measuring whether an "intervening circumstance" has prospectively eliminated a plaintiff's personal stake. *West Virginia v. EPA*, 597 U.S. 697, 719 (2022) (cleaned up).

Because standing and mootness are related—a plaintiff seeking equitable relief must have injury, causation, and redressability as of commencement (standing) and maintain it until final judgment (mootness)—lower courts sometimes confuse the doctrines. *See Friends of the Earth*, 528 U.S. at 173–74 (holding that the lower court "incorrectly conflated our case law on initial standing to bring suit with our case law on post-commencement mootness" (citation omitted)). That happened here. Although the district court *stated* that CBIA lacked standing because of Wydra's second declaration, the court's reasoning *sounds* in mootness.

After crediting evidence of CBIA's standing as of the commencement of this action, SPA15 n.9, the court concluded that CBIA later lost standing because of Wydra's second declaration. *See* SPA12–13. The court characterizes the declaration as an intervening event that eliminated CBIA's personal stake prospectively, not as evidence that CBIA never had a personal stake. The court, for example, "assum[ed] that" CBIA's fear of enforcement was "*initially* reasonable" yet dissipated "*at this juncture*" due to Wydra's second declaration. *Id.* (emphases added). The court recognized that CBIA "would likely face a credible threat of enforcement" *again* if the State "were to reverse course and retract its disavowal." SPA15 n.9. The court ultimately concluded that CBIA's personal stake was "fatally *extinguished*" by the purported disavowal. SPA11. In other words, the court recognized that the declaration does not purport to talk about "the state of things at the time of the action brought." *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824).

Such enforcement disavowals are classic intervening events, which raise questions of mootness. *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 831 (7th Cir. 2014) (recognizing that "[e]ven if the plaintiff's standing was secure when the case was filed, a controversy can become moot if the threat of prosecution has evaporated" through a government disavowal of enforcement, but finding threat of enforcement lingered); *see also Winsness v. Yocom*, 433 F.3d 727, 736 (10th Cir. 2006) ("Even if we assume that a credible threat of prosecution existed before this lawsuit was filed, the prosecutors' affidavits have rendered the controversy moot."). The Supreme Court confirmed this understanding at least twice in recent years. In *FBI v. Fikre*, 601 U.S. 234 (2024), the Court subjected a government disavowal to the mootness framework and held that it did not moot the case, *see id.* at 242. In *West Virginia v. B.P.J. by Jackson*, 609 U.S. ____ (2026), the Court similarly rejected a plaintiff's post-certiorari disavowal, relying on mootness precedents. *See id.*, slip op. at *14 n.3.

But here, the district court did not apply the mootness framework to Wydra's second declaration. After concluding that the declaration's disavowal eliminates CBIA's fear of enforcement going forward, the court stopped its analysis and held that it lacked jurisdiction.[2] SPA11, SPA17n.12. In so doing, the court erred as a matter of law because the mootness framework is critically different from the standing framework. *See Friends of the Earth*, 528 U.S. at 190–91.

Two differences are highly relevant. *First*, the defendant bears the burden on mootness, whereas the plaintiff bears the burden on standing. *Second*, the doctrine of mootness has equitable exceptions, whereas standing does not. By failing to apply the mootness framework, the district court failed to hold the State to its burden of showing that the voluntary cessation exception does not keep the case alive.

---

2 As explained below, the Wydra declaration is not an effective disavowal. *See infra* pp. 34–41.

What appears to have led the court astray was a misunderstanding of the evidentiary standards applicable to standing. SPA9 n.6. The court keyed its ruling to the principle that "[a] plaintiff's burden to demonstrate standing increases over the course of litigation." *Id.* (citing *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011)). Over the course of a case—from the pleading stage, to summary judgment, and then at trial—a plaintiff's "burden of establishing" standing changes commensurate with the stage of proceedings and "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561.[3] Yet, no matter the stage at which a court assesses standing, the question always is whether the plaintiff possessed

3 This Court's recent decision in *Elias Bochner, 287 7th Ave. Realty LLC v. City of New York*, 118 F.4th 505 (2d Cir. 2024), shows how this works. At the pleading stage, the plaintiffs adequately alleged a credible threat of enforcement of a Guaranty Law. *Id.* at 519. At summary judgment, the plaintiffs conceded no threat existed because the City lacked statutory authority to enforce the Guaranty Law. *Id.* at 522. On appeal (in post-oral-argument filings, no less), the plaintiffs tried to claw back their fatal concession, claiming the City had broad powers to enforce all laws, including the Guaranty Law. *Id.* at 524. The City responded that it would never enforce the Guaranty Law against *anyone*. *Id.* at 525. This Court, accordingly, declined to relieve the plaintiffs of their concession and held that they failed to carry their summary-judgment of adducing evidence of a credible threat of enforcement. *Id.* at 525–26 & n.13.

standing "as of" filing the suit. *Doe v. McDonald*, 128 F.4th 379, 384 (2d Cir. 2025); *see Davis*, 554 U.S. at 734. An intervening event like Wydra's declaration cannot change the answer to that question.

B. The State's voluntary cessation does not moot CBIA's claims.

A defendant's voluntary cessation moots a claim *if and only if* the defendant demonstrates that (1) there is no reasonable expectation that the action will recur and (2) interim events have completely eradicated the effects of the alleged violation. *See Seidemann v. Bowen*, 499 F.3d 119, 128 (2d Cir. 2007). A defendant "claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190.

Because the district court analyzed Wydra's declaration through standing instead of mootness, the court did not hold the State to its "formidable burden." *Id.* The State has not carried that burden. Wydra's second declaration does not eliminate the possibility of enforcement against CBIA, for two reasons.

<u>1. Proof of mootness must be "absolutely clear."</u> Defendants claiming mootness have a heavy burden of proof—absolute clarity. *See N.Y. Pub.*

Int. Rsch. Grp. v. Whitman, 321 F.3d 316, 326–27 (2d Cir. 2003) (agency did not moot a challenge to an air-permitting program by issuing a letter of commitment describing actual and intended changes because it did not make position "absolutely clear"). Inconsistencies suggesting a possibility of recurrence are enough to render a voluntary cessation ineffective, particularly in First Amendment cases. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011); *see also Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1306 (11th Cir. 2017) (holding that defendant's new position did not moot the case because the "letter—written after this action was filed—contradicts earlier positions"); *Siders v. City of Brandon*, 123 F.4th 293, 300 (5th Cir. 2024) (holding that defendant's "waffl[ing] on appeal on the behavior it might enforce" did not moot the case).

CBIA faces that lack of clarity here. From the legislative process through litigation and beyond, the State, the General Assembly, and the Attorney General relayed an unwavering message: they intend to enforce Section 31-51q against employer speech. *See infra* pp. 6–15. Wydra's purported disavowal only weakens the State's case for mootness. He asserts that "even if" his interpretation of Section 31-51q's prohibition is wrong, he still would not enforce against CBIA because he thinks CBIA is exempt. JA211. But to reach that conclusion, Wydra contradicts CBIA's own evidence about its operations—which shows that exemption's application is not "absolutely clear." JA119 (¶¶ 9, 10), JA436. Moreover, Wydra rests his disavowal on alternative and contradictory positions—that CBIA's meetings are not covered by the statute and that they are covered-but-exempt—leaving CBIA (and the court) with little clarity about the State's position.

2. A disavowal does not moot a case if it leaves the door open for future enforcement. In *Fikre*, the government placed the plaintiff on the No Fly List for allegedly unlawful reasons. After he sued, the government removed him from the List and eventually disavowed that he would be placed back on the List based on "currently available information." 601 U.S. at 242. That voluntary cessation did not moot the case because the government's disavowal did not totally close the door on re-listing the plaintiff in the future. *Id.* at 242–44; *see also West Virginia*, 609 U.S. ____, slip op. at 14 n.3 (holding a dispute not moot because plaintiff's "shift may not be permanent, particularly given [plaintiff's] prior change in position.").

The same is true here: Wydra's disavowal is conditional. He said he would not initiate enforcement against CBIA based on his opinion that CBIA's all-staff meetings on political matters do not violate Section 31-

51q. JA209. But that does not totally close the door on future enforcement. The State admitted under oath that Wydra's declaration is not binding on the Commissioner of Labor. *See* JA138 (Nos. 14–15). And Wydra has left the Department of Labor, *see* JA340–41, so his successor may adopt a different view. Most importantly, if courts ultimately reject Wydra's interpretation of Section 31-51q, the risk of enforcement will recur because CBIA has no mechanism to enforce Wydra's declaration.[4]

Moreover, even the possibility of future *private* enforcement is sufficient to stave off mootness. *Nat'l Republican Senatorial Comm. v. FEC* ("*NRSC*"), 609 U.S. ____, slip op. at 5 (2026) (holding that a *government* disavowal does not moot a case when a plaintiff still faces a potential "threat of *private* enforcement." (emphasis added)). On that logic, Wydra's disavowal cannot moot this case because CBIA still faces a threat of private enforcement. Section 31-51q is enforced both by State-imposed penalties and by employees suing for damages. *See* Conn. Gen. Stat. § 31-51q(b). Because a threat of *private* enforcement lingers, "this dispute 'is

[4] As discussed earlier, at least one court has already rejected a similar interpretation of an identical California statute. *See Cal. Chamber of Com.*, 802 F. Supp. 3d 1227, *appeal pending*.

still very much alive.'" *NRSC*, 609 U.S. ____, slip op. at 5 (quoting *Chafin v. Chafin*, 568 U.S. 165, 173 (2013)).

These twin concerns about voluntary cessation have defeated similar disavowals in other pre-enforcement First Amendment challenges. *Wisconsin Right to Life* was a pre-enforcement challenge to state campaign-finance laws. 751 F.3d at 809. Wisconsin conceded that a particular provision was unconstitutional and disavowed enforcement against only the plaintiff, not others. *Id.* at 831. The disavowal did not moot the case. The Seventh Circuit instead held that, by taking "inconsistent and shifting positions" and "not fully disclaiming the right to enforce this facially invalid statute," Wisconsin had undermined its "halfhearted concession" and left the Court "with no assurance" that the threat of prosecution "evaporated." *Id.* Wydra's disavowal is even less compelling. While he and Wisconsin both failed to disclaim enforcement "*against anyone*," *id.* at 832, Wisconsin at least premised its disavowal on a concession that its law was unconstitutional, whereas Wydra did not.

Wydra's purported disavowal is far different from the sort of voluntary cessation that has mooted cases. For example, in *Lamar Advertising v. Town of Orchard Park, New York*, a city mooted a constitutional challenge to sign ordinances—by repealing and amending them. 356 F.3d 365

(2d Cir. 2004). Even then, this Court noted that legislative changes to a challenged law do not always moot a case. What distinguished the legislative changes in *Lamar Advertising* is that they were combined with (1) deference to the legislative branch's decision, (2) government disavowals to return to the prior statutory regime, and (3) lack of evidence suggesting the contrary. *Id.* at 377.

Unlike the city in *Lamar Advertising*, the State has offered nothing beyond Wydra's targeted disavowal. *Cf. Kentucky v. Yellen*, 54 F.4th 325, 341 (6th Cir. 2022) (holding that pre-enforcement challenge to federal agency's broad interpretation of statute was mooted when agency not only disavowed that interpretation during litigation but also promulgated binding regulation embracing narrower reading).

As a matter of law, then, the State's nonbinding disavowal is not enough to carry its burden. *See Fikre*, 601 U.S. at 244 ("What matters is not whether a defendant repudiates its past actions, but what repudiation can prove about its future conduct."). Wydra's second declaration does not completely and clearly eliminate the possibility that CBIA will face enforcement under Section 31-51q in the future.

II. CBIA still faces a credible threat of enforcement based on its interpretation of Section 31-51q.

A. CBIA adduced evidence that it faced a credible threat of enforcement.

A plaintiff has standing to maintain a pre-enforcement constitutional challenge if (1) he intends to engage in activity "arguably" protected by the Constitution, (2) his activity is "arguably" proscribed by the statute, and (3) he faces a "credible threat" of enforcement. *See Vitagliano v. County of Westchester*, 71 F.4th 130, 136, 138 (2d Cir. 2023) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 162 (2014)).

CBIA easily clears this low bar to suit. As the district court acknowledged, *see* SPA15 n.9, CBIA's all-staff, mandatory meetings to discuss political matters and unionization are at least "arguably" protected by the First Amendment and the NLRA and at least "arguably" proscribed by Section 31-51q. Successful pre-enforcement challenges to other states' captive-audience laws validate CBIA's arguable interpretation of Section 31-51q as imposing content- and viewpoint-discriminatory burdens on speech. *See, e.g.*, *Honeyfund.com Inc. v. Governor, Fla.*, 94 F.4th 1272 (11th Cir. 2024) (affirming injunction of Florida law that targeted mandatory workplace meetings on state-disapproved topics); *Cal. Chamber of*

Com., 802 F. Supp. 3d 1227 (enjoining a California law materially identical to Section 31-51q).

CBIA also submitted sufficient evidence that it faced a credible threat of enforcement as of commencing this suit. The credible-threat requirement is not onerous. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). A credible threat exists whenever "prosecution is *remotely* possible." *Younger v. Harris*, 401 U.S. 37, 42 (1971) (emphasis added). That plaintiff-friendly standard is even friendlier in the First Amendment context, where a modicum of enforcement risk can chill speech. *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 690 (2d Cir. 2013). A plaintiff in a pre-enforcement First Amendment challenge need show only "an actual and well-founded fear" of enforcement, *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000), which means a fear that is not "'imaginary or wholly speculative,'" *Susan B. Anthony List*, 573 U.S. at 160 (quoting *Babbitt*, 442 U.S. at 302).

Like countless other plaintiffs in pre-enforcement challenges, CBIA did not need discovery of state agencies, admissions from state officers, or direct proof of the State's intent to enforce the law. *See Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 70–71 (2d Cir. 2019); *cf. Ashcroft v. ACLU*, 542 U.S. 656, 670–71 (2004) (warning that "speakers may self-censor rather than risk the perils of trial"). CBIA properly established a threat of enforcement with circumstantial evidence consistent with the possibility of enforcement.

First, CBIA relied on the fact that the Assembly amended Section 31-51q only a few months before its lawsuit. Many plaintiffs have established a credible threat of enforcement merely by noting that a challenged statute is "recent and not moribund." *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *accord Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013); *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016); *Vitagliano*, 71 F.4th at 138. Because legislatures enact laws expecting them to be enforced, courts have credited that recently enacted laws are likely to be enforced. Laws enacted just months before suit, like Section 31-51q, are recent enough to prove a credible threat of enforcement. *See id.*

Second, CBIA relied on the law's legislative history and the circumstances surrounding Section 31-51q's amendment, all of which demonstrate the State's commitment to enforcing its prohibitions. *See Wollschlaeger*, 848 F.3d at 1306 (comments of medical board's "Rules/Legislative Committee" established credible threat of enforcement). The Assembly's multiple attempts to enact laws like Public Act 22-24 show that the legislature was serious about enforcement. The Assembly amended

Section 31-51q only after the Attorney General blessed it in an opinion that invoked the State's enforcement powers to shield employees from hearing speech with which they disagree. *See* Conn. A.G. Opinion No. 2019-03, 2019 WL 2246103, at *3 (contending that the State can "protect the interest of the unwilling listener[s] who cannot avoid speech" by their employers). The Assembly's official analysis specifically warned the public that the State will enforce Section 31-51q. *See* An Act Protecting Employee Freedom of Speech and Conscience, OLR Bill Analysis, at 3 (Conn. Apr. 22, 2022), https://www.cga.ct.gov/2022/BA/PDF/2022SB-00163-R01-BA.PDF. And, throughout the entire lower-court proceedings, the State reaffirmed its power and intent to enforce Section 31-51q against violators. *See* JA43–44 (¶¶ 13–18), JA70–71, JA135, JA137 (Nos. 3–4), JA139–40 (Nos. 10–11, 17–19); *see also* JA115 (¶ 20).

The district court properly concluded that CBIA adduced evidence of a credible threat of enforcement as of commencement of this case. SPA11 n.7. But on the court's view, Wydra's second declaration—alone—defeated CBIA's summary judgment motion and carried the State's cross-motion. *See* SPA15 n.9. As explained below, the court's reliance on the declaration was misplaced.

B. Wydra's second declaration does not alleviate the threat of enforcement because it rests on his alternative interpretation of Section 31-51q.

A plaintiff has standing to maintain a pre-enforcement challenge when he faces a credible threat of enforcement for actions the challenged law "*arguably*" proscribes. *Susan B. Anthony List*, 573 U.S. at 159 (emphasis added). For every element of the standing analysis, including the credible-threat requirement, it is the *plaintiff's* arguable interpretation that controls. "If a plaintiff's interpretation of a statute is 'reasonable enough' and *under that interpretation* the plaintiff 'may legitimately fear that it will face enforcement of the statute,' then the plaintiff has standing to challenge the statute." *Pac. Cap. Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) (emphasis added).

As long as the plaintiff's interpretation of a challenged law is "arguable," the court has jurisdiction—even if, on the merits, the court ends up concluding that the plaintiff's interpretation is not "valid." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). "Jurisdiction … is not defeated … by the possibility that" the plaintiff's interpretation is flawed; the court must proceed to adjudicate the merits and resolve the dispute over the meaning of the law if "the right of the [plaintiff] to recover … will be sustained" on his "construction." *Bell v. Hood*, 327 U.S. 678, 685

(1946) (quoted in *Steel Co.*); *see Soule v. Conn. Ass'n of Schs., Inc.*, 90 F.4th 34, 48 (2d Cir. 2023) (*en banc*) ("[W]e must assume Plaintiffs are correct that" claimed injury "violated federal law and that" they "are therefore impacted by an unlawful policy.").

Because a defendant cannot attack a plaintiff's standing on the ground that the plaintiff's interpretation of the relevant law is invalid, this Court has consistently rebuffed defendants who dispute the threat of enforcement—or who disavow enforcement—because they dispute the plaintiff's interpretation of the law. *See Vt. Right to Life*, 221 F.3d at 383–84; *Picard v. Magliano*, 42 F.4th 89, 99 (2d Cir. 2022); *cf. Hedges*, 724 F.3d at 199–202 (ignoring government's disavowal of enforcement based on contrary legal interpretation, but concluding plaintiffs did not face threat of enforcement "*independent* of the government's litigation position." (emphasis added)). A defendant cannot defeat a credible threat of enforcement simply by "den[ying] that the plaintiff actually [is] subject to the challenged law." *Nat'l Org. for Marriage*, 714 F.3d at 690. If anything, when the parties' dispute over the risk of enforcement turns on competing interpretations of the challenged law, it is clear there is a real, live, actual controversy that needs judicial resolution.

Take *Vermont Right to Life Committee*. The plaintiff feared enforcement based on a "literal" interpretation of state law. *See Vt. Right to Life Comm.*, 221 F.3d at 383. Because the plaintiff's reading would cover its advertising, the plaintiff had standing to bring a pre-enforcement challenge the law's constitutionality. The defendants proposed a different interpretation based on their view of the law's "plain meaning" and argued that the plaintiff faced no risk of enforcement under that interpretation. *See id.* This Court squarely rejected the defendants' effort to repackage their *merits* arguments as *standing* arguments: "while there may be other, perhaps even better," interpretations, the plaintiff's interpretation was "reasonable enough that it may legitimately fear that it will face enforcement of the statute by the State brandishing the definition proffered by" the plaintiff. *Id.* (reversing summary judgment for the defendants after holding, in part, that plaintiffs had standing to challenge statute based on fear of enforcement).

Wydra's second declaration is of a piece with the disavowal in *Vermont Right to Life Committee*. Wydra impermissibly linked his disavowal to his reading that Section 31-51q does not apply to mandatory meetings generally or to CBIA's all-staff meetings specifically. *See* JA210 (¶¶ 24, 25).

Wydra first claimed that he will not enforce against CBIA because he interprets Section 31-51q to not cover mandatory meetings on political matters, rather only the actual or threatened discipline of employees who skip meetings on political matters. *See* JA205–19. When the State proposed this strained distinction at the pleading stage, the district court rightly found it implausible: "Calling a meeting 'mandatory' carries with it an understanding on the employee's part that there may be consequences for failing to attend that meeting and an expectation for the employer that such consequences should be available to it, but that is precisely what the statute proscribes." JA96.

Perhaps anticipating that the district court would rebuff that strained interpretation again, Wydra claimed that, alternatively, he will not enforce against CBIA "even if" Section 31-51q covers its mandatory meetings because, contrary to CBIA's own evidence, he thinks CBIA qualifies for an exemption based on his belief that all CBIA employees need to know about its policy positions to do their jobs. JA211–13 (¶¶ 30–31, 34).

In other words, Wydra's declaration speaks to whether CBIA faces a credible threat of enforcement *based on his interpretation of the law*. But it does not address the relevant question for standing—whether CBIA faces a credible threat of enforcement *based on its interpretation of the* *law*. As such, it neither rebuts nor refutes CBIA's case for Article III standing.

The district court acknowledged that the State's purported disavowal is "rooted in its own interpretation of the statutory text." SPA15 That should have decided the issue of standing in CBIA's favor. By crediting Wydra's interpretation, "*even if misguided*," SPA16 (emphasis added), the court took an approach that contradicts *Susan B. Anthony List*, *Vermont Right to Life Committee*, *Picard*, and more.

The court set aside *Vermont Right to Life Committee* and *Picard* because the states in those cases "simply *argued*" that their interpretations foreclosed a credible threat of enforcement, whereas Wydra said the same in a sworn declaration. SPA15 n.8. That distinction fails for several reasons. *First*, whether presented in a brief, oral argument, or declaration, a disavowal based on the *defendant's* disputed interpretation of the challenged law is irrelevant to determining whether the plaintiff faces a credible threat of enforcement based on its interpretation of the law. *See Pac. Cap. Bank*, 542 F.3d at 350. *Second*, the disavowals in *Vermont Right to Life Committee* and *Picard* share the same problem with Wydra's declaration: none are forever binding on the state officers charged with enforcement. *See Vt. Right to Life Comm.*, 221 F.3d at 383 (declining to credit disavowal based on state's contrary interpretation of law because "[i]t is not forever bound … to the view of the law that it asserts in this litigation."); *Picard*, 42 F.4th at 99 (same). *Third*, the district court's distinction is inapposite because Wydra left his position before summary judgment, and the State purported to maintain his disavowal *through a lawyer's argument*. *See* JA340.

Neither of the cases relied on by the district court warrants holding otherwise.

The district court relied on *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979), to conclude that the State's purported disavowal, based on a contrary interpretation of law, rendered any threat of enforcement against CBIA "illusory." SPA13. *Babbitt* does not support that conclusion. There, the Supreme Court concluded that a credible threat of enforcement existed because "the positions of the parties are sufficiently adverse with respect to the" challenged statute "to present a case or controversy." 442 U.S. at 302. So too here. The State's purported disavowal heightened the controversy over Section 31-51q by focusing the dispute on its scope and application.

The district court also relied on *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014), to conclude that it should defer to the State's interpretation of the law. SPA15–16. But this Court has distinguished *Blum*, noting that the case concerned a statute that explicitly included "rules of construction protecting First Amendment rights." *Cerame v. Slack*, 123 F.4th 72, 87 n.15 (2d Cir. 2024). As a sister circuit put it, "the government's disavowal" in *Blum* rested on "a secure statutory basis." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 337 n.15 (5th Cir. 2020), *as revised* (Oct. 30, 2020). In other words, the *Blum* plaintiffs lacked an arguable interpretation of law. Not so here. CBIA's interpretation of the law remains arguable *at minimum*. Indeed, the district court earlier rejected the State's strained interpretation of Section 31-51q as covering only conduct, not speech, such that the law is inapplicable to mandatory meetings. JA67. And, at summary judgment, the court found persuasive another district court's conclusion that an identical California law was likely unconstitutional. SPA17 n.12 (citing *Cal. Chamber of Com.*, 802 F. Supp. 3d 1227). Still, the district court concluded it lacked jurisdiction to decide the statutory issues motivating the State's disavowal because the State rejected that interpretation of law. SPA16.

That paradox exemplifies the problem at the core of this appeal. If the district court's reasoning stands, states will be able to do what courts cannot—deprive plaintiffs of standing by taking a contrary view of the merits. But to place CBIA's "First Amendment rights 'at the sufferance'" of the State is alien to our constitutional order. *Cerame*, 123 F.4th at 87 (quoting *Vt. Right to Life Comm.*, 221 F.3d at 383).

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

/s/ Bryan Killian

Bryan Killian
Pranav Mulpur
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, D.C. 20004
T: 202-739-3000
bryan.killian@morganlewis.com

July 24, 2026

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that this APPELLANT'S OPENING BRIEF meets the type-volume limitations of Rule 32(a)(7)(B) and Circuit Rule 32.1(a)(4)(A) because it contains 7,728 words, excluding the items listed under Rule 32(f).

Further, this brief meets the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 365 in Century font, a proportionally spaced typeface. The body text and footnotes are set in 14-point Century font, and the headings are set in 16-, 18-, and 20-point Century font.

/s/ Bryan Killian

Counsel for Plaintiff-Appellant
Connecticut Business & Industry Association