Nos. 20-3434, 20-3492

United States Court of Appeals for the Third Circuit

FDRLST MEDIA, LLC,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW FROM THE
NATIONAL LABOR RELATIONS BOARD
CASE NUMBER 02-CA-243109

PETITIONER/CROSS-RESPONDENT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and L.A.R. 26.1, Petitioner/Cross-Respondent makes the following disclosure: There are no parent corporations of FDRLST Media, LLC. No publicly held company holds 10% or more of FDRLST Media, LLC's stock.

/s/ Aditya Dynar
Aditya Dynar

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GLOSSARY

ALJ	Administrative Law Judge of the National Labor Relations Board
APA	Administrative Procedure Act (Pub. L. 79-404 (1946), codified at 5 U.S.C.)
CAR	Certified Administrative Record (ECF No. 18 in this Court); page numbers are given in the top-right corner of each page
EEOC	Equal Employment Opportunity Commission
FDRLST	FDRLST Media, LLC (Respondent in administrative proceedings, Petitioner in this Court in Case No. 20-3434, and Cross-Respondent in this Court in Case No. 20-3492)
FRAP	Federal Rules of Appellate Procedure
FRCP	Federal Rules of Civil Procedure
L.A.R.	Local Appellate Rules
NLRA	National Labor Relations Act (codified at 29 U.S.C. §§ 151–169)
NLRB	National Labor Relations Board
Section	Refers to specific sections of the NLRA

INTRODUCTION

The National Labor Relations Act does not empower random people to activate the NLRB's enforcement machinery against employers to punish their employees' personal speech. Mr. Joel Fleming, a random person, disapproved of a tweet he saw on Twitter.com (Twitter) posted by a Twitter user (Mr. Ben Domenech) on the user's personal account. Mr. Fleming then filed a charge with NLRB against Mr. Domenech's employer, FDRLST Media, LLC. Despite the Charging Party's lack of aggrievement, NLRB launched an investigation into FDRLST.

NLRB has no statutory authority to prosecute this action without a "person aggrieved" by an alleged "unfair labor practice." 29 U.S.C. § 160(b). Moreover, NLRB Region 2 lacked personal jurisdiction over FDRLST and was an improper venue to litigate this matter. Those two glaring jurisdictional defects, standing alone, would suffice to vacate NLRB's decision against FDRLST.

If the Court reaches the unfair-labor-practice and freedom-of-speech issues, it should reverse NLRB's decision and vacate its order because Mr. Domenech's tweet is (1) not an unfair labor practice, and (2) protected by the First Amendment and 29 U.S.C. § 158(c). Also, NLRB cannot constitutionally require FDRLST to order Mr. Domenech to delete his personal tweet.

Ordinary tools of construction resolve the statutory questions here. Resort to deference doctrines is both unnecessary and unconstitutional.

JURISDICTIONAL STATEMENT

NLRB issued a complaint against FDRLST based on Mr. Fleming's charge filed with NLRB's Region 2. CAR188–211.

NLRB asserted subject-matter jurisdiction under Section 160(b), and Region 2 asserted personal jurisdiction and said it was a proper venue. FDRLST contested those assertions throughout the agency proceedings and now presents those issues to this Court. CAR161–216, 272–273, 289–302, 336–367.

This Court has appellate jurisdiction under Section 160(f) to review NLRB orders. Venue is proper in this Court because FDRLST Media, LLC is a Delaware limited liability company that resides in the Third Circuit. CAR66.

NLRB issued the final order on November 24, 2020. CAR431–436. In an interlocutory order entered on February 7, 2020, NLRB had denied FDRLST's motion to dismiss the NLRB's complaint against FDRLST. CAR272–273.

FDRLST's petition to review was docketed in this Court on December 1, 2020, within 7 days of NLRB's order. NLRB's cross-petition to enforce its order was docketed in this Court on December 10, 2020, *i.e.*, 16 days after NLRB's order issued.

ISSUES PRESENTED

1. Whether NLRB lacks subject-matter jurisdiction under 29 U.S.C. § 160(b) for want of a "person aggrieved" by an alleged "unfair labor practice." CAR431 n.4.
2. Whether an NLRB Region lacks personal jurisdiction over the employer and is an improper venue because the employer's principal place of business and its place of incorporation lie outside that Region's geographic boundaries, and when neither the Charging Party's alleged aggrievement nor the alleged unfair labor practice occurred within that Region. CAR431 n.4.
3. Whether a person has the right to speak freely and satirically to express his personal views on his personal Twitter account under the First Amendment to the United States Constitution and 29 U.S.C. § 158(c). CAR435 n.9, 431.
4. Whether NLRB can require an employer to order an employee to delete a tweet posted by the employee on the employee's personal Twitter account. CAR431 n.5, 432.
5. Whether the Court owes any deference to NLRB's interpretations bearing on the above issues. CAR431–436, 272–273.

STATEMENT OF RELATED CASES

As of the filing date of this brief there are no other cases related to this case in counsel's knowledge that are pending in any federal court. This case has not been before this Court previously.

REQUEST FOR ORAL ARGUMENT

FDRLST respectfully requests that the Court schedule oral argument in this case because it will aid the Court's determination of the weighty jurisdictional and constitutional issues presented.

STATEMENT OF THE CASE

On June 6, 2019, Mr. Ben Domenech tweeted the following joke on his personal Twitter account: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." CAR68.

On June 7, 2019, Mr. Joel Fleming, a random person on Twitter who has never been FDRLST's employee, independent contractor, or paid or unpaid intern, CAR69, filed a charge with NLRB Region 2 alleging FDRLST engaged in an unfair labor practice. CAR63–65.

On September 11, 2019, NLRB Region 2 issued a complaint alleging that FDRLST engaged in an unfair labor practice in violation of Section 158(a)(1). CAR45.

On January 13, 2020, FDRLST filed a motion to dismiss the complaint for lack of subject-matter jurisdiction, lack of personal jurisdiction, and improper venue. CAR162.

On January 22, 2020, Region 2 ALJ Kenneth Chu denied FDRLST's motion to dismiss and scheduled an evidentiary hearing in New York City on February 10, 2020. CAR252–253.

On January 24, 2020, ALJ Chu vacated his January 22 order. CAR254.

On Friday, February 7, 2020, NLRB issued an interlocutory order denying FDRLST's motion to dismiss. CAR272–273.

At the scheduled Monday, February 10, 2020 evidentiary hearing before ALJ Chu, FDRLST, through counsel, entered a special appearance, not a general appearance. CAR6–8, 14–17, 24.

In a decision issued April 22, 2020, ALJ Chu concluded that FDRLST violated Section 158(a)(1) because Mr. Domenech's tweet was a threat, CAR279, issued a cease-and-desist order against FDRLST, and ordered it to post an NLRB notice at FDRLST's Washington, DC office address. CAR280–283.

FDRLST appealed the ALJ's decision to NLRB, and NLRB cross-appealed. CAR289–367.

NLRB's deputy executive secretary denied the motion for leave to file an amicus brief, filed by two (out of six) FDRLST employees, who were represented by independent counsel of their choice. CAR418. NLRB's deputy executive secretary granted the Center on National Labor Policy, Inc.'s motion for leave to file an amicus brief. CAR417.

On November 24, 2020, NLRB issued a decision and order. In it, NLRB reaffirmed its previous interlocutory decision (CAR272–273) that:

(1) it had subject-matter jurisdiction,

(2) Region 2 had personal jurisdiction over FDRLST, and

(3) Region 2 was a proper venue. CAR431 n.4.

NLRB also concluded that FDRLST violated Section 158(a)(1) because of Mr. Domenech's June 6 tweet. *Id.*; CAR433.

NLRB required FDRLST to order Mr. Domenech to "delete the statement from his personal Twitter account." CAR431 n.5.

FDRLST petitioned this Court to review NLRB's decision and order. NLRB cross-petitioned for enforcement of its decision and order.

STATEMENT OF FACTS

On June 7, 2019, Mr. Joel Fleming filed a charge with NLRB. CAR188. Despite the NLRB Form's only instruction—"File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring," CAR188—Mr. Fleming filed it in Region 2 (New York), a region that has no connection with or relation to FDRLST, the alleged unfair labor practice, Mr. Fleming's place of residence (Massachusetts), FDRLST's place of incorporation (Delaware), or FDRLST's principal place of business (Washington, DC). CAR66, 188. NLRB divides itself into 32 geographic regions. NLRB, Regional Offices, https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices.

Mr. Fleming gave an erroneous Illinois address for FDRLST. CAR188. Eventually, the parties stipulated that FDRLST's correct address is Washington, DC. CAR66. Region 2's geographic boundaries cover parts of New York State and do not extend to Massachusetts, Delaware, Illinois, or Washington, DC. NLRB Region 2, https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices/region-02-new-york.

Mr. Fleming stated erroneously that FDRLST employs "50" persons, but FDRLST employs *seven*. CAR67, 188.

Mr. Fleming stated FDRLST's "principal product or service" as "Conservative media commentary," CAR188, indicating that FDRLST or authors published by FDRLST express what Mr. Fleming perceives as a particular viewpoint. He described the basis of the charge as follows, CAR189:

> At 8:39 PM EST on June 6, 2019, Ben Domenech, who is the publisher of The Federalist, sent the following tweet

> from his Twitter account (@bdomenech): … As of 2:00 pm EST on June 7, 2019, that tweet is publicly available here: https://twitter.com/bdomenech/status/1136839955068534784
>
> I am not an employee of The Federalist. This charge is submitted pursuant to 29 C.F.R. § 102.9, which provides that 'Any person may file a charge … .'

Mr. Fleming's basis for the charge was Section 158(a)(1): "Within the previous six months, the Employer has interfered with, restrained, and coerced its employees in the exercise of rights protected by Section [157] … by threatening to retaliate against employees if they joined or supported a union." CAR191. Mr. Fleming alleged "Ben Domenech" as the "Employer's Agent/Representative who made the statement" on "June 6, 2019." *Id.*

Mr. Domenech is FDRLST's Publisher. CAR67. FDRLST publishes "The Federalist" web magazine which provides cultural, political, and religious commentary on a variety of contemporary newsworthy and controversial issues. CAR69. The Federalist website maintains a Twitter account under the username "@FDRLST." CAR68. Mr. Domenech maintains a personal Twitter account with the username "@bdomenech." *Id.* Mr. Domenech uses his personal Twitter account for personal, expressive speech. CAR151–152. Mr. Domenech has sole and exclusive control over his personal Twitter account; FDRLST has none. *Id.* He has posted thousands of tweets and has tens of thousands of followers. *Id.*

SUMMARY OF THE ARGUMENT

NLRB lacks subject-matter jurisdiction under Section 160(b) for want of a "person aggrieved" by an alleged "unfair labor practice." NLRB's interpretation of Section 160(b) given in 29 C.F.R. § 102.9 that "any person" can confer subject-matter jurisdiction on NLRB is wrong under ordinary tools of statutory construction. To the extent NLRB's interpretation rests on ambiguous text or statutory silence, this Court should decline to give that interpretation any deference.

NLRB Region 2 lacked personal jurisdiction over FDRLST and was an improper venue because FDRLST's principal place of business and its place of incorporation lie outside Region 2's geographic boundaries, and because the alleged unfair labor practice did not occur within Region 2. NLRB failed to follow its own regulation (29 C.F.R. § 102.10) in concluding otherwise.

Mr. Domenech's tweet was not an unfair labor practice. Moreover, Mr. Domenech and FDRLST each have the constitutional and statutory right to speak freely and satirically. Mr. Domenech has the right to express his personal views on his personal Twitter account, over which he has complete control and FDRLST has none. FDRLST cannot make Mr. Domenech tweet or delete anything from his personal Twitter account. In addressing all these issues, the Court should not defer to NLRB's interpretations.

The Court should vacate NLRB's decision for want of subject-matter jurisdiction and personal jurisdiction, set aside that portion of 29 C.F.R. § 102.9 that allows "[a]ny person" to file a charge regardless of aggrievement, and require NLRB to follow its own rules that the charge be filed in the region where the alleged unfair labor practice has

occurred or is occurring. The Court should also reverse NLRB's decision and vacate its order because Mr. Domenech's tweet is not an unfair labor practice under Section 158(a)(1), and is fully protected speech under the First Amendment and Section 158(c). The Court should award FDRLST its costs, expenses, and attorneys' fees under the Equal Access to Justice Act, and other applicable cost-and-fee statutes and caselaw.

ARGUMENT

I. STANDARD OF REVIEW

NLRB and/or Mr. Fleming had the burden of establishing subject-matter jurisdiction, personal jurisdiction, propriety of venue, and that an unfair labor practice occurred by a preponderance of evidence. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 145 (3d Cir. 2019); *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 143 n.2, 146 (3d Cir. 1992); *United States v. Auerheimer*, 748 F.3d 525, 533 (3d Cir. 2014); *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 817 (3d Cir. 1985).

This Court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706(2). The agency receives no deference on pure questions of law, like constitutional and statutory interpretation, or whether it followed procedures required by law. *United States v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013). The Court applies the arbitrary-and-capricious and substantial-evidence standards to NLRB's underlying factual determinations. *Id.*; *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 250–51 (3d Cir. 2010); 5 U.S.C. § 706(2).

II. NLRB LACKS SUBJECT-MATTER JURISDICTION

NLRB lacked authority to investigate and prosecute FDRLST based on Mr. Fleming's defective charge because he is not "aggrieved" by the alleged "unfair labor practice" under Section 160(b), and he is not within the zone of interests the NLRA protects. Section 160(b) (emphasis added) states in relevant part:

> Whenever it is charged that any person has engaged in any *such unfair labor practice*, the Board … shall have power to issue and cause to be served upon such person a complaint stating the charges … : Provided, That no complaint shall issue based upon any *unfair labor practice* occurring more than six months prior … unless the *person aggrieved thereby* was prevented from filing *such charge* by reason of service in the armed forces.

Mr. Fleming's charge is a legal nullity and cannot trigger NLRB's subject-matter jurisdiction over FDRLST.

Section 160(b)'s text and NLRA's structure show Congress allowed "persons aggrieved" to file a charge. NLRB's corresponding regulation, however, allows "any person" to file an unfair-labor-practice charge: "*Any person* may file a charge alleging that *any* person has engaged in or is engaging in *any* unfair labor practice affecting commerce." 29 C.F.R. § 102.9 (emphasis added).

The universal charging-party status invented by NLRB's regulation cannot survive scrutiny when one employs traditional tools of statutory construction. It also fails as a constitutional matter.

A. The Plain Meaning of the Statute Controls

NLRB's reading of Section 160(b) would permit an agency to expand its jurisdiction without limit any time Congress speaks in passive voice: "Whenever it is charged." Agencies have only those powers that Congress specifies. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357, 374 (1986) (agencies have "no power to act … unless and until Congress confers power upon" them; agencies have no power to "override Congress"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (agency power "is circumscribed by the authority granted"); *Long Island Radio Co. v. NLRB*, 841 F.2d 474, 477–78 (2d Cir. 1988) (NLRB has no power to expand its own jurisdiction by extending a statutory deadline). Courts construe statutory limits on jurisdiction more strictly than they "might read the same wording … in a non-jurisdictional provision." *United States v. Bond*, 762 F.3d 255, 261 (2d Cir. 2014). The use of passive voice in a statute does not alter this fundamental limitation on agency power. Any contrary interpretation is unlawful administrative overreach.

This Court's analysis "begins with the statute's plain language." *In re Visteon Corp.*, 612 F.3d 210, 219 (3d Cir. 2010). "Congress' intent is best determined by looking at the statutory language that it chooses." *United States v. Monsanto*, 491 U.S. 600, 610 (1989) (cleaned up). "The words of a statute are not to be lightly jettisoned by courts looking to impose their own logic on a statutory scheme," and the Court "may look behind a statute only when the plain meaning produces a result that is not just unwise but is clearly absurd." 612 F.3d at 219–20 (cleaned up). "When statutory language is plain and unambiguous, the sole function of the courts is to enforce it according to its terms." *Id.* (cleaned up). "The plainness or ambiguity of statutory language is determined by

reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Therefore, a single term or sentence "cannot be construed in a vacuum." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). Instead, its words "must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 1748; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (Thompson/West 2012) ("The text must be construed as a whole.").

Reading the first sentence of Section 160(b) in context and harmony with the rest of the provision reveals that the charging party must be aggrieved by an unfair labor practice to trigger NLRB's authority. Although the section uses passive voice rather than stating its subject explicitly ("Whenever it is charged": charged by whom?), the following clause beginning with "Provided" shows that Section 160(b) contemplates that the person "filing such [a] charge" is a "person aggrieved" by "a[n] unfair labor practice." That reading gives meaning to the entire provision.

The Distributive-Phrasing Canon, an ordinary statutory-construction tool, dictates that "[d]istributive phrasing applies each expression to its appropriate referent (*reddendo singula singulis*)." *Reading Law* at 214. Some "word[s] signa[l] a distributive sense." *Id.* Section 160(b) (emphasis added) has two words—"such" and "thereby"—that reveal its meaning: "Whenever it is charged" that a person has engaged in "any *such* unfair labor practice," then NLRB can file a complaint, when "the person aggrieved *thereby*" files "*such* charge." The distributive words "such" and "thereby" both point to "unfair labor practice." Section 160(b), therefore, requires that the charging party be a "person aggrieved" by an "unfair labor practice."

The presumption of consistent usage—another traditional statutory-construction tool—also clarifies the meaning of "person aggrieved" in Section 160(b). *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("[W]e cannot … giv[e] the word 'filed' two different meanings in the same section of the statute.") (Stevens, J., majority opinion); *United States v. Sims*, 957 F.3d 362, 365 (3d Cir. 2020) (applying the presumption of consistent usage). Interpreting "person aggrieved" in Section 160(f), this Court has said the "person aggrieved" "must suffer 'an adverse effect in fact,' to be 'aggrieved' under the NLRA." *Quick v. NLRB*, 245 F.3d 231, 251–52 (3d Cir. 2001); *see also Retail Clerks Union 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965) (Section 160(f)'s "person aggrieved" means a person having suffered an "adverse effect in fact."). Mr. Fleming, a stranger to FDRLST, has suffered no adverse effect in fact because of Mr. Domenech's June 6 tweet.

The Supreme Court has also looked at a statute's structure to determine the subject of passive-voice provisions since John Marshall was Chief Justice. *Barron v. City of Baltimore*, 32 U.S. 243 (1833). *Barron* concluded that the "states" were not the subject of the passive-voice phrase "shall be passed" in Article I, § 9 because the next section reads, "No State shall pass."

The Court still employs the same approach. *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019), construed the phrase "registration has been made" in 17 U.S.C. § 411(c). Looking closely at the "specific context" of § 411(c) and nearby sections (17 U.S.C. §§ 408(f), 410) the Court concluded that "has been made"

refers to "registration" done by the Copyright Office. Reading the whole statute, the Court determined the subject of the passive-voice phrase. *Id.* at 890; *see also United States v. Wilson*, 503 U.S. 329 (1992) (construing the phrase, "[a] defendant shall be given credit" in 18 U.S.C. § 3585(b), in contextual harmony with its statutory scheme to mean the Attorney General, not the courts, calculates credits); *United States v. Brumbaugh*, 909 F.2d 289, 291 (7th Cir. 1990) ("Several tools of statutory interpretation" such as "structure and language of the statute" help clarify the "subject" of "the passive voice in the statutory language").

The NLRA does not give non-aggrieved persons like Mr. Fleming *carte blanche* charging power, nor does it grant NLRB a virtually limitless power to investigate and prosecute employers whose employees are not aggrieved. Allowing any random person to subject a company to a government-directed and funded unfair-labor-practice action, and forcing that company to defend against the litigation (as has happened here), distorts the legislative scheme and invites abuse. It is "rather fundamental" and a "basic tenet of due process" that "the Government cannot, without violating due process, needlessly require a party to undergo the burdens of litigation" because "[t]he Government is not a ringmaster for whom individuals and corporations must jump through a hoop at their own expense each time it commands." *Continental Can Co. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979); *Bartkus v. Illinois*, 359 U.S. 121, 127 (1959) (holding that "the cruelty of harassment by … prosecutio[n]" can violate the Fifth Amendment's Due Process Clause).

While "a legislature's use of the passive voice sometimes reflects indifference to the actor," courts cannot likewise be indifferent in their adjudicative and interpretive

roles, for courts have no luxury to be indifferent as to the actor if it "would be inconsistent with the [NLRA's] statutory declaration of purpose." *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 479 (7th Cir. 2016). Even if the "passive-voice phrasing … introduces some ambiguity," NLRA's declaration of policy ("restoring equality of bargaining power between employers and employees," Section 151)—"clarifies" that only persons aggrieved by an alleged unfair labor practice can file charging documents. *Rubin* at 479–80 (quoting *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("Oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme." (cleaned up))); *see also* Anita S. Krishnakumar, *Passive-Voice References in Statutory Interpretation*, 76 Brook. L. Rev. 941 (2011) (collecting and discussing cases interpreting passive-voice legislative text).

Reading Section 160(b)'s aggrieved-person requirement as qualifying only the armed-forces tolling provision, as opposed to also qualifying *whose* charge authorizes NLRB to investigate and issue a complaint, illogically twists the statutory text. There is no indication that Congress, without explanation, would have tolled the statute of limitations only for aggrieved persons in the armed forces while permitting any non-aggrieved persons to file a charge. Section 160(b) explicitly grants special status to aggrieved persons. There is no discernible reason why that special status would apply only for the statute of limitations, nor why non-aggrieved persons in the armed forces would be permitted to file a charge but not benefit from the tolling provision. Courts interpret statutes to avoid such absurd results. *Republic of Sudan v. Harrison*, 139 S. Ct.

1048, 1060 (2019) ("[I]ts ordinary meaning better harmonizes the various provisions in [the statute] and avoids the oddities that respondent['s] interpretation would create.").

Congress could have easily drafted Section 160(b) to grant NLRB roving authority to investigate and enforce the NLRA against suspected violators. Instead, Congress required the "person aggrieved" trigger to activate NLRB's administrative machinery. Under the any-person reading, a business competitor could jumpstart NLRB's authority. The NLRA forbids such bootstrapping.

Nothing in the complaint, the charging document, or any proof submitted at the ALJ hearing, even arguably alleges—let alone proves—that Mr. Fleming is a "person aggrieved." He is not an employee or independent contractor of FDRLST. CAR69. He is not an "individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" at FDRLST. Section 152(3). Nor is he in privity with any employee or independent contractor of FDRLST. In fact, there is no nexus or privity whatsoever between FDRLST and Mr. Fleming. He is a random person on Twitter who apparently does not share Mr. Domenech's sense of humor. Lack of aggrievement excludes Mr. Fleming from the class of persons who can trigger NLRB's subject-matter jurisdiction under Section 160(b).

B. Article III Standing Requires the Charging Party to Be Aggrieved

The Court should also look at how courts have interpreted aggrievement requirements in other statutes. Those cases show that Section 160(b)'s "person aggrieved thereby" must be someone who can satisfy Article III standing.

The words "person aggrieved" show "a congressional intent to define standing as broadly as is permitted by Article III of the Constitution" and not broader than the

constitutional standing requirement. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972); *see also Loeffler v. Staten Island University Hosp.*, 582 F.3d 268, 280 (2d Cir. 2009) (concluding that the phrase "any person aggrieved" in the Rehabilitation Act of 1973, 29 U.S.C. §§ 794–794a, "evinces a congressional intention to define standing … as broadly as is permitted by Article III of the Constitution"); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 108–09 (1979) (concluding that statutes using the phrase "person aggrieved" mean that the person bringing the action must have standing only "as broadly as is permitted by Article III" (cleaned up)). Congress's aggrievement requirement in Section 160(b) likewise limits the ability to file a charge to those who would have standing to sue the employer.

A charging party must be able to show (1) it has suffered an injury-in-fact to a legally protected interest and that injury is (a) concrete and particularized and (b) actual or imminent, (c) not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan*, 504 U.S. at 560. The "usual rule" is that "a party may assert only a violation of its own rights." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988). The complainant needed to demonstrate that Mr. Fleming had standing "separately for each form of relief sought"—cease and desist, and delete the tweet. *Laidlaw*, 528 U.S. at 185. A person aggrieved in one respect does not have standing to bring a broader challenge, as "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996).

Mr. Fleming has suffered *no* "injury in fact," and has *no* "legally protected interest" at all. *Laidlaw*, 528 U.S. at 180–81. At most he personally disagreed with the views Mr. Domenech expressed or disliked his irreverent Twitter persona—which constitutes neither a "concrete" nor a "particularized" injury. Merely producing Mr. Domenech's satirical tweet as evidence of injury comes nowhere close to establishing "actual" or "imminent" injury to Mr. Fleming. Mr. Fleming has no injury "fairly traceable" to FDRLST.

Given his lack of injury, it is beyond "speculative" that a decision favorable to Mr. Fleming could provide "redress." Noteworthy in this respect, NLRB ordered FDRLST "to direct [Mr.] Domenech to delete the statement from his personal Twitter account." CAR431 n.5. Even assuming for argument's sake that the tweet constituted a threat, Mr. Fleming was not threatened, so removing the tweet does not remove any threat against him. "[I]f an unfair labor practice is found to exist, the ensuing … order" should "coerce conduct by the wrongdoer *flowing particularly to the benefit of the charging party*." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 156 n.22 (1975) (emphasis added). The ALJ did not order FDRLST to direct Mr. Domenech to delete the tweet, CAR431, 436, and Mr. Fleming took no exception to that decision. That omission shows that removal of the tweet will have no effect upon Mr. Fleming personally. Moreover, Mr. Domenech is not a party to this action, and NLRB could not have ordered a nonparty to delete a tweet as a "remedy" to resolve Mr. Fleming's case regardless.

Eschewing traditional tools of statutory interpretation, NLRB supports its unbounded reading of "aggrieved person" with cursory *dicta* in *NLRB v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 17 (1943). That Court, however, did not even analyze the

statutory language. Instead, the Court relied on one statement by one Senator during a committee hearing for the proposition that Section 160(b) did not require "that the charge be filed by a labor organization or an employee." Because a labor organization *had* filed a charge in that case, the question of whether Section 160(b) permits a nonemployee or nonlabor organization to file a charge was not before the Court. *Id.* While "it was often not prudent for the workman himself to make a complaint against his employer," even that Senator's statement (which was of limited probative value) did not assume that any stranger should be able to file a charge. Neither the Supreme Court nor any other court has read the statute to encompass random charging parties. *Id.*[1]

FDRLST does not argue that only employees and unions may file a charge. Any person may file a charge, so long as that person is *aggrieved* by the charged unfair labor

[1] *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 112, 121 (2d Cir. 2001) (charging party was Local 90, "a 'labor organization'" that wanted to be recognized as the collective-bargaining representative of the respondent's employees); *NLRB v. Television & Radio Broad. Studio Emp., Local 804*, 315 F.2d 398, 399–401 (3d Cir. 1963) (charging party was an employer alleging unfair labor practices by the recognized collective-bargaining representative of its employees); *NLRB v. Chauffeurs, Teamsters & Helpers, Local No. 364, Int'l Bhd. of Teamsters, Warehousemen & Helpers of Am.*, 274 F.2d 19, 24 (7th Cir. 1960) ("[T]he charge was filed by Light, the primary employer, who was engaged in the labor dispute."); *S. Furniture Mfg. Co. v. NLRB*, 194 F.2d 59, 60 (5th Cir. 1952) ("The amended charge upon which the present complaint was predicated alleges the discriminatory discharge of 33 named employees, and was signed only by … one of the discharged employees."); *NLRB v. Gen. Shoe Corp.*, 192 F.2d 504, 505 (6th Cir. 1951) (charging party was "Boot and Shoe Workers Union, A.F. of L.," a union that alleged a shoe manufacturer had engaged in unfair labor practices); *NLRB v. Fulton Bag & Cotton Mills*, 180 F.2d 68, 70 (10th Cir. 1950) (charging party was "a representative of the union to which [a terminated employee] belonged"); *NLRB v. J.G. Boswell Co.*, 136 F.2d 585, 588, 590 (9th Cir. 1943) (charging parties were "Cotton Products and Grain Workers Union, Local 21798" and an employee who the respondent had discharged because of the employee's "membership and activities" in the labor union).

practice. Aggrievement—not employment status—is the limitation Congress chose to impose on charging parties. That is not to say that employment status is irrelevant; indeed, the entire purpose of the NLRA is to "restor[e] equality of bargaining power between employers and employees." Section 151. Allowing random, unaggrieved people to turn the government's enforcement machinery lose on a company would interfere with employer–employee relations if the employees—as here—do not agree with the random outsider's perspective.

Even statutes using a broader any-person formulation are limited by Article III standing. In *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014), the Supreme Court construed the phrase "any person" in 15 U.S.C. § 1125(a). Only those who can "satisfy the minimum requirements of Article III" to commence action could satisfy the any-person provision. *Id.* Not "all factually injured plaintiffs" can commence action but only those whose "interests fall within the zone of interests protected by the law invoked." *Id.* So too here.

Lujan similarly concluded that the any-person provision of 16 U.S.C. § 1540(g) cannot exceed Article III standing because Congress cannot confer "upon *all* persons … an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." 504 U.S. at 572–73; *Dellinger v. Science Applications Intern. Corp.*, 649 F.3d 226, 227 (4th Cir. 2011) (concluding that the any-person provision of the Fair Labor Standards Act gives "an employee the right to sue only his or her current or former employer and that a prospective employee cannot sue a prospective employer for retaliation"); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997) (concluding that the any-person provision of 52 U.S.C. § 30109(a)(1) is limited to those who can

demonstrate Article III standing because holding otherwise would allow any person to allege "a violation of the law has occurred," which would be "tantamount to recognizing a justiciable interest in the enforcement of the law)." *See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (consumers of information also need to demonstrate Article III standing and cannot satisfy standing by alleging a bare violation of a federal statute). The Court should conclude that "aggrieved" persons under Section 160(b) must have Article III standing because to conclude otherwise would make the statute unconstitutional. Mr. Fleming, who lacks Article III standing, cannot activate NLRB's machinery against FDRLST.

Mr. Fleming's charge flunks *Lujan*. The standing analysis is relevant not because Article III standing applies to NLRB proceedings themselves, but because it informs the Court's statutory interpretation. *Trafficante*, 409 U.S. at 209, *Loeffler*, 582 F.3d at 280, and *Gladstone Realtors*, 441 U.S. at 108–09, all engaged in ordinary statutory construction to conclude a person-aggrieved formulation requires that person to have Article III standing in both administrative adjudications and federal-court cases. Mr. Fleming does not meet that minimum requirement to claim aggrievement under Section 160(b). No evidence or proof presented in this case shows otherwise. NLRB, therefore, lacked subject-matter jurisdiction to investigate and prosecute FDRLST based on Mr. Fleming's charge.

Two well-developed lines of cases provide a helpful counterpoint to show why Section 160(b)'s person-aggrieved requirement does not encompass officious interlopers like Mr. Fleming: cases discussing the third-party standing exception and generalized grievances.

1. Mr. Fleming Does Not Satisfy the Third-Party Standing Exception

Mr. Fleming does not have third-party standing either. There is no associational relationship or nexus between him and FDRLST's employees, independent contractors, their family members, and/or their union. Mr. Fleming saw a tweet online and filed a charge with NLRB. Recognizing him as being "aggrieved" in these circumstances would stretch Section 160(b) beyond the scope Congress established and extend the third-party standing doctrine well past its breaking point.

In *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), the Supreme Court denied third-party standing to a father who sued on behalf of his school-aged daughter to challenge the Pledge of Allegiance recital requirement in public schools.[2] A nonexistent relationship between Mr. Fleming and those who could potentially be "aggrieved" by the alleged "unfair labor practice" does not permit him to assert aggrievement on their behalf. However well-intentioned Mr. Fleming's reaction to the tweet may have been, his relationship to FDRLST, its employees, independent contractors, and/or their family members is far more attenuated than was Michael Newdow's to his daughter.

2. Mr. Fleming Presents a Mere Generalized Grievance

NLRB adjudicated a generalized grievance. Mr. Fleming, by filing a charge, expressed his general concern as a citizen and taxpayer over Mr. Domenech's tweet. A "generalized grievance" is "inconsistent with the framework of Article III because the

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[2] *Newdow* was abrogated on other grounds by *Lexmark*, 572 U.S. 118. In *Lexmark*, the Court did not abrogate the "third-party standing" portion of *Newdow*, which is relevant here. *Id.* at 127 n.3.

impact on [the complainant] is plainly undifferentiated and common to all members of the public." *Lujan*, 504 U.S. at 575 (cleaned up). Congress did not enact the NLRA so that anyone could wield Section 160 as a sword against business competitors or ideological adversaries. Indeed, statutes are interpreted in a way that avoids such "absurd or unjust results." *Douglass v. Convergent Outsourcing*, 765 F.3d 299, 302 (3d Cir. 2014).

There is no such thing as "[o]ffended observer standing" because it "is deeply inconsistent with" the "longstanding principl[e] … that generalized grievances … are insufficient to confer standing." *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., joined by Thomas, J., concurring in the judgment) (cleaned up) (citing *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974); *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004)).

Mr. Fleming's admission in the charging document should settle the matter. He specifically invoked any-person standing, a generalized grievance. CAR189. Neither Mr. Fleming nor NLRB bothered to prove that Mr. Fleming is a "person aggrieved" by the alleged "unfair labor practice" as Section 160(b) requires. Section 160(b) prohibits NLRB from investigating, prosecuting, and adjudicating generalized grievances.

C. Mr. Fleming Is Not Within the Zone of Interests the Statute Protects

Lexmark's authoritative formulation of the zone-of-interests test restricts NLRB's jurisdiction under Section 160(b). Whether a person "comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses [that

person's] claim." 572 U.S. at 127 (cleaned up). The zone-of-interests inquiry is relevant because NLRB, like all federal administrative agencies, has only those powers authorized by Congress. *Stark v. Wickard*, 321 U.S. 288, 310 (1944). If "traditional principles of statutory interpretation" show NLRB lacks statutory authority to take an action against FDRLST based on a charging document by a random person, then NLRB lacks jurisdiction and should have dismissed the case. *Lexmark*, 572 U.S. at 127.

In *Lexmark*, the question was whether Static Control, the party claiming to be aggrieved, "falls within the class of plaintiffs whom Congress has authorized to sue under [15 U.S.C.] § 1125(a)." *Id.* Section 1125(a) allows "any person" to file a "civil action." *Lexmark* did not read this "any person" provision to mean that any random person can sue. Rather, *Lexmark* concluded that the Court is "require[d] … to determine the meaning of the congressionally enacted provision creating a cause of action"—"whether Congress in fact" authorized a random person to file. *Id.*

Under *Lexmark*, the statutory cause of action—the filing of a charge with NLRB—extends only to those whose interests "fall within the zone of interests protected by the law invoked." *Lexmark*, 572 U.S. at 126. The "breadth of the zone of interests varies according to the provisions of law at issue." *Id.* at 130. The provisions of Section 160(b) foreclose the tactic of siccing a government agency that Mr. Fleming wields against those with whom he disagrees. Put differently, Mr. Fleming has no protectable interest—neither one provided for by statute nor by the Constitution. A random person's indignation at a joke does not rise to the kind of aggrievement that falls within the zone of interests protected by the NLRA.

Here, as in *Lexmark*, "[i]dentifying the interests protected by" the NLRA "requires no guesswork, since the Act includes … [a] statement of the statute's purposes." 572 U.S. at 131. The test requires that Mr. Fleming's injuries must be "proximately caused by violations of the statute." *Id.* at 131–32. Here, there is neither an allegation nor proof that Mr. Fleming is injured:

- *qua* "employee," independent contractor, or paid or unpaid intern of FDRLST;
- nor as a family member of any of FDRLST's employees, independent contractors, or paid or unpaid interns;
- nor as a bargaining representative for FDRLST's employees, independent contractors, or paid or unpaid interns;
- nor that FDRLST burdened in any manner Mr. Fleming's exercise of rights protected by the NLRA;
- nor that any of Mr. Fleming's imagined injuries were "proximately caused" by Mr. Domenech's June 6, 2019 tweet (Mr. Fleming's charge did not allege any injury to himself whatsoever, CAR188–191);
- nor that Mr. Fleming's "work" (either as a lawyer practicing in Massachusetts, or as a self-appointed twitterati) has "ceased as a consequence of, or in connection with … or because of" Mr. Domenech's June 6 tweet. Section 152(3).

This Court should perform the zone-of-interests analysis under *Lexmark*'s command of engaging in ordinary statutory construction, and reverse NLRB's decision and vacate its order.

D. Mr. Fleming Falls Outside the Scope of APA's Aggrievement Requirement

Even if Section 160(b) itself were silent on whether only an "aggrieved" person may file a charge, the default aggrievement requirement contained in the APA, 5 U.S.C. § 702, would still apply. Section 702 authorizes suit by any "person … adversely affected or aggrieved … within the meaning of a relevant statute." The Supreme Court has read APA's aggrievement requirement to require the complainant to fall "within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Thompson v. North American Stainless, LP*, 562 U.S. 170, 177 (2011) (cleaned up). *Thompson* "incorporate[d]" this APA zone-of-interests test to ascertain whether a charging party is "aggrieved" within the meaning of Title VII of the Civil Rights Act. *Id.* at 178 (discussing 42 U.S.C. § 2000e-5(f)(1)'s "person aggrieved" formulation); *compare* 42 U.S.C. § 2000e-5(f)(1) (providing that a "person aggrieved" can file a charge and EEOC can bring a civil action against the charged party) *with* Section 160(b) (providing that a "person aggrieved" by an alleged "unfair labor practice" can file a charge and NLRB can file a complaint against the charged party). The Court should also use APA's zone-of-interests test to interpret Section 160(b).

The zone-of-interests test thus "enable[s] suit by any plaintiff with an interest arguably sought to be protected by the statute, … while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in [the relevant statute]." *Id.* at 178 (cleaned up). Mr. Fleming simply does not have any interest in this case that the NLRA protects. His interest is unrelated to Section 160(b)—or to the NLRA as a whole.

E. NLRB Lacked Statutory Authority to Investigate FDRLST Based on Mr. Fleming's Charge

Section 161 confers investigatory powers on NLRB "for the exercise of the powers vested in it by sectio[n] … 160." NLRB's investigatory authority, therefore, is contingent upon a valid charge being filed by a "person aggrieved" by an alleged "unfair labor practice." Section 160(b). Because the condition precedent that triggers NLRB's investigatory authority has not been and cannot be met by Mr. Fleming, NLRB lacked the authority to investigate FDRLST.

In statutory regimes where Congress includes an aggrieved-person requirement, Congress does not and cannot grant the agency authority—authority which Congress itself did not possess—to expand the scope of the person-aggrieved requirement. *Lujan*, 504 U.S. at 573 (concluding that the citizen-complainant provision of 16 U.S.C. § 1540(g) that permitted "any person [to] commence a civil suit" is unconstitutional because Congress cannot, by statute, expand the "Article III case or controversy" requirement); *see also Thompson*, 562 U.S. 170 (EEOC also requires a charge by an aggrieved person (citing 42 U.S.C. § 2000e *et seq.*)).

Congress conferred "investigatory powers" on NLRB only "[f]or the purpose of all hearings and investigations" under "sections 159 and 160 of this title." Section 161. Instead of saying that NLRB shall investigate all charges, Section 161 limits investigations only to the extent "necessary and proper for the exercise of the powers vested in [NLRB] by sections 159 and 160 of this title." Section 160(b), in turn, limits prosecutions to those based on charges filed by persons aggrieved by an unfair labor practice. Investigation being a necessary step that occurs before prosecution can occur,

Sections 160(b) and 161 require NLRB to assure itself of basic jurisdictional facts. NLRB did not do so here.

NLRB issued a pre-complaint investigatory subpoena to FDRLST at the wrong address supplied by Mr. Fleming who (apparently because he has no connection with FDRLST) did not know FDRLST's correct address. CAR43, 49, 51, 57–58, 188. There is nothing in the record indicating whether NLRB obtained any information from Mr. Fleming indicating precisely how he is "aggrieved" by Mr. Domenech's June 6 tweet. Instead, NLRB directly issued a complaint against FDRLST without engaging in jurisdictional factfinding. Even a cursory investigation into jurisdictional facts would have established Mr. Fleming's lack of aggrievement (as well as the other missing jurisdictional facts). The laxity of NLRB's investigation is fatal to NLRB's further prosecutorial and adjudicatory actions taken against FDRLST.

Perhaps NLRB thinks it can confer on itself both the power to investigate and the power to prosecute under 29 C.F.R. § 102.9. The plain words of Section 160(b) foreclose that possibility. The statute has not delegated to NLRB such a broad authority. If, as NLRB claims, "any person" can trigger its investigatory, prosecutorial, and adjudicative powers by filing a charge, such an interpretation would render the charge requirement superfluous, give bootstrapping jurisdiction to NLRB, and cast serious doubt on the constitutionality of Section 160(b) under the Fifth Amendment's Due Process Clause.

To avoid rendering the statute unconstitutional, the Court should conclude that NLRB lacked subject-matter jurisdiction to investigate FDRLST based on a charge leveled by Mr. Fleming. Absent a showing that the threshold set by Congress has been

met as a matter of law, NLRB has stepped outside the metes and bounds of its authority. This Court should so conclude, reverse NLRB's decision, vacate its order, and set aside that portion of 29 C.F.R. § 102.9 that purports to authorize the filing of an unfair labor practice charge by "[a]ny person."

III. NLRB REGION 2 LACKED PERSONAL JURISDICTION OVER FDRLST

The Court should conclude that an NLRB Region lacks personal jurisdiction over the employer if the employer is not "at home" in that region, or when neither the charging party's alleged aggrievement nor the alleged unfair labor practice occurs within that Region.

NLRB's Regions, like any state or federal court, must have personal jurisdiction over a defendant. *Picquet v. Swan*, 19 F. Cas. 609, 611 (C.C.D. Mass. 1828) (Story, J.) ("It matters not, whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extra-territorial; if the latter, then the judicial interpretation is, that the sovereign has chosen to assign this special limit, short of his general authority."); *see also Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622–23 (1925) ("No distinction has been drawn between the case where the plaintiff is the Government and where he is a private citizen."). "The requirement that a court have personal jurisdiction flows not from Art[icle] III, but from the Due Process Clause. … It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *see also Peay v. Bellsouth Med. Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000) ("[T]he Fifth Amendment 'protects individual litigants against the burdens of litigation in an unduly inconvenient forum.'").

Absent an explicit grant of statutory authority allowing a tribunal to exercise nationwide jurisdiction, the default rule is that the division of the nation into regions limits the authority of each region to exercise its jurisdiction over only persons and

property within its regional boundaries. *See Omni Capital Intern., Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 109 (1987) ("[A] legislative grant of authority is necessary."); *Ex Parte Graham*, 10 F. Cas. 911, 913 (C.C.E.D. Pa. 1818) (only "an act of congress" can remove the prohibition against exercising "over persons not inhabitants of, or found within the district where the suit is brought").

This default common-law rule persists. In 1925, the Supreme Court rejected the Railroad Labor Board's attempt to ignore jurisdictional boundaries. *Robertson*, 268 U.S. at 622. The statute at issue allowed the Board to "invoke the aid of any United States District Court" to issue subpoenas; but the Court held that the phrase "any court" must mean "any such court 'of competent jurisdiction.'" *Id.* at 627. The Court reasoned that its ruling was consistent with "the general rule" that a federal court's *in personam* jurisdiction is "limited to the district of which the defendant is an inhabitant or in which he can be found." *Id.* "It is not lightly to be assumed that Congress intended to depart from a long-established policy." *Id.*

More recently, the Supreme Court explained that a tribunal can exercise personal jurisdiction only when there is "notice to the defendant," "a constitutionally sufficient relationship," and "a basis for the defendant's amenability to service of summons." *See Omni Capital*, 484 U.S. at 104. In federal court, FRCP 4 typically governs amenability to service. *Id.* at 104–05; *see also* 29 C.F.R. § 102.14(b) (adopting Rules 4 and 5 as the methods of service to be used by the Regional Director). Under FRCP 4, federal courts exercise personal jurisdiction only if the defendant is subject to the jurisdiction of a state court where the district court is located, unless a separate federal statute expands their jurisdiction further. *See* FRCP 4(k)(1); *see also Molock v. Whole Foods Mkt. Grp.*, 952

F.3d 293, 308 (D.C. Cir. 2020) (Silberman, J., dissenting) ("[I]n the absence of another statute or Rule expanding the reach of effective service of process, a district court's analysis of personal jurisdiction in a civil action will be identical to the Fourteenth Amendment inquiry undertaken by the relevant state court."). It would be unwise, *Omni Capital* reasoned, to expand the default rule through a court's common-law power because the statutes and rules that set the scope of jurisdiction have been developed with the default rule in mind. 484 U.S. at 109–10; *see also id.* at 106 ("Congress knows how to authorize nationwide service of process when it wants to provide for it.").

Section 160 does not include an explicit departure from the default rule. Rather, Section 160(e) limits the jurisdictions in which the Board can enforce any such order: "The Board shall have power to petition any court of appeals of the United States, or … any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business[.]" *See also* 29 U.S.C. § 161(2) (limiting the Board's enforcement of subpoenas to federal courts "within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business").

Even if the Board could in some circumstance exercise nationwide jurisdiction, that does not mean individual regions can, too. NLRB's creation of regions and delegation of its authority to regional directors curtails the *in personam* jurisdictional reach of each region to its geographical boundaries. *See, e.g.*, 29 U.S.C. § 154(a) (authorizing the Board to delegate its authority to regional directors).

NLRB's regions, and its delegation of authority to the directors of those regions, pre-dates the current Board and its organic statute. *See* 1 NLRB Ann. Rep. at 4, 16 (1936), *available at* https://www.nlrb.gov/sites/default/files/attachments/pages/node-131/nlrb1936.pdf ("The [pre-NLRA] Board … established 20 regional boards … to adjust cases and hold hearings in the regions where the controversies arose, and thus expedite the cases and enable the parties to avoid the burden of coming to Washington. … The National Labor Relations Board retained the system of regional offices which had been in existence under the old National Labor Relations Board."). When drafting the NLRA, then, Congress would have had in mind these already-existing territorial boundaries. *See, e.g.*, 29 U.S.C. § 154(a) ("The Board may establish or utilize such regional, local, or other agencies[.]"). The Board kept its regions in place. *Cf.* 29 C.F.R. § 102.1(d) ("Region means that part of the United States or any territory thereof fixed by the Board as a particular Region.").

The Board's rules confirm the limited jurisdiction of each region. Specifically, the Charging Party must file a charge "with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring." 29 C.F.R. § 102.10; *id.* § 102.33(a) ("Whenever the General Counsel deems it necessary to effectuate the purposes of the Act or to avoid unnecessary costs or delay, a charge may be filed with the General Counsel in Washington, DC, or, at any time after a charge has been filed with a Regional Director, the General Counsel may order that such charge and any proceeding regarding the charge be" transferred, consolidated, or severed.).

Nothing in these service rules suggests that the Board has even attempted to depart from the default rule limiting service against non-residents. *Mississippi Pub. Corp.*

v. Murphree, 326 U.S. 438, 444–45 (1946) ("[S]ervice of summons is the procedure by which a court … asserts jurisdiction over the person of the party served."). Region 2, therefore, is not authorized to exercise personal jurisdiction over non-residents who are not amenable to service in its regional boundaries.

Even if a statute or rule allowed Region 2 to reach beyond its boundaries, its exercise of jurisdiction would still have to comport with the Due Process Clause. *See Peay*, 205 F.3d at 1212 ("Like the Eleventh Circuit, we discern no reason why the Fourteenth Amendment's fairness and reasonableness requirements 'should be discarded completely when jurisdiction is asserted under a federal statute.'"). The personal-jurisdiction restrictions are territorial limitations, not just "a guarantee of immunity from inconvenient or distant litigation." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). Both the Due Process Clause of the Constitution and the laws of the state in which a forum lies limit a forum's power to exercise personal jurisdiction over a non-resident defendant. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 311, 321 (1945). Neither Mr. Fleming nor NLRB articulated any grounds to support Region 2's exercise of personal jurisdiction—neither during the motion-to-dismiss stage, nor in the ALJ evidentiary hearing when FDRLST entered a special appearance to contest the jurisdictional facts. CAR1–31.

A. FDRLST Is Not Amenable to Service in New York

A federal forum has personal jurisdiction over the defendant "to the extent provided under [the relevant] state law." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 96 (3d Cir. 2004); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 446, 448 (7th Cir. 2020) (a federal forum has personal jurisdiction if the "state court where the federal [forum] is located"

has personal jurisdiction over the party). The forum here was NLRB Region 2, a geographic area fully contained within the boundaries of New York state. NLRB Region 2, https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices/region-02-new-york.

A non-resident would be subject to Region 2's jurisdiction when the non-resident "is amenable to service of process" under New York law. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996). As relevant, New York's long-arm statute, N.Y. C.P.L.R. § 302, permits the exercise of personal jurisdiction over "any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. Transacts any business within the state or contracts to supply goods or services in the state; or 2. Commits a tortious act within the state[.]" *Id.* The cause of action against the non-resident defendant must "'relate to' [the] defendant's minimum contacts with the forum." *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 167 (2d Cir. 2010).

New York's long-arm statute does not extend to the full limits permitted by the Due Process Clause. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 459–60 (1965). New York's long-arm statute "does not go as far as is constitutionally permissible." *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 71 (1984). "[A] situation can occur in which the necessary contacts to satisfy due process are present, but [personal] jurisdiction will not be obtained in [New York] because the statute does not authorize it." *Id.*

FDRLST did not come within reach of New York's long-arm statute and was not amenable to service under New York law. NLRB's entire theory rests on the notion that Mr. Domenech's tweet "occurred on the Internet, not in a specific geographical

NLRB Region." CAR223. That is not how personal jurisdiction works. New York's long-arm statute does not extend to a statement published in media or on the internet merely because it is accessible to New York readers. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 253 (2d Cir. 2007) (collecting cases holding that a non-resident's posting of information on a website is insufficient to establish that the non-resident directed tortious conduct or purposefully availed himself of the forum). There is no allegation or proof that Mr. Domenech published his tweet from New York or directed his tweet to anyone in New York. No one alleged or proved that anyone in New York read the tweet.

B. Haling FDRLST to Region 2 Offends Due Process

The forum's adjudicatory authority extends only to "issues deriving from, or connected with, the very controversy" at issue. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Courts apply the same due-process inquiry under the Fifth and Fourteenth Amendments—balancing the interests of the plaintiff, the defendant, the forum, and the public generally. *Peay*, 205 F.3d at 1211–12 (setting out factors to weigh under the Fifth Amendment due-process analysis); *Mussat*, 953 F.3d at 446 (announcing there is no difference in the personal-jurisdiction analysis under the Fifth and Fourteenth Amendments). FDRLST is subject to neither general nor specific jurisdiction in Region 2 based on the facts established in this case.

1. General Jurisdiction

For general personal jurisdiction over FDRLST to be valid, NLRB had to show that FDRLST is "at home" in Region 2. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). Business entities like FDRLST are at home in only two places: their "place of

incorporation" or their "principal place of business." *Id.* A forum's "exercise of general jurisdiction in every state in which a corporation engages in a substantial, continuous, and systematic course of business … is unacceptably grasping." *Id.* at 138 (cleaned up).

FDRLST is not "at home" in Region 2. It is incorporated in Delaware and has its principal place of business in Washington, DC. NLRB, Mr. Fleming, and FDRLST stipulated to these jurisdictional facts. CAR213. Region 2 could not have obtained general personal jurisdiction over FDRLST under *Daimler*, 571 U.S. at 137.

2. Specific Jurisdiction

A forum constitutionally obtains specific jurisdiction only when the claim "arise[s] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). The nonmoving party must establish that (1) the defendant has "purposefully directed [its] activities at residents of the forum"; (2) the claim "arise[s] out of or relate[s] to" those same activities directed at the forum; and (3) the forum's exercise of jurisdiction will not offend "traditional conceptions of fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 472 (1985). Unless a non-resident defendant has "certain minimum contacts" with the forum, haling them in to defend a suit will offend "traditional conceptions of fair play and substantial justice." *Id.* at 464 (quoting *International Shoe*, 326 U.S. at 320).

While a court "must consider a variety of interests," including those of the forum "and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice," "the primary concern is the burden on the defendant." *Bristol-Myers*, 137 S. Ct. at 1780 (cleaned up). Courts look to several factors to do that analysis. *Burger King*, 471 U.S. at

477. More important than practical burdens such as the inconvenience of travel to a distant forum, the defendant's burden includes "the more abstract matter of submitting to the coercive power of a [forum] that may have little legitimate interest in the claims in question." *Id.* The test looks not only to the relationship between the defendant and the forum, but to "the relationship among the defendant, the forum, *and the litigation*." *Daimler*, 571 U.S. at 126 (emphasis added). "[T]here must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum … and is therefore subject to the [forum's] regulation." *Bristol-Myers*, 137 S. Ct. at 1780 (cleaned up). A non-resident's contacts with a forum are insufficient to establish specific jurisdiction unless the litigation arises out of those contacts. *Daimler*, 571 U.S. at 126–27.

A tribunal's adjudicatory authority is limited to those "issues deriv[ed] from, or connected with, the very controversy that establishes jurisdiction." *Goodyear*, 564 U.S. at 919. "[T]he commission of certain 'single or occasional acts' in a [forum] may be sufficient to render a corporation answerable in that [forum] with respect to those acts" but insufficient to render the corporation answerable more generally "with respect to matters unrelated to the forum connections." *Id.* at 923. Even continuous activity of only "some sorts" within a forum "is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *Bristol-Myers*, 137 S. Ct. at 1781.

For specific personal jurisdiction over FDRLST to be valid, NLRB needed to show that "the business [FDRLST] does in [Region 2] is sufficient to subject [FDRLST] to specific personal jurisdiction in [Region 2] on claims related to the business it does

in [Region 2]." *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 1559 (2017). Region 2 had no personal jurisdiction over FDRLST in this case. FDRLST did not purposefully direct *any* contacts at the residents of New York—let alone minimum contacts relating to this case. Mr. Fleming's claim does not relate to any contacts that FDRLST may have within Region 2. Mr. Fleming, for his part, is a resident of Cambridge, Massachusetts, and did not allege any harm that occurred within Region 2. CAR188–191. Nor did Mr. Fleming or Region 2 have any interest in deciding this suit in a forum with no relation to either FDRLST or the underlying facts. The due process cost on FDRLST far exceeded any negligible interest Region 2 may have had.

In unfair-labor-practice cases, the charging party is typically an employee or a collective-bargaining representative of the employees. That Mr. Fleming is neither, CAR216, underscores the absurdity of NLRB's decision. It is unsurprising in most situations that employees or employee associations will file unfair-labor-practice charges in the region where the employer's place of business is located. If the employer has multiple locations, charges are typically filed where a particular office is located and in which an alleged unfair labor practice occurred. Mr. Fleming's charge and NLRB's adjudication in Region 2 is far removed from situations that readily meet the specific-personal-jurisdiction test. *BNSF Railway*, 137 S. Ct. at 1559. Even assuming the tweet was directed at FDRLST's six other employees, none of them lives in Region 2.

Allowing NLRB to disregard the due-process limitations on personal jurisdiction would permit any random slacktivist with an internet connection to file an unfair-labor-practice charge in the NLRB region covering Hawaii against a Delaware company merely because one of the corporation's employees tweeted a statement the slacktivist

apparently found offensive. The NLRA does not confer such sweeping, roving jurisdiction to bring suit in a region that cannot establish personal jurisdiction over the respondent company. The Due Process Clause forbids one NLRB region from exercising such nationwide personal jurisdiction. *Daimler*, 571 U.S. at 121–22; *BNSF Railway*, 137 S. Ct. at 1554. As do NLRB's own regulations. 29 C.F.R. § 102.10.

The Court should reverse NLRB's decision and could vacate its order on this basis alone.

C. NLRB Region 2 Was an Improper Venue

NLRB's rules set the venue where a charge must be filed: "with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring." 29 C.F.R. § 102.10. That regulation lists a place that "turns on classic venue concerns—'choosing a convenient forum.'" *Brentwood at Hobart v. NLRB*, 675 F.3d 999, 1002 (6th Cir. 2012) (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006)). *Forum non conveniens* also leads to the same conclusion. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 341 n.6 (1981) (listing private-interest and public-interest factors). All ten factors show Region 2 is an improper venue. There is no regional interest in having any "localized controvers[y]" decided there.

NLRB did not follow its own rules when its Region 2 accepted the charge, issued a complaint, and then prosecuted and adjudicated it. NLRB cannot ignore its own rules. *Denver & R.G. W.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 559–60 (1967) (proper venue to sue a union "should be determined by looking to the residence of the association itself rather than that of its individual members"; holding otherwise "is patently unfair to the association").

IV. THE FIRST AMENDMENT AND SECTION 158(C) PROTECT THE RIGHT TO SPEAK FREELY AND SATIRICALLY TO THE PUBLIC AT LARGE

A. Mr. Domenech's Tweet Does Not Violate the NLRA

Mr. Domenech's Twitter joke is not an unfair labor practice. FDRLST employees took it as a joke, nothing more. CAR151–158. That joke did not "restrain, or coerce" FDRLST "employees in the exercise of the rights guaranteed in section 157." Section 158(a)(1). Unlike Vox's, CAR71, there was no employee walkout at FDRLST. Nor would FDRLST restrain or coerce its employees' exercise of Section 157 rights when they choose to exercise them. CAR154–158. FDRLST does not control or dictate what its employees, including Mr. Domenech, choose to post on their personal Twitter accounts. FDRLST did not engage in a practice that can be categorized as a "*labor* practice," let alone an "*unfair* labor practice." The Court should read Section 158(a)(1) as written—to avoid the constitutional issues that would otherwise surface.

B. Mr. Domenech's Tweet Is Fully Protected Speech

The Court should discard NLRB's labored reading of Section 158(a)(1). The right to speak or associate freely and the right of free press are sacrosanct under the First Amendment and are "not confined to any field of human interest." *Thomas v. Collins*, 323 U.S. 516, 531 (1945). The exercise of those rights on "social media is entitled to the same First Amendment protections as other forms of media." *Knight First Amendment Institute at Columbia v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019). The basic First Amendment principles "do not vary" by "medium of communication." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011). The constitutional safeguards are not rendered ineffectual because

"interests of workingmen are involved." *Thomas*, 323 U.S. at 531. "[D]ebate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The "prospect" that someone "might be persuaded by" a viewpoint is not a violation of the NLRA; "it *is* the democratic political process." *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting). Parody, satire, or commentary on a politically charged issue of our times receives full First Amendment protection.

Section 158(c) also prohibits NLRB from persecuting speakers for "expressing … views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form … if such expression contains no threat of reprisal or force or promise of benefit." Section 158(c) "merely implements the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

Gissel Packing permits the factfinder to consider evidence contextualizing the online comment, including the speaker's motive, intended audience, listener's remarks, and so forth. Proving situation-specific information about the scope, reach, and intended audience informs the factfinder whether, given the totality of circumstances, the statement is actionable under Section 158(a)(1), and then whether that statement actually violates that section. *See Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1253 (5th Cir. 1978) (explaining the type, quality, and quantity of evidence needed to prove a Section 158(a)(1) violation). There is room for humor even amidst labor-organizing activity. *Id.* Mr. Domenech's Tweet was not even made within any Section-157-aligned context.

NLRB interprets *Gissel Packing* as follows: "[NLRB] will not *ordinarily* look to the [e]mployer's motive, or whether the alleged coercion succeeded or failed, but whether the employer's conduct may reasonably be seen as tending to interfere with the free exercise of employee rights under the Act. … [T]here are situations where motive and probable success or failure of the coercion *may be considered*." *Miller Electric Pump & Plumbing*, 334 NLRB No. 108 (2001) (emphasis added).

NLRB's decision ignored *Gissel Packing* and resurrected the pre-*Gissel Packing* rule that the circumstances of the allegedly offensive speech are irrelevant. CAR431 n.3 (quoting *American Freightways Co.*, 124 NLRB 146, 147 (1959)); *but see GM Electrics*, 323 NLRB 125, 127 (1997) (requiring proof of "all circumstances"). NLRB is bound by court precedent, even if it permits its ALJs to ignore those decisions. *See* NLRB Division of Judges Bench Book (Jan 2021), at § 13-100 (p. 143), https://bit.ly/2P0r2dY.

As a matter of statutory construction, Section 158(c)'s "if such expression contains" clause suggests a totality-of-circumstances test like *Gissel Packing*. But *Gissel Packing* (1969) itself needs to be updated under the Supreme Court's recent First Amendment jurisprudence that looks to the wider context in which speech occurs and strictly scrutinizes rules requiring the government actor to read the message to determine whether it violates the enacted law. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Elonis v. United States*, 575 U.S. 723 (2015). The Court should so hold; otherwise, NLRB's context-free test renders Section 158(c) unconstitutional.

NLRB's decision was also arbitrary, capricious, and devoid of evidentiary support. 5 U.S.C. § 706(2). No evidence—only speculation and conjecture—supports NLRB's decision to order FDRLST to censure Mr. Domenech. NLRB *did not prove* that:

- Mr. Domenech spoke for FDRLST when he published the tweet;
- Mr. Domenech's email use and Twitter use are interchangeable (*compare* CAR151–152 (Twitter use) *and* CAR69 (email use)) such that posting on Twitter "evince[s] an intent to communicate with [FDRLST's] employees" (CAR431 n.4) and that it "express[es] an intent to take swift action against any [FDRLST] employee" (*id.*);
- Any of FDRLST's employees are required to or actually do "follow" the @fdrlst and/or @bdomenech Twitter accounts such that Mr. Domenech's tweet on his personal Twitter account or the use of "FYI @fdrlst" in the June 6 tweet is a communication directed at FDRLST employees (CAR68, 431);
- A *FDRLST employee* would reasonably understand Mr. Domenech's tweet as anything other than a joke, much less a threat (two of six FDRLST employees, represented by independent counsel of their choice, voluntarily submitted sworn statements saying that they took Mr. Domenech's tweet as simply "satirical," "funny," "sarcastic," "pithy" and nothing more—and certainly not as a threat (CAR154–158, 368–370, 418)).

FDRLST proved:

- Mr. Domenech expresses only his own opinions on his personal Twitter account to the public at large, not FDRLST's (CAR151–152);
- Mr. Fleming re-tweeted Mr. Domenech's tweet (CAR159).

NLRB, thus, failed to prove that the June 6 tweet violated Section 158(a)(1), and FDRLST proved that no such violation occurred.

NLRB also cannot order FDRLST to instruct Mr. Domenech to delete the tweet. CAR432. "A non-party cannot be bound by the terms of an injunction unless the non-party is found to be acting in active concert or participation with the party against whom injunctive relief is sought." *Elliott v. Kiesewetter*, 98 F.3d 47, 56 (3d Cir. 1996). Mr. Fleming was free to file a charge against Mr. Domenech. He did not, and NLRB did not issue a complaint against Mr. Domenech. If FDRLST orders Mr. Domenech to delete the tweet, FDRLST would likely be interfering with his constitutionally and statutorily protected rights to speech, association, and press. NLRB's ordering FDRLST to violate the protected rights of Mr. Domenech is at cross-purposes with the NLRA. FDRLST will not take such rights-violating action.

V. THE COURT SHOULD NOT AFFORD *CHEVRON*, *CITY OF ARLINGTON*, *AUER*, OR *BRAND X* DEFERENCE TO NLRB'S INTERPRETATIONS

The Court should not defer to:

- NLRB's any-person interpretation of the statutory person-aggrieved requirement under *Chevron* or *City of Arlington*;[3]
- NLRB's interpretation of its own any-person regulation or regulations regarding personal jurisdiction and venue under *Auer*/*Kisor*;[4]
- NLRB's rewriting of the Supreme Court's *Gissel Packing* test and First Amendment jurisprudence under *Brand X*.[5]

NLRA's unambiguous and plain words—and the Constitution and Supreme Court precedent—control over NLRB's contrary interpretations. Were the Court inclined to conclude that the relevant statutes or regulations are ambiguous or silent, the Court should still not defer to NLRB's interpretation because such deference would be unconstitutional.

A. Deference Violates the Fifth Amendment's Due Process Clause

Deferring to NLRB's flawed interpretation "[t]ransfer[s] the job of saying what the law is from the judiciary to the executive." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Such bias and transfer of powers leads to "more than a few due process … problems." *Id.* at 1155.

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[3] *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *City of Arlington v. FCC*, 569 U.S. 290 (2013).

[4] *Auer v. Robbins*, 519 U.S. 452 (1997); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

[5] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

Deference removes the judicial blindfold. It requires judges to display systematic bias favoring agency litigants—and against counterparties like FDRLST. Deference "embed[s] perverse incentives in the operations of government" and requires courts to "bow to the nation's most powerful litigant, the government, for no reason other than that it is the government." *Egan v. Delaware River Port Authority*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring). The "risk of arbitrary conduct is high" and deference puts "individual liberty … in jeopardy" because an agency can provide "minimal justification and still be entitled to full deference." *Id.* at 280. It is a denial of due process when judges "engage in systematic bias in favor of the government … and against other parties." Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1195 (2016).

Typically, even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet deference institutionalizes a regime of systematic judicial bias by requiring courts to "defer" to agency litigants especially where the agency litigant, as here, openly ignores or disregards written text and federal-court precedent. Deference doctrines thus force judges to abandon their own judgment about what the law is and instead consciously substitute the legal judgment of one of the litigants before them.

All federal judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon [them]." 28 U.S.C. § 453. Federal judges are ordinarily very scrupulous about living up to these commitments. Nonetheless, in affording deference, judges who are supposed to administer justice "without respect to persons" peek from behind the judicial blindfold and precommit to favoring the government agency's position.

Whenever a deference doctrine is applied in a case in which the government is a party, the courts are denying due process by showing favoritism to the government's interpretation of the law. Judicial proceedings are, instead, required to provide "neutral and respectful consideration" of a litigant's views free from "hostility or bias." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1732, 1734 (2018) (Kagan., J., concurring).

B. Deference Undermines Judicial Independence Under Article III

Judges also abandon their Article III duty of independent judgment when they "become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first." *Valent v. Commissioner of Social Security*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting). "[T]he agency is free to expand or change the obligations upon our citizenry without any change in the statute's text." *Id.* That truth is especially obvious here because the NLRA has not changed since it was enacted.

This Court should properly refuse to abdicate its judicial duty, as other courts have. In *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812, 823 (8th Cir. 2017) (*en banc*), the majority explained that deferring to NLRB "would leave the Board free to disregard any prior Supreme Court or court of appeals interpretation of the NLRA." Refusing to abandon judicial independence, *MikLin* withheld deference.

Deference mandates that the government litigant win as long as its preferred interpretation seems "permissible," even if it is wrong. NLRB did not bother to engage in a traditional-tool analysis when it first promulgated regulations, or when it rendered its decision in this case. *See* 24 Fed. Reg. 9095, 9104 (1959); CAR272–273, 431–436. But the Supreme Court requires lower courts to engage in a rigorous traditional-tool analysis

to interpret statutes. *Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. … If a court, employing traditional tools of statutory construction ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *Kisor*, 139 S. Ct. at 2415 (courts must "empty" the "legal toolkit"); *City of Arlington*, 569 U.S. at 296 ("First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter[.]"); *Baldwin v. United States*, 140 S. Ct. 690 (2020) (Thomas, J., dissenting) (*Brand X* is "inconsistent with the Constitution, the [APA], and traditional tools of statutory construction").

C. Deference Violates the Constitution's Separation of Powers

Deference doctrines "rais[e] serious separation-of-powers questions" because they are "in tension with Article III's Vesting Clause," and "Article I's [Vesting Clause]." *Michigan v. EPA*, 576 U.S. 743, 760 (2015) (Thomas, J., concurring). The separation-of-powers concern is especially acute in this case where an Article II agency via regulation has expanded the scope of an Article I act of Congress and in so legislating, has aggrandized not only its own executive powers (investigating and prosecuting charges filed by random persons) but also its adjudicatory powers (adjudicating complaints based on such any-person charges and ignoring jurisdictional strictures).

Deference doctrines undermine "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The

Court should call out the "serious separation-of-powers" problem with judicial deference and interpret statutes and regulations *de novo*.

D. Canons of Construction Fully Resolve the Interpretive Question, Making Deference Unnecessary

The Court should clarify that deference doctrines apply at most in rare instances where the meaning of the statute truly cannot be ascertained using ordinary statutory-construction methods. That approach would be consistent with the ones the Supreme Court took in *Kisor* and *United States v. Dickson*, 40 U.S. 141 (1841). Justice Story refused to defer to a Treasury Department interpretation of an act of Congress when Treasury had argued that its construction is "entitled to great respect." *Id.* at 161. Justice Story said, "the judicial department has … the solemn duty to interpret the laws[;] … and … in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it." *Id.* at 161–62.

To be sure, this Court cannot declare deference doctrines unconstitutional. It can avoid the constitutional problems either by engaging in *de novo* construction in the first instance or by recognizing that the Supreme Court has cabined deference doctrines in cases such as *Kisor*. Because of the judges' duty to say what the law is, they must opine on deference doctrines' failings and flag the ways in which they are unconstitutional. *Cf. United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794, 802 (Fed. Cir. 2020) (applying *Kisor* and declining to defer to Department of Commerce's interpretation).

A rigorous analysis employing ordinary statutory-interpretation tools should resolve this case without resort to any judicial deference doctrines.

CONCLUSION

The Court should vacate NLRB's decision for want of subject-matter and personal jurisdiction, and it should set aside that portion of 29 C.F.R. § 102.9 that allows "[a]ny person" to file a charge regardless of aggrievement. The Court should reverse NLRB's decision and vacate its order, because Mr. Domenech's tweet is not an unfair labor practice and is fully protected speech under the First Amendment and Section 158(c).

Respectfully submitted on March 22, 2021, by:

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CERTIFICATES

I certify as follows:

All attorneys except Mark Chenoweth listed in the signature block are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

The brief complies with the requirements of FRAP 32(a)(5) and (6) because it has been prepared in 14-point, plain, roman-style typeface.

The brief complies with the type-volume limitations of FRAP 32(a)(7) because it contains **12,995** words.

The electronic version of this brief was scanned with Windows Defender. It contains no known viruses.

Paper copies of this brief will be identical to the electronic version.

I electronically filed the brief to which this certificate is attached using the Court's CM/ECF system. All parties are represented by counsel registered with the Court's CM/ECF system. Service on all counsel will be accomplished via the Court's CM/ECF system.

Respectfully submitted, on March 22, 2021,

/s/ Aditya Dynar
Aditya Dynar

Nos. 20-3434, 20-3492

United States Court of Appeals for the Third Circuit

FDRLST MEDIA, LLC,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW FROM THE
NATIONAL LABOR RELATIONS BOARD
CASE NUMBER 02-CA-243109

PETITIONER/CROSS-RESPONDENT'S APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FDRLST MEDIA, LLC, Petitioner, vs. **NATIONAL LABOR RELATIONS BOARD**, and **JOEL FLEMING**, Respondents.	Case No.: _____ NLRB Case No. 02-CA-243109

PETITION FOR REVIEW
OF THE DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

FDRLST Media, LLC, hereby petitions this Court for review of the Decision and Order of the National Labor Relations Board dated November 24, 2020 in Case No. 02-CA-243109, a copy of which is attached as Exhibit A.

FDRLST Media, LLC, hereby petitions this Court for review of the interlocutory Order of the National Labor Relations Board denying FDRLST Media, LLC's motion to dismiss the complaint dated February 7, 2020 in Case No. 02-CA-243109, a copy of which is attached as Exhibit B.

Respectfully submitted, this 30th day of November, 2020.

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FDRLST Media, LLC *and* Joel Fleming. Case 02–CA–243109

November 24, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND MCFERRAN

On April 22, 2020, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.[1] The General Counsel also filed cross-exceptions and a supporting brief, to which the Respondent filed an answering brief, and the General Counsel filed a reply brief. In addition, the Center on National Labor Policy, Inc. (CNLP) filed an amicus brief,[2] to which the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[3] findings,[4] and conclusions and to adopt the recommended Order as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board orders that the Respondent, FDRLST Media, LLC, Washington, D.C., its officers, agents, successors, and assigns, shall

[1] The Respondent also filed a motion requesting oral argument. The Respondent's request is denied as the record and the briefs adequately present the issues and the positions of the parties.

[2] On September 9, 2020, the Board granted CNLP's motion for permission to file an amicus brief and accepted its brief, which was attached to the motion. On September 15, 2020, the Board denied Respondent employees Emily Jashinsky and Madeline Osburn's motion for leave to file an amici curiae brief, finding it would not assist the Board in deciding this matter.

[3] We find merit in the General Counsel's contention that the judge erred by allowing the Respondent to enter affidavits of Ben Domenech, Emily Jashinsky, and Madeline Osburn into evidence without establishing that the affiants were unavailable to testify. See *G.M. Mechanical, Inc.*, 326 NLRB 35, 35 fn. 1 (1998); *Valley West Welding Co.*, 265 NLRB 1597, 1597 fn. 3 (1982); *Limpco Mfg. &/or Cast Products*, 225 NLRB 987, 987 fn. 1 (1976), enfd. mem. 565 F.2d 152 (3d Cir. 1977). However, the judge's ruling was harmless error, as the affiants' statements regarding the Respondent's motive for its conduct and their subjective interpretations of it are irrelevant to determining whether the Respondent violated Sec. 8(a)(1) as alleged. See, e.g., *American Freightways Co.,* 124 NLRB 146, 147 (1959) ("It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.").

[4] In their briefs, the Respondent and CNLP contend that the Board lacks subject-matter jurisdiction and that Region 2 lacks personal jurisdiction and is an improper venue. These contentions were previously considered and rejected in a February 7, 2020 unpublished Order denying the Respondent's motion to dismiss the complaint. Member McFerran did not participate in the Board's consideration of the motion to dismiss, but she agrees that these contentions do not raise anything not previously considered and rejected.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) when its statutory agent and supervisor, Ben Domenech, stated in a tweet: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." We find that employees would reasonably view the message as expressing an intent to take swift action against any employee who tried to unionize the Respondent. In addition, the reference to sending that employee "back to the salt mine" reasonably implied that the response would be adverse. Accordingly, we adopt the judge's finding that the Respondent threatened employees with unspecified reprisals if they engaged in union activity. See, e.g., *Peter Vitalie Co.*, 310 NLRB 865, 873 (1993) (finding employer conveyed threat of unspecified reprisals by stating that one response to unionizing could be to "make it rough" on its employees). In adopting this finding, however, we do not rely on evidence that the Respondent's website hosts editorials about unionization or that Vox Media employees engaged in a walkout on June 6, 2019, as there is no evidence that employees who viewed the tweet were aware of either the editorials or the walkout.

We find without merit the Respondent and CNLP's contention that Domenech's Twitter statement conveys a personal view protected under Sec. 8(c). By its express terms, Sec. 8(c) excludes threats of reprisal from the protection it otherwise affords to the expression of views, arguments, or opinions. See also *Webco Industries,* 327 NLRB 172, 173 (1998) (Sec. 8(c) does not protect implicit threat to discipline employees if they engage in prounion activities) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)), enfd. 217 F.3d 1306 (10th Cir. 2000). We also reject their contention that because the statement was posted on Twitter, it does not evince an intent to communicate with the Respondent's employees. The words of the statement itself leave no doubt that it is directed at the Respondent's employees. In any event, the parties stipulated that at least one employee viewed the tweet, and the Board has found that a threat "not intended for the eyes of employees" but nonetheless seen by them violates Sec. 8(a)(1). *Crown Stationers*, 272 NLRB 164, 164 (1984). Finally, we reject CNLP's contention that our recent decision in *General Motors, LLC*, 369 NLRB No. 127 (2020), holds that the General Counsel must establish the respondent's motive in all cases involving alleged violations of Sec. 8(a)(1). Nothing in *General Motors* changed the longstanding principle that *Wright Line* applies "in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) *turning on employer motivation*." *Wright Line*, 251 NLRB 1083, 1089 (1980) (emphasis added) (subsequent history omitted). As we have explained, the Respondent's motive is not at issue here.

[5] The General Counsel contends that the judge's remedy should be amended to require the Respondent to delete Domenech's tweet. Instead, we shall order the Respondent to direct Domenech to delete the statement from his personal Twitter account, and to take appropriate steps to ensure Domenech complies with the directive. In addition, we shall modify the recommended Order to conform to the violation found (by substituting "protected union activity" for "protected activity" in para. 1(a)) and to our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall also substitute a new notice to conform to the Order as modified.

1. Cease and desist from

(a) Threatening employees with unspecified reprisals if they engage in protected union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Direct its agent and supervisor, Ben Domenech, to delete his June 6, 2019 statement—"FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine"—from the @bdomenech Twitter account, and take appropriate steps to ensure Domenech complies with its directive.

(b) Post at its Washington, D.C. facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 24, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisals if you engage in protected union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL direct our agent and supervisor, Ben Domenech, to delete his June 6, 2019 statement—"FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine"—from the @bdomenech Twitter account, and WE WILL take appropriate steps to ensure Domenech complies with our directive.

The Board's decision can be found at http://www nlrb.gov/case/02-CA-243109 or by using the QR code below. Alternatively, you can obtain a copy of

[6] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Jamie Rucker, Esq., for the General Counsel.
Aditya Dynar, Esq., Kara Rollins, Esq., and *Jared McClain, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in New York, New York on February 10, 2020. Joel Fleming, an individual filed the charge on June 7, 2019. Region 2 of the National Labor Relations Board (NLRB) issued the complaint on September 11, 2019.[1] The complaint alleges that FDRLST Media, LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act) when its executive officer, Ben Domenech, who serves as the publisher of the Respondent's website, The Federalist, issued a public "Tweet" on June 6, 2019 that had threatened employees with the comment, "FYI@fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine" (GC Exh. 1(c)).[2] The Respondent provided a timely answer denying the material allegations in the complaint (GC Exh. 1(e)).

On the entire record and after consideration of the posthearing briefs filed by the General Counsel and the Respondent, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the publication of websites, electronic newsletters, and satellite radio shows. The Respondent admits it is a Delaware corporation, with an office at 611 Pennsylvania Avenue, S.E. Washington, D.C. The Respondent further admits, in conducting the operations as described, Respondent receives revenues sufficient to meet the Board's discretionary jurisdictional standard for newspapers and spends more than $5000 on goods and services that are received or provided directly from points outside of Washington, D.C. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4]

II. ALLEGED UNFAIR LABOR PRACTICES

The parties stipulated to the following verbatim findings of fact (GC Exh. 2):

> Since at least January 1, 2016, The Federalist has been a division of Respondent. Since at least January 1, 2016, Respondent has operated The Federalist as a website at the domain name "thefederalist.com." Since at least January 1, 2016, Ben Domenech ("Domenech") has held the position of executive officer of Respondent. Since at least January 1, 2016, Domenech has held the position of publisher of The Federalist. Since at least January 1, 2016, Domenech has been a supervisor of Respondent within the meaning of Section 2(11) of the National Labor Relations Act ("Act"). Since at least January 1, 2016, Domenech has been an agent of Respondent within the meaning of Section 2(13) of the Act. 13. Since before June 2019, Respondent has employed employees at The Federalist. The Federalist is a 'web magazine focused on culture, politics, and religion that publishes commentary on a wide variety of contemporary newsworthy and controversial topics.' (GC Exh. 2, paras. 5, 6, 9–13, 31.)
>
> Twitter is a microblogging and social networking service on which users post and interact with messages known as "tweets." Tweets are limited to 280 characters and may contain photos, videos, links and text. Registered users can post, like, and retweet tweets, but unregistered users can only read them. User's access Twitter through its website interface, through Short Message Service (SMS), or Twitter's mobile-device application software ("app"). Users can "follow" another user, which means that the follower subscribes to the user's tweets. If a user tweets, the message will appear on each follower's timeline. Tweets are posted to a user's profile, sent to the user's followers, and are searchable on Twitter. On Twitter, replies to tweets that are part of the same "thread" or conversation are indicated by replying to a Twitter account's username with "@," e.g., "@bdomenech." Tweets may be viewed, retweeted, republished, or reported on or in Twitter, Facebook, radio, television, newspapers, news media, and various other print and social media platforms. The Federalist website maintains a Twitter account under the user or account name "@FDRLST" (GC Exh. 2, paras. 15–24).
>
> Since at least June 5, 2019, Ben Domenech has had a Twitter account with the listed account name @bdomenech. On about June 6, 2019, Ben Domenech, through the Twitter account @bdomenech, posted the following Tweet: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine" (GC Exh. 2, paras. 25, 26).
>
> At least one employee of Respondent viewed the Tweet described in the preceding paragraph. Since at least January 1, 2019, Ben Domenech has communicated with (and continues to communicate with) Respondent employees about

[1] All dates are 2019 unless otherwise indicated.
[2] The exhibits for the General Counsel are identified as "GC Exh." and Respondent's exhibits are identified as "R. Exh." The closing briefs are identified as "GC Br." and "R. Br." for the General Counsel and the Respondent, respectively. The hearing transcript is referenced as "Tr."
[3] No witnesses were called at the hearing.
[4] The Respondent admits to corporate status, corporate location, operations, and revenue in a stipulation entered with the counsel for the General Counsel (GC Exh. 2).

Respondent's business matters using his own personal e-mail accounts) as well as an email account owned by Respondent. Ben Domenech uses his Twitter account @bdomenech to promote and discuss Respondent's published content (GC Exh. 2, paras. 27–29).

It is not disputed that Joel Fleming, the individual who filed the charge in this complaint, is not and never has been an employee of the Respondent.

The counsel for the General Counsel contends that on June 6, online media and news sites, including the Washington Post, CNN, Bloomberg News, Yahoo, and among others, carried a story of a walkout by union employees at Vox Media. Vox Media is an online digital media network that carries the stories, podcasts, and events produced by other companies, including the Federalist. The counsel for the General Counsel maintains that the walkout by unionized employees resulted in online magazines, like the Federalist, to "go dark" (GC Exhs. 3.8 and 3.9; GC Br. at 4). On the same day as the walkout, Ben Domenech (Domenech) tweeted, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." The counsel for the General Counsel argued that the tweet was a threat made by Domenech even though the tweet was made on Domenech's own personal Twitter account (@bdomenech). The tweet from his personal account had a @fdrlst salutation and it is not disputed that some employees of the Respondent read this tweet.

The counsel for the General Counsel maintains that the tweet was consistent with The Federalist's anti-union editorial position, as demonstrated by its digital articles titled "Public-Sector Unions Deserved to be Destroyed;" Baltimore's Real Police Problems: Unions;" and "Why Pay Full Pensions to Unions That Bankrupted Taxpayers [sic] Pockets and Kids' Minds?" (GC Exhs. 3, 3.1–3.7; GC Br. at 4). The counsel for the General Counsel argues that the tweet is not protected under the First Amendment (or Sec. 8(c) of the Act) because the comment is a threat of unspecified reprisal (GC Br. at 5).

The counsel for the Respondent maintains that the General Counsel failed to establish that Domenech speaks for or on behalf of the Respondent on all occasions when he posts tweets on his personal account. The Respondent denies that Domenech spoke on its behalf in the tweet (R. Br. at 4, 5). The Respondent further maintains that a reasonable FDRLST employee would not take Domenech's tweet as a threat of reprisal with loss of employment or other benefits. Indeed, counsel for the Respondent provided two affidavits prepared by employees of the Respondent denying that the tweet was a threat and perceived the tweet to be a humorous expression by Domenech (R. Exhs. 4, 5; R. Br. 5–7).[5] Finally, counsel for the Respondent denies that the Respondent is anti-union. It is maintained that the articles cited by the General Counsel were republished from other sources on the Respondent's website and that the Respondent was merely acting as a forum for different viewpoints of the authors of these articles and not the viewpoint of FDRLST (R. Br. 7–9; R. Exhs. 1, 2).[6]

III. DISCUSSION AND ANALYSIS

Section 7 of the Act provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations..." Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Section 8(a)(1) of the Act makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of [those] rights." See, *Brighton Retail Inc.*, 354 NLRB 441, 447 (2009). The test for evaluating if the employer violated Section 8(a)(1) is "whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities." *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014). Additionally, the test of interference, restraint, and coercion under Section 8(a)(1) does not turn on the employer's motive or on whether the coercion succeeded or failed. *American Tissue Corp.,* 336 NLRB 435, 441 (2001); *Hanes Hosiery, Inc.*, 219 NLRB 338, 338 (1975) ("we have long recognized that the test of interference, restraint and coercion . . . does not turn on Respondent's motive, courtesy, or gentleness . . . the test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act."); also, *Amnesty International of the USA, Inc*., 368 NLRB No. 112 (2019).

As noted, in determining whether an employer's actions violate Section 8(a)(1), the employer's motivation is immaterial; what matters is whether the employer's conduct, viewed from the perspective of a reasonable person, tends to interfere with the free exercise of employee rights. E.g., *Crown Stationers*, 272 NLRB 164, 164 (1984). As with all alleged 8(a)(1) violations, the judge's task is to "determine how a reasonable employee would interpret the action or statement of her employer…and such a determination appropriately takes account of the surrounding circumstances." *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011) (totality of the circumstances).

[5] The counsel for the General Counsel strenuously objected as hearsay the acceptance of the three affidavits proffered by the Respondent (Tr. 21–24; GC Br. at 9, 10). As with other rules of evidence, the Board applies the hearsay rules "so far as practicable." Sec. 10(b) of the Act, 29 U.S.C. § 160(b), states: "Any [unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." See also NLRB Rules and Regulations, Sec. 102 39, and Statements of Procedure, Sec. 101.10(a). Like other administrative agencies, the Board does "not invoke a technical rule of exclusion but admit[s] hearsay evidence and give[s] it such weight as its inherent quality justifies." *Midland Hilton & Towers*, 324 NLRB 1141, 1141 fn. 1 (1997). As such, I allowed the three affidavits in the record giving limited probative value to the affidavits.

[6] The Respondent had raised other arguments in its motion to dismiss the complaint filed with the Board on January 13, 2020. The Respondent's motion to the Board maintained that the NLRB lacks subject matter jurisdiction because Fleming was not aggrieved; lacks personal jurisdiction because the Respondent was not amenable to service under New York State laws; and that Region 2 is an improper venue for the issuance of the complaint because the Respondent's principle place of business is located in Washington, D.C. The entire motion was dismissed in an order issued by the Board on February 7, 2020 (of record). The Respondent again asserted the lack of jurisdiction of the NLRB in its posthearing brief (R. Br. at 11, 12). For the same reasons as in the Board's Order, this argument has little merit.

Here, the alleged threat tweeted by Domenech was, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." This expression is an idiom. An idiom is an expression, word, or phrase that has a figurative meaning conventionally understood by native speakers. This meaning is different from the literal meaning of the idiom's individual elements. In other words, idioms don't mean exactly what the words say. Obviously, the FDRLST employees are not literally being sent back to the salt mines. Idioms have, however, hidden meanings. The meaning of these expressions is different from the literal meaning or definition of the words of which they are made. The literal definition of *salt mine* explains the origin of the figurative meaning. Work in a salt mine is physically challenging and monotonous, and any job that feels that tedious can be called a salt mine. The term is sometimes used in a lighthearted or joking way: "It was a great weekend, but tomorrow it's back to the *salt mine*." See, Farlex Dictionary of Idioms. © 2015 Farlex, Inc, all rights reserved. Nevertheless, the expression "salt mine" is most often used to refer to tedious and laborious work.

Domenech provided an affidavit in this proceeding. Domenech stated that he is the publisher of the Respondent. He further stated that the tweet was from his personal account and was set for public viewing. He maintained that the tweet was a satire and an expression of his personal viewpoint on a contemporary topic of general interest (R. Exh. 3). It is significant to note that although the tweet was from Domenech's personal account, the tweet itself was prefaced with the Respondent's name and it was "FYI" or 'For Your Information', which, in my opinion, was clearly directed to the employees of FDRLST and not to the general public. This is a reasonable conclusion to draw since the statement "if you unionize, you will be sent to the salt mines" was meant for the FDRLST employees and not the public. The expression that he will send the FDRLST employees back to the salt mine for attempting to unionize is an obvious threat. In viewing the totality of the circumstances surrounding the tweet, this tweet had no other purpose except to threaten the FDRLST employees with unspecified reprisal, as the underlying meaning of "salt mine" so signifies.

The Respondent proffered two additional affidavits from FDRLST employees, both stating that the tweet was funny and sarcastic and neither one felt that the expression was a threat of reprisal (R. Exh. 3).[7] However, a threat is assessed in the context in which it is made and whether it tends to coerce a reasonable employee. *Westwood Health Care Center*, 330 NLRB 935, 940 fn. 17 (2000). The standard for assessing alleged 8(a)(1) threats is objective, not subjective. *Multi-Add Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Any subjective interpretation from an employee is not of any value to this analysis. *Miami Systems Corp*., 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997); *Roemer Industries*, 367 NLRB No. 133 (2019). Moreover, threats allegedly made in a joking manner also violate the Act. *Southwire Co.,* 282 NLRB 916, 918 (1987), citing *Champion Road Machinery*, 264 NLRB 927, 932 (1982) (Applying an objective standard, the Board found a supervisor's statement violated Sec. 8(a)(1) of the Act, although the threatened employee testified he felt certain the comment was a joke).[8]

I agree with the counsel for the General Counsel that a reasonable interpretation of the expression meant that working conditions would worsen or employee benefits would be jeopardized if employees attempted to unionize. The timing of the tweet contemporaneous to the internet blackout at Vox Media is significant. Domenech clearly expressed his displeasure with the Vox walkout and made that known to his employees through his tweet. As such, the tweet is reasonably considered as a threat because it tends to interfere with the free exercise of employee rights. It is irrelevant that the threat by Domenech, as the publisher of FDRLST, was his personal opinion or that it was made from his personal Twitter account. His tweet was directed to the FDRLST employees and originated from the Respondent's publisher and executive officer. A statement by a supervisor or agent of an employer threatening a plant closure violates the Act, even if the speaker attempts to couch the statement as his personal opinion. *Twistex, Inc.,* 283 NLRB 660, 663 (1987). A threat stated as a matter of personal opinion is still coercive. *Mid-South Drywall Co., Inc.,* 339 NLRB 480, 481 (2003), citing *Clinton Electronics Corp*., 332 NLRB 479 (2000) (finding a threat of job loss threat couched as personal opinion violated Sec. 8(a)(1)). Statements are viewed objectively and in context from the standpoint of employees over whom the employer has a measure of economic power. See, e.g., *Mesker Door, Inc.,* 357 NLRB 591, 595 (2011). When an employer tells employees that they will jeopardize their jobs, wages, or other working conditions by supporting a union or engaging in concerted activities, such communication tends to restrain and coerce employees if they continue to support a union or engage in other concerted activities in violation of Section 8(a)(1). *Noah's Bay Area Bagels, LLC,*331 NLRB 188 (2000); *Bloomfield Health Care Cent*er, 352 NLRB 252 (2008); *Green Apple Supermarket of Jamaica, Inc*., 366 NLRB No. 124 (2018).[9]

I find that the threat alleged by the General Counsel in the complaint would reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act.

[7] Emily Jashinsky, cultural editor at the Federalist (a division of FDRLST) stated in her affidavit that she read the tweet on June 6 and found it "funny and sarcastic" and did not believe the tweet was made as a threat. Madeline Osburn, also a FDRLST employee, stated that the tweet was satirical and a funny way of expressing (Domenech's) personal views.

[8] I would give little weight to the two employee affidavits as corroborating documents to support Domenech's assertion that his tweet was satirical. It is unknown why these two employees were chosen to provide the affidavits, it is not clear whether there were absent any implied threats if they did not provide such statements, and no assurances were given by the Respondent that there would be no reprisals for refusing to provide a statement or regardless of what they may state in the affidavits. *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964).

[9] The Respondent also argued that NLRB was infringing on the First Amendment right of free expression by Domenech or the Respondent. However, these rights do not extend to threats made by employers to workers. Statements made by an employer to employees may convey general and specific views about unions or unionism or other protected activity as long as the communication does not contain a "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969).

CONCLUSIONS OF LAW

1. The Respondent FDRLST Media, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act on June 6, 2019 when Ben Domenech, the publisher and executive officer of FDRLST Media, LLC, threatened FDRLST employees by stating: "the first one of you tries to unionize I swear I'll send you back to the salt mine."

3. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, FDRLST, Media, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisal because they engaged in protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days after service by the Region, post at its facility in Washington, D.C. copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2019.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 22, 2020

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisal or otherwise discriminate against you because you engage in protected activities or to discourage you from engaging in these or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reaffirm that you have the right to exercise your Section 7 rights guaranteed by the Act.

FDRLST MEDIA, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-243109 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purpose.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FDRLST MEDIA, LLC

and **Case 02-CA-243109**

JOEL FLEMING

ORDER

The Respondent's Motion to Dismiss the complaint is denied. The Respondent has not demonstrated that the complaint fails to state a claim upon which relief can be granted and that it is entitled to judgment as a matter of law.

The Respondent's arguments are without merit. It is well-established that "Board proceedings are governed by the Administrative Procedure Act and the Board's Rules and Regulations, not the FRCP."[1] Indeed, the Supreme Court has explicitly instructed that "[a] charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit."[2] Further, contrary to the Respondent's assertions, the clear and unambiguous weight of both Board and Supreme Court authority holds that any person may file an initial charge.[3] The Respondent's attacks on personal jurisdiction and venue are

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[1] *Component Bar Products, Inc.*, 364 NLRB No. 140, slip op. at 10 (2016). *See also Armstrong Cork Co.*, 112 NLRB 1420, 1420–21 (1955) ("[T]he Federal Rules of Civil Procedure are applicable to Board proceedings only with respect to the introduction of evidence, and not with respect to pleadings before the Board").

[2] *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959) (noting that it is not the role of the Board "to adjudicate private controversies" but rather "to advance the public interest in eliminating obstructions to interstate commerce"). *See also NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. at 18 ("The charge is not proof. . . . The charge does not even serve the purpose of a pleading.").

[3] *See NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17–18 (1943) (a "stranger" to the relationship may file the initial charge; noting Senator Wagner's objection to limiting who could file); *Castle Hill Health Care Center*, 355 NLRB 1156, 1190 (2010) (anyone may file a charge with the NLRB). *See also* Section 102.9 of the Board's Rules and Regulations ("[a]ny

similarly inapposite. The venue for filing of a charge is not a basis for attacking the validity of a complaint.[4] Decisions regarding where to prosecute a complaint are primarily an administrative function within the GC's discretion, and he has the authority to transfer a case.[5]

Accordingly, the Respondent's Motion to Dismiss is denied.

Dated, Washington, D.C., February 7, 2020.

JOHN F. RING,	CHAIRMAN
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER

person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce").

[4] *See, e.g.*, *Earthgrains Co.*, 351 NLRB 733, 733 n.2 (2007) (where charge should be filed is a venue matter; improper venue not fatally defective where Respondent has notice and opportunity to defend against the charge and complaint on the merits); *Allied Products Corp.*, 220 NLRB 732, 733 (1975) (same).

[5] *See* Section 102.33 of the Board's Rules and Regulations; *see also, e.g.*, *Consolidation Coal Co.*, 310 NLRB 6, 8 (1993); *Allied Products Corp.*, 220 NLRB at 733.

CERTIFICATE OF SERVICE

I certify that on March 22, 2021, I electronically filed the foregoing using the Court's CM/ECF system. All parties are represented by counsel registered with the Court's CM/ECF system. Service on all counsel will be accomplished via the Court's CM/ECF system.

/s/ Aditya Dynar
Aditya Dynar