UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

FDRLST MEDIA, LLC, *Respondent* -and- JOEL P[redacted] *Charging Party*	Case No. 02-CA-243109

RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

Respondent, FDRLST Media, LLC (FDRLST or Respondent), respectfully requests that the complaint against it be dismissed in its entirety.

This case commenced when Mr. Joel F[redacted], the Charging Party, disapproved of a tweet he saw on Twitter.com (Twitter) posted by a twitter user—Mr. Ben Domenech—from his personal account. Mr. F[redacted] filed a charge with the National Labor Relations Board (NLRB) against Mr. Domenech's employer, FDRLST Media, LLC.

The Complaint should be dismissed because NLRB has no authority to prosecute this case when there is no "person aggrieved" within the meaning of the National Labor Relations Act (NLRA) This tribunal lacks subject-matter jurisdiction under the Constitution and the NLRA, and it lacks personal jurisdiction over Respondent. Region 2 is also an improper venue to litigate this matter. As such, the Complaint should be dismissed forthwith.

BACKGROUND AND FACTS

Mr. Domenech holds the position of Publisher with Respondent FDRLST Media, LLC. Stip. ¶ 10.[1] FDRLST publishes "The Federalist" web magazine which publishes cultural, political, and religious commentary on a variety of contemporary newsworthy and controversial topics. Stip. ¶ 31. The Federalist website maintains a Twitter account under the username "@FDRLST." Stip. ¶ 24. Mr. Domenech maintains a personal Twitter account with the username "@bdomenech." Stip. ¶ 25. On June 6, 2019, Mr. Domenech, who is not a named respondent in the Complaint, publicly tweeted 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." Stip. ¶ 26.

[1] The General Counsel, Respondent, and Charging Party executed a Stipulation, which is attached as Exhibit 3 to this Motion.

Mr. Joel F[redacted], who is not and has never been Respondent's employee, independent contractor, or paid or unpaid intern, apparently did not like Mr. Domenech's tweet and filed a charge with NLRB the next day on June 7, 2019. Stip. ¶ 30; *see generally* Charging Doc.[2]

On September 11, 2019, the Board filed a Complaint against FDRLST based on Mr. F[redacted]'s charge. *See generally* Compl.[3]

STANDARD OF REVIEW

The Board's rules provide for the filing of a motion to dismiss after the answer is filed. 29 C.F.R. § 102.28. "Upon receipt of a motion for … dismissal, the Board may deny the motion or issue a notice to show cause why the motion should not be granted. If a notice to show cause is issued, the hearing, if scheduled, will normally be postponed indefinitely." 29 C.F.R. § 102.24(b). Motions can be made "in writing … or stated orally on the record." 29 C.F.R. § 102.24(a).

This tribunal is required to, "so far as practicable," conduct the proceeding "in accordance with the … rules of civil procedure for the district courts of the United States." 29 U.S.C. § 160(b). This tribunal and the Board look to the Federal Rules of Civil Procedure (FRCP) where the Board's rules contained in 29 C.F.R. fail to provide specific guidance. *Brink's, Inc.*, 281 NLRB 468, 468 (1986). The Board's rules do not specify the defenses that are available and that can be pleaded in motions to dismiss. Where Board rules or decisions do not contain specific guidance, this tribunal looks at FRCP and federal cases deciding FRCP questions for elucidation, instruction and relevant authority. *Id.*

Thus, if the General Counsel asserts a claim for relief, this tribunal looks to FRCP 12(b) defenses to decide, upon the filing of a motion to dismiss, whether the complaint should be dismissed. *See, e.g.*, *Allied Mechanical Services, Inc.*, 357 NLRB 1223, 1224 (2011) (applying FRCP 12(b) to a union's motion to dismiss the complaint).

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[2] Attached as Exhibit 1 to this Motion.

[3] Attached as Exhibit 2 to this Motion.

A. The Motion-to-Dismiss Standard for Lack of Subject-Matter Jurisdiction

To decide a motion to dismiss for lack of jurisdiction, FRCP 12(b)(1), the "plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the [tribunal] lacks the statutory or constitutional power to adjudicate it." *Makarova*, 201 F.3d at 113; *Cardox Division*, 268 NLRB 335 (1983).

Rule 12(b)(1) motions can be either facial or fact-based. When a Rule 12(b)(1) motion is facial, it is "based solely on the allegations of the complaint or the complaint and exhibits attached to it (collectively the 'Pleading')." *Carter v. HealthPort Techs., LLC*, 822 F.2d 47, 56 (2d Cir. 2016) (cleaned up). The nonmovant "has no evidentiary burden" when the movant files a facial motion. *Id.* The task of this tribunal in deciding a facial motion to dismiss "is to determine whether the Pleading alleges facts that affirmatively and plausibly suggest" that there is jurisdiction. *Id.*

A fact-based Rule 12(b)(1) motion to dismiss is one in which the movant "proffer[s] evidence beyond the Pleading." *Id.* at 57. To oppose such a motion, the opposer "will need to come forward with evidence of their own to controvert that presented by the defendant." *Id.*

B. The Motion-to-Dismiss Standard for Lack of Personal Jurisdiction

To defeat a motion to dismiss for lack of personal jurisdiction under FRCP 12(b)(2), the nonmovant bears the burden of showing that the tribunal has personal jurisdiction over the defendant. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996). When no evidentiary hearing is held, the nonmovant may defeat a motion to dismiss based on "legally sufficient allegations of jurisdiction." *Id.* But when an evidentiary hearing is held, the nonmovant "must demonstrate … personal jurisdiction over the [movant] by a preponderance of the evidence." *Id.* at 567. If no evidentiary hearing is held and the nonmovant conducts "extensive discovery regarding the [movant's] contacts with the forum" then the nonmovant's "*prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the [movant]." *Id.* (cleaned up).

The amenability of a corporation to suit "is determined in accordance with the law of the state where the [tribunal] sits." *Id.* In resolving questions of personal jurisdiction in a diversity action, this tribunal conducts a "two-part inquiry": (1) "whether the [nonmovant] has shown that the [movant] is amenable to service of process under the forum state's laws"; and (2) "whether the tribunal's assertion of jurisdiction under these laws comports with the requirements of due process." *Id.* (cleaned up). *See also Walden v. Fiore*, 571 U.S. 277, 283 (2014) (giving forum state's law and the Due Process Clause as the two factors in the personal-jurisdiction inquiry).

For NLRB Region 2, which services a geographic area fully contained within the boundaries of New York State, https://www.nlrb.gov/region/02/area-served, the Charging Party or the General Counsel must show this Region can validly exercise personal jurisdiction over FDRLST Media, LLC under New York's long-arm statute. *See id.*

N.Y. C.P.L.R. § 302, New York's long-arm statute, "does not extend to the full limits permitted by the Due Process Clause of the Fourteenth Amendment." *Cuccioli v. Jekyll & Hyde Neue Metropol Bremen Theater Produktion GmbH & Co.*, 150 F. Supp. 2d 566, 572 & n.24 (S.D.N.Y. 2001) (citing *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 459–60 (1965)). "[I]n setting forth certain categories of bases for long-arm jurisdiction," 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, 67 (1984). That is, "a situation can occur in which the necessary contacts to satisfy due process are present, but personal jurisdiction will not be obtained in this State because the statute does not authorize it." *Id.*

Because both prongs of the personal-jurisdiction test need to be met, in addition to showing that New York's long-arm statute would allow the exercise of personal jurisdiction, the General Counsel or Charging Party would still need to show whether, under the second part of the test, personal jurisdiction exists under the test articulated by the Supreme Court under the Due Process Clause. *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

For general personal jurisdiction over FDRLST to be valid, nonmovants must show that FDRLST is "at home" in Region 2. *Daimler*, 571 U.S. at 137. Corporate entities like FDRLST are at

home in their "place of incorporation" or in their "principal place of business." *Id.* "[E]xercise 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.

For specific personal jurisdiction over FDRLST to be valid, nonmovants must 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).

C. The Motion-to-Dismiss Standard for Improper Venue

The "same standard of review" applies to a motion to dismiss for improper venue under FRCP 12(b)(3) as applies to dismissals for lack of personal jurisdiction pursuant to FRCP 12(b)(2). *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005); *Minholz v. Lockheed Martin Corp.*, 227 F. Supp. 3d 249, 260 (N.D.N.Y. 2016). That is, "[i]f the court chooses to rely on pleadings and affidavits, the [nonmovant] need only make a *prima facie* showing of [venue]. But if the court holds an evidentiary hearing, the [nonmovant] must demonstrate [venue] by a preponderance of the evidence." *CutCo Indus. v. Naughton*, 806 F.2d 341, 364–65 (2d Cir. 1986) (cleaned up). In either instance the *nonmovants—i.e.*, Mr. F[redacted] and the General Counsel—bear the burden of proving that venue is proper. *EPA v. Port Auth. of N.Y. & N.J.*, 162 F. Supp. 2d 173, 183 (S.D.N.Y. 2001).

Under the general venue statute, a defendant corporation "reside[s] in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c). Thus, for venue to be proper in NLRB Region 2, the nonmovants must show this Region has personal jurisdiction over Respondent.

ARGUMENT

I. THE CHARGING PARTY AND THE GC FAIL TO ESTABLISH SUBJECT-MATTER JURISDICTION

The Complaint should be dismissed because Mr. F[redacted] and the Board have failed to establish subject-matter jurisdiction. That is so because Mr. F[redacted] is not "aggrieved" within the meaning of NLRA Section 160(b), he is not within the zone of interests protected by the NLRA, and NLRB lacks statutory authority to investigate FDRLST based on Mr. F[redacted]'s charge.

A. Mr. Joel F[redacted] Is Not "Aggrieved" Within the Meaning of 29 U.S.C. § 160(b)

Section 160(b) (emphasis added) states in 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 … : Provided, That no complaint shall issue based upon any *unfair labor practice* … unless the *person aggrieved thereby* was prevented from filing *such charge* by reason of service in the armed forces.

Mr. F[redacted] was not "aggrieved" by the alleged "unfair labor practice." As such, his charge is deficient as a matter of law to establish subject-matter jurisdiction over FDRLST Media, LLC.

While the text of Section 160(b) and the structure of the NLRA show Congress's textual commitment to allow "persons aggrieved" to file a charge, NLRB's corresponding regulation seems to allow "any person" to file an unfair-labor-practice charge. 29 C.F.R. § 102.9. The panoptic 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.

Congress enacted the NLRA in 1935 and created a statutory cause of action for a "person aggrieved" by an "unfair labor practice" to file a charge with the Board. The filing of the "charge" triggers the Board's authority to investigate. 29 U.S.C. § 161. If the allegation is substantiated, the Board may prosecute the charge by issuing a "complaint" against the charged party. 29 U.S.C. § 160(b). The NLRA protects the "right of employees to organize." 29 U.S.C. § 151. It does not authorize random people like Mr. F[redacted] to act as self-appointed surrogates for Respondent's employees. Otherwise NLRB, without Congressional authorization, could investigate and prosecute whomever it

chooses based upon the filing of a charge by a person who is a complete stranger to and has no connection with the alleged unfair labor practice.

The NLRA does not give such carte blanche harassment power to Mr. F[redacted], and it does not grant NLRB, contrary to what Mr. F[redacted] and the General Counsel seem to suggest here, a virtually limitless power to search and harass people with whose views they disagree. The ability of any random person to subject a company to a government-directed and funded unfair-labor-practice action forcing it to endure the cost of defending against the litigation, as has happened here, contorts the legislative scheme into something it is not.

There is nothing in the Complaint—nor in the charging document—that even arguably alleges that Mr. F[redacted] is a "person aggrieved" within the meaning of Section 160(b). He is not an employee or independent contractor of FDRLST Media, LLC.[4] Stip. ¶ 30. Nor is he in privity with any employee or independent contractor of Respondent. In fact, there is no nexus or privity whatsoever between Respondent and Mr. F[redacted]. He is nothing more than a random person on the internet who does not share Mr. Domenech's views or sense of humor and who reported one of Mr. Domenech's tweets posted on his personal Twitter account that was intended to be, and was obviously, a joke.

Courts have interpreted aggrievement requirements in statutes to require and ensure that the charging party has Article III standing. The cases on standing are an important tool to determine the meaning of Section 160(b).

When Congress uses the words "person aggrieved," it shows "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

[4] Mr. F[redacted] is also 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." 29 U.S.C. § 152(3). Nor is he an "individual having the status of an independent contractor" of FDRLST Media, LLC. *Id.*

a congressional intention to define standing … as broadly as is permitted by Article III of the Constitution").

Therefore, the charging party must 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, 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 Envtl. Servcs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[A] plaintiff must demonstrate standing separately for each form of relief sought." *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). And 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).

In truth, Mr. F[redacted] has suffered *no* "injury in fact." He has suffered no injury to any "legally protected interest" he might have. His fabricated aggrievement—his choice to take offense—is neither "concrete" nor "particularized." Moreover, Mr. Domenech's satire comes nowhere close to establishing "actual" or "imminent" injury to Mr. F[redacted], or to any other persons who can realistically claim aggrievement. Mr. F[redacted]'s made-up injury arises out of perhaps an overly active imagination, but it is not "fairly traceable" to FDRLST Media, LLC.

Furthermore, it is highly "speculative," even downright nonsensical, that such an injury could be "redressed" by a decision favorable to Mr. F[redacted]. Noteworthy in this respect, the General Counsel, "as part of the remedy" for the alleged unfair labor practice "seeks an Order *requiring Respondent to delete the tweet*." Compl. at 3 lines 6–7 (emphasis added). There is no allegation that Respondent dictates or can compel Mr. Domenech, its other employees, officers, supervisors, or agents, to "delete" a tweet any of them posted on their personal Twitter accounts expressing their personal opinion on a currently debated topic.[5] There is no allegation that FDRLST dictates or compels Mr. Domenech's or anyone

[5] 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,

else's personal beliefs or what they choose or do not choose to publish on their personal Twitter accounts. Even assuming for argument's sake that the tweet constituted a threat, Mr. F[redacted] was not threatened, so removing the tweet does not remove any threat against him. Mr. F[redacted] does not want the tweet removed because of any effect the tweet has upon himself personally, aside from his generalized objection to its contents.

The Complaint, therefore, also flunks *Lujan*'s three prongs. As such, Mr. F[redacted] does not meet even the minimum requirement to claim aggrievement under 29 U.S.C. § 160(b).

Nor does Mr. F[redacted] fall within the familiar exception to the bar against asserting third-party standing based on a close relationship between him and Respondent's employees, independent contractors, their family relatives, and/or a union. For example, two physicians were accorded standing to challenge a state statute that prohibited the use of state Medicaid funds to pay for nontherapeutic abortions because there was a "patent" "closeness of … relationship" between doctor and patient, and the physicians were "intimately involved" in the patient's decision to exercise her constitutional right to abortion. *Singleton v. Wulff*, 428 U.S. 106, 117 (1976).

Not so here. Mr. F[redacted] saw a tweet on Twitter, felt provoked, and reported that to the Board by filing a charging document. Recognizing him as being "aggrieved" within the meaning of 29 U.S.C. § 160(b) in these circumstances would stretch the statute beyond the scope Congress established.

Even if Mr. F[redacted]'s reaction were well-intentioned, his relationship to FDRLST Media, LLC, its employees, independent contractors, and/or their family members is more attenuated than

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links, and text. Users like Mr. Domenech and Mr. F[redacted] can post, like, and retweet Tweets. Users access Twitter through its website, through Short Message Service, or Twitter's mobile-device application. Users can voluntarily "follow" another user, which means that the follower subscribes to the user's Tweets. Stip. ¶ 19. As Mr. Domenech's follower, Mr. Domenech's Tweets will appear on Mr. F[redacted]'s Twitter Timeline. Mr. F[redacted] can choose to not follow Mr. Domenech on Twitter to make his Tweets not appear on Mr. F[redacted]'s Timeline. In that scenario, Mr. F[redacted] will still be able to access public Tweets posted by Mr. Domenech but will have to browse Mr. Domenech's entire Twitter account if he wishes to see all of Mr. Domenech's public tweets. The functionality (or lack thereof) of Twitter also suggests Mr. F[redacted]'s filing of a charge is nothing more than a roving tactic employed by him perhaps against those he perceives to be his ideological opponents.

was Michael Newdow's to his daughter. In *Elk Grove Unified School District v. Newdow*, the 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. 542 U.S. 1 (2004).[6] A nonexistent relationship between Mr. F[redacted] and those who could potentially be "aggrieved" by the alleged "unfair labor practice" does not permit him to assert aggrievement on their behalf within the meaning of 29 U.S.C. § 160(b).

Mr. F[redacted]'s assertion that he is a "person aggrieved," therefore, is at most a generalized grievance expressing his concern as a citizen or taxpayer that a *non-Respondent* (Mr. Domenech) should refrain from potentially offending random people on the internet. A "generalized grievance" is "inconsistent with the framework of Article III because the 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 can wield Section 160 as a sword against business competitors or ideological adversaries. Indeed, statutes are "interpreted in a way that avoids absurd results." *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000)

Having failed to show Mr. F[redacted] is a "person aggrieved," NLRB's perfunctory investigation and the subsequent filing of a complaint have broken out of its statutory bounds. Congress has conferred jurisdiction on the Board to investigate only those charges that are filed by a "person aggrieved" by an alleged "unfair labor practice," and to issue complaints only in cases that satisfy this essential statutory minimum. The Board simply does not have jurisdiction in circumstances such as those presented here. Consequently, the tribunal should dismiss this action for having been instituted outside the statutory constraints placed upon NLRB by Congress.

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[6] *Newdow* was abrogated on other grounds by *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). As noted in *Lexmark*, the Court did not abrogate the "third-party standing" portion of *Newdow*, which is relevant here. 572 U.S. at 127 n.3 (*Lexmark* "does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can await another day.").

B. Mr. F[redacted] Is Not Within the Zone of Interests Protected by Statute

Mr. F[redacted] is also not within the zone of interests protected by the National Labor Relations Act. Try as he might, he cannot realistically show he is a "person aggrieved" by an unfair labor practice—and therefore within the zone of interests protected by the NLRA. 29 U.S.C. § 160(b). This is another reason why the Board lacks jurisdiction and should therefore dismiss this case.

Lexmark International, Inc. v. Static Control Components, Inc. provides an authoritative formulation of the zone-of-interest test. 572 U.S. 118 (2014). Foremost, "[w]hether a plaintiff 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 a particular plaintiff's claim." 572 U.S. at 128 (cleaned up).

The zone-of-interests inquiry is relevant here because NLRB, like all federal administrative agencies, can exercise powers only to the extent authorized by Congress. If "traditional tools of statutory interpretation" show NLRB lacks authority to take an action against Respondent under this set of facts, then this tribunal lacks jurisdiction and should dismiss the case.

In *Lexmark*, the question was whether "Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a)." *Id.* at 128. Similarly, the question here is whether Mr. F[redacted] falls within the class of persons whom Congress has authorized to file a "charge" alleging an unfair labor practice. In *Lexmark*, as here, that "question requires us to determine the meaning of the congressionally enacted provision creating a cause of action"—"whether Congress in fact" authorized Mr. F[redacted] to charge FDRLST Media, LLC with committing an unfair labor practice. *Id.* The traditional tools of statutory interpretation show that Congress did not extend charging-party status to random people on the internet who are perhaps too easily offended by someone else's exercise of Constitutionally protected speech or expression. Nor did it empower such random people to brandish the power of the NLRB against someone whom they perceive to be their ideological opponents.

Canons of construction render the meaning of Section 160(b) clear. They also show that NLRB's interpretation of the statute is deeply flawed and unsupportable under an ordinary statutory-interpretation analysis.

The Distributive-Phrasing Canon, for example, dictates that "[d]istributive phrasing applies each expression to its appropriate referent (*reddendo singular singulis*)." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 214 (Thompson/West 2012). Some "word[s] signa[l] a distributive sense." *Id.* Section 160(b) 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 the Board can file a complaint, but "no complaint shall issue upon any *unfair labor practice* occurring more than six months prior to the filing of the charge … unless the person aggrieved *thereby* was prevented from filing *such* charge … ." The distributive words "such" and "thereby" point to "unfair labor practice." Section 160(b), therefore, requires that the charging party be a "person aggrieved" by an "unfair labor practice."

Another aspect of Section 160(b) is telling: the use of passive voice in the phrase "[w]henever it is charged." While "a legislature's use of the passive voice sometimes reflects indifference to the actor," courts do not attribute such indifference 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—among others, "restoring equality of bargaining power between employers and employees," 29 U.S.C. § 151—"clarifies" that only persons aggrieved by an alleged unfair labor practice can file charging documents with the Board. *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).

In short, 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 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The "breadth of the zone of interests varies according to the provisions of law at issue." *Id.* at 130 (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). The provisions of 29 U.S.C. § 160(b) foreclose precisely the type of search-and-destroy tactic that Mr. F[redacted] wishes to wield against those whom he perceives to be his ideological opponents.

Put differently, Mr. F[redacted] has no protectable interest—neither one provided for by statute nor by the Constitution. A random person's purported indignation at a joke does not transform him into an aggrieved person falling within the zone of interests protected by the NLRA. Mr. F[redacted] is not and has never been an "employee" as defined at 29 U.S.C. § 152(3), and Respondent is not and has never been Mr. F[redacted]'s "employer" as defined at 29 U.S.C. § 152(2). Stip. ¶ 30; *cf. American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., joined by Thomas, J., concurring in the judgment) (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" (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)).

In *Lexmark*, as here, "[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 purpose of the Lanham Act at issue in *Lexmark* was "protecting persons engaged in commerce within the control of Congress against unfair competition." *Id.* (cleaned up). To fall within the zone of interests of the Lanham Act § 1125(a)'s false-advertising provision, "a plaintiff must allege an injury to a commercial interest in reputation or sales," and the plaintiff's injuries must be "proximately caused by violations of the statute." *Id.* at 131–32. Likewise, the General Counsel and the Charging Party here needed to allege—but have not so alleged and will be unable to prove—that Mr. F[redacted] is injured *qua* "employee" in his exercise of rights protected by the NLRA and that such injuries are "proximately

caused" by Mr. Domenech's June 6, 2019 tweet. Mr. F[redacted]'s "work" has *not* "ceased as a consequence of, or in connection with … or because of" Mr. Domenech's June 6 Tweet. 29 U.S.C. § 152(3).

Even if Section 160(b) itself were considered silent on the question of whether only an "aggrieved" person may file a charge, the default aggrievement requirement of the Administrative Procedure Act (APA) would still apply. *See* 5 U.S.C. § 702. APA § 702 authorizes suit by any "person … adversely affected or aggrieved … within the meaning of a relevant statute." The Supreme Court has read the APA's aggrievement requirement to "establish a regime under which a plaintiff may not sue unless he falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011) (cleaned up). *Thompson* "incorporate[d]" this APA zone-of-interests test for the term "aggrieved" in Title VII of the Civil Rights Act. *Id.* at 178 (citing 42 U.S.C. § 2000e-5(f)(1) ("a civil action may be brought … by the person claiming to be aggrieved")). The zone-of-interest 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). Thus, apart from Mr. F[redacted]'s feigned or generalized injury, he simply does not have any interest that is protected by the NLRA. His interest is unrelated to Section 160(b), which confers charging-party status on a person aggrieved by an alleged unfair labor practice.

Mr. F[redacted] is *not* a "person aggrieved" by the alleged "unfair labor practice" for purposes of 29 U.S.C. § 160(b). The Board, therefore, lacks jurisdiction to investigate and prosecute a "charg[e]" filed by a person who is not within the zone of interests protected by the NLRA.

C. The Board Lacks Statutory Authority to Investigate Respondent Based on Mr. F[redacted]'s Charge

The Board also lacks statutory authority to investigate FDRLST based on Mr. F[redacted]'s charge. Section 161 of the NLRA confers investigatory powers on the Board "for the exercise of the powers vested in it by sectio[n] … 160." This means that the Board's investigatory authority is contingent upon a valid charge filed by a "person aggrieved" by an alleged "unfair labor practice." 29

U.S.C. § 160(b). Because the condition precedent that triggers the Board's investigatory authority, as discussed above, has not been and cannot be met here, the Board lacks the authority to investigate FDRLST based on an inherently invalid charge filed by Mr. F[redacted].

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court held unconstitutional an act of Congress providing that "any person may commence a civil suit on his own behalf … to enjoin any person … who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g). *Lujan* held that the "any person" statutory language is unconstitutional because it would allow plaintiffs with generalized grievances to "commence a civil suit" against anyone. Congress cannot by statute expand the "Article III case or controversy" requirement. 504 U.S. at 573.

Thus Congress could not have conferred on NLRB the authority—which *it* did not possess to begin with—to expand the scope of the "person aggrieved" requirement to allow "any person" (29 C.F.R. § 102.9) to file an "unfair labor practice" charge like the one Mr. F[redacted] filed here. NLRB, which can exercise only the authority granted to it by Congress has no power to investigate Respondent under 29 C.F.R. § 102.9. The plain words of 29 U.S.C. § 160(b) foreclose that possibility. The statute has not delegated to NLRB such a broad authority. Congress has already decided that only "persons aggrieved" by an "unfair labor practice" can file a charge. This case, on its face, does not fit the limited category of cases that Congress has authorized NLRB to investigate and prosecute. This tribunal should interpret the statute not to permit "any person" to file a charge because if it interprets the statute to permit that, Section 160(b) would be unconstitutional under *Lujan*.

The Board simply lacks statutory authority to prosecute FDRLST based on a charge leveled by Mr. F[redacted]. NLRA § 160(b) confers prosecution authority on the Board, but that prosecutorial power flows as a consequence of a charge filed by a "person aggrieved" by an "unfair labor practice." Absent a showing that the threshold set by Congress has been met as a matter of law, this entire search-and-destroy operation remains unauthorized by statute. NLRB has stepped outside the metes and bounds of its authority. The case should therefore be dismissed in its entirety.

II. NLRB REGION 2 LACKS PERSONAL JURISDICTION OVER RESPONDENT

The respective residences of FDRLST and Mr. F[redacted]—both outside the geographic boundaries of NLRB Region 2—also reveal NLRB's misguided investigation and prosecution. FDRLST is a Delaware corporation, Stip. ¶ 1, with its principal place of business in Washington, DC. Stip. ¶ 3. Mr. F[redacted] is a resident of Cambridge, Massachusetts. Charging Doc. at 1, ¶ 4a. FDRLST is not "amenable to service of process under [New York's] laws," and therefore NLRB Region 2 has no personal jurisdiction over Respondent. *Metropolitan Life Ins. Co.*, 84 F.3d at 567. Nor would NLRB Region 2's "assertion of jurisdiction compor[t] with the requirements of due process." *Id.* (cleaned up). FDRLST is not "at home" in Region 2 or New York State for general jurisdiction purposes. Region 2 covers neither Delaware nor Washington, DC—respectively, FDRLST's place of incorporation and principal place of business. Region 2, therefore, cannot obtain general personal jurisdiction over FDRLST under the *Daimler* test. 571 U.S. at 137.

Region 2 also lacks specific personal jurisdiction over FDRLST. In unfair-labor-practice cases, the charging party is typically an employee or a collective-bargaining representative of an employee. Mr. F[redacted] being neither, Stip. ¶ 30, underscores the absurdity of this case. It is unsurprising in most situations that employees or unions will file "unfair labor practice" charges in the region where the employer's place of business is located. If an employer has multiple locations across the nation, employees or unions typically file charges in the region where a particular office is located in which an alleged unfair labor practice occurred. Mr. F[redacted]'s charge is far removed from situations that readily meet the *BNSF Railway* specific personal jurisdiction test. 137 S. Ct. at 1559.

The NLRB-supplied form which Mr. F[redacted] filled out and submitted against FDRLST further shows the lack of personal jurisdiction. The very first—and only—instruction at the top of the NLRB-drafted form (Form No. NLRB-501 (2-08)) says: "File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring." Charging Doc. at 1; *see also* 29 C.F.R. § 102.10 ("[A] charge must be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring."). The information Mr. F[redacted] filled out reveals he has absolutely no relationship, nexus, or privity with FDRLST or its employees,

independent contractors, or interns. For example, as the employer's address, Mr. F[redacted] supplied a Chicago, IL address—which is also outside of Region 2. Charging Doc. at 1. He listed "50" in the column for "[n]umber of workers employed" (Charging Doc. at 1); FDRLST in fact has six employees. Stip. ¶ 14. He supplied his own address as Cambridge, Massachusetts—which is also outside Region 2. Charging Doc. at 1. Mr. F[redacted] also provided the following additional information: "I am not an employee of The Federalist." Charging Doc. at 2; *see also* Stip. ¶ 30. It is apparent, on the *face* of the charging document that Region 2 lacks personal jurisdiction.

There is no allegation that FDRLST is "at home" in Region 2, or that its contacts with Region 2 support the assertion of specific personal jurisdiction in this case. Tellingly, because Mr. F[redacted] does not reside in Region 2, there is not—and cannot be—any allegation that the alleged injury was felt in Region 2.

If this charge is allowed to proceed, any random slacktivist with an internet connection will be able 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 a sweeping, roving jurisdiction on the Board to bring suit in a region that cannot establish personal jurisdiction over the respondent company, and the Constitution's Due Process Clause does not permit it. *See Daimler*, *supra*, *BNSF*, *supra*. Region 2's assertion of personal jurisdiction over FDRLST, therefore, is untenable.

The Board's attempt to hale FDRLST into Region 2 does not satisfy New York's long-arm statute. Nor does it satisfy the test articulated by the Supreme Court under the Due Process Clause. That, alone, is reason to dismiss the Complaint in its entirety.

III. NLRB REGION 2 IS AN IMPROPER VENUE

Under the "same standard" as is applicable in determining personal jurisdiction, NLRB Region 2 also is an improper venue to maintain this action. *Gulf Ins.*, 417 F.3d at 355. Given that FDRLST's place of incorporation and principal place of business both are located within NLRB Region 5, it would be unremarkable if a proper charging party (*i.e.*, someone other than Mr. F[redacted]) had instigated

the case in Region 5. *See* NLRB Region 5, https://www.nlrb.gov/region/05/area-served (servicing, as relevant, Delaware except New Castle County, and the District of Columbia).

In whichever manner one chooses to parse Mr. F[redacted]'s charge and the NLRB's subsequent filing of the complaint against Respondent, Region 2 cannot be the proper venue. Neither the Charging Document nor the Complaint shows that either Mr. F[redacted] or FDRLST or any of FDRLST's employees reside within the geographic boundaries of Region 2. The Charging Document and the complaint fail to show that any of the events or conduct that forms the basis of this action occurred within Region 2. The proper remedy to cure improper venue is to transfer the action to the appropriate jurisdiction. *Gonzalez v. Hasty*, 651 F.3d 381, 319 (2d Cir. 2011) (transferring case from S.D.N.Y. to E.D.N.Y. due to improper venue). *See also Denver & R.G. W.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 559–60 (1967) (the 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" because holding otherwise "is patently unfair to the association"). Consequently, Region 2 being an improper venue, the case should be dismissed from this Region.

Alternatively, a transfer from one Region to another is provided for in 29 C.F.R. § 102.33. Under the NLRB regulations, the case could conceivably be transferred to Region 5. Respondent, however, takes no position at the present time on the propriety of the complaint being transferred to Region 5, and reserves the right to seek dismissal of such a complaint because of the underlying problem with Mr. F[redacted] as the charging party.

Given the other insurmountable problems with Mr. F[redacted]'s and the General Counsel's litigation position, such as lack of jurisdiction, the better course of action would be to dismiss the case outright because Mr. F[redacted] is not a person aggrieved and therefore not an appropriate charging party.

* * *

Neither the General Counsel nor the Charging Party should be allowed to file a charging document and complaint subjecting Respondent to a costly administrative-review process on as flimsy a basis as Mr. F[redacted]'s charge. This case is nothing more than the Charging Party's naked attempt at

silencing or punishing FDRLST with administrative process and costs—a form of regulatory harassment—based on a personal opinion expressed by *non-Respondent* Mr. Domenech on his personal Twitter account. That Mr. H[redacted] likely views Mr. Domenech's tweet as not ideologically aligned with his own viewpoint is no reason to marshal NLRB's administrative apparatus and waste its resources on investigating and prosecuting satirical personal opinions against that person's employer.

CONCLUSION

The Complaint against FDRLST Media, LLC should be dismissed forthwith in its entirety.

Respectfully submitted, on the 13th day of January, 2020.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

FDRLST MEDIA, LLC, *Respondent* -and- JOEL P[redacted] *Charging Party*	Case No. 02-CA-243109

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, Respondent's "Motion to Dismiss the Complaint" was electronically filed and served by e-mail and by certified U.S. Mail, return receipt requested on the following parties:

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