UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FDRLST MEDIA, LLC, *Respondent* -and- JOEL FLEMING *Charging Party*	Case No. 02-CA-243109

RESPONDENT FDRLST MEDIA, LLC'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION (ORAL ARGUMENT REQUESTED, 29 C.F.R. § 102.46(g))

June 19, 2020

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INTRODUCTION

Respondent, FDRLST Media, LLC (FDRLST or Respondent), respectfully requests that the complaint against it be dismissed in its entirety. Via this case, the Board has an important opportunity to send a message that NLRB will not tolerate being deputized by random people to harass employers for their employees' personal speech. The Board should resist the unaffiliated charging party's attempt to use NLRB to bully others into silencing controversial personal expression.

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

The complaint should be dismissed because NLRB has no authority to prosecute this action without a "person aggrieved" within the meaning of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169. The Administrative Law Judge (ALJ) and the Board lack subject-matter jurisdiction under the Constitution and the NLRA. Moreover, Region 2 lacked personal jurisdiction over Respondent and was an improper venue to litigate this matter. As such, the complaint should be dismissed forthwith.

On February 7, 2020, the Board denied Respondent's motion to dismiss that had raised the subject-matter jurisdiction, personal jurisdiction, and venue objections. Three days later, ALJ Kenneth W. Chu conducted an evidentiary hearing. Respondent, through undersigned counsel, entered a special appearance, not a general appearance at the hearing and continues to do so. Following the hearing, and simultaneous submission of post-hearing briefs and replies thereto, the ALJ concluded that Respondent engaged in "unfair labor practices [*sic*]." (ALJD 6–7). However, the General Counsel's claim against FDRLST fails as a matter of law because the tweet is protected by the First Amendment and 29 U.S.C. § 158(c). The ALJ's decision should be reversed and his order should be vacated.

STATEMENT OF FACTS

The following facts are common to all exceptions and questions presented:

On June 7, 2019, Mr. Joel Fleming filed a charge with NLRB. *See* R-7 (Charging Document). Despite the Charging Document's clear statement in its one and only instruction—"File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring," R-7 at 1—Mr. Fleming nonetheless decided to file it in Region 2, *i.e.*, a region that has no connection with or relation to FDRLST Media, LLC, the alleged unfair labor practice, Mr. Fleming's place of residence, Respondent's place of incorporation, or to Respondent's principal place of business.

Mr. Fleming erroneously gave a Chicago, Illinois address for FDRLST Media, LLC. R-7 at 1. As stipulated to among the Charging Party, General Counsel for NLRB, and Respondent, that is not Respondent's address. GC-2, ¶¶ 1, 3.

Mr. Fleming erroneously stated that Respondent employs "50" persons. R-7 at 1. As stipulated to among the Charging Party, General Counsel for NLRB, and Respondent, the total number of Respondent's employees is *six*. GC-2, ¶ 14.

Mr. Fleming listed his own residence as Cambridge, Massachusetts, R-7 at 1, which again is not within the geographic limits of Region 2.

Mr. Fleming stated Respondent's "principal product or service" as "Conservative media commentary," R-7 at 1, thus identifying or implying that Respondent or authors published by Respondent express what Mr. Fleming perceives as a particular viewpoint.

Mr. Fleming described the basis of the charge as follows:

> 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): "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." 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 alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce."

R-7 at 2.

Mr. Fleming further described the basis of the charge as exclusively falling under "8(a)(1)," that is, 29 U.S.C. § 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 7 of the Act by threatening to retaliate against employees if they joined or supported a union." R-7 at 3. Mr. Fleming alleged "Ben Domenech" as the "Employer's Agent/Representative who made the statement" on "June 6, 2019." R-7 at 3.

Based on the foregoing facts, the Charging Document, *on its face*, is deficient as a matter of law and cannot support NLRB's assertion of subject-matter jurisdiction and personal jurisdiction over Respondent. This Charging Document should not have triggered NLRB's investigative authority nor its prosecutorial power over Respondent. Respondent moved to dismiss the General Counsel's complaint (which was based solely on the Charging Document) for lack of subject-matter jurisdiction, lack of personal jurisdiction, and improper venue. Respondent's Mtn. to Dismiss dt. 1/13/20. The ALJ initially denied that motion to dismiss and then the Board *sua sponte* vacated and reconsidered the ALJ's decision. Bd. Decision dt. 2/7/20.

On February 7, 2020, the Board issued an order denying Respondent's motion to dismiss. In light of that order and Respondent's preserved right to appeal that order to federal court, Respondent entered a special appearance before the ALJ during the February 10, 2020 hearing held in New York City. R-8 at 6:17–9:11; R-8 at 15:10–16:2.

Mr. Domenech holds the position of Publisher with Respondent FDRLST Media, LLC. GC-2, ¶ 10. FDRLST publishes "The Federalist" web magazine which publishes cultural, political, and religious commentary on a variety of contemporary newsworthy and controversial topics. GC-2, ¶ 31. The Federalist website maintains a Twitter account under the username "@FDRLST." GC-2, ¶ 24. Mr. Domenech maintains a personal Twitter account with the username "@bdomenech." GC-2, ¶ 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." GC-2, ¶ 26.

Mr. Fleming, 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. GC-2, ¶ 30; *see generally* R-7.

On September 11, 2019, the Board filed a complaint against FDRLST based on Mr. Fleming's charge.

The Board 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). The Board looks 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). Thus, if the General Counsel asserts a claim for relief, this tribunal looks to FRCP 12(b) defenses to decide 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 request to dismiss the complaint); *Bethany College*, Nos. 14-CA-201546, 14-CA-201584 (NLRB June 10, 2020) (dismissing complaint for lack of subject-matter jurisdiction).

ARGUMENT

I. THE GENERAL COUNSEL AND CHARGING PARTY FAILED TO ESTABLISH SUBJECT-MATTER JURISDICTION

The complaint should be dismissed because neither Mr. Fleming nor the General Counsel established subject-matter jurisdiction. *See* Exceptions ## 1–31. FDRLST takes exception to the ALJ's finding and conclusion that he and the Board have subject-matter jurisdiction in this case. NLRB lacks statutory authority to investigate and prosecute FDRLST based on Mr. Fleming's charge because Mr. Fleming is not "aggrieved" within the meaning of 29 U.S.C. § 160(b) and he is not within the zone of interests protected by the NLRA.

The General Counsel "has the burden of proving by a preponderance of the evidence that" "subject matter jurisdiction … exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A case is properly dismissed for lack of subject matter jurisdiction … when the [Board] lacks the

statutory or constitutional power to adjudicate it." *Makarova*, 201 F.3d at 113; *Cardox Division*, 268 NLRB 335 (1983).

A. Mr. Fleming Is Not "Aggrieved" Within the Meaning of 29 U.S.C. § 160(b)

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 … : 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. Fleming was not "aggrieved" by the alleged "unfair labor practice." As such, his charge is a legal nullity and could not trigger the Board's subject-matter jurisdiction over FDRLST Media, LLC.

1. The Plain Meaning of the Statute Controls

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 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.

Reading Section 160(b) as eliminating any restriction that Congress imposed on the Board's subject-matter jurisdiction would permit an agency to expand its own jurisdiction without limit any time Congress speaks in the passive voice: "[w]henever it is charged." Agencies have only those powers that Congress delegates to them. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (agencies have "no power to act … unless and until Congress confers power upon [them]."). The use of passive voice in a statute does not alter this fundamental limitation on agency power. And canons of statutory interpretation confirm this reading. Any contrary interpretation is unlawful administrative overreach.

A statute "should be enforced according to its plain and unambiguous meaning." *United States v. Livecchi*, 711 F.3d 345, 351 (2d Cir. 2013). "Congress' intent is best determined by looking to the statutory language that it chooses." *United States v. Monsanto*, 491 U.S. 600, 610 (1989) (cleaned up).

Accordingly, statutory interpretation "begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016); *see also In re Armes Dep't Stores, Inc.*, 582 F.3d 422, 427 (2d Cir. 2009) ("Statutory interpretation always begins with the plain language of the statute."). "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.'" *Greathouse v. JHS Sec., Inc.*, 784 F.3d 105, 111 (2d Cir. 2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). For this reason, 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) (citation omitted). 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 the Board's authority. Although the sentence beginning with the "Provided" clause uses passive voice rather than stating its subject explicitly, the following sentence shows that Section 160(b) contemplates that the person "filing such [a] charge" is a "person aggrieved" by "a[n] unfair labor practice." This is the most straightforward reading and gives meaning to the provision in its entirety.

The Distributive-Phrasing Canon, a tool of statutory construction, dictates that "[d]istributive phrasing applies each expression to its appropriate referent (*reddendo singular singulis*)." Scalia & Garner, *Reading Law* at 214. 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* … unless the person aggrieved *thereby* was prevented from filing *such* charge by reason of service in the armed forces." 29 U.S.C. § 160(b) (emphasis added). 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."

By contrast, reading the aggrieved-person requirement as qualifying only the armed-forces tolling provision, as opposed to *whose* charge authorizes the Board to issue a complaint, illogically twists the words of Section 160(b). There is no support for why Congress, without explanation, would have permitted non-aggrieved persons to file a charge but limited the armed-forces tolling provision to only aggrieved persons. Congress explicitly contemplated that aggrieved persons have a special status under Section 160(b). There is no discernible reason why that special status would apply only in the context of the statute of limitations; nor is there any reason 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. *See, e.g.*, *New York v. Mountain Tobacco Co.*, 942 F.3d 536, 547 (2d Cir. 2019) ("[A] statute should be interpreted in a way that avoids 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.").

2. NLRB Cannot Override Statutory Text by Issuing Contrary Regulations

Reading Section 160(b) to allow "any person" to file a charge also fails because it impermissibly expands the jurisdictional limit that Congress has set on NLRB. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (citation omitted). Section 160(b) so circumscribes NLRB's authority.

An agency cannot expand its own authority or jurisdiction because doing so "would be to grant to the agency the power to override Congress." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. at 357; *see also Long Island Radio Co. v. NLRB*, 841 F.2d 474, 477–78 (1988) (holding that the Equal Access to Justice Act restricted to a 30-day period the jurisdiction of an agency to consider an application for attorneys' fees, leaving the NLRB without authority to expand its own jurisdiction by granting a time extension); *Spencer v. Banco Real, S.A.*, 87 F.R.D. 739, 743–44, 746–47 (S.D.N.Y. 1980) (rejecting a regulation promulgated by the Equal Employment Opportunity Commission that permitted the Commission to issue right-to-sue letters to aggrieved persons prior to a 180-day waiting period because Congress made the waiting period mandatory and jurisdictional, and the Commission's regulation had

the effect of expanding jurisdiction). In fact, when interpreting a statutory limit on jurisdiction, courts will construe provisions more strictly than they "might read the same wording … in a non-jurisdictional provision of the Code." *United States v. Bond*, 762 F.3d 255, 261 (2d Cir. 2014).

Congress could have easily drafted Section 160(b) to grant NLRB roving authority to investigate and enforce the NLRA against suspected violators of the Act. Instead, Congress chose to constrain NLRB's authority to instances when "a person aggrieved" by an alleged unfair labor practice files a charge. Reading Section 160(b) to permit "any person"—regardless of whether that person is aggrieved—to trigger NLRB's authority by filing a charge eviscerates the constraint Congress imposed. Under the any-person reading of Section 160(b), an NLRB Field Attorney could trigger the Board's authority by filing a charge. Such a reading is inconsistent with the plain language of Section 160(b) and would completely undermine the congressional purpose of limiting NLRB's jurisdiction.

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 substantiated, the Board may prosecute the charge by issuing a "complaint" against the charged party. 29 U.S.C. § 160(b). The NLRA protected the "right of employees to organize." 29 U.S.C. § 151. It does not authorize random people like Mr. Fleming 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 the situation and has no connection with the alleged unfair labor practice.

3. Passive-Voice Statutory Provisions Provide Meaningful Limits as to Statutory Actors Because the Context of the Statutory Scheme Clarifies the Meaning

The Supreme Court has looked at a statute's structure to determine the subject of passive-voice provisions since John Marshall was Chief Justice. *See Barron v. City of Baltimore*, 32 U.S. 243 (1833). In interpreting the passive-voice phrase "shall be passed" in Article I, § 9 of the U.S. Constitution, Chief Justice Marshall, writing for the Court, concluded that the meaning is clear by looking at the structure and language of nearby provisions. Looking toward a subsequent section, Article I, § 10

(emphasis added), which reads, "No *State* shall … pass," the Court concluded that Article I, § 9, "however comprehensive its language, contains no restriction on state legislation." 32 U.S. at 248.

As recently as last Term, the Supreme Court employed the same approach as it has since the early-19th Century. At issue in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019), was the construction of the phrase "registration has been made" of 17 U.S.C. § 411(c). Justice Ginsburg writing for the unanimous Court looked closely at the "specific context" of Section 411(c) and nearby sections, 17 U.S.C. §§ 408(f), 410, to conclude that "has been made" refers to "registration" done by the Copyright Office. By reading the statute as a whole, the Court resolved the apparent ambiguity 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 the statutory scheme as a whole to mean the Attorney General, not the courts, is the statutory actor tasked with calculating 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").

Applying the approach the Supreme Court has taken for nearly two centuries identifies the unnamed actor in the first sentence as the "aggrieved person" that Congress identified in the following sentence. *See Barron*, 32 U.S. 243. The General Counsel's reading of the statute, as adopted by the ALJ, contorts the legislative scheme into something it is not and authorizes 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. The NLRA does not give carte blanche harassment power to Mr. Fleming, and it does not grant NLRB a virtually limitless power to investigate and harass an employer whose employees are not aggrieved by something that bothers the agency. Allowing any random person to subject a company to a government-directed and funded unfair-labor-practice action, thus forcing that company to endure the cost of defending against the litigation (as has happened here), contorts the legislative scheme into something it is not and invites abuse.

While "a legislature's use of the passive voice sometimes reflects indifference to the actor," courts do not attribute indifference to the actor if it "would be inconsistent with the 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).

There is nothing in the complaint, the charging document, or any proof submitted at the hearing to the ALJ, that even arguably alleges—let alone proves—that Mr. Fleming is a "person aggrieved" within the meaning of Section 160(b). He is not an employee or independent contractor of FDRLST Media, LLC. GC-2, ¶ 30. He 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" at FDRLST. *See* 29 U.S.C. § 152(3). Nor is he in privity with any employee or independent contractor of Respondent. In fact, there is no nexus or privity whatsoever between FDRLST and Mr. Fleming. He is nothing more than a random person on the internet who does not share Mr. Domenech's views or sense of humor. This lack of privity or protected interest excludes Mr. Fleming from the class of persons who can trigger NLRB's authority.

4. "Person Aggrieved" and "Any Person" Are Coterminous with Article III Standing

Courts have interpreted aggrievement requirements in statutes to require and ensure that a 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 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 broad as is permitted by Article III" (cleaned up)). In other words, we must assume that the purpose of Congress's "person aggrieved" requirement in Section 160(b) was to limit the ability to file a charge to those persons who would have standing to sue the accused employer.

Therefore, 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, 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 v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The General Counsel or Charging Party needed to "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).

Mr. Fleming has suffered *no* "injury in fact." He has suffered no injury to any "legally protected interest" at all. *Laidlaw*, 528 U.S. at 180–81. His purported aggrievement—his personal disagreement with the views Mr. Domenech expressed—is neither "concrete" nor "particularized." Moreover, 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's fabricated 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. Fleming. Noteworthy in this respect, the General Counsel, "as part of the remedy" for the alleged unfair labor practice, sought "an Order requiring Respondent to delete the tweet." GC-1 at 3. The General Counsel, however, failed to prove 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. There was no allegation, and the General Counsel failed to prove, that FDRLST dictates or compels Mr. Domenech's or anyone 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. Fleming was not threatened, so removing the tweet does not remove any threat against him. Tellingly, the ALJ *did not* even order FDRLST to order Mr. Domenech to delete the tweet. And that omission from the ALJ's decision and order shows that removal of the tweet will have no effect upon Mr. Fleming personally, aside from his generalized (and hence non-actionable) objection to its contents. Nor could the ALJ have ordered Mr. Domenech directly to delete the tweet. Mr. Domenech is not a party to this action, and the ALJ could not have ordered a non-party to do or not do something as a "remedy" to resolve this case.

In *NLRB v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 17 (1943), without any analysis of the statutory language, the Court in *dicta* 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." Considering that a labor organization filed the charge, the question of whether Section 160(b) permits a non-employee or non-labor organization to file a charge was not before the Court. *See id.* The one Senator opined that "it was often not prudent for the workman himself to make a complaint against his employer." *Id.* But even that Senator's statement did not go so far as to assume that any stranger should be able to file a charge, and the Supreme Court studiously refrained from endorsing that view in *Indiana & Michigan*. Indeed, FDRLST does not argue that only employees and unions may file a charge. In fact, FDRLST agrees that *any* person—regardless of whether an employee, union, or otherwise—may file a charge, so long as that person is statutorily

aggrieved by the charged unfair labor practice. Aggrievement—not employment status—is the limitation Congress chose to impose on a charging party. That is not to say, however, that employment status is irrelevant. Just because a non-employee and non-union could be aggrieved by an unfair labor practice does not transform Mr. Fleming into an "aggrieved person" within the meaning of Section 160(b).[1] In fact, "if 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's order here does not—and could not—flow to the benefit of Mr. Fleming, thus he is not a proper party.

In *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014), the Supreme Court's task was to construe the meaning of the phrase "any person" in 15 U.S.C. § 1125(a). According to the Court, only those who can "satisfy the minimum requirements of Article III" to commence action could satisfy the "any person" provision. *Id.* That is, the Court did not allow "all factually injured plaintiffs" to commence action but only those whose "interests fall within the zone of interests protected by the law invoked" to commence action. *Id.* So too here.

Lujan itself concluded that the "any person" provision of 16 U.S.C. § 1540(g) cannot be broader than Article III standing. 504 U.S. at 572. And in *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997), the court concluded 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." 108 F.3d at 418. But "Congress cannot, consistent with Article III, … confe[r] 'upon *all* persons … an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law.'" *Id.* (quoting *Lujan*, 504 U.S. at 573) (emphasis in original). *See also 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

[1] To the extent 29 C.F.R. § 102.9 would permit a non-aggrieved person to file a charge, that provision is inconsistent with the statute and therefore devoid of any force or effect.

prospective employer for retaliation"); *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). *See also United States v. Alvarez*, 567 U.S. 709, 720 (2012) (concluding that 18 U.S.C. § 1001, in which the word "any" occurs *nine* times, "does not lead to the broader proposition that false statements are unprotected when made to *any* person, at *any* time, in *any* context" (emphasis added)); *Graham Co. Soil & Water Conservation Dist. v. United States*, 545 U.S. 409, 418 (2005) ("[T]he phrase '*any action* brought under section 3730' is *limited* to § 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party[.]" (emphasis added)); *United States v. Ninety-Three Firearms*, 330 F.3d 414, 423 (6th Cir. 2003) (concluding that the purpose of 18 U.S.C. § 924(d)(1) would not be served by interpreting "any action" to mean both administrative and judicial actions).

The complaint in this case flunks *Lujan*'s three prongs. The standing analysis is relevant not because Article III standing applies to the NLRB proceedings themselves, but because it informs who may be aggrieved by an unfair labor practice and how to construe statutory and regulatory text. *See Trafficante*, *supra*; *Gladstone Realtors*, *supra* (the "person aggrieved" statutory language requires a showing of Article III standing in both administrative adjudications and federal-court cases).

As such, Mr. Fleming does not meet even the minimum requirement to claim aggrievement under 29 U.S.C. § 160(b). And no evidence presented to the ALJ during the evidentiary hearing shows otherwise. The case should be dismissed.

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

Nor does Mr. Fleming fall within the familiar exception to the bar against third-party standing. There is no existing or associational relationship between him and Respondent's employees, independent contractors, their family members, 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. Fleming 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.

In *Elk Grove Unified School District v. Newdow*, 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. 542 U.S. 1 (2004).[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 within the meaning of 29 U.S.C. § 160(b). 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 more attenuated than was Michael Newdow's to his daughter.

6. Mr. Fleming Presents a Mere Generalized Grievance

No one alleged, and no one proved, that Mr. Fleming is a "person aggrieved." Despite this fatal flaw, the ALJ adjudicated a generalized grievance. FDRLST takes exception to the ALJ's adjudication of the mere generalized grievance presented by Mr. Fleming—an error the Board should correct by vacating and reversing the ALJ's decision.

At most, Mr. Fleming, by filing a charge, expressed his concern as a citizen and 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 could wield Section 160 as a sword against business competitors or ideological adversaries. Indeed, statutes are

[2] *Newdow* was abrogated on other grounds by *Lexmark*, 572 U.S. 118. 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.").

"interpreted in a way that avoids absurd results." *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000).

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)).

Having failed to show—indeed specifically disclaiming (by stating in the Charging Document that he is invoking "any person" standing, R-7 at 2)—that Mr. Fleming is a "person aggrieved," NLRB's perfunctory investigation and subsequent filing of a complaint have exceeded their 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 Board should dismiss this action for having been instituted outside of statutory constraints placed upon NLRB by Congress.

B. Mr. Fleming Is Not Within the Zone of Interests Protected by Statute

Mr. Fleming is also not within the zone of interests protected by the NLRA. Try as he might, he could not show—and indeed, neither the General Counsel nor the Charging Party, who did not participate in the hearing before the ALJ, showed—that he is a "person aggrieved" by an unfair labor practice and therefore that he is within the zone of interests the NLRA protects. 29 U.S.C. § 160(b). This shortcoming is another reason why the ALJ erred in assuming jurisdiction. The ALJ and the Board lack subject-matter jurisdiction in the matter at hand. The Board should therefore dismiss the case.

1. The *Lexmark* Zone-of-Interests Test Looks to Traditional Tools of Statutory Interpretation

Lexmark provides an authoritative formulation of the zone-of-interests test. 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, has only those powers authorized by Congress. If "traditional tools of statutory interpretation" show NLRB lacks statutory authority to take an action against Respondent based on a charging document filed by a random person, then the Board 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.* The statute at issue in *Lexmark*, like the statute here (29 U.S.C. § 160(b)), does not specify who may commence action. 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 a random person like Mr. Fleming to charge FDRLST 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 Congress empower such random people to invoke the immense power of the NLRB against someone whom they perceive to be their ideological opponent. Exercising such silencing power would harm the purpose of the NLRA rather than promote it. *See* 29 U.S.C. § 151 (protecting the freedom-of-speech and freedom-of-association rights of both employers and employees).

Canons of construction render the meaning of Section 160(b) clear. They also show that NLRB's interpretation of 29 U.S.C. § 160(b) contained in 29 C.F.R. § 102.9 is deeply flawed and insupportable under any ordinary statutory-interpretation analysis. The statutory-construction analysis this brief has provided thus far is fully applicable in evaluating the *Lexmark* test, and Respondent will not repeat those arguments here.

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. Fleming wishes to wield 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 purported indignation at a joke does not transform him into an aggrieved person falling within the zone of interests protected by the NLRA. Mr. Fleming is not and has never been an "employee" of FDRLST as defined at 29 U.S.C. § 152(3), and FDRLST is not and has never been Mr. Fleming's "employer" as defined at 29 U.S.C. § 152(2). GC-2 ¶ 30.

Here, as in *Lexmark*, "[i]dentifying the interests protected by" the NLRA "requires no guess-work, 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 of § 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 failed to allege—let alone prove—that Mr. Fleming is injured *qua* "employee" or independent contractor of FDRLST, nor as a family member of an employee or independent contractor of FDRLST, nor as a bargaining representative for employees or independent contractors of FDRLST, nor 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. Fleming's "work"—as a lawyer practicing in the state of Massachusetts, or as a self-appointed twitterati—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). The ALJ failed to engage in this analysis—an error the Board should correct by vacating and reversing the ALJ's decision.

2. 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 Administrative Procedure Act (APA), 5 U.S.C. § 702, would still apply. 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. North American 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-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 that the NLRA protects. His interest is unrelated to Section 160(b), which confers charging-party status on a person aggrieved by an alleged unfair labor practice.

Mr. Fleming is *not* a "person aggrieved" by the alleged "unfair labor practice" for purposes of 29 U.S.C. § 160(b). NLRB, 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 FDRLST Based on Mr. Fleming's Charge

The Board also lacked statutory authority to investigate FDRLST based on Mr. Fleming'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." The Board's investigatory authority, therefore, 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 has not been and cannot be met here, the Board lacked the authority to investigate FDRLST based on an invalid charge filed by Mr. Fleming.

Congress could not have conferred on NLRB the authority—which Congress did not possess—to expand the scope of the "person aggrieved" requirement of 29 U.S.C. § 160(b) to allow "any person," 29 C.F.R. § 102.9, to file an "unfair labor practice" charge like the one Mr. Fleming filed here. *See 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). NLRB, which can exercise only the authority granted to it by Congress has no power to investigate FDRLST 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 Congress has authorized NLRB to investigate and prosecute. The Board should interpret the statute not to permit "any person" to file a charge, because if it interprets the statute to empower NLRB to investigate and prosecute based on such faulty charges, it would be casting serious doubt, under *Lujan*, on the constitutionality of Section 160(b).

The Board lacks statutory authority to prosecute FDRLST based on a charge leveled by Mr. Fleming. 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 complaint should therefore be dismissed.

II. NLRB REGION 2 LACKED PERSONAL JURISDICTION OVER FDRLST

Restrictions on a forum's exercise of personal jurisdiction 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) (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). Both the Due Process Clause of the United States 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. State of Wash., Off. of Unemployment Compensation & Placement*, 326 U.S. 310, 311, 321 (1945). A forum's exercise of jurisdiction must, therefore, satisfy both the laws of the state in which the tribunal sits and "the requirements of due process." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.

1996) (cleaned up); *see also Walden v. Fiore*, 571 U.S. 277, 283 (2014) (identifying the forum state's law and the Due Process Clause as the two factors in the personal-jurisdiction inquiry).

The forum in this case was NLRB Region 2, a geographic area fully contained within the boundaries of New York State, https://www.nlrb.gov/regions/10/area-served. The General Counsel or Mr. Fleming, as the party who brought the action, had the burden to prove the propriety of Region 2 exercising personal jurisdiction over FDRLST, a non-resident. *See Friedman v. Bloomberg L.P.*, 884 F.3d 83, 90 (2d Cir. 2017); *Metropolitan Life*, 84 F.3d at 566. When an evidentiary hearing is held to establish jurisdiction, the General Counsel "must demonstrate … personal jurisdiction over the [respondent] by a preponderance of the evidence." *Id.* at 567. If no evidentiary hearing is held and the General Counsel conducts "extensive discovery regarding the [respondent's] contacts with the forum," then the General Counsel'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 [respondent]." *Id.* (cleaned up).

The ALJ erred by exercising personal jurisdiction over FDRLST in Region 2. *See* Exceptions ## 32–54. Neither the General Counsel nor Mr. Fleming articulated any grounds to support Region 2's exercise of personal jurisdiction over FDRLST under New York's long-arm statute and the Due Process Clause. At the outset of the February 10 evidentiary hearing in front of the ALJ, FDRLST entered a special appearance, not a general appearance, to give the General Counsel and Mr. Fleming an opportunity to establish "jurisdictional facts." *Chen v. United States Sports Academy, Inc.*, 956 F.3d 45, 56 (1st Cir. 2020). Establishing jurisdictional facts is not burdensome; an affidavit suffices. *Id.* at 55–57. Neither the General Counsel nor the Charging Party, who had full opportunity to do so, have provided any evidence to prove such jurisdictional facts. Accordingly, FDRLST takes exception to the ALJ's finding that Region 2 had personal jurisdiction over FDRLST Media, LLC in this case.

A. FDRLST Is Not Amenable to Service in New York

A non-resident is subject to jurisdiction under New York law when the non-resident "is amenable to service of process" under New York law. *Metropolitan Life*, 84 F.3d at 567. As relevant here, 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 anywhere to supply goods or services in the state; or 2. commits a tortious act within the state[.]" N.Y. C.P.L.R. § 302(a). Moreover, the cause of action against a 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 of the Fourteenth Amendment." *Cuccioli v. Jekyll & Hyde Neue Metropol Bremen Theater Produktion GmbH*, 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, 71 (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.*

In this case, FDRLST did not come within the reach of New York's long-arm statute and was not amenable to service under New York Law. The General Counsel asserted that Mr. Domenech's tweet "occurred on the Internet, not in a specific geographical NLRB Region." GC Opp'n to FDRLST's Mtn. Dismiss at 7. That is not, however, how the law works. In fact, 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. *See, e.g.*, *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 253 (2d Cir. 2007) (collecting cases that hold 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 in this case that Mr. Domenech published his tweet from New York or directed his tweet at anyone in New York. Worse yet, the General Counsel did not even allege that anyone in New York read the tweet. FDRLST therefore takes exception to the ALJ's implicit conclusion that Region 2 had personal jurisdiction over FDRLST under New York law.

B. Haling FDRLST to Region 2 Offends Due Process

The Due Process Clause limits a forum's adjudicatory authority over a defendant 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); *see also Mussat v. IQVIA, Inc.*, 953 F.3d 441, 446 (7th Cir. 2020) ("[I]n federal court it is the Fifth Amendment's Due Process Clause that is applicable, but the mention of the Fourteenth Amendment [in the Supreme Court's cases] ma[kes] no difference" in a federal court's analysis.); *but see Bristol-Myers*, 137 S. Ct. at 1783–84 ("[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question of whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.").[3]

A forum's exercise of specific personal jurisdiction satisfies due process 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 non-moving 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.*

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[3] The limits of specific jurisdiction on federal forums under the Fifth Amendment have been questioned recently. For instance, this past March, Judge Silberman reasoned that "the Fifth Amendment requires only that the claims at issue in a federal court arise out of the defendant's minimum contacts with the United States as a whole." *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 308 (D.C. Cir. 2020) (Silberman, J., dissenting). Under Judge Silberman's reasoning, federal statutes and rules place further limits on a federal forum's exercise of specific jurisdiction. *Id.* This theory, notably, only received one vote. A better understanding of specific jurisdiction in federal forums is that the forum's rules and organic statute place the same limits as a state court's long-arm statute, and the Fifth Amendment's Due Process Clause applies as a constitutional backstop in the same manner as the Fourteenth Amendment's Due Process Clause. *See Mussat v. IQVIA, Inc.*, 954 F.3d at 446 (announcing that there is no difference in the application of the two Due Process Clauses).

In other words, by carving the nation into geographical regions, the Board has limited the geographical reach of those regions for jurisdictional purposes. This understanding is consistent with the Board's own rules, which require a charging party to file a charge in the region in which the unfair labor practice allegedly occurred. 29 C.F.R. § 102.10. Mr. Fleming's failure to do so here reinforces Region 2's lack of specific jurisdiction and informs the violation of due process discussed throughout this section.

Rudzewicz, 471 U.S. 462, 464, 472 (1985) (citations omitted). Unless a non-resident defendant has "certain minimum contacts" with the forum, haling them in to defend a suit in the forum will offend "traditional conceptions of fair play and substantial justice." *Id.* at 464 (quoting *International Shoe*, 326 U.S. at 320).

In *Bristol-Myers*, the Supreme Court recently reiterated that a court determining whether personal jurisdiction is present "must consider a variety of interests," including those of the forum "and of the plaintiff proceeding with the case in the plaintiff's forum of choice." 137 S. Ct. at 1780 (citation omitted). Importantly, however, the Court maintained that "the primary concern is the burden on the defendant." *Id.* (cleaned up). In addition to various 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.* This inquiry 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 AG v. Bauman*, 571 U.S. 117, 126 (2014) (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). In other words, a non-resident's contacts with a forum are insufficient to establish jurisdiction unless the litigation arises out of those contacts. *See Daimler*, 571 U.S. at 126–27.

A forum's exercise of personal jurisdiction will comport with "fair play and substantial justice" in two categories of instances—general or specific jurisdiction—in different respects. *Id.* at 126. FDRLST is subject to neither general nor specific jurisdiction in Region 2 based on the allegations in this case.

1. General Jurisdiction

For general personal jurisdiction over FDRLST to be valid, the General Counsel or Charging Party had to show that FDRLST is "at home" in Region 2. *Daimler*, 571 U.S. at 137. Corporate 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.

There was no allegation, and neither the General Counsel nor the Charging Party produced any proof at the evidentiary hearing, that FDRLST is "at home" in Region 2. FDRLST is incorporated in Delaware and has its principal place of business in Washington, DC. This places FDRLST "at home" in NLRB Region 4, https://www.nlrb.gov/regions/12/area-served (servicing, as relevant, New Castle County, Delaware); and NLRB Region 5, https://www.nlrb.gov/regions/13/area-served (servicing, as relevant, the District of Columbia).

The jurisdictional facts relevant to FDRLST's "home" jurisdictions were stipulated to by the parties, GC-2, ¶ 30, entered into among the General Counsel, Mr. Fleming, and FDRLST. Region 2 covers neither Delaware nor Washington, DC, respectively. Region 2, therefore, cannot obtain general personal jurisdiction over FDRLST under the *Daimler* test. 571 U.S. at 137. To the extent that the ALJ's exercise of personal jurisdiction over FDRLST was based on general jurisdiction, Respondent takes exception to that erroneous finding.

2. Specific Jurisdiction

"Specific jurisdiction is very different." *Bristol-Myers*, 137 S. Ct. at 1780. For specific personal jurisdiction over FDRLST to be valid, the General Counsel or Charging Party 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). Specific jurisdiction exists only when the cause of action "arise[s] out of or relate[s] to the defendant's contact with the forum[.]" *Helicopteros*, 466 U.S. at 414 n.8.

More specifically, the non-moving party must show that (1) the defendant has "purposefully directed its activities at residents of the forum"; (2) the plaintiff's claims "arise out of or relate to" those activities directed at the state; and (3) whether the exercise of personal jurisdiction would "comport with fair play and substantial justice" so as to be constitutionally reasonable. *Burger Kin*, 471 U.S. at 472, 476 (cleaned up). To resolve the third component, courts look to several factors, including "the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's

interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 477 (cleaned up); *see also Asahi Metal Indus. Co., Ltd. v. Superior Ct.*, 480 U.S. 102, 113 (1987).

A tribunal's adjudicatory authority under specific jurisdiction is limited to those "'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Goodyear*, 564 U.S. at 919 (citation omitted). "[T]he commission of certain 'single or occasional acts' in a State may be sufficient to render a corporation answerable in that State with respect to those acts" without rendering the corporation subject to jurisdiction more generally "with respect to matters unrelated to the forum connections." *Goodyear*, 564 U.S. at 923 (citation omitted). 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 (citation omitted).

Applying these due-process principles to the underlying action, NLRB Region 2 was not empowered to exercise personal jurisdiction over FDRLST in this case. There was no allegation that FDRLST purposefully directed *any* contacts at the residents of New York—let alone the minimum contacts relating to this case necessary to satisfy due process. This claim is in no way related to any contacts that FDRLST may have within Region 2. There is no allegation that Mr. Domenech, FDRLST, or any person aggrieved by the tweet resides in Region 2. Mr. Fleming, for his part, is a resident of Cambridge, Massachusetts, and did not allege any harm that occurred within Region 2. R-7, ¶ 4a. Even assuming Mr. Fleming were capable of being "aggrieved" by Mr. Domenech's tweets—which he is not—Mr. Fleming, a resident of Cambridge, Massachusetts, also lacks any plausible connection to Region 2. 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*, 84 F.3d at 567.

Nor did Mr. Fleming or Region 2 have any interest in deciding this suit in a forum with no relation to either the Respondent or the facts underlying the action. The burden on FDRLST far exceeded any negligible interest the forum or Charging Party may have had. As the Supreme Court

has held, the burden on the defendant is "the primary concern." *Bristol-Myers*, 137 S. Ct. at 1780. NLRB Region 2's assertion of jurisdiction did not "compor[t] with the requirements of due process." *Id.* (cleaned up). Consequently, haling FDRLST into Region 2 offends due process of law.

In unfair-labor-practice cases, the charging party is typically an employee or a collective-bargaining representative of the employees. Mr. Fleming being neither, GC-2, ¶ 30, underscores the absurdity of this case. 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 an employer has multiple locations across the nation, employees or employee associations typically file charges in the region where a particular office is located and in which an alleged unfair labor practice occurred. Mr. Fleming's charge is far removed from situations that readily meet the *BNSF Railway* specific personal jurisdiction test. 137 S. Ct. at 1559.

Even if Mr. Fleming had some nexus or privity with FDRLST or its employees, that would not put this matter in Region 2 because the suit does not arise out of a transgression in New York. FDRLST, and the allegations against it, have no relation to the forum, and it would offend notions of fair play and substantial justice to hale FDRLST, given the facts of this case, to Region 2.

It was, thus, apparent *on the face* of the charging document that Region 2 lacked personal jurisdiction. That deficiency was further underscored later by the factual stipulation, GC-2, ¶ 30, entered into among the General Counsel, Mr. Fleming, and FDRLST.[4]

Tellingly, because Mr. Fleming 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

[4] The initial attempt at investigation by Region 2 also shows that Region 2 lacked personal jurisdiction over FDRLST. Based on the incorrect address supplied on the Charging Document, and also presumably based on incorrect information found by NLRB personnel, NLRB served "Subpoena Duces Tecum B-1-15S84ZF" and "Subpoena Ad testificandum A-1-15S83QZ" by certified and regular mail on "Custodian of the Records" of "FDRLST Media, LLC" at the following two incorrect addresses: (1) "Chicago, IL 60646"; and (2) "Alexandria, VA 22309." GC-1, Ex. C. Neither FDRLST's business nor its custodian is located at either of those two addresses. Ms. Fatima Powell, "Designated Agent of NLRB" signed an affidavit stating truthfully that she mailed by certified and regular mail the two aforementioned subpoenas to the two aforementioned mailing addresses. GC-1, Ex. C. Neither of these two places falls within Region 2.

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 sweeping, roving jurisdiction to bring suit in a region that cannot establish personal jurisdiction over the respondent company. The Constitution's Due Process Clause forbids NLRB from exercising such nationwide personal jurisdiction. *See Daimler*, 571 U.S. at 121–22; *BNSF Railway*, 137 S. Ct. at 1554. Region 2's assertion of personal jurisdiction over FDRLST, therefore, is untenable.

The ALJ's acceptance of the General Counsel's theory that tweets occur everywhere the internet reaches does not change this analysis. In *Chen*, a student residing in Massachusetts filed suit against an Alabama corporation that offered an online learning platform granting advanced degrees. The court concluded that the defendant had not purposefully availed itself of the laws of Massachusetts by operating a website that the plaintiff had accessed in Massachusetts. *Id.* at 60–61. Even a highly interactive website, such as the defendant's in *Chen*, does not suffice to show purposeful availment under the Due Process Clause. *Id.* So too here. By assuming that online statements subject a nonresident to specific personal jurisdiction in every forum with internet access, the ALJ conflated general and specific personal jurisdiction. But the Supreme Court has made clear repeatedly in its recent decisions that "[s]pecific jurisdiction is very different" from general jurisdiction. *Bristol-Myers*, 137 S. Ct. at 1780; *see also BNSF*, 137 S. Ct. 1558; *Daimler AG*, 571 U.S. 118.

The Charging Party's and the General Counsel'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. The Region 2 ALJ erred in ignoring FDRLST's entry of special appearance and proceeding to the hearing on the merits by erroneously and implicitly asserting Region 2's personal jurisdiction over FDRLST. The ALJ failed to look at the stipulated jurisdictional facts that *are* in the record and which unambiguously show that Region 2 lacked personal jurisdiction over FDRLST. The Board should therefore dismiss the complaint.

III. NLRB REGION 2 WAS AN IMPROPER VENUE

The "same standard of review" applies to ascertain propriety of venue as applies to dismissals for lack of personal jurisdiction. *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, "if the court holds an evidentiary hearing, the [General Counsel or Charging Party] must demonstrate [venue] by a preponderance of the evidence." *CutCo Indus. v. Naughton*, 806 F.2d 341, 364–65 (2d Cir. 1986) (cleaned up). The General Counsel or Charging Party bears 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).

A respondent business entity "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 General Counsel or Charging Party needed to show this Region has personal jurisdiction over FDRLST at the time the action was commenced.

NLRB rules, specifically 29 C.F.R. § 102.10, set the venue in which an aggrieved party's charge must be filed: "with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring." The NLRA's venue provisions, 29 U.S.C. §§ 160(e) and (f), provide geographic limitations on where the Board may petition for an enforcement order and where a party aggrieved by the Board's final order may seek redress. *Brentwood at Hobart v. NLRB*, 675 F.3d 999, 1002 (6th Cir. 2012). Like the Board's rule determining where an aggrieved party must file a charge, both venue provisions provide a place that "turns on classic venue concerns—'choosing a convenient forum.'" *Id.* (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006)). Also, like the Board's rule, Sections 160(e) and (f) "permi[t] the action to proceed in the circuit where 'the unfair labor practice in question' occurred." *Brentwood at Hobart*, 675 F.3d at 1002. Unlike 29 C.F.R. § 102.10, the NLRA's venue provisions also permit actions to proceed in the United States court of appeals in the circuit where the Respondent "resides or transacts business" or the D.C. Circuit. 29 U.S.C. §§ 160(e), (f). The NLRA's venue provisions are focused on convenience and the "provisions ensure that the company will not be forced to defend an action in a faraway circuit." *Id.* It follows that a charging party must file its charge where the alleged unfair labor practice occurred—as 29 C.F.R. § 102.10 *requires*—so a

respondent does not have to defend against a charge at the administrative level in some faraway Region with no connection to the case, as has happened here.

There was no allegation that the alleged unfair labor practice in this case occurred in Region 2; nor is Region 2 the residence of FDRLST, its employees, or any person who could conceivably be statutorily aggrieved by the joke in Mr. Domenech's tweet. Not even Mr. Fleming resides in Region 2. So, in addition to not being "aggrieved" as required by the NLRA, Mr. Fleming has shown he is so removed from the alleged unfair labor practice that he was not able to guess accurately where the alleged incident occurred for purposes of filing his charge correctly. Having supplied a Chicago, Illinois address for FDRLST, Mr. Fleming filed the charge in Region 2, whose geographic boundaries are contained within the state of New York. Even assuming Mr. Fleming thought the Chicago, Illinois address was accurate at the time he filed the charge, it is hard to see his decision to file the charge in Region 2 as anything other than a forum-shopping or inconvenience-generating tactic. And the NLRB fell for it. Permitting such non-aggrieved persons to file charges incentivizes forum shopping, sends NLRB on wild goose chases, and foments frivolous litigation that innocent parties like FDRLST must finance.

Under the "same standard" as is applicable in determining personal jurisdiction, NLRB Region 2 also was an improper venue to maintain this action. *Gulf Ins.*, 417 F.3d at 355. The General Counsel and the ALJ were capable of curing the personal-jurisdiction objection early on. Given that FDRLST's place of incorporation is in Region 4 and its principal place of business is located within NLRB Region 5, it would have been proper if a proper charging party (*i.e.*, someone other than Mr. Fleming who was actually aggrieved) had instigated the case in Region 4 or 5. Region 2 could have been proper only if there were an actual aggrieved party in Region 2 such that the alleged unfair labor practice, *i.e.*, the harm, occurred in Region 2. The ALJ failed to consider these crucial jurisdictional facts. The Board should therefore reverse the ALJ's decision.

No proof was brought forward by either the General Counsel or the Charging Party at the ALJ's evidentiary hearing. Neither the General Counsel nor the Charging Party showed—because they could not—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 was to transfer the action to the appropriate jurisdiction. *Gonzalez v. Hasty*, 651 F.3d 318, 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 have been transferred out of Region 2.

Such transfer from one Region to another is provided for in 29 C.F.R. § 102.33. Under the NLRB regulations, the case should have conceivably been transferred to Region 5. Such a transfer would have addressed not only FDRLST's venue objections but the lack of personal jurisdiction as well—granted, the Board would still lack subject-matter jurisdiction. But the ALJ did not so transfer. Therefore, FDRLST takes exceptions to ALJ's assertion of personal jurisdiction over FDRLST in an improper venue. *See* Exceptions ## 32–54

IV. THE GENERAL COUNSEL AND MR. FLEMING FAILED TO PROVE THAT FDRLST ENGAGED IN AN UNFAIR LABOR PRACTICE, AND THE ALJ ERRED IN CONCLUDING OTHERWISE

The General Counsel alleged in the complaint:

> On June 6, 2019, Respondent, by Domenech, via the Twitter account https://twitter.com/bdomenech, threatened employees with reprisals and implicitly threatened employees with loss of their jobs if they formed or supported a union. [¶] By the conduct described above in paragraph 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

GC-1, ¶¶ 6–7. The General Counsel failed to prove that sweeping allegation and FDRLST takes exception to the ALJ's finding 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." ALJD 6:25–26. *See* Exceptions ## 55–101.

A. The General Counsel Offered Only Speculation About Mr. Domenech's Twitter Use

Establishing that Mr. Domenech speaks for and on behalf of Respondent—and that he did speak on behalf of Respondent when he published the tweet—is a central, threshold question on which the General Counsel adduced no proof. Instead, the Counsel for General Counsel assigned to this case only offered his own speculation and assumptions, neither of which constitutes proof on this important threshold issue. Thus, it would have been necessary for the ALJ to peruse the contents of the tweet only if the General Counsel had proved that Mr. Domenech spoke for and on behalf of FDRLST to FDRLST's employees (as opposed to the general public) when he published the tweet. Absent such a finding, the ALJ's decision suffers from an incurable flaw.

Respondent proved at the February 10, 2020 evidentiary hearing that Mr. Domenech speaks for himself, not for FDRLST, through his personal Twitter account:

- "I use my personal Twitter account to engage in expressive speech and conduct by posting tweets, re-tweets, replies to tweets, following other Twitter users, liking others' tweets, as well as blocking or muting content." R-3, ¶ 7.
- "I created my personal Twitter account in June of 2008. Since then, I have maintained sole and exclusive control over my personal Twitter. My posts on my personal Twitter account reflect my views, not those of FDRLST Media, LLC." R-3, ¶ 8.

The ALJ failed to appreciate the difference between Mr. Domenech's email use and his Twitter use. In his opening statement, the General Counsel offered, not proof, but the following speculative observation: "The Respondent may argue that the tweet cannot be attributed to the Employer, because it was made from Mr. Domenech's personal account, but that argument is empty. Mr. Domenech himself does not distinguish between his so called 'personal accounts' and those owned by Respondent in addressing employees, as his use of email shows." R-8 at 13:17–22.

It was an illogical leap for the ALJ to conflate email use with Twitter use. Assuming so implicitly led the ALJ to conclude that Mr. Domenech's tweet was "directed to the employees of FDRLST." ALJD 5:19. There is nothing in the record suggesting Mr. Domenech uses his personal Twitter account

to communicate with FDRLST's employees regarding business matters. In fact, the parties have stipulated: "Since at least January 1, 2019, Ben Domenech has communicated with (and continues to communicate with) Respondent employees about Respondent's business matters using his own personal *e-mail* account(s) as well as an *email* account owned by Respondent." GC-2, ¶ 28 (emphasis added). The parties did not stipulate—and the General Counsel did not prove—that Mr. Domenech uses his personal Twitter account to communicate with FDRLST employees about FDRLST's business matters. Mr. Domenech, via affidavit, testified he uses his personal Twitter account to express his personal views, "not those of FDRLST Media, LLC." R-3, ¶ 8. He testified that the tweet was "satire and an expression of [his] personal viewpoint on a contemporary topic of general interest." R-3, ¶ 5. Mr. Domenech uses his "personal Twitter account to engage in expressive speech and conduct." R-3, ¶ 7. Nor did the two employees who confirmed they saw the tweet in question construe the tweet as anything other than Mr. Domenech's satirical commentary on a then-current topic. *See* R-4; R-5.

The General Counsel stated the applicable rule during the hearing but failed to factually prove the elements of that rule. The General Counsel stated: "In determining whether a statement violates [Section] 8(a)(1) [of the NLRA], the Board … consider[s] … *only whether an employee would reasonably understand the statement as threatening adverse action in response to protected activities.*" R-8 at 13:7–11 (emphasis added). Two employees, represented by counsel separate from FDRLST's counsel, who saw the tweet in question and offered testimony for the record, both stated unambiguously in their respective sworn affidavits that they did not perceive the tweet as a threat, reprisal, use of force, or promise of benefit. *See* R-5, ¶¶ 8–9; R-4, ¶¶ 8–9.

The General Counsel failed to prove, when objectively viewed under the applicable totality-of-the-circumstances test, that Mr. Domenech's tweet was an "unfair labor practice" within the meaning of the NLRA. NLRB's test "is whether under all circumstances the remark reasonably tends to restrain, coerce, or interfere with the employees' rights guaranteed under the Act." *GM Electrics*, 323 NLRB 125, 127 (1997).

At the hearing, the General Counsel failed to prove that a FDRLST employee reasonably would take Mr. Domenech's satire to be threatening bad consequences, loss of a job, or promise of a

benefit. The General Counsel failed to prove that a FDRLST employee would reasonably perceive Mr. Domenech's statement as anything other than a joke.

In fact, at the hearing, Respondent proved that FDRLST employees understood the tweet to be satire. Two employees voluntarily submitted sworn affidavits, under penalty of perjury, and independently represented by counsel of their choice, in support of Respondent and against NLRB, stating:

- "The Tweet was a satirical and funny way of expressing personal views on a contemporary topic. … I did not in any manner perceive Mr. Domenech's Tweet as a threat, reprisal, use of force, promise of benefit, or in any manner whatsoever as touching, concerning, or relating to any workplace activity that is protected under the National Labor Relations Act." R-5, ¶¶ 8–9.
- "The Tweet was funny, obviously sarcastic, and was a pithy way of expressing personal views on a contemporary topic." R-4, ¶¶ 8–9.

The General Counsel failed to prove the essential element of the test that, by his own concession, the Board uses in determining whether a statement violated NLRA Section 8(a)(1). Despite this failure of proof, the ALJ erroneously concluded—without pointing to facts or supporting law—that the tweet was threatening. ALJD 6:25. Having failed to support his central conclusion, the ALJ's decision against FDRLST, should therefore be vacated.

The General Counsel's failure of proof also reveals the strangeness of this case where FDRLST's employees or those in privity with them are *not* the charging parties. It shows that this case is nothing short of harassment of FDRLST by Mr. Fleming—abetted by NLRB. If the General Counsel's case-in-chief proves anything, it proves that FDRLST is being subjected to a costly, unnecessary, and unconstitutional administrative process. This onerous and unconstitutional process is the punishment here. For administrative adjudications like this one, 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., U.S.A. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979); *cf. Bartkus v. Illinois*, 359 U.S. 121, 127 (1959) (holding that "the cruelty of harassment by … prosecutio[n]" can violate the Due Process Clause of the Fifth Amendment).

The ALJ only compounded the General Counsel's failure of proof by inserting his own evidence-less and context-less speculation of what the tweet means. *See* (ALJD 4:33–5:11). The Board should forthwith rule as a matter of law in favor of FDRLST and dismiss the complaint against FDRLST in its entirety.

B. The General Counsel's Perception of FDRLST as an "Anti-Union Website" Is Insufficient to Prove that FDRLST Engaged in an Unfair Labor Practice

The General Counsel, perhaps unwittingly, revealed the true reason why NLRB, goaded by Mr. Fleming, is harassing FDRLST:

> The Federalist, anti-union website, is demonstrated by its editorial content. As the publisher of The Federalist, and CEO of the Respondent, the editorial positions of the website are reasonably understand – understood [*sic*] as Mr. Domenech's own. In light of the anti-union position of The Federalist, an apatory (phonetic), Mr. Domenech, no reasonable reader would interpret the threat as anything other than simply another expression of Mr. Domenech's anti-union stance. The foregoing being so, the facts demonstrate Respondent's violation of the Act, and Your Honor should so find. That's it.

R-8 at 14:4–14 (underlining in original); *see also* R-8 at 22:17–24 (General Counsel stating that he introduced certain exhibits "for the purpose of showing The Federalist's *political position* on unionization (underlining in original; emphasis added)). The General Counsel's entire theory of the case—not proof, but theory—is that tweeting a seemingly anti-union joke is a *per se* violation of the NLRA. For reasons explained below, that cannot be so.

FDRLST, as stipulated by the parties, "is a web magazine focused on culture, politics, and religion that publishes commentary on a wide variety of contemporary newsworthy and controversial topics." GC-2, ¶ 31. It expresses a variety of viewpoints of outside authors. The General Counsel introduced, and the ALJ admitted into evidence, newspaper articles written around the time Mr. Domenech published his tweet. *See* GC-3 & Exhibits attached thereto. All of these newspaper articles

show the respective authors' viewpoints on a contemporary, controversial topic. And the corresponding articles introduced by FDRLST, and admitted into evidence by the ALJ—to show those articles were published elsewhere *in addition to* being published on FDRLST's website and where the *authors* solicited publication on FDRLST's website, not vice versa—prove that FDRLST provides a forum for a variety of authors to express their personal views. *See* R-1; R-2.

The General Counsel did not present *any* evidence that FDRLST has published any so-called anti-union editorial authored by FDRLST's editorial board—and there is none. As to op-eds published by FDRLST employees, if any, those op-eds also express viewpoints of the respective authors, *not* the viewpoint of FDRLST. In any event, the General Counsel presented *no* evidence apart from his speculative leap to show why all of these individual viewpoints can be conflated with, attributed to, or necessarily become the viewpoints of FDRLST. And the General Counsel presented *no* evidence, even assuming these are FDRLST's viewpoints, that FDRLST therefore has actually threatened its employees such that it constituted an actionable "unfair labor practice."

NLRA defines "unfair labor practices by employer." 29 U.S.C. § 158(a). Employers engage in an "unfair labor practice" if they, for example, "interfere with, restrain, or coerce employees in their exercise of [§ 157 rights]," dominate or interfere with the formation or administration of any labor organization," "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter," "to refuse to bargain collectively with the representatives of his employees." *Id.* However, the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

Even under an expansive reading of "unfair labor practice," FDRLST did not engage in a practice that can be categorized as a "*labor* practice," let alone an "*unfair* labor practice." Non-respondent Mr. Domenech posted a satirical comment on his personal Twitter account. A stranger—Mr.

Fleming—saw Mr. Domenech's tweet. Mr. Fleming's delicate sensibilities were apparently offended, either by Mr. Domenech's tweet, his Twitter persona, or by the mere fact that others could hold viewpoints different from Mr. Fleming's. Mr. Fleming even re-tweeted Mr. Domenech's tweet. *See* R-6. Mr. Domenech did not interfere with, restrain or coerce FDRLST employees—or Mr. Fleming—in any manner whatsoever.

C. Prosecution Based on the General Counsel's Perception of FDRLST Violates the First Amendment and NLRA Section 158(c)

Assuming *arguendo* that the personal views of Mr. Domenech, FDRLST, and FDRLST's employees or invited authors (as expressed through articles that are admitted into evidence) are all one and the same, then that provides all the more reason for NLRB to keep its hands off FDRLST. These individuals have banded together because they share common beliefs. Publishing these common beliefs, even if they are disfavored by some, is necessary for a functioning democratic society. Protecting this right and freedom of association, protecting and encouraging the formation of such associations is the very reason NLRB purportedly exists.

The General Counsel's theory of the case is that a publisher's "expression of [an] anti-union stance" is a "violation of the Act." R-8 at 14:4–14. This *per se* rule against speech by groups who allegedly hold a viewpoint that the General Counsel disfavors would interfere with the freedom-of-speech, freedom-of-press, and freedom-of-association rights of those who have banded together based, at least in part, on such shared beliefs. The ALJ's adoption of the General Counsel's far-fetched theory only achieves the exact opposite of NLRB's stated mission.

The right to speak or associate freely is sacrosanct under the First Amendment to the U.S. Constitution. "The First Amendment gives freedom of mind the same security as freedom of conscience. … And the rights of free speech and free press are not confined to any field of human interest." *Thomas v. Collins*, 323 U.S. 516, 531 (1945); *see also Knight First Amendment Inst. at Columbia v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) ("As a general matter, social media is entitled to the same First Amendment protections as other forms of media."). Indeed, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different

medium for communication (such as Twitter) appears. *Joseph Burstyn, Inc v. Wilson*, 343 U.S. 495, 503 (1952); *see also Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011).

It is "not sound" to claim that "the First Amendment's safeguards" are rendered ineffectual or "wholly inapplicable" because "interests of workingmen are involved." *Thomas*, 323 U.S. at 531. Indeed, "debate 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 is "a form of artistic expression" that is "protected by the First Amendment." *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc.*, 886 F.2d 490, 493 (2d Cir. 1989).[5] It is "deserving of substantial freedom" either as "entertainment [or] as a form of social and literary criticism." *Id.* (cleaned up). It is "axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). "In the realm of private speech or expression, government regulation must not favor one speaker over another." *Id.* "Discrimination against speech because of its message is *presumed* to be unconstitutional." *Id.* (emphasis added). Like here, where the "government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. NLRB "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

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[5] "Satire" means "'ridicule, derision, burlesque, irony, parody, [or] caricature' to censure the 'vices, follies, abuses, or shortcomings' of an individual or society." *Farah v. Esquire Magazine*, 736 F.3d 528, 536 (D.C. Cir. 2013). Satire has "played a prominent role in public and political debate. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54 (1988); *see also FCC v. Pacifica Foundation*, 438 U.S. 726, 745–46 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."). That the Charging Party, the General Counsel or the ALJ found no humor in Mr. Domenech's statement has no bearing on whether the tweet is satire and subject to the First Amendment's protections.

What's more, 29 U.S.C. § 158(c) also specifically 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." *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (Section 158(c) "merely implements the First Amendment by requiring that the expression of any views, argument, or opinion shall not be evidence of an unfair labor practice." (cleaned up)). The view, argument, or opinion expressed in Mr. Domenech's tweet is precisely the type of expression that is protected by the First Amendment and Section 158(c). This case is nothing more than a naked attempt at silencing a disfavored viewpoint. NLRB ill serves its mission by falling for such an obvious attempt by an ostensibly offended random activist to unleash the force of government prosecution and to chill constitutionally protected freedom of speech, of the press, and of association.

FDRLST takes exception to the ALJ's finding that Mr. Domenech's tweet is an idiom with only one meaning and to the ALJ's failure to find that the tweet was satire protected under the First Amendment. ALJD 4:32–5:11 & 6 n.9. The tweet is satire as shown through context, the absurdity of the statement, and the satirical way it was taken by FDRLST employees.

D. Humor and Satire Do Not Violate the NLRA Without Independent Proof of Threat

The General Counsel laid bare the entire basis for prosecuting this case against FDRLST:

- "the virulently anti-union editorial stance of The Federalist," GC Br. at 4[6];
- the General Counsel's speculation that "The Federalist is a vehemently anti-union website," GC Br. at 7; and
- the General Counsel's assumption that "[i]n light of the anti-union position of The Federalist and, *a fortiori*, Mr. Domenech, no reasonable reader would interpret the threat explicitly made in the Tweet as anything other than another expression of Mr. Domenech's anti-union sentiment," GC Br. at 7 (italics in original).

[6] The General Counsel filed a substantive brief providing legal argument and caselaw support for its theory for the first time on March 10, 2020 in its closing post-hearing brief. "GC Br." refers to the brief the General Counsel filed on March 10, 2020.

These statements are consistent with the General Counsel's argument presented during the February 10 hearing. *See* R-8 at 14:4–14. And the ALJ endorsed the General Counsel's assumptions and speculation in his decision.

The General Counsel argued that a violation of 29 U.S.C. § 158(a)(1) occurs when an individual who works for a media company express an anti-union message even when there is *no proof* that employees were actually threatened or felt threatened. That notion ignores in wholesale fashion the plain proscription of the First Amendment and 29 U.S.C. § 158(c) that NLRB has no authority to prosecute particular viewpoints and label them as violating the NLRA. *Cf. BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002) (narrowing the scope of what constitutes actionable unfair labor practice under Section 158(a)(1)), *on remand BE & K Construction Co.*, 351 NLRB No. 29 (2007) (Board reversing its previous decision in light of the Supreme Court's narrowing of Section 158(a)(1)).

There is a further problem with the General Counsel's newly minted test—one that the ALJ faithfully applied in his decision. The ALJ assumes Mr. Domenech's satire and the personal viewpoints of specific authors whose articles FDRLST publishes are also the viewpoints of FDRLST. Without any citation to pertinent authority, the General Counsel urged the ALJ to conclude that as publisher, Mr. Domenech's viewpoints are the publication's viewpoints as a matter of law. This is an absurd and unsupported proposition. The General Counsel submitted no proof—because there is none—that those individual viewpoints are one and the same.

Indeed, humor and satire remain fully protected speech. *See Cliffs Notes*, 886 F.2d at 493 (concluding that humor or satire is speech that is fully protected under the First Amendment). The ALJ, therefore, especially absent proof of unfair labor practice, has illegitimately and unconstitutionally decided this case against FDRLST.

E. NLRB's Cases Do Not Support the ALJ's Decision

Tellingly, NLRB's cases do not support the ALJ's decision. Cases such as *Best Distributing Co., Inc.*, 255 NLRB 165 (1981), and *Herb Kohn Electric Co.*, 272 NLRB 815 (1984), both involved charges filed by employees who were actually discharged by the employer. 255 NLRB at 166–67 ("Go home today. We don't need you. You are laid off as of Friday at 5:30"; "[employee] stated that it sounded to

him as if he were being laid off *for* joining the Union") (emphasis added); 272 NLRB at 816 (stating that employer "discharged [two employees] *because of* their union and/or protected concerted activities") (emphasis added). It is unsurprising that statements made by an employer's agent directly to an individual employee during the conversation in which the employer's agent fires the employee would likely trigger 29 U.S.C. § 158(a)(1). And it is unsurprising that employers who fire employees *for* or *because of* the employee's pro-union position likely violate the NLRA.

FDRLST's situation, however, is far removed from the typical case—like *Best Distributing* and *Herb Kohn Electric*—in which NLRB has concluded the employer violated the NLRA. FDRLST's case involves a satirical tweet. The General Counsel premised his desired conclusion of an NLRA violation on the fact that the tweet "is most naturally understood as a reaction to and commentary upon that [*i.e.*, Vox Media] walkout." GC Br. at 7.[7] The General Counsel failed to prove that such satire published by a publishing company's executive expressing his own views on his personal Twitter account who works for a company that routinely publishes commentary on all sorts of contemporary newsworthy topics triggers Section 158(a)(1). The General Counsel failed to prove that any FDRLST employee took the tweet to be anything other than a joke. And the General Counsel failed to prove that any FDRLST employee took the statement to be Mr. Domenech directing them as their supervisor.

Nor does the argument based on *Gissel Packing*, 395 U.S. 575, fare any better. The General Counsel addressed FDRLST's First Amendment argument in a single three-sentence paragraph and cited no case other than *Gissel Packing* to support his position. GC Br. at 8. And the ALJ similarly, addressed *Gissel Packing* in a single footnote. (ALJD 6 n.9).

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[7] The General Counsel stated, "Vox Media magazine website—online magazines like The Federalist—went 'dark as hundreds of employees stage[d] [a] walkout to demand [a] union deal.'" GC Br. at 4 (bracketed text alterations appear in GC's brief). The General Counsel's *ipse dixit* seems to be relying on several premises, none of which has any basis in fact. Nothing in the record suggests—nor could it suggest because it did not happen—that FDRLST's employees staged a walkout like Vox Media's employees. Nothing in the record suggests—nor could it suggest because it did not happen—that FDRLST's website went dark. Nothing in the record suggests—nor could it suggest because it did not happen—that FDRLST employees demanded a union deal. Such misleading implications, suggestions, and speculations are dangerous and an inappropriate, disingenuous method of proof. They undermine the generally accepted practice, grounded in civil procedure and logic, of presenting provable facts and meeting the burdens of proof and persuasion.

The Supreme Court stated the test as follows: "The expression of any views, argument, or opinion shall not be evidence of an unfair labor practice, *so long as such expression contains no threat of reprisal or force or promise of benefit*." *Gissel Packing*, 395 U.S. at 617 (emphasis added; cleaned up). The Board, unlike the ALJ, is required to follow federal-court precedent.[8]

The General Counsel failed to prove that the tweet actually *contains* a threat of reprisal or force or promise of benefit. Before ever filing this case, he had the option of telephonically calling FDRLST employees and Mr. Domenech to ascertain whether any threat transpired here. The General Counsel could have sought to call them to the stand to provide live testimony; he, instead, voluntarily withdrew all subpoenas that were issued—to Mr. Domenech and four FDRLST employees (only the female employees, oddly). NLRB failed to gather evidence to prove its case—not once, but twice.

Had the General Counsel investigated, he would have learned that FDRLST employees took Mr. Domenech's tweet as obvious satire. Two FDRLST employees (represented by independent counsel, separate from FDRLST's counsel) submitted sworn affidavits, signed under penalty of perjury, unequivocally stating that the tweet did not actually contain any threat of reprisal or force or promise of benefit. *See* R-4, R-5. The two employees stated that the tweet was "a satirical and funny way of expressing personal views on a contemporary topic," "was funny, obviously sarcastic, and was a pithy way of expressing personal views on a contemporary topic." R-5, ¶ 8; R-4, ¶ 8. Mr. Domenech's affidavit stated that he uses his personal Twitter account to express his own "views, not those of FDRLST Media, LLC." R-3, ¶ 8. And he stated that the tweet was "satire." R-3, ¶ 5. The General Counsel, who carried the burdens of proof and persuasion on the merits, failed to produce any evidence under this crucial component of the *Gissel Packing* test.

The ALJ's analysis in the decision under review shows that the ALJ has expanded, at the General Counsel's urging, the *Gissel Packing* test. That novel legal theory guts the *Gissel Packing* test

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[8] *Contrast with* NLRB Division of Judges, Bench Book: An NLRB Trial Manual § 13-100 (Jeffrey D. Wedekind, ed. Jan. 2009), *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/alj_bench_book_2019.pdf ("Administrative law judges must follow and apply Board precedent, notwithstanding contrary decisions by courts of appeals, unless and until the Board precedent is overruled by the Supreme Court or the Board itself.").

altogether. The Supreme Court has said that the statement itself "shall not be evidence of an unfair labor practice" unless there is proof, independent of the statement, that shows the statement "contains … threat of reprisal or force or promise of benefit." 395 U.S. at 617. Furthermore, "an employer is free to communicate to his employees any of his general views about unionism"; "conveyance of the employer's belief" is not actionable under the NLRA "unless" the threat "is capable of proof." *Id.* at 61819 (cleaned up). *Gissel Packing* has long foreclosed the kind of *res ipsa loquitur*—or the statement-speaks-for-itself—theory of proving a violation of Section 158(a)(1) that the General Counsel proposed and the ALJ adopted in this case.

Put differently, the General Counsel's unproven perception of FDRLST as anti-union does not provide the independent proof of threat that is necessary to satisfy the *Gissel Packing* test. Being a media company willing to publish articles commentating on current events (which sometimes might include articles submitted by authors critical of public-sector unions, *see* R-1, R-2) cannot be the circumstance—under the totality-of-circumstances test—that makes Mr. Domenech's personal tweet a violation of the NLRA. *See GM Electrics*, 323 NLRB at 127 (giving the totality-of-circumstances test).

The General Counsel argued that "the Board does not consider either the motivation for the statement or its actual effect." GC Br. at 5 n.36 (citing *Miller Electric Pump & Plumbing*, 334 NLRB No. 108 (2001)); *see also* GC Br. at 8 & n.44 (stating that "as noted above, … the intent of the speaker is irrelevant" as is the "actual effect upon the listener") (citing *Teamsters Local 391 (UPS)*, 357 NLRB 2330 (2012); *Smithers Tire*, 308 NLRB 72 (1992); *Waco, Inc.*, 273 NLRB 746 (1984)). But that proposition is only one part of *Miller Electric*'s holding. *Miller Electric* cites *Gissel Packing* and reiterates the Supreme Court's formulation of the test: "The Board will not *ordinarily* look to the Employer'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*." 334 NLRB No. 108 at *11 (citing *Rossmore House*, 269 NLRB 1176 (1984), *aff'd by* 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Center*, 277 NLRB 1217 (1985)) (emphasis added).

There are, therefore, situations, as here, where it is proper to consider motives under the totality-of-circumstances test. The General Counsel himself offered evidence—evidence that the ALJ accepted and considered—of motive by admitting into the record articles written about the unrelated Vox Media walkout. *See generally* GC-3 & Exhibits attached thereto. Those articles were the General Counsel's attempt to show that Mr. Domenech's motive was to supply his personal commentary on the news of the day. Mr. Domenech expressed his views by using satire on a platform that permits users to input only 280 characters of text. To clarify for the record the actual motive of the speaker—as well as how the statement was objectively perceived by employees of FDRLST—the Respondent introduced and the ALJ admitted three affidavits into the record. *See* R-3; R-4; R-5. The only employees of FDRLST who testified "reasonably underst[ood] the statement" as satiric. GC Br. at 5. The reason the tweet is reasonably interpreted as a joke is because there is no evidence Mr. Domenech owns a salt mine; no evidence that FDRLST employees had previously been made to work in a salt mine, and no evidence that Mr. Domenech has any authority or ability as publisher of a web magazine to force FDRLST employees to work in a salt mine. The absurdity of all of those propositions is what makes it a joke. *See* The Free Dictionary, *Back to the Salt Mine* ("Today the term is only used ironically."). Instead, the ALJ speculated the tweet is "refer[ring] to tedious and laborious work," and then erroneously concluded that the tweet is "an obvious threat" that "had no other purpose but to threaten the FDRLST employees with unspecified reprisal." ALJD 5:11; 5:19–25.

Thus, given *no* evidence from the General Counsel and given competent controverting evidence from Respondent, the General Counsel's blanket assertion—that there is "no plausible alternative" reading of the tweet and therefore that the tweet violates the NLRA, GC Br. at 5–6, simply falls short.

Three cases that the General Counsel cited, GC Br. at 5 n.37,[9] confirm that the operative test is whether "*an employee* would reasonably understand the statement as threatening adverse action *in response to* protected activity." GC Br. at 5 (emphasis added). FDRLST employees, in fact, understood

[9] *Franklin Preparatory Academy*, 366 NLRB No. 67 (2018); *Nellis Cab Co.*, 362 NLRB 1587 (2015); *Lamar Advertising of Hartford*, 343 NLRB 261 (2004).

the statement as satire. *See* R-4; R-5. Moreover, the test requires the General Counsel or the Charging Party to prove—and they did not so prove here—that the alleged unlawful statement was made *in response to protected activity*. There is nothing in the record to suggest that FDRLST's six employees ever engaged in any protected activity—because they did not—nor that Mr. Domenech's tweet was in response to such protected activity. To the contrary, the General Counsel himself readily speculated that Mr. Domenech's tweet was not in response to FDRLST employees' engaging in protected activity but that "it is more naturally understood as a reaction to and commentary upon that [*i.e.*, Vox Media] walkout." GC Br. at 7. Purported protected activity of Vox Media employees cannot be imputed to FDRLST's employees. *Franklin*, *Nellis*, and *Lamar* only confirm the *Gissel Packing* rule that the General Counsel or the Charging Party must offer proof other than the alleged unlawful statement to show that the statement in fact threatened reprisal or force or promise of benefit. Neither the General Counsel nor the Charging Party (who has remained absent from this case after setting the powerful NLRB machinery in motion with his deficient charging document) has provided proof to satisfy the test.

The lack of proof going to the particular elements of the operative test is fatal to the General Counsel's case against FDRLST. In *Frazier Industrial Co.*, for example, the General Counsel proved through testimony and other competent evidence that the employer "discharged [employee] because he failed to adhere to the [employer's] unlawful rule barring union talk during worktime" "but permitted other nonwork discussions," and therefore that the employer violated Section 158(a)(1). 328 NLRB No. 89, *3, *6 (1999). There was evidence in *Frazier* independent of the alleged threatening remark that proved an NLRA violation.

The same is true of *Meisner Electric, Inc.*, 316 NLRB No. 102 (1995). There, the General Counsel proved through evidence independent of the actual statements made by the employer that the employer made "several threats about employees' union activities." 316 NLRB No. 102, at *1. In *Ethyl Corp.*, 231 NLRB No. 40, *12, *17, *25, *30 (1987), the General Counsel called several witnesses to the stand. The General Counsel and the Charging Party in *Southwire Co.*, 282 NLRB No. 117, *7, *12, *13, *15 (1987) also called several witnesses, including employees of the respondent employer, to the

stand to present live testimony and evidence. Despite putting live testimony from witnesses into the record, the General Counsel in *Southwire* failed to prove "the obvious basis for the remarks by both employee and supervisor." *Id.* at *15. The *Southwire* ALJ, therefore, correctly concluded that "the substance of the remarks standing alone would not be probative of a violative intent or attitude. The General Counsel has simply failed to show that the remarks relied on were grounded in animus toward the Union or employees who supported the Union and therefore coercive. The record actually shows the opposite is true." *Id.* The *Southwire* ALJ held that the "General Counsel has failed to sustain his burden of proof for any allegation in the complaint," and that "[employer] has not, by the conduct of its agents, … violated Section 8(a)(1) of the Act." *Id.*

The General Counsel, in his case against FDRLST, has presented no proof other than Mr. Domenech's tweet despite having had full opportunity to do so. For example, the General Counsel had the option of not voluntarily withdrawing five subpoenas he had issued to compel live witness testimony—of Mr. Domenech and four of FDRLST's six employees. In contrast to situations involving hundreds of employees, because FDRLST has only six employees, the General Counsel had full opportunity to interview all of them and Mr. Domenech as part of his investigation prior to issuing the complaint. Instead, the General Counsel chose to conduct no investigation—neither before filing the complaint nor afterwards. His speculation is not an appropriate stand-in for such evidence. And such speculation cannot satisfy the burdens of proof and persuasion that are incumbent on the General Counsel to carry in his case against FDRLST.

To overcome the General Counsel's lack of proof, the ALJ replaced it with his own speculation as to what the tweet means. ALJD 4–6. Online communications can easily become decontextualized by third parties. *See, e.g.*, R-6 (Charging Party re-tweeting Mr. Domenech's tweet). By re-tweeting Mr. Domenech's tweet, was Mr. Fleming also threatening FDRLST employees? Was the act of re-tweeting endorsement of the tweet or criticism of it? A speaker might send an email to one person, only to see that person forward the message to dozens of others or post it on a public mailing list. Such decontextualization circumvents any effort by a speaker to provide additional context, outside the plain words of the statement, that would make the non-threatening intent of the statement clear.

Thus, not inquiring into a speaker's intent (as permitted under *Gissel Packing*) for online communications inevitably chills constitutionally protected speech, as speakers like Mr. Domenech would bear the burden of accurately anticipating the potential reaction of unfamiliar listeners or readers—often thousands of readers. *See, e.g.*, R-3, ¶¶ 9–10 ("As of February 4, 2020, I have sent over 86,000 tweets. As of February 4, 2020, I have over 96,000 followers on Twitter."). Was Mr. Domenech's statement "I swear I'll send you back to the salt mine" a threat to all of his thousands of Twitter followers?

Gissel Packing's totality-of-circumstances test addresses this problem by allowing a factfinder to consider evidence contextualizing the online comment, including the speaker's intended audience, other remarks clarifying the challenged statement's meaning, the speaker's motive for making the statement, and so forth. Proving situation-specific information about a speaker's choices regarding the scope, reach, and intended audience is precisely the sort of evidence that is relevant to a factfinder's assessment of the speaker's intent, and whether, given the totality of circumstances, the statement is actionable under 29 U.S.C. § 158(a)(1), and then whether the statement actually violates that section.

In *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1253 (5th Cir. 1978), for example, the Fifth Circuit explained the type, quantity and quality of evidence that is needed to prove a Section 158(a)(1) violation:

> The record shows that before the March, 1975 election (the second election) was held, during a change in the work shift of foreman Bowlby's employees, the workmen were laughing and sticking the red dot card in Bowlby's face and daring, teasing, and bantering him to blow on the red dot on the card to see if it would turn blue. Bowlby picked up one of the cards that was laying on top of employee Emerson's tool box and looked at it and smiled, whereupon Emerson said 'blow on it and see if it will turn blue.' Bowlby replied, 'I bet I can make it turn brown.' He then placed a burning cigarette lighter under the red dot until it turned brown and caught fire. Bowlby then blew out the fire and put the card down. Emerson did not object nor protest in any way to Bowlby's action; and, in fact, laughed with Bowlby about it. At the trial Emerson was asked if the whole incident was a joke and he did not deny it. He admitted in his testimony that he 'snickered' and 'laughed' when the incident occurred. The Administrative Law Judge held that the red dot incident was a destruction of Union literature and violated Section 8(a)(1) of the Act and interfered with the holding of a fair and free election. We do not agree. It is obvious that the entire incident was a joke and occurred in jest for the purpose of evoking

> laughter, which actually occurred. Foreman Bowlby was merely having fun in responding to what is known in common parlance as 'kidding' and 'horseplay' by the employees, including Emerson himself. It must be remembered that all of these people were close friends and knew each other on a first name basis, and an incident such as this would not be unusual or unexpected among them. There is no indication that Bowlby's act was designed to hurt Emerson or his property, or to influence or to affect the election.

Cf. Steinhauer v. DeGolier, 359 F.3d 481, 487 (7th Cir. 2004) ("[I]nane comments do not constitute sufficient evidence of anti-male bias to create an issue of fact as to [employer's] motivation for firing [employee].").

The General Counsel neither investigated nor presented evidence on any of these points to meet his burdens of proof and persuasion against FDRLST. In contract, FDRLST presented proof showing the tweet was meant to be and was perceived by FDRLST employees as Mr. Domenech's personal satirical opinion. The ALJ's decision ignoring all of the facts of this case is, therefore, both groundless and meritless.

F. The General Counsel's Brand-New Test, First Adopted by the ALJ, Improperly Expands Authority Given to NLRB by Congress

The General Counsel cobbled together a brand-new test by selectively cutting out pieces from the *Gissel Packing* test that were incompatible with his theory of the case. In doing so, the General Counsel resorts to stacking speculation upon speculation—without actual proof. The General Counsel's test that the ALJ ultimately adopted looks nothing like the test that NLRB and federal courts have applied in a long line of precedent from *Gissel Packing* onward. If also adopted by the Board, the General Counsel's and ALJ's strained reading of applicable law would lead to a conspicuous expansion of the narrow authority Congress has given to the National Labor Relations Board.

In addition to the General Counsel's omissions and half-truths discussed above, the General Counsel, for example, alleged in the complaint that Mr. Domenech "*implicitly* threatened employees with loss of their jobs if they formed or supported a union." GC-1, ¶ 6 (emphasis added). This implicit-threat theory, adopted by the ALJ, works a vast expansion of NLRB's authority beyond the scope of the NLRA, and leads to a breach of the First Amendment.

The Board should conclude that a mere statement, without further proof, is insufficient as a matter of law to confer authority on NLRB to allege an unfair labor practice and then for the ALJ/Board to conclude that the speaker "implicitly threatened" employees in violation of 29 U.S.C. § 158(a)(1). The Charging Document did not allege anything other than that Mr. Domenech publicly posted a tweet. NLRB conducted no investigation of the circumstances surrounding the tweet. Had even a cursory investigation occurred, NLRB personnel would have easily discovered that the Charging Party is not FDRLST's employee nor someone with any nexus to a FDRLST employee; instead, he is some random person who saw a tweet on the internet. That investigation would also have helped NLRB personnel understand the totality of the circumstances surrounding the tweet—that it was satire, perceived as such by FDRLST employees. NLRB did none of that. Instead, the General Counsel and ALJ used their own senses of humor as stand-ins for how FDRLST employees perceive satire. Without procuring any evidence—evidence that the General Counsel had full opportunity to collect since June 2019—the General Counsel urged, and the ALJ adopted, myriad speculations as somehow proof that Mr. Domenech threatened employees and that such threat constituted an unfair labor practice under Section 158(a)(1).

Instead of concluding that the General Counsel failed to prove allegations made in the complaint, and therefore, that the complaint should be dismissed in its entirety, the ALJ reveled in his own speculative musings about the content of the tweet and the speaker's and listeners' motives and perceptions. ALJD 4–6. As previously explained, the ALJ's decision readily shows why it is plain, reversible error. The Board should reverse the ALJ's decision and dismiss the complaint against FDRLST Media, LLC in its entirety.

CONCLUSION

The ALJ should not have allowed the General Counsel and the Charging Party to file a charging document and complaint subjecting FDRLST to a costly administrative-review process on as flimsy a basis as Mr. Fleming's charge. This case is nothing more than Mr. Fleming'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. Fleming 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. The complaint against FDRLST Media, LLC should be dismissed forthwith in its entirety for lack of personal jurisdiction and lack of subject-matter jurisdiction. In addition, the General Counsel has failed to prove his case against FDRLST: a case based on an investigation that was never lawfully opened in the first place, and a prosecution that, as is apparent now after an evidentiary hearing, is lacking any basis or evidence to conclude that FDRLST engaged in any practice that is actionable under the NLRA.

The Board should dismiss the complaint against FDRLST Media, LLC and reverse the ALJ's decision.

Respectfully submitted, on the 19th day of June, 2020.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FDRLST MEDIA, LLC, *Respondent* -and- JOEL FLEMING *Charging Party*	Case No. 02-CA-243109

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2020, Respondent's "Brief in Support of Exceptions to the Administrative Law Judge's Decision" was electronically filed and served by e-mail, return receipt requested on the following parties:

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