UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF FDRLST MEDIA, LLC EMPLOYEES EMILY JASHINSKY AND MADELINE OSBURN IN SUPPORT OF RESPONDENT

Pursuant to the National Labor Relations Board (NLRB) Guide to Board Procedures, FDRLST Media, LLC (FDRLST Media) employees Emily Jashinsky and Madeline Osburn respectfully move for leave to file the accompanying amici curiae brief in support of Respondent FDRLST Media.

Emily Jashinsky is the Culture Editor at The Federalist, a division of FDRLST Media. Madeline Osburn is a Staff Editor at the Federalist. Both employees submitted affidavits at the February 10, 2020 evidentiary hearing for this claim. In the affidavits, both employees swore, under penalty of perjury, that they understood the employer's remarks at issue to be nonthreatening, nor otherwise in violation of the National Labor Relations Act.

As members of the press, amici have a strong interest in protecting First Amendment freedoms to discuss public affairs without fear of reprisal. They also value the freedom to share personal opinions on social media without fear of reprisal. The employees support the same freedoms for their employer.

Amici believe that the arguments set forth in their brief will assist the NLRB in resolving the charges made against their employer. Given their experiences, both as members of the press seeking to keep citizens well-informed and as employees working directly under Respondent, amici provide direct insight into the problem with the Charging Party's position and the floodgates this claim could open. For the foregoing reasons, amici respectfully request that this Board grant leave to participate as amici curiae and to file the accompanying amici curiae brief in support of Respondent.

Respectfully submitted,

Kimberly S. Hermann
Anna Celia Howard
Southeastern Legal Foundation
560 W. Crossville Rd., Ste. 104
Roswell, Georgia 30075
Telephone: (770) 977-2131
Facsimile: (770) 977-2134
khermann@southeasternlegal.org
choward@southeasternlegal.org

Attorneys for Amici Curiae

July 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, a copy of the foregoing was filed electronically and served by email on the following parties:

John J. Walsh, Jr.
Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278-0104

Jamie Rucker
Field Attorney
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278-0104
Jamie.Rucker@nlrb.gov

Joel Fleming
Block & Leviton LLP
260 Franklin St., Suite 1860
Boton, MA 02110
Fleming.Joel@gmail.com

Aditya Dynar
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
Adi.Dynar@NCLA.legal

By: Attorneys for Amici, FDRLST Media Employees
/s/ Kimberly S. Hermann
Kimberly S. Hermann
Anna Celia Howard
Southeastern Legal Foundation
560 West Crossville Rd., Ste. 104
Roswell, GA 30075
Telephone: (770) 977-2131
khermann@southeasternlegal.org
choward@southeasternlegal.org

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AMICI CURIAE BRIEF OF FDRLST MEDIA, LLC EMPLOYEES EMILY JASHINSKY AND MADELINE OSBURN IN SUPPORT OF RESPONDENT

Employees Emily Jashinsky and Madeline Osburn are members of the staff at FDRLST Media, LLC (FDRLST). Both employees submitted affidavits at the February 10, 2020 evidentiary hearing for this claim. In the affidavits, both employees swore, under penalty of perjury, that they understood the employer's remarks at issue to be nonthreatening, nor otherwise in violation of the National Labor Relations Act (NLRA).

As members of the press, amici have a strong interest in protecting First Amendment freedoms to discuss public affairs without fear of reprisal. They also value the freedom to share personal opinions on social media without fear of reprisal. The employees support the same freedoms for their employer.

SUMMARY OF ARGUMENT

For better or worse, social media has become a very present part of our lives. It provides a way to communicate with long distance friends and family, it is a creative outlet for people of all ages, and it is a source—if not *the* source—of public news and information for many Americans. In that regard, it is a double-edged sword. It is a "marketplace of ideas" that may, at times, offend readers. But regardless of our personal views on public affairs, every American has a

constitutionally protected right to share their opinions on social media, no matter how disagreeable that speech may be. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

Unfortunately, today's "cancel culture" tries to undermine this First Amendment principle by silencing speakers with whom listeners disagree. One listener stumbled upon a personal tweet by a news editor that teased his colleagues about unionizing. Resp't Br. 2. As a result, that listener not only succeeded in filing a NLRA claim against the employer; the Administrative Law Judge (ALJ) himself agreed with the listener that the employer's tweet was unsavory, ignoring sworn affidavits by employees that defended their employer. *Id*. at 3–4, 34. Allowing government officials like the ALJ to make judgments based on personal values not only violates the First Amendment, but it also seriously undermines social media's role in forming a well-rounded, informed, and engaged citizenry. As a result of decisions like the ALJ's, social media users with allegedly unpopular opinions will increasingly self-censor, rather than face consequences for speaking their mind. Social media will only become a louder echo chamber for the tyranny of the majority, which our Framers warned us about in no uncertain terms. *See* The Federalist No. 51 (James Madison) (Clinton Rossiter ed., Signet Classics 2003).

ARGUMENT

I. The First Amendment curbs the tyranny of the majority by encouraging public discussion.

Since 1724, freedom of speech has famously been called the "great Bulwark of liberty[.]" 1 John Trenchard & William Gordon, *Cato's Letters: Essays on Liberty, Civil and Religious* 99 (1724), reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (Oxford University Press 1988). Responding "to the repression of speech and the press that had existed in England" and seeking to curb that tyranny in the future, the Founders created the First Amendment. *Citizens United v. FEC*, 558 U.S. 310, 353 (2010).

"Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

II. Today's cancel culture undermines the First Amendment by coercing speakers into silence.

Today, the repressive forces the Framers fought to curb are everywhere. We are living in the prime of "cancel culture." If a speaker utters something that could be interpreted in a remotely offensive way, she is "canceled"—her post is deleted, she is fired from her job, her work is boycotted, and she becomes the subject of vicious threats from strangers.[1] Worse, any peer who stands up for the speaker can face the same fate.[2] In this culture, there is not even room to issue an apology for past mistakes;[3] the stakes are high, and the risk of falling from grace even higher.

Civility and respect certainly ought to be encouraged among peers. But imposing a moral standard on others at the cost of their free expression is plainly unconstitutional. "If there is a

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[1] *See, e.g.*, https://www.theguardian.com/books/2020/jun/14/jk-rowling-from-magic-to-the-heart-of-a-twitter-storm. In response to a tweet referring to "people who menstruate," famous author JK Rowling wrote, "I'm sure there used to be a word for those people. Someone help me out. Wumben? Wimpund? Woomud?" *Id.* Twitter users immediately accused Rowling of transphobia and vowed to stop reading her children's books, while celebrities who owed their success to the series distanced themselves from Rowling and tweeted their support for the transgender community. *Id*. Within just a few weeks, Rowling's book sales dropped. https://www.independent.co.uk/arts-entertainment/books/news/jk-rowling-transphobic-book-sales-harry-potter-a9624671.html.

[2] *See* https://www.washingtonpost.com/nation/2020/07/08/letter-harpers-free-speech/. In the weeks that followed Rowling's controversial tweet, over 150 public figures signed a letter making the case for free speech in light of today's culture. *Id*. When that letter was met with more outrage and controversy, many of the public figures backtracked their decision to support the letter's message. *Id*.

[3] *See, e.g.*, https://nypost.com/2020/07/03/boeing-communications-boss-niel-golightly-resigns-over-article/. A Boeing executive resigned after an article he wrote in the 1980s resurfaced. *Id.* In it, the former U.S. Navy pilot argued that women should not participate in combat as part of "a debate that was live at the time." *Id*. Despite stating that his point of view changed since the 80s, he immediately resigned to avoid embarrassing the company. *Id*.

bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Rather, the First Amendment demands "that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978). The government thus cannot make value judgments based on the content of speech or the viewpoint of the speaker. To discriminate based on content is almost never constitutional, absent a compelling interest that is narrowly tailored.[4] *Boos v. Barry*, 485 U.S. 312, 319 (1988). To discriminate against speech based on viewpoint is *never* constitutional. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Moreover, "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham*, 137 S. Ct. at 1735. In recent years, the Supreme Court has designated social media as one of "the most important places . . . for the exchange of views." *Id*. Indeed, social media serves multiple purposes: it is a creative outlet to connect with others and to share personal photos, opinions, and anecdotes; but more importantly, it has become a venue for political discussion, news, and civic engagement. It is thus inevitable that, at times, personal views and public discussion will overlap on these sites. But it is not the job of our government to police that speech.

III. The ALJ opinion prohibits the expression of an idea it finds disagreeable and turns the NLRA standard for employer remarks on its head.

Enacted in 1935, the purpose of the NLRA is to protect the rights and interests of both employees and employers.[5] The NLRA prohibits employers from making a remark that "under all

[4] A compelling interest can be invoked only against "the gravest abuses" that pose an actual or impending danger to the public. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

[5] *See* 29 U.S.C. § 151; *see also* https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-

circumstances . . . reasonably tends to restrain, coerce, or interfere with the employees' rights[.]" *GM Electrics*, 323 NLRB 125, 127 (1997). Although employees have an avenue to file complaints against their employers, this provision also preserves the employers' constitutional right of due process: the remark must be viewed objectively from the perspective of a reasonable employee in that work environment. *Id*.; *see also Mesker Door, Inc.*, 357 NLRB 591, 595 (2011) (finding that an employer's remarks must be viewed from the standpoint of his employees).

As Respondent notes, Mr. Domenech shared a tweet on his personal Twitter account, over which he maintains exclusive control, that referenced sending his employees "back to the salt mine" if they unionized. Resp't Br. 3. His employees understood it to be an "obviously sarcastic" joke. *Id*. at 34. But Mr. Fleming—a third party complainant with no ties to the FDRLST—did not get the joke. Instead, he took a page from the cancel culture handbook and sued Mr. Domenech. The ALJ not only allowed the lawsuit to proceed, but it fully supported Mr. Fleming's argument and held that the tweet was a threat to Mr. Domenech's employees.

The ALJ held that employer "[s]tatements are viewed objectively and . . . from the standpoint of employees over whom the employer has a measure of economic power." ALJD 6:16–17 (citing *Mesker*, 357 NLRB at 595). However, when provided with statements from employees made under penalty of perjury that they "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 [NLRA]," the ALJ rejected them outright because the employees did not explicitly state that they were not coerced to testify. Resp't Br. 34; ALJD 5 n.8. He further held that "[a]ny subjective interpretation from an

act#:~:text=Congress%20enacted%20the%20National%20Labor,businesses%20and%20the%20U.S.%20economy.

employee is not of *any* value to this analysis." ALJD 5:33 (emphasis added). The ALJ went on to find that a reasonable employee would, in fact, feel threatened by Mr. Domenech's tweet. *Id*. at 6:25.

This turns the objective NLRA standard on its head. First, the ALJ suggested that the views of the FDRLST employees, taken under oath, were unreasonable.[6] *Id*. at 5:26–30. Even if the affidavits were subjective, it cannot be said that they were of no value to the analysis; subjective interpretations from two FDRLST employees could lend some insight into the general consensus among all FDRLST employees. *See* Resp't Br. IV.E. And even if the affidavits lend no value to the ALJ's analysis, the ALJ failed to address whether, from the standpoint of reasonable FDRLST employees, the tweet could be considered a joke. Rather, he concluded, "[I]n my opinion," the tweet was clearly directed to FDRLST employees and had a hidden meaning. ALJD 5:4–5, 19. Based on that hidden meaning, the tweet could have "no other purpose except to threaten the FDRLST employees with unspecified reprisal" for joining a union. *Id*. at 5:23–24.

This inversion of the NLRA standard, coupled with references to Mr. Domenech's "anti-union" stance, suggest that the ALJ considered Mr. Domenech's speech disagreeable from the start. *See id*. at 3–6. This holding undermines the core First Amendment principle that the government must protect unpopular speech without making a value judgment about the speaker's views or the content of the speech. *FCC*, 438 U.S. at 745–46. This sets a dangerous precedent: public profiles, like Mr. Domenech's, are encouraged on Twitter so thoughts can be shared and expanded upon through re-tweets and comments. But if and when a user comes along who fails to

[6] "The Respondent proffered two additional affidavits from FDRLST employees, both stating that the tweet was funny and sarcastic and neither one felt that the expression was a threat of reprisal . . . . However, a threat is assessed in the context in which it is made and whether it tends to coerce a *reasonable* employee." ALJD 5:26–30 (emphasis added) (internal citation omitted).

understand a joke between colleagues, he will now have a platform to sue the colleagues' business itself. The result: businesses crack down on social media use, individuals self-censor, and speech about public affairs dwindles, because being canceled simply isn't worth the risk.

IV. Even if the Board finds that Mr. Domenech's tweet is political, it should reaffirm our nation's commitment to political liberty and democracy.

As this Court has acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (quoting *Mills v. Alabama*, 384 U.S 214, 218–19 (1966). The Framers recognized that nowhere are the threats of censorship more dangerous than when a restriction prohibits public discourse on political issues. They sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Smith, at 11. As such, the First Amendment guards against prior restraint or threat of punishment for voicing one's opinions publicly. *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940)). It protects and encourages discussion about political candidates, government structure, political processes, and ideology. *Mills*, 384 U.S. at 218–19.

Along with providing a check on tyranny, freedom of speech and the press ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Speech about public affairs is thus "the essence of self-government" because citizens must be well-informed. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). They must know "the identities of those who are elected [that] will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); *see also Citizens United*, 558 U.S. at 349. For these reasons, public discussion is not merely a right; "[it] is a political duty." *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

The freedom to speak publicly on political issues, especially in open social media forums, is critical to both a functioning democracy and a well-rounded citizenry. Twitter users are diverse in thought, race, religion, and culture. For that reason, it is a "marketplace of ideas" that can provide citizens with the knowledge they need to stay informed about public affairs. And, other times, it is simply a platform to share personal photos, funny memes, or friendly debates about the use of the Oxford comma. No matter how an individual chooses to use it, it can hardly be denied that social media allows for thought-provoking and lively discussion. It is users' job to ignore, respond to, or stop following those with whom they disagree. But it is not the job of any court, judge, or board to monitor these posts and perpetuate the cancel culture.

CONCLUSION

For the reasons stated in this amici curiae brief, amici respectfully request that this Board overturn the ALJ's decision and find for Respondent.

Respectfully submitted,

Kimberly S. Hermann
Anna Celia Howard
Southeastern Legal Foundation
560 W. Crossville Rd., Ste. 104
Roswell, Georgia 30075
Telephone: (770) 977-2131
Facsimile: (770) 977-2134
khermann@southeasternlegal.org
choward@southeasternlegal.org

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Attorneys for Amici Curiae

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John J. Walsh, Jr.
Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278-0104

Jamie Rucker
Field Attorney
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278-0104
Jamie.Rucker@nlrb.gov

Joel Fleming
Block & Leviton LLP
260 Franklin St., Suite 1860
Boton, MA 02110
Fleming.Joel@gmail.com

Aditya Dynar
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
Adi.Dynar@NCLA.legal

By: Attorneys for Amici, FDRLST Media Employees
/s/ Kimberly S. Hermann
Kimberly S. Hermann
Anna Celia Howard
Southeastern Legal Foundation
560 West Crossville Rd., Ste. 104
Roswell, GA 30075
Telephone: (770) 977-2131
khermann@southeasternlegal.org
choward@southeasternlegal.org