Nos. 20-3434, 20-3492

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FDRLST MEDIA, LLC,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Review from the National Labor Relations Board
(No. 02-CA-243109)

BRIEF OF TECHFREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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March 29, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, TechFreedom makes the following disclosures:

1) For non-governmental corporate parties, please list all parent corporations:

Not applicable. TechFreedom is a non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code. TechFreedom has no parent corporation.

2) For non-governmental corporate parties, please list all publicly held companies that hold 10% or more of the party's stock:

Not applicable. TechFreedom has issued no stock.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

TechFreedom is unaware of any such corporation, apart from those identified by the parties.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: (1) the debtor, if not identified in the case caption; (2) the members of the creditors' committee or the top 20 unsecured creditors; and (3) any entity not named in the caption which is an active participant in the bankruptcy proceeding.

If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

March 29, 2021 /s/ Corbin K. Barthold

Counsel for TechFreedom

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INTEREST OF *AMICUS CURIAE*[*]

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

Government over-regulation of online speech is a major threat to free expression, free association, and the open Internet. Accordingly, TechFreedom has defended websites' right to moderate speech for themselves, and to be free of liability for *others*' speech, under Section 230 of the Communications Act of 1934. See, e.g., Comments of TechFreedom, *Section 230 of the Communications Act of 1934*, FCC Docket RM-11862, https://bit.ly/31XVlpe (Sept. 2, 2020). The petitioner, FDRLST Media, LLC, which publishes a website called *The Federalist*, does not share TechFreedom's view about the importance of Section 230. See, e.g., Helen Raleigh, *3 Strategies For Dismantling Digital Totalitarianism In America*, The Federalist, https://bit.ly/39EsXLH (Oct. 28, 2020).

When Google threatened, in June 2020, to stop monetizing *The Federalist* through web advertising, TechFreedom criticized *The Federalist*'s position on Section 230, and defended Google's right to invoke it. See Berin Szóka & Ashkhen

[*] No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

Kazaryan, *Section 230: An Introduction for Antitrust & Consumer Protection Practitioners*, The Global Antitrust Institute Report on the Digital Economy 1088-92, https://bit.ly/2XQeyXq (2020). Google wanted to disassociate itself from derogatory statements made in *The Federalist*'s comments sections. See *id*. TechFreedom disagrees with *The Federalist*'s assertions that Google's acting on that (quite reasonable) desire amounts to "censorship" of *The Federalist*. See Tristan Justice, *Ben Domenech On Google: We've Been Warning About This Censorship For Years*, The Federalist, https://bit.ly/3sytkQK (June 21, 2020).

But TechFreedom's commitment to free speech is fundamental. That we disagree with much of *The Federalist*'s speech, including its speech about forcing other companies to associate with it, makes it all the *more* important that we defend the right to free speech in *this* case. There is no freedom for thought unless there is "freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting), overruled by *Girouard v. United States*, 328 U.S. 61 (1946). What matters is that the petitioner has been unconstitutionally punished, its freedom of speech wrongfully curtailed. The order should be vacated.

SUMMARY OF ARGUMENT

Section 8(a)(1) of the National Labor Relations Act (NLRA) bars an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of their right to organize, unionize, and collectively bargain. 29 U.S.C. § 158(a)(1).

Section 8(c) confirms that, consistent with the First Amendment, this prohibition does not bar "the expressing of any views" by an employer that contain "no threat of reprisal or force or promise of benefit." *Id*. at § 158(c).

In June 2019 hundreds of employees of the leftwing online publication *Vox* staged a walkout as part of a unionization campaign. Making a joke about this event, Ben Domenech, publisher of the rightwing online publication *The Federalist*, tweeted: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." The core question in this appeal is whether Domenech's tweet qualifies as a threat under Section 8(a)(1), and is unprotected by Section 8(c) or the First Amendment.

In its decision below, the National Labor Relations Board (the Board) found the tweet to be an unprotected "threat" of "unspecified reprisals" for "engag[ing] in union activity." Pet. App. 3 n.4. But that outcome cannot be squared with the Supreme Court's modern First Amendment jurisprudence.

Common sense dictates that a threat, to receive no constitutional protection, must be an *actual* threat—a *true* threat. Sure enough, *Watts v. United States*, 394 U.S. 705 (1969), holds that only a "true" threat can be punished, and that a protestor's promise, at a rally, to get the President "in [his] sights" was heated rhetoric protected by the First Amendment. *Id*. The Board's approach to employer free speech stands on a different case, however. *NLRB v. Gissel Packing Co.*, 395

U.S. 575 (1969), says that the "context" of the "labor relations setting" is special. Within that "context," *Gissel Packing* holds, an employer must be careful not to "overstep," not to make "overstatements." To fall within the First Amendment, *Gissel Packing* concludes, an employer's comments about unions and unionization must be "careful," "reasonable," and "capable of proof."

In recent decades, the Supreme Court has made clear that laws that disfavor certain speech based on its content, its viewpoint, or the identity of the person speaking are subject to strict scrutiny. *Gissel Packing*, by contrast, lets Sections 8(a) and 8(c) impose special speech restrictions based on content (speech about labor relations), viewpoint (speech in opposition to labor organizing), and identity (speech by an employer). By treating *Gissel Packing* as a sweeping authority, the Board gave Domenech's tweet far less protection than it was due under the First Amendment. This Court need not (and, of course, cannot) overrule *Gissel Packing*. But if *Gissel Packing* is to be harmonized with later Supreme Court precedent (and *Watts*), it must govern only situations like the one it had before it—in which an employer was making concrete threats in response to real efforts to unionize. A sarcastic tweet, ostensibly directed at employees who have never shown the slightest interest in unionizing, must fall well outside its scope.

Even under *Gissel Packing*, broadly construed, the petitioner should prevail. No reasonable employee would view Domenech's sarcastic tweet as interfering with

her right to organize. Had the Board applied strict scrutiny, however, as it was required to, the outcome would have been all the clearer. The Board's analysis would have resembled the analysis in *Watts*, which looks at words in their setting and understands the concept of hyperbole. *Watts* engages in constitutional avoidance: it reads the words of the statute before it to ensure that *only* true threats—not mere cranky remarks—fall within its scope. That's precisely what the Board should have done, and what this Court should now do, here. The First Amendment requires that Sections 8(a) and 8(c) be read to allow the punishment only of a *true* threat. Under that test, a tweet about sending employees "back to the salt mine," like a promise to "get [the president] in my sights," falls short of the mark.

ARGUMENT

THE BOARD SHOULD HAVE APPLIED STRICT SCRUTINY, FOUND NO THREAT UNDER SECTION 8(A), AND RULED IN FAVOR OF PETITIONER.

A. *Watts* (1969) and *Gissel Packing* (1969) Create Distinct Rules For "Political" Threats And "Labor-Relations" Threats.

A look at two 1969 Supreme Court decisions, *Watts*, 394 U.S. 705 (1969), and *Gissel Packing Co.*, 395 U.S. 575 (1969), can take us a long way toward understanding (1) how the First Amendment should have been applied in this case and (2) how the Board's approach to free speech goes astray. *Watts* closely resembles this case, and the free-speech principles set forth there should govern here.

The Board instead applied an expansive reading of *Gissel Packing*, whose views on free speech are (as we will see in the next section) quite out of date.

1. At a 1966 Vietnam War protest near the Washington Monument, Robert Watts responded, during a group discussion, to a suggestion that young people should get more education before forming an opinion on the war. Watts said that he already had a 1-A draft card, that he had been ordered to report for a military physical, and that he planned not to go. "If they ever make me carry a rifle," he then exclaimed, "the first man I want to get in my sights is L.B.J." 394 U.S. at 706. Watts was prosecuted and convicted under a law against making an intentional threat on the life or body of the President. The pertinent law barred "any" such "threat."

The Supreme Court reversed, and ordered that Watts be acquitted. A prohibition on speech as broad as the one in the law at issue should, the Court declared, attract immediate skepticism. *Id*. at 707. Speech restrictions must be read "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id*. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "The language of the political arena" is, the Court observed, "often vituperative, abusive, and inexact." *Id*. But this fact does not permit the government to police speech; on the contrary, it simply highlights the importance of "requir[ing] the Government to prove a true 'threat.'" *Id*.

Having thus set the terms of the legal debate in favor of protecting even rash and indignant speech, and against letting po-faced government officials punish mockery and invective, the Court had only to declare the obvious: Watts's statement was not to be construed literally. Taken in context, the Court ruled, the remark was "a kind of very crude offensive method of stating a political opposition to the President." *Id*. Indeed, the justices could "not see how it could be interpreted otherwise." *Id*.

2. A couple months after issuing *Watts*, the Court issued an opinion that discusses free speech in a decidedly different tone. *Gissel Packing* addresses consolidated cases in which employers refused to bargain with unions. In one of the cases, the Board found that the employer violated Section 8(a)(1) by threatening to close a plant if employees unionized, and the employer challenged the finding under Section 8(c) and the First Amendment.

The Court did not open its First Amendment analysis with a warning about the importance of free speech. Instead, it warned that labor law subjects employers to "certain hazards"—to "difficulties" that are "not so easily resolved"—when they speak against unionization. 395 U.S. at 616-17. True, the Court acknowledged, an "employer's free speech right to communicate his views to his employees is firmly established" by Section 8(c), which "merely implements the First Amendment." *Id.* at 617. But "any assessment of the precise scope of employer expression," the Court

then cautioned, "must be made in the context of its labor relations setting." *Id*. An employer, the Court concluded, may not speak with the freedom it could toward a "disinterested ear." *Id*. Its speech rights are constrained, rather, when it speaks toward an "economically dependent employee." *Id*.

"Within this framework," an employer may not predict the effect "unionization will have on his company" unless the prediction is "*carefully* phrased" and based on "*demonstrably* probable consequences beyond his control." *Id*. at 618 (emphasis added). Any prediction that is not "*reasonable*," in other words, is "without the protection of the First Amendment." *Id*. (emphasis added). Under this rubric, an employer may not even express *an opinion*. "Conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a [protected] statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." *Id*. at 618-19.

Gissel Packing's slanted, anti-speech framing of the rules was not even necessary to its holding. Unlike in the present case, the employer *really did* make concrete threats to retaliate against employees; to "throw" them "out of work regardless of the economic realities," if they unionized. *Id*. at 619; see also *id*. at 588-89. There was no need, in *Gissel Packing*, to treat the context of labor speech (i.e., its content, viewpoint, and speaker) as creating special conditions—conditions in which an employer is at peril, when speaking, of being punished by the

government for "overstep[ping]," for making "overstatements." *Id*. at 620. Yet that's what *Gissel Packing* purports to do.

Gissel Packing suggests a distinct structure for policing "the impact of utterances made in the context of the employer-employee relationship." *Id*. at 620. The Board applied that structure here.

B. Post-1969 Supreme Court Decisions Make Clear That Free-Speech Distinctions Based On Content, Viewpoint, Or Speaker Are Subject To Strict Scrutiny.

Gissel Packing "was decided long before the Supreme Court articulated its First Amendment doctrines as to content-, viewpoint-, and identity-based discrimination in anything like their current form." *NLRB v. IAB Local 229*, 974 F.3d 1106, 1111 (9th Cir. 2020) (Berzon, J., dissenting from denial of rehearing en banc). "The strict scrutiny standard applicable to such discrimination" back then "was at best in a nascent state." *Id*. Today, however, that standard is fleshed out in a coherent body of modern Supreme Court decisions. Those decisions establish that the tweet at issue here enjoys far greater First Amendment protection than the Board, applying *Gissel Packing* broadly, afforded it.

Start with content discrimination. *Gissel Packing* lets the government more easily punish speech connected to a specific topic—employee relations. But a law that "applies to particular speech because of the topic discussed" is "content based," and "content-based laws . . . are presumptively unconstitutional." *Reed v. Town of*

Gilbert, 576 U.S. 155, 163-64 (2015). Such laws are subject to strict scrutiny; the government may enforce only those that are narrowly tailored to serve a compelling state interest. *Id*. Thus a municipal code that places restrictions on signs that announce a church gathering, but not on signs that announce other kinds of meetings, is content-based and subject to strict scrutiny. 576 U.S. 155. So is a state law that forces clinics to make disclosures to patients about abortion services, but not about other services. *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018). And so is a federal law if it targets tweets about labor relations, but not tweets about other issues.

Next, consider viewpoint discrimination. "Government discrimination among viewpoints"—regulation "based on the specific motivating ideology or the opinion or perspective of the speaker"—is simply "a more blatant and egregious form of content discrimination." *Town of Gilbert*, 576 U.S. at 168. A law that favors some ideas over others is thus subject to strict scrutiny *at minimum*. In *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), the Court considered an ordinance that banned speech that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender," *id*. at 380. The ordinance discriminated based on viewpoint, the Court concluded, because although it banned fighting words that *arouse* racial, color, etc., hatred, it allowed fighting words "*in favor* of racial, color, etc., tolerance and equality." *Id*. at 391-92. Faced with a city's attempt "to handicap the expression of particular ideas," the Court struck down the law before it without even applying strict

scrutiny. *Id*. at 391-94; see also *IAB Local 229*, 974 F.3d at 1112 (Berzon, J., dissenting from denial of rehearing en banc) (construing *R.A.V.* as "declining to apply even the strict scrutiny standard that mere content discrimination would demand"). Like the ordinance in *R.A.V.*, a federal law that bars speech in opposition to employee organizing, but not speech in favor of it, seeks to "handicap the expression of particular ideas." 505 U.S. at 394. Such a law is arguably *per se* invalid. It is certainly subject to nothing less than strict scrutiny.

Finally, there is speaker discrimination. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court was asked to reconsider precedents upholding laws that barred speech "based on the speaker's corporate identity," *id*. at 319. Those precedents, the Court concluded, had "depart[ed] from ancient First Amendment principles." *Id*. "Quite apart from the purpose or effect of regulating content," the Court explained, "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Id*. at 340. Laws that seek to "impose restrictions on certain disfavored speakers" are therefore subject to strict scrutiny. *Id*. at 341. The federal law at issue in *Citizens United*, which barred corporations and unions, but not others, from spending money on certain "electioneering" speech, was subject to (and failed to meet) strict scrutiny. *Id*. at 318-19. Likewise, the federal law at issue here, which bars an employer, but not others, from speaking against labor

organizing, should, if construed to bar an employer's sarcastic tweet, be subject to (and fail to meet) strict scrutiny.

Neither the Court in *Gissel Packing*, nor the Board in this case, paid enough attention to the First Amendment problems that Section 8(a), with its restrictions on content (speech about labor relations), viewpoint (speech in opposition to labor organizing), and speaker (employers), creates at every turn. When the modern First Amendment cases are applied, it is clear that Section 8(a), to the extent it applies to more than *true* threats, should be subject to strict scrutiny.

C. Had It Applied Strict Scrutiny, The Board's Analysis Would Have Tracked *Watts*—Which Found No Threat.

"Strict scrutiny is a searching examination, and it is the government that bears the burden of proof." *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013). Strict scrutiny is absent from *Gissel Packing*, which, casually noting the "context" of labor relations and the special "dependen[ce]" of employees, requires employers to "carefully" frame "reasonable" words. 395 U.S. at 617-18. Strict scrutiny is present in *Watts*, which demands that the First Amendment be kept "clearly in mind," and which observes that even "vituperative, abusive, and inexact" words must be protected. 394 U.S. at 707-08.

To employ strict scrutiny here, therefore, the Board would have had to ignore the waffling attitude toward free speech found in *Gissel Packing*, and to adopt the deep skepticism of speech regulation on display in *Watts*. The outcome, had the

Board done this? There can be no doubt. Robert Watts's remark about getting the President "in [his] sights" was bitter, caustic, and hyperbolic—and, as the Court understood, no less protected for that. Similarly, Ben Domenech's tweet about sending employees "back to the salt mine" is biting, sarcastic, and flamboyant—and protected all the same. Each statement is, at worst, "a kind of very crude offensive method of stating a political opposition." *Id*. at 708. Each statement is protected by the First Amendment from government censure.

This is not to say that the petitioner loses under *Gissel Packing*'s speech-restrictive standard. Under that standard, speech violates Section 8(a)(1) only if it has "a *reasonable* tendency in the *totality of the circumstances* to intimidate." *Intertape Polymer Corp. v. NLRB*, 801 F.3d 224, 230 (4th Cir. 2015) (emphasis added). Thus a "no strike/no picketing" clause did not violate Section 8(a)(1) when it was buried in a collective-bargaining offer's fine print, presented to "educated employees," and not understood by anyone to constitute a threat of retaliation. *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1036 (D.C. Cir. 1997). Domenech's comment was clearly facetious, and there is no evidence that any employee took it seriously. The comment was not made in the context of an actual labor or unionization debate at FDRLST Media. And the comment was made on Twitter, a platform universally known for its frivolous banter, jesting, and repartee. There is, in short, no *context* here that transforms the comment into something a

reasonable person might see as coercive. Cf. *Belcher Towing Co. v. NLRB*, 726 F.2d 705, 709 (11th Cir. 1984) (employer's surveillance of employees, when "placed *in the context of the bitter and long-standing dispute* surrounding the [employees'] efforts to unionize," violated Section 8(a)(1)) (emphasis added); *NLRB v. Hasbro Indus., Inc.*, 672 F.2d 978, 985 (1st Cir. 1982) (employer's interview of employee, *shortly before a union election*, when viewed in its "*entire factual context*"—high-level officers did the questioning, the employee spoke poor English, etc.—violated Section 8(a)(1)) (emphasis added); *J.P. Stevens Co., Inc. v. NLRB*, 638 F.2d 676, 683 (4th Cir. 1980) (employer's comment about an employee's union card, "however innocent [it] may appear to a disinterested observer," violated Section 8(a)(1) when said to "an employee who had *previously suffered discrimination* as a result of union activity") (emphasis added); *id*. at 687 ("viewed against *the background of [the employer's] history of misconduct*," a poster violated Section 8(a)(1) by stating that unionization can have "serious consequences") (emphasis added).

So the petitioner should win no matter what. Regardless of what gloss the Board (applying a broad reading of *Gissel Packing*) might place on it, "the [NLRA] does not require the Board to treat employees as if they were bacteria on a petri dish that must be kept free of contamination." *NLRB v. Lovejoy Indus., Inc.*, 904 F.2d

397, 402 (7th Cir. 1990). The First Amendment, properly applied—applied, that is, in line with *Watts*—simply makes the petitioner's victory all the clearer.

To apply the First Amendment, the Court need not reweigh any finding of fact or strike down any part of Section 8(a). All the Court need do is engage in sound statutory construction. "Where an otherwise acceptable construction of a statute would raise serious constitutional problems," a court should "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988). Giving a narrow reading to Section 8(a)(1)'s words "interfere with, restrain, or coerce" is not "plainly contrary to the intent of Congress." If anything, Congress *required* that they be given a narrow reading when it passed Section 8(c), which, by confirming that employers' may express "any views" *short* of a threat, 29 U.S.C. § 158(c), "expressly recognize[s]" the "employer's strong interest in preserving its right to free speech." *Intertape*, 801 F.3d at 237-38. And the words "interfere with, restrain, or coerce" readily permit, and perhaps even require, a narrow construction. They are "nonspecific, indeed vague, and should be interpreted with caution and not given a broad sweep." *DeBartolo*, 485 U.S. at 578. To avoid "serious constitutional problems," the Court need merely give Section 8(a)(1) a constrained reading, one that places the tweet at issue here well outside the section's ambit. See *id*. (applying

constitutional avoidance to protect union leafletting from punishment under a similarly worded section of the NLRA).

Watts is again instructive. "Certainly," the Supreme Court wrote, "the statute under which [Watts] was convicted is constitutional on its face." 394 U.S. at 707. The state, after all, has "a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." *Id*. "Nevertheless," the Court continued, shifting to the analysis we today call constitutional avoidance, "a statute such as this one . . . must be interpreted with the commands of the First Amendment clearly in mind." *Id*. The "commands of the First Amendment" include that a statute punishing threats narrowly define (or, if necessary, be judicially construed to narrowly define) the threats to be punished. "What is a threat must be distinguished from what is constitutionally protected speech." *Id*. Hence *Watts*'s insistence that the state prove a "*true* threat," as well as its conclusion that Watts's "hyperbole" did not fit the bill. *Id*. at 708 (emphasis added).

Following *Watts*'s lead, this Court should heed "the commands of the First Amendment" and construe Section 8(a)(1) to require a legitimate threat. With the scope of Section 8(a)(1) thus confined, this becomes an exceedingly easy appeal. The Board has mistaken a snarky tweet for a federal case.

CONCLUSION

The Board's decision should be reversed, and its final order vacated.

March 29, 2021

Respectfully submitted,

/s/ Corbin K. Barthold

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CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH WORD-COUNT AND TYPEFACE REQUIREMENTS, AND VIRUS CHECK

I certify that I am a member in good standing of the Bar of this Court. I further certify, pursuant to Federal Rules of Appellate Procedure 32(a)(5)-(7) and Local Appellate Rules 31.1(c) and 32.1(c), that the foregoing brief is proportionately spaced, has a typeface of 14-point Times New Roman, and contains 3,874 words; and that the text of the electronic brief is identical to the text of the paper copies. I further certify, pursuant to Local Appellate Rule 31.1(c), that Microsoft Defender Antivirus did not detect a virus.

March 29, 2021

/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2021, a true and correct copy of the foregoing brief was filed with the Clerk of the United States Court of Appeals for the Third Circuit via the Court's CM/ECF system. All counsel of record in this case are registered CM/ECF users. In accord with Local Rule 31.1, as amended by the April 29, 2013, standing order, I have on this day mailed seven copies of the brief to the Clerk.

March 29, 2021 /s/ Corbin K. Barthold