Case Nos. 20-3434, 20-3492

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FDRLST MEDIA, LLC,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition for Review from the
National Labor Relations Board
Case No. 02-CA-243109

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER/CROSS-RESPONDENT AND REVERSAL

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation's Center for the Separation of Powers[1] has an enduring interest in preventing the muscular exercise of regulatory authority from eroding the constitutional structure of separated powers. One of the Center's goals is to constrain judicial deference to agency interpretations of statutes. The Foundation has participated as lead counsel and amicus curiae in an array of administrative law matters before the United States Supreme Court. *See, e.g.*, *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (lead counsel in a case holding that a jurisdictional determination under the Clean Water Act is subject to judicial review under the Administrative Procedure Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (lead counsel in a case holding that an EPA compliance order is subject to judicial review under the Administrative Procedure Act); *Kisor v. Wilkie*, 139 S. Ct. 2400

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), Amicus Curiae states that no party's counsel authored this brief in whole or in part, or contributed money intended to fund the preparation or submission of this brief, and that no person other than Amicus Curiae's members or counsel contributed money intended to fund the preparation or submission of this brief.

(2019) (amicus curiae in a case regarding judicial deference to agency interpretations of regulations).

Pacific Legal Foundation also promotes and protects freedom of speech. PLF has served as lead counsel in free speech cases in the United States Supreme Court and in federal courts across the country. *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (case holding that a ban on political apparel at the polling place violated the First Amendment); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (case holding that a state bar's use of compulsory dues for non-germane political activities violates First Amendment rights).

Hence, PLF has expertise in several of the core issues raised in this matter. In particular, PLF urges this Court not to defer to the National Labor Relations Board's interpretation of its subject-matter jurisdiction and to hold that the National Labor Relations Act violates FDRLST-Media's First Amendment rights as applied to the speech at issue in this case.

INTRODUCTION

The National Labor Relations Board (NLRB) has penalized FDRLST-Media because a random Twitter user was offended by an off-

hand joke made to the public on a manager's private social media account. This overzealous approach to interpretation of the National Labor Relations Act (NLRA) does not comport with the statute or the First Amendment.

An agency's subject-matter jurisdiction defines the role Congress intended the agency to play in administering and enforcing its enabling statute. This Court should decline to defer to NLRB's broad interpretation of its own authority under the deference doctrine articulated under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). An agency cannot invoke deference in order to "bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). Additionally, *Chevron* deference should not apply to an agency regulation that ventures into an area where Congress has simply not spoken. Otherwise, an agency would have broad power to regulate as it wishes unless Congress affirmatively denies such authority.

Even if *Chevron* deference were to apply to this matter, the NLRB's interpretation is unreasonable. The statute requires that a charging

party be "aggrieved." 29 U.S.C. § 160(b). As FRLST-Media explains in its principal briefing, the aggrieved person requirement is a legal term of art which tracks federal standing doctrine by requiring a concrete, traceable, and remediable injury. *See* Dkt. #24 at 19. A stranger mildly offended by one of thousands of tweets that appear on his feed does not fit within this statutory requirement.

Moreover, the NLRB's reading of its own jurisdiction and its aggressive reading of what constitutes an "unfair labor practice" under the NLRA should be rejected because its interpretation raises serious First Amendment concerns. If anyone on social media can charge a company with an unfair labor practice over views expressed about unionization, then the looming threat of a heckler's veto will cast a substantial chill on freedom of speech. Further, the NLRA violates the First Amendment as applied to a joke published on Twitter by a political commentator. "Political hyperbole" is fully protected expression, *see Watts v. United States*, 394 U.S. 705, 707 (1969), and the First Amendment shield cannot be eroded by overbroad interpretations of an unfair labor practice. This Court should not allow a federal agency to bully media outlets over "anti-union" viewpoints.

BACKGROUND

This is a case about a federal agency hounding an online magazine for a terse joke on social media because a random Twitter user was offended.

FDRLST-Media publishes "The Federalist" web magazine, which produces conservative commentary on a wide range of controversial topics. CAR 66, 69. Its Publisher, Ben Domenech, is an outspoken conservative blogger, writer, and editor with a substantial social media presence. CAR 67.

In 2019, unionized employees staged a walkout at Vox Media, a liberal-leaning news conglomerate. CAR 112. Remarking on this, Mr. Domenech posted a sarcastic tweet 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." CAR 68. "@fdrlst" is the official Twitter account for The Federalist magazine and mostly publishes tweets linking to articles published on The Federalist website. *Id.*

Joel Fleming, a random Twitter user, didn't like Mr. Domenech's tweet. Mr. Fleming filed a charge with the NLRB, CAR 63–65, alleging that the tweet constituted an unfair labor practice under the following

provision of the NLRA: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights in section 157 of this title." 29 U.S.C. § 158(a)(1). These include the rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

The Board investigated and prosecuted FDRLST-Media for "interfer[ing] with, restrain[ing], [and] coercing" its employees via tweet. CAR 45. In the administrative proceeding, the NLRB's counsel presented no witnesses—none of FDRLST-Media's staff writers, no one who knows Mr. Domenech, no one who even read the tweet on Twitter. The NLRB's counsel presented no testimony or documentary evidence that anyone at any time felt afraid of exercising their rights under the NLRA because of Mr. Domenech's tweet.

Instead, the NLRB's counsel presented the tweet and some printouts of Federalist articles that showed "antiunion" viewpoints. CAR 73–103. In effect, the NLRB's evidence of an unfair labor practice

consisted exclusively of the viewpoints expressed by Federalist contributors on labor relations matters.

FDRLST-Media, for its part, presented affidavits of their employees making clear that no one felt threatened and that staff knew the tweet was a joke. *See* CAR 156, 158. Indeed, FDRLST-Media employees moved to file an amicus brief supporting the company's defense. *See* CAR 382–86.

An administrative law judge employed by the NLRB agreed with his employer that FDRLST-Media had engaged in an unfair labor practice. *See* CAR 274–83. The Board affirmed and issued an order requiring FDRLST-Media to compel Mr. Domenech to delete the tweet and notify FDRLST-Media's handful of staff that it had violated the NLRA and that it would take necessary measures to ensure that no similar actions would occur. *See* CAR 431–36. In other words, the remedial order requires an online news outlet to tell its writers that the company will be policing their private expression on social media.

FDRLST-Media appealed to this Circuit.

ARGUMENT

I. The Court should not defer to NLRB's interpretation of its jurisdiction

The NLRB does not have freewheeling jurisdiction over any "unfair labor practice." It can only take administrative action against an employer after someone files a charge. The statute says that those who have been "aggrieved" by the practice at issue may file such a charge:

> 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 occurring more than six months prior to the filing of the charge . . . 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).

Agency regulation, however, goes farther and allows anyone to file a charge: "Any person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce." 29 C.F.R. § 102.9.

Should the NLRB seek *Chevron* deference for its regulation,[2] this Court should not defer for four reasons. First, *Chevron* should not apply to the agency's determination of when it has authority to institute proceedings against the regulated public. Second, at best Congress chose to remain silent, and an agency should not be entitled to expand its authority in the face of congressional silence. Third, the statute limits charging authority to "aggrieved" persons. Fourth, even if the statute is ambiguous, the regulation is not a reasonable interpretation.

[2] It is unclear whether an agency can waive or forfeit *Chevron* deference. *Compare Hays Medical Center v. Azar*, 956 F.3d 1247, 1264 (10th Cir. 2020) (government's "threadbare citation" to *Chevron* without further discussion forfeited reliance on *Chevron* deference); *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S. Ct. 789, 789–90 (Mem) (2020) (Gorsuch, J., concurring in denial of petition for a writ of certiorari) (reasoning that *Chevron* deference does not apply where the government "has expressly waived reliance on *Chevron*"), *with Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 23 (D.C. Cir. 2019) (*Chevron* deference cannot be waived or forfeited by a government litigant). *See also Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (noting in dictum that "[n]either the Solicitor General nor any party has asked us to give what the Court has referred to as *Chevron* deference to the EPA's interpretation of the statute" but concluding that *Chevron* deference would have been improper anyway.

a. This Court should not defer to the NLRB's interpretation of its own authority.

The NLRA regulations here seek to interpret the agency's own subject-matter jurisdiction. The Supreme Court has repeatedly emphasized the "fundamental" principle that an agency cannot "bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co.*, 494 U.S. at 650. This case presents one of those situations.

The question of threshold jurisdiction is a question of law that constitutes a distinct legal inquiry under the Administrative Procedure Act (APA). The APA states that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). It provides, in turn, that "all relevant questions of law" belong to the domain of Article III courts. *Id.* § 706. It follows that jurisdiction, as a relevant question of law established as a distinct APA inquiry, is something that merits de novo consideration by federal courts.

Deference to an agency's determination regarding the reach of its investigatory and prosecutorial powers raises troubling questions regarding accountability and control. Because such deference could encourage an agency to arrogate to itself powers that Congress did not

intend it to exercise, it is unreasonable to assume that Congress intended to delegate the question of how far an agency's power extends to the agency itself, absent clear language to the contrary. *See* Cass R. Sunstein, *Law and Administration after* Chevron, 90 Colum. L. Rev. 2071, 2100 (1990) ("Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers."). Hence, "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 616 (1944).

The Supreme Court took this approach in *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990), where the Office of Management and Budget (OMB) asserted authority to review and approve regulations of safety disclosures to employees under the Paperwork Reduction Act. The Act says OMB has authority to review and approve new paperwork requirements imposed on the public by agencies. *Id.* at 35. OMB claimed this authority extended to agency rules requiring disclosures to third parties. *Id.* Declining to defer under *Chevron*, the Court rejected OMB's interpretation, holding that OMB's authority only

extended to rules requiring disclosures to the given agency, not other members of the public. *Id.* at 42–43.

The Supreme Court's opinion in *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013), does not foreclose the argument that interpretations regarding the reach of the agency's own power do not merit deference. *City of Arlington* held that an agency's assertions about the meaning of a substantive statutory provision do not lie outside the scope of *Chevron* deference simply because litigants characterized such questions as "jurisdictional." *See id.* at 300 ("[E]very new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction.").

The Court distinguished between statutory questions regarding "the class of cases [the agency] may decide" and questions about "*how* they decide those cases." *Id.* at 297 (emphasis added). The Court held that the latter were not "jurisdictional" in the traditional sense and therefore normal deference rules applied. The Court did not, however, address whether *Chevron* deference should apply to questions about "the class of cases [agencies] may decide," i.e., the kinds of cases like *Dole*, where an agency decides for itself just how far its power extends. *Id.*

Indeed, *City of Arlington* recognized that "[w]hether the [agency] decided *correctly* is a question that has different consequences from the question of whether it had the power to decide *at all*." *Id.* (emphasis in original).

Moreover, the question before the Court in *City of Arlington* was not a question about "whether [the agency] had the power to decide *at all*." *Id.* It was a question about how the agency interpreted the substantive law—specifically what a "reasonable period of time" for local governments to act on wireless siting applications meant under the Communications Act. *Id.* at 294. It was not a question regarding whether an agency had threshold authority to enforce substantive law in the first instance. On the latter point, *Dole* offers a ready answer, not *City of Arlington*.

Similarly, the Supreme Court's opinion in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), does not say otherwise. Unlike *City of Arlington*, the Court in *Schor* was in fact presented with a genuine question about the class of cases an agency can decide—specifically whether the Commodity Futures Trading Commission (CFTC) could assert authority over state-law counterclaims. *Id.* at 835–36. Some commentators have read *Schor* as holding that *Chevron*

deference does apply to questions about the class of cases an agency can reach. *See* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1511 (2009). But the Court held de novo that the CFTC's authority over such claims was "evident on the face of the statute." *Schor*, 478 U.S. at 841–42; *see also id.* at 841 ("Congress plainly intended the CFTC to decide counterclaims"). The Court only discussed *Chevron* deference *after* concluding that the statute was clear on its face—indicating that *Schor*'s discussion of deference is dicta. *See id.* at 844–45; *see also* Sales & Adler, *supra* at 1512. Indeed, after that discussion the Court reiterated that "Congress explicitly affirmed the CFTC's authority to dictate the scope of its counterclaim jurisdiction." *Schor*, 478 U.S. at 846.

Here, this Court should not defer to the NLRB on the issue of who may file a charge that triggers the agency's authority over a particular case. Much like standing or other justiciability doctrines, 29 U.S.C. § 160(b) governs the "the class of cases [agencies] may decide," 569 U.S. at 297, which are cases where a charge has been brought by an aggrieved person. This provision relates to the agency's threshold authority to

decide at all, i.e., the class of cases that *Dole* indicates should be decided by courts de novo, unencumbered by a duty to defer.

b. The statute's silence does not imply delegated authority.

Deference to agency regulation here would also be inappropriate because statutory silence does not imply a congressional delegation of rulemaking authority. Under *Chevron*, courts should distinguish between a statute that employs ambiguous terms that allow for gap-filling and silence where Congress has simply declined to speak to an issue. For the purpose of determining whether Congress has delegated gap-filling authority to an agency, the difference between ambiguity and silence is vital.

An example of silence that does not constitute implicit delegation arose in a case much like this one. In *Railway Labor Executives' Association v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994), the National Mediation Board sought to expand its subject-matter jurisdiction by regulation. The Board has authority to investigate representation disputes among railroad employees "upon request of either party to the dispute." *Id.* at 658. The Board, however, promulgated a rule allowing it to initiate investigations sua sponte. *Id.* at 660.

The Board called for deference to its regulation because the statute, which expressly granted authority to investigate upon request, was silent as to whether the agency had authority to bring investigations on its own initiative. The D.C. Circuit rejected the Board's demand for deference: "[T]he Board would have us *presume* a delegation of power from Congress absent an express *withholding* of such power. This comes close to saying that the Board has power to do whatever it pleases merely by virtue of its existence, a suggestion that we view to be incredible." *Id.* at 659 (emphasis in original). The D.C. Circuit denounced the Board's suggestion "that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power." *Id.* at 671. If courts presumed Congress had delegated power so long as it did not expressly forbid the exercise of power, "agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely the Constitution as well." *Id.* In short, an agency cannot treat the outer reaches of a statute as blank pages rather than bookends.

Here, FDRLST-Media correctly argues that the plain language of the statute limits the NLRB to investigating and prosecuting only those charges brought by aggrieved persons. *See* Petitioner/Cross-Respondent's

Opening Brief, Dkt. #24 at 14–24. Even if, however, the language of the statute does not expressly limit jurisdiction to charges brought by aggrieved persons, deference to NLRB's regulation would be improper. In that case, the NLRB would be seeking to expand its authority into a void of statutory silence, not simply filling in gaps within the bookends of the statutory language. Like the sua sponte authority claimed by the agency in *Railway Labor*, 29 F.3d at 660, the agency has arrogated to itself power to expand authority to charges brought by "any person." 29 C.F.R. § 102.9. This is not just a clarification of what "aggrieved" means—it is a blatant assumption that the agency can exercise more than the express power granted to the agency by Congress "merely by virtue of its existence." *Railway Labor*, 29 F.3d at 659. Under any plausible reading of the statute, therefore, the agency is not exercising authority delegated to it by Congress and hence does not enjoy deference.

c. The statute unambiguously forecloses the agency from asserting jurisdiction over charges brought by non-aggrieved parties.

Even if the statutory provision at issue here does warrant application of *Chevron* deference, the statute is plain on its face, largely for the same reason described above: it grants jurisdiction to investigate

and prosecute when a charge is filed by an "aggrieved" person. "[A]ggrieved" and "aggrieved person" are both legal terms of art which refer specifically to legally cognizable injuries. This narrow and technical meaning is well-attested from cases and legal dictionaries that are roughly contemporaneous with the passage of the NLRA and does not include those who are angry or upset but not legally injured.[3] And under longstanding canons of statutory construction, the explicit mention of one class impliedly excludes others. As the D.C. Circuit put it, "if Congress makes an explicit provision for apples, oranges and bananas, it is most unlikely to have meant grapefruit." *American Petroleum Institute v. EPA*,

[3] *Roullard v. McSoley*, 54 R.I. 232, 172 A. 326, 327 (1934) ("The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation."); *Glos v. People*, 259 Ill. 332, 339, 102 N.E. 763, 766 (1913) ("Persons having an interest in the cause, if not aggrieved by the particular errors assigned in the decree, cannot maintain a bill of review, however injuriously the decree may affect the rights of third persons.").

The 4th Edition of Black's Law Dictionary relies on these cases and others and defines aggrieved as "[h]aving suffered loss or injury; damnified; injured," and aggrieved party as "[o]ne whose legal right is invaded by an act complained of, or whose pecuniary interest is directly affected by a decree or judgment." Black's Law Dictionary 87 (4th ed. 1964). *See also* Benjamin W. Pope, Legal Definitions Vol 1. at 52 (1919) (defining aggrieved as "having a substantial grievence"); Bouvier's Law Dictionary Vol. 1 (8th ed. 1914) (defining aggrieved as "Having a grievence, or suffered loss or injury" and noting that "[o]ne cannot be said to be aggrieved unless error has been committed against him").

198 F.3d 275, 279 (D.C. Cir. 2000). Hence, the mention of aggrieved persons impliedly excludes simply "any person" at all.

d. The NLRB's interpretation is not reasonable.

Even if the statute were ambiguous, the NLRB's interpretation is not reasonable because it is inconsistent with the context and purpose of the statute. When assessing reasonableness under *Chevron*, courts look to whether the regulation is "inconsistent with the design and structure of the statute as a whole." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 321 (2014). If so, it does not merit deference.

Allowing for the NLRB to seize jurisdiction whenever anyone at all files a charge clashes with the design of the statute as a whole. The Supreme Court has held that the NLRA's purpose is remedial, not punitive. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940). The Court has noted that the Act prescribes no penalties or fines for vindicating a public interest, instead focusing only on the protection of the given company's employees and redressing their grievances. *Id.* at 11. "Had Congress been intent upon such a [punitive] program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme." *Id.* at 10.

Given this context, it makes little sense to interpret the NLRB's subject-matter jurisdiction to extend to charges filed by random Twitter users with no relationship to the company or its employees, when not a single one of the company's employees could be shown to be hurt by the one-sentence tweet.

II. The NLRB's muscular exercise of its authority to penalize expression on social media violates the First Amendment.

The NLRB's fixation on a pithy quip on Twitter raises serious First Amendment concerns. For one, expression on the internet will be chilled if an expanded subject-matter jurisdiction allows random Twitter users to summon a federal agency to investigate and prosecute speech they don't like. Secondly, the NLRB's interpretation of an unfair labor practice, as applied to a hyperbolic tweet, burdens protected speech and should be subject to strict scrutiny. It is unlikely that the NLRB can demonstrate that its persecution of a conservative media outlet over satirical commentary on matters of public interest that did not result in any injury to employees is a narrowly tailored means of achieving a compelling government interest.

a. An overbroad interpretation of the Board's charging authority creates a heckler's veto that will chill expression on matters relating to labor relations.

Defining who has the power to file a charge with the NLRB can have important consequences for the expression of viewpoints on matters related to labor relations. While filing a charge does not guarantee ultimate liability, "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."). If any troll on social media can trigger a federal investigation over an "anti-union" viewpoint, then commentators may "choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). This concern extends not only to threats but also viewpoints on labor relations generally, as evidenced in this case: counsel for the agency pointed to "anti-union" articles published by FDRLST-Media as the primary evidence, aside from the tweet itself, in proving an unfair

labor practice. *See* CAR 73–103. The realities of online communication only inflame these problems, where context is often lost and speakers cannot easily control audience or interpretation.

Thus, a broad reading of the Board's subject-matter jurisdiction raises serious risks of viewpoint discrimination. Allowing anyone to file a charge, regardless of whether they have been in fact injured, encourages individuals to engage in politically driven speech suppression—something patent in this case—which then allows the agency to pick and choose the cases which strike its fancy or invoke its ire. Indeed, such a policy "gives to the perpetuation and encouragement of the practice of informing which most of us think of as being associated only with totalitarian governments." *Noto v. United States*, 367 U.S. 290, 301–02 (1961) (Black, J., concurring). Unmoored from actual injury to employees, broad subject-matter jurisdiction may encourage the agency to align its priorities toward penalizing companies engaged in expression the agency dislikes.

b. The NLRB cannot prosecute hyperbole.

Political hyperbole on social media, regardless of how well it's taken, merits full First Amendment protection. *See Hustler Magazine,*

Inc. v. Falwell, 485 U.S. 46 (1988) (recognizing that deliberatively provocative parody merits First Amendment protection). The NLRB, however, ignored the obvious sarcasm in Domenech's words and held that First Amendment protections "do not extend to threats made by employers to workers." CAR 279. Any such exception to First Amendment protection should not extend to online hyperbole.

Sarcasm and political hyperbole have long enjoyed First Amendment protection. The Supreme Court has extended this even to violent rhetoric that could otherwise qualify as a criminal threat exempted from the First Amendment. In *Watts v. United States*, 394 U.S. 705, 706 (1969), Robert Watts stated at a public rally during the Vietnam War: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Watts was convicted of a federal crime for threatening the President. *Id.* The Supreme Court, however, distinguished threats from Watts's "political hyperbole" in interpreting the criminal statute to avoid a First Amendment violation. *Id.* at 707–08. The Court noted that Watt's overblown rhetoric is common in political speech: "The language of the political arena . . . is often vituperative, abusive, and inexact." *Id.* at 708.

As the Supreme Court has explained, the First Amendment protects even hostile or vituperative remarks unless "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). But the NLRB found FDRLST-Media responsible for threatening employees based only on the complaint of an unaffected third party. Not a single individual who works with Domenech or observed his tweet offered testimony that his tweet was meant as anything but a hyperbolic remark aimed at the public Twitter community. Nor is there any evidence in the record that there was any real possibility that FDRLST-Media employees might unionize. And of course, it should go without saying that FDRLST-Media owns no salt mines to which Mr. Domenech might banish his staff writers. Reliance on the complaints of individuals who are not aggrieved dramatically increases the risk that protected speech will be subject to investigation.

Furthermore, the stony literalism with which the NLRB frowned upon this obvious wisecrack demonstrates why federal agencies should not be in the business of prosecuting people for tweets—the danger of

enforcement abuse is too great. *See Hustler Magazine*, 485 U.S. at 55 ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."). NLRB may not appreciate Mr. Domenech's humor, but "First Amendment protections do not only apply to those who speak clearly, whose jokes are funny, and whose parodies succeed." *Yankee Pub. Inc. v. News America Pub. Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992).

The NLRB concluded that Domenech's cheeky wisecrack is beyond the scope of First Amendment protection because it was a "threat of reprisal" against employees who want to unionize.

The Supreme Court has indeed carved out a narrow exception to First Amendment protection where an employer engages in speech that amounts to a "threat of reprisal" for unionizing. But the NLRB's decision stretches that limited exception to ludicrous proportions.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), a union had waged an organizational campaign to win employer recognition. *Id.* at 579. The employer resisted bargaining and engaged in "vigorous

antiunion campaigns that gave rise to numerous unfair labor practice charges." *Id.* at 580. These included interrogation of employees and threats of discharge. *Id.* at 583. The specific speech at issue in *Gissel* involved a pamphlet from an employer to employees warning that unionization could force the business to close. *Id.* at 588. The NLRB concluded the speech constituted an unlawful threat of reprisal under the NLRA when considering the "totality of the circumstances." *Id.* at 589.

The Supreme Court rejected the company's First Amendment defense. While recognizing that "an employer's free speech right to communicate his views to his employees is firmly established," the Court threaded the needle: "Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.* at 618. *Gissel* concluded that, while employers were free to predict likely economic outcomes from unionization, the NLRB could reasonably conclude that the "intended and understood import was not to predict [closure] but to threaten employees out of work regardless of the economic realities." *Id.* at 619.

Circuit Courts applying *Gissel* have largely been protective of employer speech. *See* Beth Z. Margulies, NLRB v. Gissel Packing Co.*: A Standard Without a Following (The Need for Reappraisal of Employer Free Speech Rights in the Organizing Campaign)*, 22 Willamette L. Rev. 459, 469–92 (1986) (reviewing circuit court applications of *Gissel*). This Circuit has only found that employer speech was not protected by the First Amendment where, as in *Gissel*, it arose in the midst of an actual effort to unionize by employees and was accompanied by other unlawful and coercive behavior by the employer during an actual employee effort to unionize. Hence, in *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 177 (3d Cir. 2002), this Circuit held that requests to videotape employees for an anti-union video was an unprotected threat when considered in the context of "a vigorous anti-union campaign underway at the time of the challenged inquiries." *See also Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534 (3d Cir. 1983) (widespread and repeated employee questioning about unionization during a union organizing campaign was not protected from an unfair labor violation); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934 (3d Cir. 1980) (First Amendment did not shield employer who, during a campaign to unionize, distributed leaflets and made

speeches to employees about the adverse consequences of unionizing). All these cases point to a very narrow exception to the First Amendment: employer speech that amounts to repeated express or implied threats made in the context of a pattern of anti-union campaigning during an actual ongoing movement among employees to unionize.

A saucy quip on Twitter bears no resemblance to these cases. Unlike *Gissel* and the Third Circuit cases applying it, Domenech's one-sentence comment was not part of a larger theme of anti-union campaigning by FDRLST-Media, nor did it arise during any actual attempt to unionize by FDRLST-Media's staff. NLRB did not even bother to present evidence on the "impact of utterances made in the context of the employer-employee relationship." *Gissel*, 395 U.S. at 620. Nor can a tweet on Domenech's personal Twitter account, issued to the world at large, be seen as a communication "in the context of the employer-employee relationship" simply because Domenech tagged FDRLST-Media's company Twitter account in his post. *Gissel*'s narrow exception to the First Amendment has no role to play in this matter.

But even more to the point: the tweet is simply not a threat of reprisal. It is precisely the kind of "political hyperbole" that the Supreme

Court has recognized as protected even in the context of violent threats against the President of the United States. *Watts*, 394 U.S. at 708. *See also Black*, 538 U.S. at 360 (citing *Watts* for the proposition that political hyperbole is not a "true threat" that falls outside First Amendment protection). Sarcastic overstatement, commonplace in online banter, merits full First Amendment protection, especially where there is no "reason to believe [it] will mislead [FDRLST-Media's] employees." *Gissel*, 395 U.S. at 620.

CONCLUSION

The NLRB has overstepped its statutory authority in an attempt to cast "anti-union" expression in the public marketplace of ideas as an unlawful labor practice. This Court should not stand for such agency abuse of its power.

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Respectfully submitted,

By s/ J. DAVID BREEMER

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COMBINED CERTIFICATES

I hereby certify

that J. David Breemer and Daniel M. Ortner are members in good standing of the bar of this Court, and that Ethan W. Blevins is a member in good standing of the state bars of Washington, Montana, and Utah and the Bar of the U.S. Ninth Circuit Court of Appeals;

that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)(A) because it has been prepared in 14 point Century Schoolbook font;

that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and 29(a)(5) because it contains 5,801 words;

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