In The

United States Court of Appeals for the Third Circuit

20-3434 & 20-3492

FDRLST MEDIA, LLC,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

On Petition for Review of an Order of the National Labor Relations Board, No. 02-CA-243109

BRIEF OF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

JONATHAN S. GOLDSTEIN, ESQ.
I.D. No: 201627

SHAWN M. RODGERS, ESQ.
I.D. No: 307598

Attorneys for Amicus Curiae
National Federation of Independent Business
Small Business Legal Center

GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
Phone 610.949.0444
Fax: 610.296.7730
E-mail: jgoldstein@goldsteinlp.com
E-mail: srodgers@goldsteinlp.com

CORPORATE DISCLOSURE STATEMENT

The NFIB Small Business Legal Center is a 501(c)(3) public interest law firm. We are affiliated with the National Federation of Independent Business, a 501(c)(6) business association, which supports the NFIB Small Business Legal Center through grants and exercises common control of the NFIB Small Business Legal Center through officers and directors. No publicly-held company has 10% or greater ownership of the NFIB Small Business Legal Center.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTEREST OF AMICUS CURIAE

The National Federation of Independent Business Small Business Legal Center (NFIB SBLC) is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington D.C., and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB SBLC frequently files amicus briefs in cases that affect small businesses. Federal Rule of Appellate Procedure 29(a)(2) authorizes NFIB SBLC to submit this Amicus Brief as "all parties have consented to its filing[.]"

COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

Counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, their members, and their counsel has made a

monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioner thoroughly addresses the First Amendment and personal jurisdiction issues in this appeal from the National Labor Relations Board's decision. *Amicus curiae's* brief will address the following points:

1) The National Labor Relations Board (NLRB or Board) did not have subject-matter jurisdiction to investigate and issue a ruling against Petitioner's officer because its regulation is an invalid interpretation of the National Labor Relations Act (NLRA or Act); and
2) The Board's interpretation of the Act would have a damaging impact on the business community.

A simple textual analysis of the NLRA, a review of case precedent, and common sense, reveals that the Board's regulation is invalid. It is uncontroverted that this controversy began with a tweet by Mr. Domenech.[1] Factual indeed, this is irrelevant to the question of subject-matter jurisdiction. The NLRA states that the person filing the unfair

[1] The NFIB Small Business Legal Center takes no position on and does not endorse Mr. Domenech's tweet.

labor practice charge must be a "person *aggrieved*" by the alleged practice. The Board, in regulations enforcing the NLRA, interprets this to mean "[*a*]*ny person* may file a charge." Rendering the "aggrieved" qualifier a nullity, the Board's interpretation expands its own jurisdiction to investigate and prosecute an unfair labor practice charge. It does so at the expense of the text's meaning, relevant canons of construction, and precedent from this and other courts.

In addition, the Board's interpretation of the NLRA to allow for "[a]ny person" to file an unfair labor practice charge flies in the face of practicality. By allowing someone with no specific injury or relationship to the charged party to file a charge, the Board weaponizes the NLRA against the business community. It flips the NLRA on its head, from being an administrative check on businesses, to being a tool ripe for abuse. Especially in the age of social media and emerging technology, the Board's interpretation allows for any person to file a charge based on nothing more than a personal bias against a business, animosity toward the owner, or market competition.

This Court should rein in the Board's expansion of the NLRA's meaning and hold that only an "aggrieved" person may file an unfair labor practice charge.

ARGUMENT

I. The National Labor Relations Board's allowance in 29 C.F.R. § 102.9 of "[a]ny person" to file an unfair labor practice charge violates the text of the National Labor Relations Act's requirement that an "aggrieved" person file the charge, and therefore no subject-matter jurisdiction exists.

The NLRA is the enabling act for the NLRB. Besides creating the Board, *see* 29 U.S.C. § 153(a), the Act empowers the Board "to prevent any person from engaging in any unfair labor practice[.]" 29 U.S.C. § 160(a). The Act describes the process by which the Board prevents and prosecutes unfair labor practices:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect . . . : Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, *unless the person aggrieved* thereby was prevented from filing such charge by reason of service in the armed forces, in which event the

> six-month period shall be computed from the day of his discharge. . . .

29 U.S.C. § 160(b) (emphasis added). The Act also gives the Board authority to issue rules and regulations to carry out the Act's mandate. 29 U.S.C. § 156. The Board interprets § 160(b), by way of regulation, to mean "[*a*]*ny 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 (emphasis added). The Board's interpretation of § 160(b) is erroneous in multiple respects.

A. The National Labor Relations Board's regulation ignores the clear text of the National Labor Relations Act.

First and foremost, the Board's interpretation that "[a]ny person may file a charge" ignores the definition of the adjective "aggrieved" qualifying the noun "person." Black's Law Dictionary defines "aggrieved" as "[h]aving suffered loss or injury; damnified; Injured." *Aggrieved*, BLACK'S LAW DICTIONARY (6th ed. 1990). The legal definition for "aggrieved" provided by Merriam-Webster is "suffering from an infringement or denial of rights" or "having interests adversely affected." *Aggrieved*, MERRIAM-WEBSTER'S DICTIONARY, www.merriam-

webster.com (last visited Mar. 22, 2021).[2] Mr. Fleming suffered no loss, injury, or infringement of rights. Mr. Fleming's only claim to "injury" from Mr. Domenech's tweet is, at best, being an offended observer.[3]

B. The National Labor Relations Board's regulation enforcing the National Labor Relations Act conflicts with well-established canons of statutory interpretation.

The Board's broad interpretation set forth in 29 C.F.R. § 102.9 ignores the word "aggrieved" and renders it surplusage. If "person aggrieved" means that "[a]ny person" may file an unfair labor practice charge, then the meaning of the statute is unchanged if it read "*unless the person* thereby was prevented from filing such charge."[4] But it is a

---

[2] Merriam-Webster also notes a broader definition used in common parlance: "troubled or distressed in spirit" and "showing or expressing grief, injury, or offense." *Aggrieved*, MERRIAM-WEBSTER'S DICTIONARY, www.merriam-webster.com (last visited Mar. 22, 2021). This extremely broad definition does not make sense considering the Act's use of the word, the interpretive canons pointing toward the narrower legal definition, and case precedent discussed.

[3] The Supreme Court recognizes "offended observer" standing only in Establishment Clause cases, and to this author's knowledge, no other area of the law. Even in those cases, this theory of standing is highly controversial. *See American Legion v. American Humanist Assoc.*, 139 S. Ct. 2067, 2098-104 (2020) (Gorsuch, J. concurring, joined by Thomas, J.). This Court should not extend the notion of "offended observer" standing to the NLRA and this case, as the Board attempts to do via 29 C.F.R. § 102.9.

[4] Any argument that "aggrieved" serves to distinguish "the person" from "the person against whom such charge is made" in the preceding

cardinal principle of statutory interpretation that "every word . . . is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it . . . to have no consequence." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) (hereinafter "READING LAW"); *see also Pennsylvania v. Navient Corp.*, 967 F.3d 273, 285 (3d Cir. 2020) (rejecting the argument that broader statutory language in a statute was limited because doing so would render the broader language surplusage – the exact inverse of the Board's interpretation broadening the limiting statutory language, thereby rendering it surplusage).

Moreover, reading 29 U.S.C. § 160(b) as the Board does in 29 C.F.R. § 102.9 to allow "[a]ny person" to file an unfair labor practice charge produces absurd results. When faced with two readings of a statute, courts are advised to steer away from a reading that produces absurd results. *See McNeil v. United States*, 563 U.S. 816, 822 (2011) ("Absurd results are to be avoided." (quoted source omitted)); *United States v. Schneider*, 14 F.3d 876, 880 (3d Cir. 1994) ("It is the obligation

---

sentence ignores that "prevented from filing such charge" performs the same function – distinguishing between the charged party and the charging party. *See* 29 U.S.C. § 160(b).

of the court to construe a statute to avoid absurd results . . . ." (cited source omitted)). The Board's interpretation creates the absurd results courts are to avoid. Reading "aggrieved" to mean "[a]ny person" allows an individual with no prior relationship to a business, and with no personal knowledge of a business's workings, to file an unfair labor practice charge with the Board. This might be a permissible reading, had Congress demonstrated a commitment to this interpretation through the text of 29 U.S.C. § 160(b) or the Act generally, but it has not.

The clear policy of the Act is to address asymmetrical bargaining power that exists between employers and their employees, not to provide a weapon for public use against an employer. *See* 29 U.S.C. § 151 (setting forth the congressional policy of the Act and discussing this asymmetry between employers and their employees).[5] In addition, the listing of unfair labor practices by an employer in 29 U.S.C. § 158(a) refutes the Board's broad reading. If "[a]ny person" can file a charge as

[5] Any argument that the definition of "employee" in 29 U.S.C. § 152 supports the Board's broad interpretation to allow "[a]ny person" to file a complaint is wrong. "Employee" "not be[ing] limited to the employees of a particular employer" simply means the Act applies to all employers and their employees.

the Board claims, how can an employer commit an unfair labor practice by "discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony . . ."? 29 U.S.C. § 158(a)(4). An employer cannot discharge or discriminate against an employee who is not his own. Likewise, if the Act does not only grant jurisdiction over the complaints of employees about their employers, why does the next subsection also mention "refus[ing] to bargain collectively with the *representatives of his employees*" as an unfair labor practice? 29 U.S.C. § 158(a)(5) (emphasis added). Not only does this subsection specifically reference "his employees," but it is obvious that an employer cannot collectively bargain with representatives of employees that are not his. Other provisions of the Act similarly belie the Board's broad interpretation of jurisdiction. *See* 29 U.S.C. § 159(a) ("[A]ny individual employee or a group of employees shall have the right at any time to present grievances to *their employer* . . . ." (emphasis added)); 29 U.S.C. § 160(c) (discussing the remedy when the Board determines an unfair labor violation has occurred to be "an order requiring [the violator] to cease and desist from such unfair labor practice, and to *take such affirmative action including reinstatement of*

employees with or without back pay, as will effectuate the policies of this subchapter[.]" (emphasis added)). In sum, "the language and design of the statute as a whole" contradicts the Board's broad interpretation of jurisdiction allowing "[a]ny person" to file a complaint. *See United States v. Jabateh*, 974 F.3d 281, 295 (3d Cir. 2020) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)).

C. The National Labor Relations Board's interpretation of the National Labor Relations Act ignores the prior meaning attributed to "aggrieved" in the Act by some courts of appeal.

This Court and other courts of appeal have defined "aggrieved" as used in 29 U.S.C. § 160(f) to mean that "one must suffer 'an adverse effect in fact,' to be 'aggrieved' under the NLRA." *Quick v. N.L.R.B.*, 245 F.3d 231, 251-52 (3d Cir. 2001) (quoted source omitted) (holding a person was not entitled to review of an NLRB order denying attorney's fees because the person suffered no "injury in fact"). The D.C. Circuit has similarly held that "person aggrieved" in § 160(f) means having suffered an "adverse effect in fact." *Retail Clerks Union 1059 v. N.L.R.B.*, 348 F.2d 369, 370 (D.C. Cir. 1965). Granted these holdings interpret § 160(f)'s review of a final Board order provisions, instead of

§ 160(b)'s complaint process provisions, but both sections use the same phrase – "person aggrieved." *Compare* 29 U.S.C. § 160(b) *with* 29 U.S.C. § 160(f). Without a clear indication from Congress, it makes little sense to interpret "person aggrieved" in § 160(b) to mean "[a]ny person," but "person aggrieved" in § 160(f) to mean only one suffering a concrete or adverse injury. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (describing "the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning"); *United States v. Sims*, 957 F.3d 362, 365 (3d Cir. 2020) (presuming a repeated phrase "mean[s] the same thing throughout the [Sentencing] Guidelines"); READING LAW, *supra* at 170 (describing the presumption of consistent usage – "[a] word or phrase is presumed to bear the same meaning throughout a text[.]"). This Court should give "person aggrieved" in § 160(b) the same meaning it has given the phrase elsewhere in the statute.

The Board's only claim to subject-matter jurisdiction in this case comes from its broad interpretation of 29 U.S.C. § 160(b) in 29 C.F.R. § 102.9 that "[a]ny person may file a charge" of an unfair labor practice. This interpretation finds no support in the legal definitions for the word

"aggrieved," plain text of 29 U.S.C. § 160(b), normal tools of statutory interpretation, the Act in its entirety, or precedent on the phrase. To the contrary, all point to "person aggrieved" meaning a person suffering a denial of rights or an actual adverse loss or injury, such as an employee harmed by the alleged unfair labor practice. Because Mr. Fleming is not such a person, and has suffered no denial of rights, loss, or injury, he was not a proper charging party under 29 U.S.C. § 160(b). Thus, the Board had no subject-matter jurisdiction to investigate an unfair labor practice charge against Mr. Domenech and the Court should dismiss on that basis.

II. Allowing the National Labor Relations Board to redefine "person aggrieved" as "[a]ny person" poses a direct and continuous threat to the business community.

The practical consequences of this Court reading 29 U.S.C. § 160(b) to allow "[a]ny person" to file an unfair labor practice charge, as the Board does, are substantial. Requiring no employment or working relationship between the charging and charged parties has the effect of weaponizing the NLRA against businesses. Under the Board's interpretation, a California person can file an unfair labor practice charge against a Florida business owner, simply because the

Californian disagreed with the Floridian's political social media post. A market competitor can file a charge simply out of spite for a rival business owner. An upset friend or former partner can use the Board's interpretation of the Act to cause distress to a business owner. None of these situations serves the purpose of the Act to allow "employees to organize" and minimize the "inequality of bargaining power" between employers and their employees. *See* 29 U.S.C. § 151.

The Board's regulation epitomizes absurdity by allowing an individual, without any working relationship or personal knowledge of the business, to file an unfair labor practice charge. Business owners, especially small business owners, will be subject to distress and constantly looking over their shoulder in fear of an unfair labor practice charge filed against them. Given the truly dangerous consequences of the Board's interpretation, this Court should reject the Board's reading of the NLRA in 29 C.F.R. § 102.9.

CONCLUSION

Amicus curiae respectfully requests this Court hold the National Labor Relations Board erroneously expanded its jurisdiction under the National Labor Relations Act by allowing an unauthorized person to file

an unfair labor practice charge, and dismiss NLRB's case against Petitioner for lack of subject-matter jurisdiction.

DATED this 29th day of March 2021.

Respectfully submitted,

/s/Shawn M. Rodgers
Jonathan S. Goldstein
Shawn M. Rodgers
GOLDSTEIN LAW PARTNERS
11 Church Road
Hatfield, Pennsylvania 19440
Phone: 610.949.0444
E-mail: jgoldstein@goldsteinlp.com
E-mail: srodgers@goldsteinlp.com

Karen Harned
Rob Smith
NFIB Small Business Legal Center
555 12th Street, NW, Suite 1001
Washington, D.C. 20004

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2021, I electronically filed the foregoing *Amicus Curiae* Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel of record for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

March 29, 2021

/s/Shawn M. Rodgers

Jonathan S. Goldstein
Shawn M. Rodgers
GOLDSTEIN LAW PARTNERS
11 Church Road
Hatfield, Pennsylvania 19440
Phone: 610.949.0444
E-mail: jgoldstein@goldsteinlp.com
E-mail: srodgers@goldsteinlp.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

We hereby certify that this *Amicus* Brief complies with the type-volume limitation set forth in Rules 29(a)(5) and 32 (a)(7)(B) of the Federal Rules of Appellate Procedure and contains 2,719 words.

We further certify that this Brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief appears in proportionately spaced typeface using Microsoft Word in Century Schoolbook, 14- point font.

The text of the electronic Brief is identical to the text in the paper copies.

Respectfully Submitted,

March 29, 2021

/s/Shawn M. Rodgers

Jonathan S. Goldstein
Shawn M. Rodgers
GOLDSTEIN LAW PARTNERS
11 Church Road
Hatfield, Pennsylvania 19440
Phone: 610.949.0444
E-mail: jgoldstein@goldsteinlp.com
E-mail: srodgers@goldsteinlp.com

Counsel for Amicus Curiae

CERTIFICATE OF BAR MEMBERSHIP

We hereby certify that we are members of the Bar of the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

March 29, 2021

/s/Shawn M. Rodgers

Jonathan S. Goldstein
Shawn M. Rodgers
GOLDSTEIN LAW PARTNERS
11 Church Road
Hatfield, Pennsylvania 19440
Phone: 610.949.0444
E-mail: jgoldstein@goldsteinlp.com
E-mail: srodgers@goldsteinlp.com

Counsel for Amicus Curiae

VIRUS SCAN CERTIFICATION

This brief complies with L.A.R. 31.1(c). Before being electronically filed with the Court, the .pdf file was scanned by the following virus detection software and found to be free from computer viruses: Norton Antivirus Plus.

Respectfully Submitted,

March 29, 2021

/s/ Shawn M. Rodgers

Jonathan S. Goldstein
Shawn M. Rodgers
GOLDSTEIN LAW PARTNERS
11 Church Road
Hatfield, Pennsylvania 19440
Phone: 610.949.0444
E-mail: jgoldstein@goldsteinlp.com
E-mail: srodgers@goldsteinlp.com

Counsel for Amicus Curiae