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NCLA Files *Amicus* Brief in NLRB Lawsuit Alleging Tesla CEO Tweet Was Unfair Labor Practice

Tesla, Inc. v. National Labor Relations Board

Washington, DC (August 11, 2021) – The National Labor Relations Board's (NLRB) preoccupation with Twitter continues to grow. Its latest victim is Tesla CEO Elon Musk. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an *amicus* brief in the U.S. Court of Appeals for the Fifth Circuit in support of Tesla, Inc.'s lawsuit against NLRB. *Tesla Inc. v. NLRB* challenges the Board's March 2021 ruling that Tesla violated the National Labor Relations Act (NLRA) and further that the electric vehicle manufacturer would be required to "direct Musk to delete [his] unlawful tweet."

In the Summer of 2018, the United Auto Workers union and a handful of Tesla's employees filed a charge with NLRB alleging that Tesla committed an unfair labor practice when Mr. Musk tweeted a statement on his personal Twitter account. An NLRB administrative law judge concluded that Tesla violated labor laws "by … [t]hreatening employees on May 20, 2018, with loss of stock options if they vote in favor of the Union."

The Board, in March 2021, decided against Tesla based entirely on its flawed decision from a few months prior in *FDRLST Media, LLC v. NLRB*. NCLA currently represents FDRLST Media, LLC in the United States Court of Appeals for the Third Circuit, in an appeal from the Board's November 2020 decision against FDRLST. There are multiple constitutional defects in the Board's *FDRLST* decision, which it only exacerbated when it relied exclusively on that decision to rule against Tesla. In doing so, NLRB ignored Supreme Court and Fifth Circuit Court decisions otherwise interpreting and applying unfair labor practice statutes and the First Amendment.

In its decision against Tesla, NLRB applied *FDRLST* without explanation or analysis. The Court should discard NLRB's labored reading of the NLRA. NCLA argues in its *amicus* brief that the Court should decline to afford NLRB's interpretation *Chevron* deference. To the extent NLRB has rewritten the Supreme Court's *Gissel* test, and First Amendment jurisprudence, the Fifth Circuit should also decline to afford *Brand X* deference to such administrative contradiction of binding federal-court decisions.

Deference to agency interpretations violates the Fifth Amendment's Due Process Clause, undermines judicial independence under Article III, and violates the Separation of Powers doctrine inherent in the U.S. Constitution. The Court should grant Tesla's petition for review and set aside the portions of the Board's Order finding unfair labor practices based on Mr. Musk's tweet.

NCLA released the following statement:

"NLRB's handbook for administrative law judges expressly instructs them to ignore federal circuit-court decisions. Given such explicit instruction, NLRB should not now be allowed to scurry under any deference umbrella to defend its thinly reasoned opinion."
— **Adi Dynar, Litigation Counsel, NCLA**

For more information visit the case page here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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