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

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONER

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DISCLOSURE STATEMENT

Counsel for *amicus curiae* certify that the Institute for Free Speech is a nonprofit corporation, has no parent company, subsidiary, or affiliate, and that no publicly held company owns more than 10 percent of its stock.

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The Institute for Free Speech is a nonpartisan, nonprofit organization that works to defend the rights to free speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society groups in cases at the intersection of political regulation and First Amendment liberties.

INTRODUCTION

"The object of the National Labor Relations Act is industrial peace and stability," *Auciello Iron Works v. NLRB*, 517 U.S. 781, 785 (1996) (citations omitted), achieved in part by "prescrib[ing] the legitimate rights of both employees and employers in their relations affecting commerce." 29 U.S.C. § 141(b).

Among those rights stands the right of free speech, including speech concerning labor relations. The Supreme Court has thus characterized the NLRA as specifically "favoring uninhibited, robust, and wide-open debate in labor disputes." *Chamber of Commerce v. Brown*, 554 U.S. 60,

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amicus or its counsel, financially contribute to preparing or submitting this brief. All parties have consented to the filing of this brief.

67 (2008) (internal quotation marks omitted). As the First Amendment protects "colorful, figurative rhetoric that reasonable minds would not take to be factual," *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 367 (9th Cir. 1995), the Supreme Court has imposed "substantive restrictions" on state libel laws in order to "prevent unwarranted intrusion upon free discussion envisioned by the [NRLA]," *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 272 (1974) (internal quotation marks omitted). A party to a labor dispute can "use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Id.* at 283. The speaker "must not be stifled by the threat of liability for the overenthusiastic use of rhetoric." *Id.* at 277.

However, in Mr. Domenech's case, a third-party interloper has wielded the NLRA as a weapon to silence purely political speech with which he disagrees. Particularly in the age of the internet and social media, expanding the NLRA's definition of "aggrieved party" to include any person, regardless of his or her interest or injury, will chill constitutionally protected speech of employers and employees alike. The Board's decision should be vacated.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS EMPLOYERS' FREEDOM TO OPINE ON THE SUBJECT OF LABOR RELATIONS.

At the core of the First Amendment is "the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). The First Amendment prevents not only "attempts to disfavor certain subjects or viewpoints," but also "restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Accordingly, the protections afforded speech by the First Amendment do not "depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

Indeed, the NLRA secures employers' First Amendment speech rights with respect to labor unions. The act "merely implements the First Amendment by requiring that the expression of 'any views, argument, or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of" employees' right to organize. *NLRB v.*

Gissel Packing Co., 395 U.S. 575, 617 (1969) (citing 29 U.S.C. § 158(c)) (other citation omitted). Simply put, the NLRA "manifest[s] a 'congressional intent to encourage free debate on issues dividing labor and management.'" *Chamber of Commerce*, 554 U.S. at 67 (quoting *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966)).

"Labor disputes are ordinarily heated affairs . . . Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Linn*, 383 U.S. at 58. This "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." *Chamber of Commerce*, 554 U.S. at 68 (internal quotation marks omitted). Even in the course of ongoing disputes between management and employees, where the government's interests are at their zenith, the First Amendment protects employers' right to speak. "[A]n 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." *Gissel,* 395 U.S. at 618 (internal quotation marks omitted).

Because employers enjoy a robust right to speak during employment disputes, *Gissel Packing*'s limitation for "threat[s] of reprisal" must be read with caution. "[T]hreat[s] must be distinguished from constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707 (1969). Speech in the context of unions and labor issues often overlaps with purely ideological speech, which is "probably the most highly protected" category of speech. *Ackerley Commc'ns v. City of Cambridge*, 88 F.3d 33, 37 (1st Cir. 1996). When purely ideological speech is involved, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (collecting cases). In reviewing an employer's challenged statement, courts will "look to the context of its particular labor relations setting and balance the employer's right of expression against the equal right of employees to associate freely with a collective bargaining setting." *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 277 (8th Cir. 1979).

In *Fed.-Mogul Corp. v. NLRB*, the Fifth Circuit examined preexisting relationships in the labor relations context to determine that a foreman

burning a union card was "a joke and occurred in jest for the purpose of evoking laughter, which actually occurred . . . and an incident such as this would not be unusual or unexpected among [the employer and employees]." 566 F.2d 1245, 1253 (5th Cir. 1978). In *Gissel*, the Supreme Court acknowledged the employer's first-hand knowledge of the employer-employee rapport and his capacity to "avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees." *Gissel*, 395 U.S. at 620.

Here, the employer's ideological speech concerning labor relations enjoys strong First Amendment protection, but none of the factors warranting punishment of that speech is present. This case does not involve a labor dispute between an employer and employee—not even a hint of one—nor does it involve any threats. The joke was not uttered in the context of heated negotiations between management and a union, or in anticipation of any organizing activity by the employees. Rather, Mr. Domenech merely exercised a "freewheeling use of the written and spoken word," *Chamber of Commerce*, 554 U.S. at 68 (internal quotation marks omitted), to express "his general views about unionism [and] his specific views about a particular union," *Gissel,* 395 U.S. at 618. The

context of current events and THE FEDERALIST's views as a publication cannot be ignored when determining whether Mr. Domenech's tweet "would tend to coerce a reasonable employee." *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 938 (3d Cir. 1980). Reasonable minds would not interpret Mr. Domenech's hyperbolic speech—an exaggeration, made in jest, commenting on the political issues of the day—as an actual threat to his employees.

II. EXPANDING THE DEFINITION OF "AGGRIEVED PERSON" TO INCLUDE ANY OFFENDED PERSON WOULD UNDULY CHILL CONSTITUTIONALLY PROTECTED SPEECH.

Labor disputes are contentious enough without inviting third parties to stir the legal pot. Enabling outsiders to initiate legal action against speakers—be they labor or management speakers—involved in a labor dispute, at the mere pretext of offense, will only exacerbate the First Amendment chill inherent in the official policing of speech. In *Riley v. Nat'l Fed'n for the Blind*, 487 U.S. 781 (1988), the Court invalidated a ban on unreasonable fundraising fees in part because the enforcement procedures excessively burdened protected speech. When regulations deny speakers "a measure of security," as the Board's enforcement does here, such regulations "must necessarily chill speech in direct

contravention of the First Amendment[.]" *Id.* at 794. "Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will 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) (citation omitted).

This chill is only made worse by the temptation to silence one's opponents over partisan or political disagreement. When "the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from . . . political opponents." *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 164 (2014). In fact, complainants often "time their submissions to achieve maximum disruption of their political opponents." *Id.* at 165. In *Holland v. Williams*, for example, a concerned citizen took out an ad criticizing common core curricula, only to have a campaign finance complaint filed against her by the Superintendent of the very school district she criticized. 457 F. Supp. 3d 979, 988-89 (D. Colo. 2018). Emphasizing that the "character of the asserted injury [was] a diminution of First Amendment speech," *id.* at 992, the court

saw "nothing reasonable about outsourcing the enforcement of laws with teeth of monetary penalties to anyone who believes that those laws have been violated," *id*. at 993.

This weaponization of a universal complaint process is not unusual in the campaign finance context. When Colorado allowed third party campaign finance complaints, one party initiated 50 of the 340 complaints filed over a 14-year period, stating that the campaign finance system was a tool for waging "political guerrilla legal warfare (a.k.a. Lawfare)" against opponents. Nick Sibilla and John Kerr, *Can't Afford a Lawyer? No Free Speech for You*, REASON, January 2017, https://tinyurl.com/4wxua3j7. Allowing any person to file a third-party complaint "authorizes a purely ideological [complainant] . . . to bring into the courtroom the kind of political battle better waged in other forums." *Nike, Inc. v. Kasky*, 539 U.S. 654, 679 (2003) (Breyer, J., dissenting). The result is an environment where speakers are pressured to self-censor.

Attempts to silence others' speech is no small concern. In state after state, legislatures have passed laws limiting the type of revenge litigation enabled by the third-party complaint process here. Anti-

SLAPP statutes were prompted by "a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out . . . to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future." *Chandok v. Klessig*, 632 F.3d 803, 818-19 (2d Cir. 2011) (block quotation omitted); *see also Sarver v. Chartier*, 813 F.3d 891, 899 (9th Cir. 2016) (the purpose of anti-SLAPP laws is "to 'encourage continued participation in matters of public significance' and to protect against 'a disturbing increase in lawsuits brought primarily to chill the valid exercise' of constitutionally protected speech" (quoting Cal. Civ. Proc. Code § 425.16(a))). In the defamation context, legislatures struck a balance to protect speech and limit retaliatory litigation, which burdened the courts and defendants alike, while still allowing an avenue for justified claims.

Moreover, the increased speech burden imposed by third-party complaints is unnecessary. Limiting the definition of "aggrieved person" to those who are actually impacted by an alleged unfair labor practice still fulfills Congress's intent in passing the NLRA of securing workers' right to organize, while also avoiding infringement of First Amendment

rights. Just as the principles underlying standing require more than a "generally available grievance," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992), so too should an "aggrieved person" suffer more than offense at a tweet in order to initiate federal labor proceedings.

The Supreme Court's interpretation of similar statutory language is also instructive. *See Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary."); *McCullen v. Coakley*, 573 U.S. 464, 507 (2014) (same). The Court typically reads such language to include only individuals whose interests the relevant statute is designed to protect. For example, "[a] person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute" and seeking relief under the Administrative Procedures Act, 5 U.S.C. § 702, "must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal

basis for his complaint," *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

Likewise, under Title VII, "the term 'aggrieved' . . . enable[es] suit by any plaintiff with an interest arguably sought to be protected by the statute, while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011) (cleaned up). And although Congress repealed the Bankruptcy Code's limitation of appellate standing to "persons aggrieved by an order of a referee," 11 U.S.C. § 67(c) (1976), courts continue to enforce that limitation as a rule of prudential standing, *Travelers Ins. Co. v. H.K. Porter Co.*, 45 F.3d 737, 741 (3d Cir. 1995). Although "numerous persons are to some degree interested" in bankruptcy proceedings, "[e]fficient judicial administration requires that appellate review be limited to those persons whose interests are directly affected." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214 (3d Cir. 2004).

But under the NLRB's view, any internet user may now claim to be "aggrieved" by an employer's alleged unfair labor practice by reading a

tweet joking about labor relations. Accordingly, just as there is a need to limit political gamesmanship in campaign finance regulation; retaliatory defamation suits; and mere bystanders' administrative, employment, and bankruptcy claims, so too is there a need to limit third party NLRA complaints by those who are not directly impacted by the labor practice at issue. In this case, the "aggrieved person" was not within the "zone of interests" protected by the NLRA. The supposed unfair labor practice did not harm him or his rights. Instead, the "aggrieved person" merely exploited a tweet by Mr. Domenech as a pretext to silence political speech with which he disagreed.

III. AS THE NLRA'S CONTENT-BASED SPEECH RESTRICTION IS INHERENTLY SUSPECT UNDER THE FIRST AMENDMENT, COURTS SHOULD NOT RUSH TO EXPAND THE UNIVERSE OF PARTIES WHO MAY INITIATE ITS APPLICATION.

"That a labor union is the [speaker] and that a labor dispute [is] involved does not foreclose [First Amendment] analysis." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988). Neither is First Amendment analysis barred when employer speech is involved. All questions surrounding speech about labor disputes should be answered "consistent with developments in the Supreme Court's First Amendment jurisprudence." *Sheet Metal*

Workers' Int'l Ass'n, Local 15 v. NLRB, 491 F.3d 429, 438 (D.C. Cir. 2007).

The First Amendment requires that content-based restrictions like those at issue here meet the demands of strict scrutiny. *Reed v. Town of Gilbert,* 576 U.S. 155, 163-64 (2014). A law "is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163; *see also McCullen*, 573 U.S. at 479 (law is content based "if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred" (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)); *Thomas v. Bright*, 937 F.3d 721, 729, 738 (6th Cir. 2019) (content-based law could not survive strict scrutiny).

Section 8(c) of the NLRA is facially content-based—it "applies to particular speech because of the . . . message expressed." *Reed*, 576 U.S. at 163; *see also Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (law is "content-based because it applied or did not apply as a result of . . . [the] message expressed" (internal quotation marks omitted)); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) ("Any law distinguishing one kind of speech from another by

reference to its meaning now requires a compelling justification."). In *Reed*, the Supreme Court described an ordinance as demanding an "obvious content-based inquiry" by "requir[ing] Town officials to determine whether a sign is 'designed to influence the outcome of an election' . . . or merely 'communicating a message or ideas for noncommercial purposes' (and thus 'ideological')." *Reed*, 576 U.S. at 170; *cf. Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 112 (2d Cir. 2017) (holding the ordinance content-based as it required officials to "evaluate the speech" to determine if it was "done 'for [a particular] purpose'").

The NLRB's test here is an "obvious content-based inquiry," *Reed*, 576 U.S. at 170, because the agency must "assess the meaning and purpose" of the message, *Thomas*, 937 F.3d at 730, to determine if it is mere rhetoric or a threat subject to the NLRA. The government has not shown that it has a compelling interest in controlling jokes or hyperbole. But even if the government interest were construed more broadly as one protecting against any potential interference in employees' right to organize, and even if the government had

demonstrated that this was a compelling interest, the government has not shown that controlling jokes is narrowly tailored to that interest.

Hyperbole and satire are regularly used literary devices. Satire is defined as "trenchant wit, irony, or sarcasm used to expose and discredit vice or folly." *Satire, Merriam-Webster Dictionary* (11th ed. 2003). Hyperbole is "extravagant exaggeration," *Hyperbole*, *Merriam-Webster Dictionary* (11th ed. 2003). The joke tweet here meets both definitions; no reasonable person believed Mr. Domenech was threatening to send FDRLST employees to a literal salt mine. In fact, the ALJ even admitted that "[t]he term [salt mine] is sometimes used in a lighthearted or joking way," yet proceeded to hold that when viewed in the "totality of the circumstances," the "hidden meaning[]" of Domenech's tweet "had no other purpose except to threaten the FDRLST employees with unspecified reprisal." *FDRLST Media, LLC*, No. 02-CA-243109, 370 NLRB No. 49, at 5 (Nov. 24, 2020).

Considering the totality of the circumstances, one should realize that such extreme hyperbole would undermine any threat. THE FEDERALIST's regular commentary on union matters shows that its employees are not fans of union activity, and that an individual would not work for the

magazine unless he or she wanted to fight unionizing activity. The notion that these employees would consider unionizing is part of the joke. *See* Tristan Justice and Jordan Davidson, *It's Time to Re-Open Schools. It's Time to Defund the Teachers Unions*, THE FEDERALIST, March 4, 2021, https://tinyurl.com/92kxnh8; Libby Emmons, *Gig Workers Fight the Unions Trying to Take Away Their Self-Designated Jobs*, THE FEDERALIST, January 15, 2020, https://tinyurl.com/3yndm8n8. A reasonable employee, particularly one choosing to work at a conservative publication whose ideological mission includes opposition to labor unions, would view this tweet as nothing more than "colorful, figurative rhetoric." *Underwager*, 69 F.3d at 367. Censoring such jokes does nothing to serve any interest in protecting unionizing activity.

Furthermore, much-less restrictive means exist to serve the government's interest in protecting employees' rights to organize. *Cf. McCullen*, 573 U.S. at 478 (requiring "least restrictive means of achieving a compelling state interest."). That interest is served equally by a statutory interpretation limiting complainants to those who are subject to or personally injured by an alleged unfair labor practice. *Cf. Holland*, 457 F. Supp. 3d at 991-92. The Board has not shown why it

needs to let third parties step in and file complaints in situations where they have no knowledge of the context—or, as here, where the third parties may be interested in denying that context, contrary to the employees' interests.

As seen here, the risk of busybody or "lawfare" complaints resulting from a broad interpretation of "aggrieved person" does nothing to further the goal of protecting employee rights, but will only impose extensive burdens on speech, in the form of investigations and enforcement actions, without being tailored to the interest of protecting employees who are already fully capable of asserting their rights.

CONCLUSION

In light of the foregoing, the Court should narrowly construe the NLRA's "aggrieved person" language to apply only to those who are actually injured or impacted by the alleged unfair labor standard in order to avoid unconstitutionally restraining protected speech.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to L.A.R. 28.3(d), I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

/s/ Mallory Rechtenbach
Mallory Rechtenbach

Dated: March 29, 2021

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32 (a)(7)(B) because it contains, exclusive of those provisions exempted by Fed. R. App. P. 32(f), 3,547 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word in Century Schoolbook, 14-point font.
3. The text of the electronic brief is identical to the text in the paper copies.
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/s/ Mallory Rechtenbach
Mallory Rechtenbach

Dated: March 29, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2021 a copy of the foregoing brief was electronically served upon all parties by filing the same with the Clerk of Court using the CM/ECF system and forwarding to all counsel of record.

/s/ Mallory Rechtenbach
Mallory Rechtenbach