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## **NCLA Rejects NLRB General Counsel’s Approach to *The Federalist’s* Satirical Tweet Case**

*Joel Fleming v. FDRLST Media, LLC*

**Washington, DC (July 21, 2020)** – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, has filed two different papers in the last 24 hours in *Joel Fleming v. FDRLST Media, LLC*. The papers include a [response](#) to the NLRB general counsel’s cross exceptions as well as a [reply brief](#) in support of the exceptions NCLA filed in response to the April 22nd decision issued by Administrative Law Judge (ALJ) Kenneth W. Chu. NCLA is asking the full National Labor Relations Board (NLRB) to reject the general counsel’s arguments because they have no basis in fact or law and because the Board lacks subject-matter jurisdiction in this case.

The general counsel is claiming that ALJ Chu abused his discretion when he admitted into evidence affidavits by three employees of *The Federalist*, an online magazine published by FDRLST, including one by Mr. Ben Domenech, the magazine’s co-founder and publisher. The affidavits, which testify that the personal tweet by Mr. Domenech (who is not party to this case) was, in fact, a joke, and that the employees took it as such, are relevant and admissible to show that the tweet did not threaten FDRLST’s employees.

NCLA believes ALJ Chu reached multiple flawed conclusions in his decision, none more so than those related to subject-matter jurisdiction, personal jurisdiction and venue. The National Labor Relations Act does not empower random people like Mr. Fleming, who was not “aggrieved” by the tweet, to sick NLRB on an employer with whom Mr. Fleming has no relationship. Further, the company is not based in New York, and the alleged unfair labor practice did not occur in and was not directed at anyone residing in New York. Yet NLRB dragged FDRLST into that jurisdiction anyway. Therefore, NLRB has subjected FDRLST to an onerous enforcement action where the agency lacks both subject-matter jurisdiction and personal jurisdiction under the Constitution and under NLRB’s own established practice.

Additionally, the general counsel is asking the court to order Mr. Domenech to delete the tweet in question. But the tweet was posted in Mr. Domenech’s personal Twitter account, not that of the FDRLST, and the general counsel’s demand would require that the FDRLST delete a tweet from an account that is not within its control. FDRLST—as a media publication—does not regulate the personal speech of its employees, including that of Mr. Domenech, and there is no mechanism that would allow the company to demand he remove the tweet from his personal account.

### **NCLA released the following statements:**

“In the NLRB general counsel’s world of Alice in Wonderland, the prosecuting attorney’s evidence-less speculation is apparently more valid than actual evidence. And NLRB’s administrative law judges should

supposedly order employers to order non-party employees to delete a tweet the employee published on the employee's personal Twitter account. We are asking the Board not to go down that rabbit hole.”

— **Adi Dynar, Litigation Counsel, NCLA**

“Unsatiated by an initial ruling its favor, the general counsel is now back and asking for more-including remedies the Board is powerless to order and that infringe on the First Amendment rights an individual that is not party to the action. This must stop.”

— **Kara Rollins, Litigation Counsel, NCLA**

“Congress hasn't authorized NLRB to bring an action like this, the Board's own rules don't allow it, and the Constitution forbids it. But at each turn, NLRB's general counsel rejects any limits on the Board's authority to prosecute viewpoints it dislikes, anywhere it likes. NCLA is simply asking the Board to follow the law where its ALJ and enforcement attorneys have thus far refused to do so.”

— **Jared McClain, Staff Counsel, NCLA**

## **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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