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 AND CROSS-APPLICATION FOR ENFORCEMENT
FROM THE NATIONAL LABOR RELATIONS BOARD
CASE NUMBER 02-CA-243109

PETITIONER/CROSS-RESPONDENT'S REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and L.A.R. 26.1, Petitioner/Cross-Respondent makes the following disclosure: There are no parent corporations of FDRLST Media, LLC. No publicly held company holds 10% or more of FDRLST Media, LLC's stock.

/s/ Aditya Dynar
Aditya Dynar

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

GLOSSARY x

REPLY 1

I. NLRB LACKS SUBJECT-MATTER JURISDICTION FOR WANT OF A PERSON AGGRIEVED BY THE ALLEGED UNFAIR LABOR PRACTICE 1

A. NLRB's Subject-Matter Jurisdiction Hinges on the Words of the Statute, Not the Congressional Statement of a Lone Senator 1

B. *Indiana* Does Not Resolve the Questions Presented 1

C. NLRB's Any-Person Regulation Ignores the Statutory Text 4

II. NLRB REGION 2 LACKED PERSONAL JURISDICTION OVER FDRLST 9

A. Parties Did Not Stipulate as to Region 2's Personal Jurisdiction 9

B. FDRLST's Special Appearance and Continuing Contest to Personal Jurisdiction Are Fatal to Region 2's Assertion of Jurisdiction over FDRLST 10

III. NEITHER FDRLST NOR MR. DOMENECH COMMITTED AN UNFAIR LABOR PRACTICE 15

A. Context Matters 15

B. For the Substantial-Evidence Standard to Apply, There Must Be *Evidence* 20

IV. THE COURT SHOULD NOT AFFORD ANY DEFERENCE TO NLRB'S INTERPRETATIONS 24

CONCLUSION 26

CERTIFICATES.....27

TABLE OF AUTHORITIES

CASES

Allbritton Communications Co. v. NLRB,
766 F.2d 812 (3d Cir. 1985) 15

American Freightways Co.,
124 NLRB 146 (1959) 18, 19

Arangure v. Whitaker,
911 F.3d 333 (6th Cir. 2018) 24

Auer v. Robbins,
519 U.S. 452 (1997) 10, 11

Baldwin v. United States,
140 S. Ct. 690 (2020) 17

Bardcor Corp.,
270 NLRB 1083 (1984) 19, 20

BedRoc Ltd., LLC v. United States,
541 U.S. 176 (2004) 1

Bostock v. Clayton County,
140 S. Ct. 1731 (2020) 1

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 10

Chemical Solvents, Inc.,
331 NLRB 706 (2000) 16

Chevron U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) 2, 10, 11, 24

City of Arlington v. FCC,
569 U.S. 290 (2013) 10, 11

Elonis v. United States,
575 U.S. 723 (2015) 17, 18, 19, 20

Envirocare of Utah, Inc. v. Nuclear Regulatory Commission,
194 F.3d 72 (D.C. Cir. 1999) 5, 6

Federal-Mogul Corp. v. NLRB,
566 F.2d 1245 (5th Cir. 1978) 22

FedEx Home Delivery v. NLRB,
849 F.3D 1123 (D.C. Cir. 2017) 24

Ford Motor Co. v. Montana Eighth Judicial District,
141 S. Ct. 1017 (2021) 13, 14

Hackett v. McGuire Bros.,
445 F.2d 442 (3d Cir. 1971) 5

Hudson Ridge Owners Corp.,
313 NLRB 1055 (1994) 10

Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 14

Jicarilla Apache Tribe v. FERC,
578 F.2d 289 (10th Cir. 1978) 24

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 4, 8, 10, 13

MikLin Enterprises, Inc. v. NLRB,
861 F.3d 812 (8th Cir. 2017) 24

Miller Electric Pump & Plumbing,
334 NLRB 824 (2001) 16, 17

National Cable & Telecommunications Ass'n v. Brand X Internet Services,
545 U.S. 967 (2005) 17, 24

NLRB v. Fainblatt,
306 U.S. 601 (1939) 9, 10

NLRB v. Gissel Packing Co.,
375 U.S. 575 (1969) ..... *passim*

NLRB v. Indiana & Michigan Electric Co.,
318 U.S. 9 (1943) 1, 3, 4

NLRB v. Local No. 42, International Association of Heat & Frost Insulators & Asbestos Workers,
469 F.2d 163 (3d Cir. 1972) 2, 3

NLRB v. Television & Radio Broadcasting Studio Employees, Local 804,
315 F.2d 398 (3d Cir. 1963) 2, 3

Nw. Env't Def. Ctr. v. Bonneville Power Admin,
117 F.3d 1520 (9th Cir. 1997) 5, 6

Orange Theatre Corp. v. Rayherstz Amusement Corp.,
139 F.2d 871 (3d Cir. 1944) 10

Plummer v. Apfel,
186 F.3d 422 (3d Cir. 1999) 20, 21

Pottsville Bleaching Co.,
303 NLRB 186 (1991) 16

Prometheus Radio Project v. FCC,
939 F.3d 567 (3d Cir. 2019) 5, 6

Reed v. Town of Gilbert,
576 U.S. 155 (2015) 17, 18, 20

Rotkiske v. Klemm,
890 F.3d 422 (3d Cir. 2018)
affirmed by, 140 S. Ct. 355 (2019) 1

St. Charles Journal, Inc. v. NLRB,
679 F.2d 759 (8th Cir. 1982) 24

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 11

State Oil Co. v. Khan,
522 U.S. 3 (1997) 17

Trafficante v. Metropolitan Life Insurance Co.,
409 U.S. 205 (1972) 5

United States v. Home Concrete & Supply Co.,
566 U.S. 478 (2012) 17

United States v. Mead Corp.,
533 U.S. 218 (2001) 11

United States v. Nasir,
982 F.3d 144 (3d Cir. 2020) 2

US Magnesium, LLC v. EPA,
690 F.3d 1157 (10th Cir. 2012) 5, 6

West Virginia St. Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 19

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause) 9, 10

U.S. Const. art. III 4, 5, 14, 25

U.S. Const. amend V (Due Process Clause) 11, 12, 13, 14, 25

STATUTES

49 Stat. 453 (1935) 1, 4

61 Stat. 146 (1947) 1, 4

29 U.S.C. § 151 6

29 U.S.C. § 158(a)(1) 15, 18, 19, 21, 22

29 U.S.C. § 158(c) 2, 15, 18, 19, 26

29 U.S.C. § 160(b) ..... *passim*

42 U.S.C. § 2000e-5 5

42 U.S.C. § 2239(a)(1)(A) 6

42 U.S.C. § 3610(a) 5

42 U.S.C. § 3610(a)(1)(A)(i) 5

42 U.S.C. § 3610(a)(1)(B) 5

REGULATIONS

29 C.F.R. § 102.1(h) 7

29 C.F.R. § 102.9 ..... 8, 26

29 C.F.R. § 102.10 ..... 12, 13

RULES

FRAP 26.1 ii

FRAP 32(a)(5) 27

FRAP 32(a)(6) 27

FRAP 32(a)(7) 27

L.A.R. 26.1 ii

GLOSSARY

ALJ	Administrative Law Judge of the National Labor Relations Board
APA	Administrative Procedure Act (Pub. L. 79-404 (1946), codified at 5 U.S.C.)
CAR	Certified Administrative Record (ECF No. 18 in this Court); page numbers are given in the top-right corner of each page
FDRLST	FDRLST Media, LLC (Respondent in administrative proceedings, Petitioner in this Court in Case No. 20-3434, and Cross-Respondent in this Court in Case No. 20-3492)
FRAP	Federal Rules of Appellate Procedure
L.A.R.	Local Appellate Rules
NLRA	National Labor Relations Act (codified at 29 U.S.C. §§ 151–169)
NLRB	National Labor Relations Board
OB	Opening Brief
Resp	Brief for the National Labor Relations Board (ECF No. 55 in this Court)
Section	Refers to specific sections of the NLRA (29 U.S.C. §§ 151–169)

REPLY

I. NLRB LACKS SUBJECT-MATTER JURISDICTION FOR WANT OF A PERSON AGGRIEVED BY THE ALLEGED UNFAIR LABOR PRACTICE

A. NLRB's Subject-Matter Jurisdiction Hinges on the Words of the Statute, Not the Congressional Statement of a Lone Senator

NLRB ignores the statutory text in favor of a single senator's viewpoint during the drafting process. Resp39. But the proper starting point for this Court is the statutory text. *Rotkiske v. Klemm*, 890 F.3d 422, 424, 428 (3d Cir. 2018) (*en banc*), *affirmed by*, 140 S. Ct. 355 (2019). This Court's inquiry "begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1743 (2020) (same).

Congress amended the NLRA in 1947 to add the person-aggrieved language to the statute. *Compare* 49 Stat. 453 (1935) *with* 61 Stat. 146 (1947). Senator Wagner's statement supported the NLRA as enacted in 1935. *See NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17 (1943) (recounting Senator Wagner's statement supporting passage). Even if the Wagner speech might have been relevant in 1943 when *Indiana* was decided, it is no longer relevant because Congress amended the NLRA in 1947 to add the aggrievement requirement to Section 160(b). NLRB has subject-matter jurisdiction to investigate and, if necessary, issue a post-investigation complaint, only when a "person aggrieved" by an alleged "unfair labor practice" submits a charge.

B. *Indiana* Does Not Resolve the Questions Presented

NLRB, as expected (OB21–22), relies on *Indiana* to argue that the NLRA "permit[s] even a 'stranger' to the employment relationship to file a charge." Resp40. "[S]tranger to the labor contract" does not, however, mean "any person." 318 U.S. at

17–18. Congress defined charging-party status as one "aggrieved" by the alleged "unfair labor practice." Section 160(b). An employee's spouse is a stranger to the employer–employee contract. Yet the spouse could file an unfair-labor-practice charge if, because of the spouse's nexus or privity to the labor contract, the spouse is "aggrieved" by the alleged "unfair labor practice." This Court should give effect to the words Congress chose to define the class of persons who could instigate NLRB's machinery. An interloping charger like Mr. Fleming sits well outside the class Congress defined.

An honest textual analysis cannot sustain NLRB's any-person reading of the statutory person-aggrieved language. Resp31–47. NLRB does not offer any competing canon that could endorse its reading. *Id.* NLRB has eschewed reliance on statutory text. Instead, it asks this Court to skip *Chevron* Step One and defer to NLRB's interpretation without showing how the relevant provisions are ambiguous or silent. The Supreme Court has "awoke[n] us from our slumber of reflexive deference." *United States v. Nasir*, 982 F.3d 144, 177 (3d Cir. 2020) (*en banc*) (Bibas, J., concurring). This Court "must first exhaust" the interpretive toolkit, and in doing so "must look at things afresh," even if that means revisiting "[o]ld precedents." *Id.* This textual approach applies not just to the subject-matter-jurisdiction question, but also to the personal-jurisdiction, venue, and the First Amendment/Section 158(c) questions as well.

NLRB invokes (Resp40–41) *NLRB v. Local No. 42, International Association of Heat & Frost Insulators & Asbestos Workers*, 469 F.2d 163 (3d Cir. 1972) (*per curiam*), which appears in three sentences not to have entertained arguments similar to the ones FDRLST makes here. *Local* said that *NLRB v. Television & Radio Broadcasting Studio Employees, Local 804*, 315 F.2d 398 (3d Cir. 1963) "upheld the validity of the Board's

['any party'] rule." 469 F.2d at 165. But *Television*'s discussion comprises one five-sentence paragraph that only relies on *Indiana*. 315 F.2d at 400–01. Four points:

(1) FDRLST does not argue that only "employees" are proper charging parties against their employers. Indeed, any "aggrieved" person may file charges, as FDRLST explained. OB13–32. *Television* addressed only the former argument; it does not foreclose the latter. *Television* did not discard the statutory person-aggrieved requirement.

(2) The *Television* petitioner "d[id] not seriously press" the only-employees-can-be-charging-parties argument in this Court. So, *Television* cannot be considered precedential for a legal proposition that was easily rejectable and one that the parties in that case did not "seriously press." NLRB tries to knock down a straw man. FDRLST does not dispute that aggrieved employees can be chargers against their employers.

(3) "Similar" does not mean "same." Neither *Indiana*, nor *Local*, nor *Television* addresses the question FDRLST presents here regarding enabling a completely unconnected person to sic NLRB against employers. So those cases cannot possibly pre-decide this case.

(4) *Television* cites *Indiana*, which contains a superficial statutory-interpretation analysis and is silent as to the scope of the any-person regulation. So, nothing precludes this Court from engaging in a rigorous statutory-construction analysis respecting that question.

To shore up its argument, NLRB cites a 1975 case it decided. Resp41. That case should carry no precedential force or effect in federal court. It, however, highlights that

NLRB has expressly rid itself of Congress's aggrievement limit on NLRB's authority: "[I]t is not requisite that the charge be filed by an 'aggrieved' person." Resp41.

Ultimately, NLRB hangs its entire argument on *Indiana*, which does not reach the issue here. Congress amended Section 160(b) and added the "person aggrieved" provision. Congress dispelled doubt as to the class of persons who may spur NLRB's machinery: persons aggrieved by the alleged unfair labor practice. *Compare* 49 Stat. 453 (1935) (enacting Section 160(b)) *with* 61 Stat. 146 (1947) (amending Section 160(b)). The 1947 amendment must mean something. Reading the person-aggrieved language to still allow any person to file a charge renders superfluous the charging requirement that is written as an express limitation on NLRB's authority. The superseding words of the 1947 statute should govern, not the 1943 *Indiana* opinion (assuming it reaches the precise issue).

C. NLRB's Any-Person Regulation Ignores the Statutory Text

NLRB decisions can neither support NLRB's any-person regulation nor supplant the statute's person-aggrieved requirement. Resp43. Pursuant to *Kisor v. Wilkie*, NLRB's self-serving reliance on its own cases should have no force or effect on this Court's duty to "empty" the "legal toolkit" to interpret the words of the statute. 139 S. Ct. 2400, 2415 (2019). Nor are NLRB decisions from any decade precedential in this Court; only Supreme Court and this Court's own decisions have *stare decisis* effect.

NLRB makes a curious argument that the aggrievement requirement of Section 160(b) is a limit on judicial authority, not on NLRB's investigatory or prosecutorial authority. Resp44. FDRLST does not say that NLRB is constrained by Article III's case-

or-controversy requirement. FDRLST argues that NLRB is constrained by Section 160(b)'s aggrievement requirement. Federal courts have interpreted statutory "person aggrieved" provisions that set the federal administrative machinery into motion as encompassing only those who would have Article III-type standing. *See* OB19–24. That the person-aggrieved analysis looks like Article-III-standing analysis is distinct from saying that NLRB is constrained by Article III standing.

Trafficante v. Metropolitan Life Insurance Co. interpreted 42 U.S.C. § 3610(a): a statute that permits "[a]n aggrieved person" to "file a complaint with the Secretary," which in turn invokes the investigatory and prosecutorial power of the Secretary of Housing and Urban Development. 409 U.S. 205, 206–07 & 206 n.1 (1972); 42 U.S.C. § 3610(a)(1)(A)(i), (a)(1)(B). *Trafficante* "reach[ed] the same conclusion" with respect to 42 U.S.C. § 3610(a) as this Court did when interpreting the "person claiming to be aggrieved" provision of 42 U.S.C. § 2000e-5. 409 U.S. at 209 (citing *Hackett v. McGuire Bros.*, 445 F.2d 442 (3d Cir. 1971)). The statutes interpreted in both *Trafficante* and *Hackett* relate to chargers setting into motion the respective federal agency's investigation into and prosecution of the charged party. 42 U.S.C. §§ 2000e-5, 3610(a). So too is 29 U.S.C. § 160(b). Only those who would have Article III-type standing can set the administrative machinery into motion.

NLRB offers four cases to refute this point. Resp44 (*Envirocare of Utah, Inc. v. Nuclear Regulatory Commission*, 194 F.3d 72 (D.C. Cir. 1999); *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d Cir. 2019); *US Magnesium, LLC v. EPA*, 690 F.3d 1157 (10th Cir. 2012); *Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520 (9th Cir. 1997)). None of them is on point.

Envirocare interpreted 42 U.S.C. § 2239(a)(1)(A), which does not contain a person-aggrieved provision; the statute permits "any person whose interest may be affected by the [administrative] proceeding" to intervene in that proceeding. 194 F.3d at 75–76. *Envirocare* concluded that the agency's decision to *deny* intervention to "competitors who allege only economic injury … is consistent with the [statute]." *Id.* at 77. That conclusion is the *opposite* of the interpretation NLRB asks this Court to rubberstamp: that a person having no injury be allowed to initiate NLRB's processes against FDRLST. NLRB's any-person regulation is inconsistent with the statute's person-aggrieved provision. *Envirocare* does not help NLRB—it only highlights NLRB's defective argument.

Prometheus, *Magnesium*, and *Northwest* are not on point. The language NLRB quotes from *Prometheus*, Resp44, relates to federal appellate courts going beyond the administrative record to ascertain standing. 939 F.3d at 578. *Prometheus* concluded, relying on *Magnesium*, that "parties may submit materials to establish standing at any time in the litigation." *Id.* at 579. That rule and the discussion supporting it have nothing to do with the issue here. *Northwest* decided whether it was appropriate to consider affidavits submitted in the Ninth Circuit to "establish standing before th[at] court." 117 F.3d at 1527. So that case is also inapposite here. NLRB's inability to identify any case supporting its position is telling.

What's left is NLRB's policy argument: any-person chargers help protect "bargaining relationships" between employees and their employers. Resp41. But if the whole purpose of the NLRA is to protect employer–employee relationships (*see* 29 U.S.C. § 151), those having no nexus or privity with such relationships are simply interlopers with their own agendas who do not represent the interests of the class of

persons who fall within the zone of interests protected by the statute. OB26–28. A decision against FDRLST protects neither Mr. Fleming's bargaining relationship with his employer, nor FDRLST employees' with FDRLST. After all, FDRLST employees have filed an *amicus* brief supporting FDRLST in this matter.

As a practical matter, FDRLST's reading of Section 160(b) gives effect to each word of the NLRA. The aggrieved-person requirement is straightforward to administer. The face of the charging document in most cases should reveal whether the charger is a "person aggrieved" by an alleged "unfair labor practice." Where the charging document is unclear, NLRB can ask the charger for clarifying information before commencing an investigation against the charged party in disregard of the statutory limitations on NLRB's authority. Were it otherwise, every interloper could stick random employers across the country with a costly attorney-fee bill every time NLRB investigates them at the interloper's behest. NLRB suggests that everything is hunky-dory, though, because "[a] charge does not initiate litigation." Resp38. But a charge still initiates an *investigation*, which costs employers time and money to defend and distracts them from their core mission. Nor is it consoling to say a charger is not like a "private litigant." Resp45. Except, NLRB, by regulation, has given charging parties full party status in unfair-labor-practice adjudications. 29 C.F.R. § 102.1(h) ("Party … means …, without limitation, any person filing a charge or petition under the Act[.]").

Here, the charge on its face demonstrated that Mr. Joel Fleming does not meet the statutory person-aggrieved requirement. Mr. Fleming invoked only the any-person regulation as the basis of his charge. CAR189.

NLRB cannot commence a federal investigation and prosecution against anybody when directed by any person. This Court should interpret Section 160(b) as written, without deferring to NLRB's flat assertions to the contrary. *Kisor*, at 2415, requires the Court to apply the language of the statute before deferring to NLRB's atextual policy preferences: "if the law gives an answer … then a court has no business deferring to any other reading, no matter how much the agency insists [its "policy-laden choice"] would make more sense." The Court should vacate NLRB's decision for want of subject-matter jurisdiction, and it should set aside that portion of 29 C.F.R. § 102.9 that allows "[a]ny person" to file a charge regardless of aggrievement.

II. NLRB REGION 2 LACKED PERSONAL JURISDICTION OVER FDRLST

NLRB's personal-jurisdiction argument rests on the notion that the *Board*'s "jurisdiction is national in scope." Resp47. NLRB does not address whether *Region 2* had or lacked personal jurisdiction over FDRLST. Resp47–52. The abuse-of-discretion standard of review does not apply here, *contra* Resp50–51. Whether Region 2 lacked personal jurisdiction and whether it was an improper venue are questions of law that this Court reviews *de novo*. OB12 (cases cited therein). NLRB failed to meet its burden of establishing personal jurisdiction by a preponderance of the evidence. *Id.*

A. Parties Did Not Stipulate as to Region 2's Personal Jurisdiction

NLRB suggests that the tripartite stipulation signed by Mr. Fleming, the counsel for NLRB's General Counsel, and FDRLST resolves the personal-jurisdiction question. Resp47. Not so. The parties stipulated only that FDRLST "receives revenues" and "spends more than $5000" in interstate commerce. CAR66–67. These two sentences have little to do with Region 2's personal jurisdiction over FDRLST. Three points:

(1) Spending and receiving more than $5000 in interstate commerce does not absolve NLRB from its obligation of proving Region 2 had personal jurisdiction over FDRLST. NLRB has the burden of establishing personal jurisdiction by a preponderance of the evidence. *See* OB12.

(2) The stipulated facts say nothing about Region 2's personal jurisdiction over FDRLST. They say nothing about whether the alleged aggrievement or the alleged unfair labor practice occurred within Region 2.

(3) Those facts relate only to the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. NLRB's subject-matter jurisdiction extends only as far as Congress's power to regulate

under the Commerce Clause. *NLRB v. Fainblatt*, 306 U.S. 601, 607 (1939). NLRB interprets its Commerce-Clause-based authority to require more than a *de minimis* amount of money to flow in interstate commerce. *Hudson Ridge Owners Corp.*, 313 NLRB 1055, 1055, 1059 (1994) ($5,000 in interstate flow of monies is sufficient). The stipulation says nothing about whether FDRLST is subject to personal jurisdiction in Region 2 as a result. Put differently, whether the Commerce Clause limits NLRB's jurisdiction over companies has nothing to do with whether FDRLST has sufficient contacts with Region 2 to support NLRB's haling of FDRLST into that jurisdiction.

B. FDRLST's Special Appearance and Continuing Contest to Personal Jurisdiction Are Fatal to Region 2's Assertion of Jurisdiction over FDRLST

NLRB downplays (Resp4, Resp47, Resp51–52) the significance of FDRLST's special appearance in front of the ALJ. CAR6–9, 14–17. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 469 (1985) (entering special appearance in the first-instance tribunal sufficient to contest personal jurisdiction); *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871, 874 (3d Cir. 1944) (same). NLRB asks this Court to defer to Region 2's assertion of personal jurisdiction over FDRLST because it "reasonably interpreted" "the Act and its regulations." Resp47.

Because NLRB cannot point to any particular statute or regulation it interpreted, FDRLST and this Court must guess which specific deference doctrine applies. Although its position seems to rely on *City of Arlington* and, underlying that, *Chevron*, NLRB also seems to be relying on *Auer–Kisor* deference to its interpretation of its rules

or even *Mead–Skidmore*.[1] In the standard-of-review section, NLRB seems to ask for *Chevron* and *City of Arlington* deference but does not specify whether it asks for such deference across the board or for deciding a subset of the particular questions presented. Resp7–8.

NLRB leaves open whether its adjudicative, investigative, and prosecutorial authority over FDRLST rests on ambiguity in the statute or in its rule. NLRB's ambiguity about ambiguity denies FDRLST its due process right to know the legal basis for haling it into Region 2.

The appropriate exercise of personal jurisdiction is a constitutional question that receives no deference. FDRLST's personal-jurisdiction argument is based principally on the Constitution, and it is this Court's job to interpret the Constitution. Federal agencies get no deference on their reading of the Constitution. *Chevron* and *City of Arlington* deference relate to an "agency's construction of [a] statute." *Chevron*, 467 U.S. at 842; *City of Arlington*, 569 U.S. at 296.

NLRB says, because it has "reconfigured its regions" in the past, it can "investigate or prosecute a case" in any region. Resp48 & n.12. The federal courts have been reconfigured too—more than one federal district created or reconstituted within a state, the erstwhile Fifth Circuit separated into two circuits, and so forth. The Due Process Clause's personal-jurisdiction requirement is unaffected by such changes. Once an agency draws regional boundaries, the agency is bound by them. *See* OB34–37.

[1] *City of Arlington v. FCC*, 569 U.S. 290 (2013); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997); *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Whether NLRB could limit itself to a single region that asserts nationwide jurisdiction is a separate question. In this case, it suffices that NLRB has divided itself into geographic regions.

The personal-jurisdiction analysis should be unaffected by the fact that NLRB can re-draw regional boundaries. The Due Process Clause requires courts and federal agencies alike to honor existing geographic boundaries. This case was investigated by and prosecuted in Region 2, which lacked personal jurisdiction over FDRLST and was an improper venue. OB33–43.

NLRB's personal-jurisdiction argument does not rest on the statute. Nor does it rest on NLRB's published regulations, as they contradict NLRB's litigating position here. *See* 29 C.F.R. § 102.10. Instead, NLRB rests on nothing in particular and everything in general. Resp47–52. The Due Process Clause does not allow NLRB to play such games by presenting amorphous legal arguments in court. When proceeding against Americans, whether for a parking ticket or a tweet, the government must identify the legal foundation of its proceedings. The legal foundation for NLRB's personal-jurisdiction argument is not a law, not a rule, but NLRB's *ipse dixit*—a litigating position, which is apparently an interpretation with legal significance under some deference doctrine, but NLRB will not say which one. NLRB hides the ball. NLRB does not bother to establish how Region 2 meets the binding, precedential test for establishing personal jurisdiction over FDRLST. NLRB's vague argument leaves this Court guessing as to how this Court is supposed to bend to NLRB's will.

NLRB Region 2 does not meet the Due-Process-Clause test for asserting personal jurisdiction over FDRLST. NLRB does not even brief how its Region 2 could

have met the established test. NLRB's tactic is triply egregious. The initial due-process violation is NLRB's haling of FDRLST into Region 2 without consent. The second due-process violation is NLRB's failure to identify the legal basis for proceeding against FDRLST in Region 2. The third due-process violation is to call for this Court's acquiescence in and deference to NLRB's decision. *See* OB49–53. Any legitimacy enjoyed by NLRB's decision depends entirely on Congressional authorization and subsequent judicial review, both of which NLRB wishes to undercut here.

NLRB trots out some cases it decided. Resp49. Those Board-level cases are not precedent in this Court. They show NLRB's pattern of ignoring the constitutional due-process problems with haling charged parties into regions that cannot properly exercise personal jurisdiction over them. NLRB ignores its own rule pertaining to personal jurisdiction: 29 C.F.R. § 102.10 ("[A] charge must be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring."). NLRB, therefore, cannot claim deference to an interpretation that *ignores* its rule.

Assuming Board-level cases have disguised their active sidestepping of their own rule as "interpretation" of the rule, the path this Court should take is clear: *Kisor* requires this Court to empty the legal toolkit without deferring to NLRB's interpretation. *Kisor* supersedes any pre-*Kisor* Third Circuit case to the contrary. While 29 C.F.R. § 102.10 as written is consistent with Supreme Court precedent on personal jurisdiction, NLRB's scorn of its own rule and the resulting Region 2's assertion of personal jurisdiction over FDRLST is contrary to the Supreme Court's recent re-affirmance of longstanding personal-jurisdiction jurisprudence. There must be "an affiliation between the forum and the underlying controversy." *Ford Motor Co. v. Montana Eighth Judicial District*, 141 S.

Ct. 1017 (2021). This Court should reject NLRB Region 2's assertion of anywhere-everywhere personal jurisdiction over FDRLST.

NLRB insists that none of its regulations "import[s]" the personal-jurisdiction "precedent," Resp50, and that its "regions are no more bound by rules governing the exercise of judicial power than the Board itself is." Resp48. NLRB's choice to subdivide its authority into regions is salient and sufficient. The requirement that those regions have personal jurisdiction within their geographic boundaries "flows not from Art[icle] III, but from the Due Process Clause." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Article III does not limit any region's personal jurisdiction. The Fifth Amendment's Due Process Clause does. NLRB presents no counterarguments.

In effect, NLRB says it can harass charged parties anywhere it wants and however it wants without bothering to comport its conduct with the Due Process Clause or its own rules and largely without meaningful judicial review. This Court should not acquiesce in NLRB's attempt to flout personal jurisdiction strictures. Instead, it should vacate NLRB's decision because Region 2 lacked personal jurisdiction over FDRLST. In so reversing and vacating, the Court should not reward NLRB by remanding this case to give it a second chance to prosecute it in a region having personal jurisdiction. That is so because NLRB—in any region—would still lack subject-matter jurisdiction for want of a person aggrieved by an alleged unfair labor practice.

III. NEITHER FDRLST NOR MR. DOMENECH COMMITTED AN UNFAIR LABOR PRACTICE

The Court does not have to reach this question if it concludes that NLRB lacked subject-matter jurisdiction and that Region 2 lacked personal jurisdiction over FDRLST. If NLRB lacked either, this Court should vacate the Board's decision and order. The Court will have to reach the First Amendment/Sections 158(a)(1), 158(c) question only if it rules against FDRLST on the threshold jurisdictional questions. *See* OB3 (questions presented); Resp2 (same).

A. Context Matters

NLRB argues that Mr. Domenech's tweet, largely standing alone, comprises sufficient evidence to conclude that FDRLST violated the NLRA. Resp8–31. But almost every case NLRB cites shows otherwise—that context and the totality of the circumstances of the allegedly violating statement matter and that NLRB has the burden of proving its unfair-labor-practice allegation against FDRLST. *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 817 (3d Cir. 1985). NLRB characterizes the pre-*Gissel* test it applied as "objective." Resp9. But "objective" does not mean "context-less."

NLRB did not even attempt to meet its burden of proof during the ALJ hearing. Nor could it because Mr. Domenech's tweet was a joke, nothing more. NLRB did not prove the elements of the NLRA violation: "interfere with, restrain, or coerce employees," "threat of reprisal or force or promise of benefit." Resp9 (quoting 29 U.S.C. § 158(a)(1)); Resp22 (quoting 29 U.S.C. § 158(c)). NLRB initially issued five subpoenas *testificandum* (to Mr. Domenech and four of FDRLST's six employees), but

then withdrew them voluntarily—perhaps because it realized the employees' testimony would not support NLRB's narrative. CAR343.[2]

Instead of proof, NLRB offered speculation, conjecture, and idle inference. *See, e.g.*, Resp30 (speculating that "employers often follow through on their threats, whether they are made publicly or privately"). NLRB speculates that the tweet was a threat yet does not prove it with evidence. NLRB took no depositions, and presented no live, cross-examined, under-oath testimony. Resp11, CAR1–31. The cases it cites (Resp12) stating that unspecified reprisals are considered threats all involved live testimony. *Pottsville Bleaching Co.*, 303 NLRB 186 (1991), and *Chemical Solvents, Inc.*, 331 NLRB 706 (2000), on which NLRB relies, both involved extensive testimony through which NLRB *proved* that the statements were threats. No such proof exists here. The complainant (NLRB's General Counsel) can sit in a rocking chair, tell tales, and puff out some smoke rings, but it is no substitute for legal proof.

NLRB ignored Supreme Court precedent under the guise of "appl[ying]" "settled law." Resp15.[3] It applied its pre-*Gissel* rule. CAR431 n.3. *NLRB v. Gissel Packing Co.*, 375 U.S. 575 (1969), established that NLRB must take into account the totality of the circumstances. NLRB argues that *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001), "repudiated" the *Gissel* totality-of-the-circumstances test. Resp15–16. It seems

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[2] NLRB has not included the subpoenas *testificandum* it issued or the letters and/or emails from NLRB informing of the withdrawal of those subpoenas in the Certified Administrative Record.

[3] The question of which test applies is a question of law that this Court reviews *de novo*. *See* OB12 (cases cited therein).

NLRB asks for *Brand X* deference[4] to *Miller*. NLRB cannot overturn *Gissel* because *United States v. Home Concrete & Supply Co.* forbids "administrative contradiction of the Supreme Court" even if *Brand X* might seem to permit federal agencies to overturn federal circuit-court decisions. 566 U.S. 478, 493 (2012) (Scalia, J., concurring in part, concurring in the judgment); *see Baldwin v. United States*, 140 S. Ct. 690 (2020) (Thomas, J., dissenting from denial of certiorari) ("*Brand X* appears to be inconsistent with the Constitution, the [APA], and traditional tools of statutory interpretation.").

NLRB's decision is inconsistent with current First Amendment precedent: *Gissel* read alongside *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), and *Elonis v. United States*, 575 U.S. 723 (2015). OB46, *contra* Resp8–31. NLRB protests such a reading. Resp23; CAR431 nn.3, 4. FDRLST asks this Court to call out the problems, if any, with *Gissel* while following it so that review may be sought in the Supreme Court if needed—because it is odd to ask this Court to reconsider *Gissel. State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("It is [the Supreme Court's] prerogative alone to overrule one of its precedents.").

FDRLST filed comprehensive exceptions to the ALJ's decision and spelled out all the ways in which the ALJ failed to apply the *Gissel* test. CAR289–300. It is odd to suggest (Resp23) that FDRLST "waived" an argument when it presented it to the Board and in its Opening Brief in this Court after the Board also failed to apply the *Gissel* test and applied the pre-*Gissel* Board decisions instead.

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[4] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

Reed concludes that when a law targets "specific subject matter" (as here, speech about employer–employee relations), then strict scrutiny applies "even if [the law] does not discriminate among viewpoints within that subject matter." 576 U.S. at 169. Absent proof of threat or proof of follow-through on an alleged threat, Sections 158(a)(1) and 158(c), as applied here, likely do not survive strict scrutiny.

Strict scrutiny is the proper standard here. Under *Reed*, Sections 158(a)(1) and 158(c) are subject-matter-based and content-based restrictions on speech whose application is constitutional only if it meets strict scrutiny. 576 U.S. at 173. If NLRB's investigation into and prosecution of FDRLST depends only on the "communicative content" of Mr. Domenech's tweet—as NLRB maintains here—then those actions and the statutory or regulatory provisions on which they depend are "subject to strict scrutiny." *Id.* at 164–65. NLRB concluded here, CAR431, that one must "read the [tweet]" and only the tweet "to determine" what provisions of the NLRA apply—*i.e.*, whether the tweet violates Section 158(a)(1), or whether it is non-punishable under Section 158(c). *Id.* at 162. *Reed* requires this Court to strictly scrutinize NLRB's pre-*Gissel* (1969) context-less test. CAR431 n.3 (quoting *American Freightways Co.*, 124 NLRB 146, 147 (1959) ("It is well settled that the test … under Section 8(a)(1) … does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.")).

NLRB's decision also does not satisfy *Elonis*, 575 U.S. 723. In *Elonis*, the government had produced the defendant's Facebook posts as evidence of threat. 575 U.S. at 726–31. The Court concluded that Congress's use of the word "threat" includes

a scienter requirement. *Id.* at 735–37; *see also* 29 U.S.C. § 158(c) ("threat of reprisal or force or promise of benefit"). Like the statute at issue in *Elonis* (18 U.S.C. § 875(c)), the NLRA (29 U.S.C. §§ 158(a)(1), 158(c)) does not define the term "threat." Neither statute "specif[ies] any mental state." 575 U.S. at 734. That "does not mean that none exists." *Id.* Federal-court cases applying Sections 158(a)(1) and 158(c) are consistent with *Elonis*; NLRB's application of its (pre-*Gissel*) *American* decision to the facts in this case is not.

Justice Robert Jackson best encapsulates the grave First Amendment implications of government actions like NLRB's against FDRLST: government cannot "force citizens" to speak or remain silent. *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Assuming NLRB has subject-matter and personal jurisdiction, absent proof of threat, NLRB cannot constitutionally order FDRLST to "cease and desist from threatening employees." Resp4. NLRB cannot constitutionally order FDRLST to compel Mr. Domenech's speech and compel his silence by indirectly directing him to delete the tweet. *Id.* NLRB cannot order FDRLST to post and distribute "a remedial notice." *Id.* The NLRA does not create an exception to the First Amendment's wide protection of speech.

In *Bardcor Corp.*, 270 NLRB 1083 (1984), an employee asked her supervisor why the company's president was taking photos of employees in the plant. The supervisor answered that the president was "taking pictures of employees so that he would have something to remember them by after they were fired for union activity." *Id.* at 1085. The Board, considering all of the context, including the context in which the colloquy occurred, found that the supervisor's answer, which was made in jest, was not understood by the employee as a threat, and therefore was not actionable. *Id.* at 1084.

Bardcor applies *Gissel* and scienter properly and is consistent with current First Amendment law, *Reed* and *Elonis* included. NLRB's decision against FDRLST is not.

The First Amendment prevents NLRB from ordering FDRLST to require Mr. Domenech's compliance with its order. But NLRB argues that such orders are "the Board's customary remedial practice." Resp20. It could not have been "customary" practice because the ALJ refused to impose a delete-the-tweet order. CAR436. NLRB's General Counsel filed a cross-exception with the Board, which the Board granted by issuing the delete-the-tweet order. CAR432.

B. For the Substantial-Evidence Standard to Apply, There Must Be *Evidence*

NLRB relies heavily on the substantial-evidence standard of review. Resp2, Resp6–8. But NLRB's General Counsel "did not prove," OB46, its case against FDRLST with evidence, offering speculation and conjecture instead. NLRB does not contest that it had the burden of proving an NLRA violation. The substantial-evidence standard, as the name suggests, rests on *evidence*. The evidence in the record must be "more than a mere scintilla," which "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Plummer v. Apfel*, 186 F.3d 422, 427 (3d Cir. 1999); OB46–48; *see also* Resp30 n.8 (seemingly endorsing cases requiring the government to prove a threat with competent evidence).

Instead of proof, NLRB's General Counsel offered only conjecture and speculation to its ALJ and its Board. NLRB now offers nothing more to this Court. Resp8–31.

NLRB's principal argument is that "substantial evidence supports" the ALJ's findings of fact—which the Board affirmed—that FDRLST violated Section 158(a)(1) because of Mr. Domenech's tweet. Resp8. The burden is on NLRB to prove that. FDRLST does not have the burden of giving NLRB a roadmap of things NLRB needs to prove. NLRB General Counsel's politically loaded statements in the evidentiary hearing, CAR1–31, are inadequate to support the ALJ's findings of fact under the substantial-evidence standard. *Plummer*, 186 F.3d at 427.

NLRB's repeated recital of "substantial evidence" cannot cover its failure of proof. NLRB uses "substantial evidence" as another catchphrase for deference—this time to its General Counsel's decision to not adduce evidence proving the allegations made in the complaint. NLRB asks this Court to acquiesce in the giant factual and logical leaps NLRB took and continues to take. *See, e.g.*, Resp6 (characterizing Mr. Domenech's tweet on his personal twitter account as "employer speech" without proving it); Resp18 (calling the tweet a "threat" without proving so). But all the cases that NLRB cites relied on the broader context of the allegedly offending statement. Resp9, Resp13–15. NLRB's General Counsel did not prove so here.

To hide the fatal flaws in its litigation strategy at the ALJ and Board levels, NLRB takes cheap shots at *amici* who cannot respond. Resp5–6, Resp8, Resp12, Resp15–16, Resp20–31, Resp40. Eighteen *amici curiae* from diverse ideological and political backgrounds (even those who may be opposed to FDRLST's or Mr. Domenech's positions on controversial topics) united in six *amicus* briefs to denounce NLRB's egregious decision in this case. Such involvement by disparate sources illustrates how NLRB's decision against FDRLST is both controversial and constitutionally suspect.

NLRB fails to address the central theme of FDRLST's (and *amici*'s) objections: NLRB needed to prove Mr. Domenech's tweet was a threat. It did not. That is the end of the matter.

Parsing the plethora of prior Board decisions about when "someone laughs" (Resp17) or what statement is made in "jest" (Resp14) reinforces NLRB's failure to prove the context of Mr. Domenech's tweet. Such proof was essential in cases NLRB cites before a federal court could enforce the Board's order against the NLRA violator. *See, e.g.*, *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1260 (5th Cir. 1978) ("Mere suspicions of unlawful motivation are not sufficient to constitute substantial evidence. … In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one.").

There is nothing new about the burden of proof on NLRB's General Counsel, or the type, quality, and quantity of evidence (including evidence of motives) the General Counsel must prove. Rather than pointing to record evidence that would carry its burden, NLRB attempts to shift its burden of proof to FDRLST. NLRB insinuates that FDRLST needed to provide "legal support" for FDRLST's argument that NLRB "did not prove" FDRLST violated the NLRA. Resp17. This burden-shifting would require FDRLST to prove a negative. NLRB had many tools to obtain testimony to prove that Mr. Domenech's tweet was a threat that violated Section 158(a)(1), but it used none of them. Neither NLRB nor this Court can now assume what NLRB failed to prove. FDRLST presented an inexhaustive list of concrete facts that NLRB failed to prove. *See* OB47. Even with this convenient roadmap, NLRB could not point to any in-the-record proof. NLRB cannot now fill that glaring gap with rank speculation.

The tweet was a joke published online in response to a current event. CAR1–31. To prove that the joke was not intended as a joke but instead was a threat under the NLRA, the General Counsel needed to prove how six employees would have received the joke. Live, in-person testimony was the only way to establish that necessary context. General Counsel did not bring forward any evidence other than the tweet itself.

In the end, NLRB wants to punish FDRLST without statutory authority or judicial oversight. It needed to come up with proof and very good reasons that can be sustained with statutory authority and subject to meaningful judicial review. Instead, it offers only speculation and conjecture and no reasoned explanation for sustaining its decision. NLRB's decision should be vacated for want of competent evidence that FDRLST committed an unfair labor practice. The Court should decline to enforce NLRB's order (CAR431–433) against FDRLST because such enforcement would offend the First Amendment and undermine the NLRA.

IV. THE COURT SHOULD NOT AFFORD ANY DEFERENCE TO NLRB'S INTERPRETATIONS

NLRB calls for across-the-board deference. Resp6, 8, 18, 37, 49. The Court should afford no deference to any portion of NLRB's decision. OB49–53. NLRB invokes *Chevron* and its "superior expertise." Resp6–8, 46.

First, canons of construction are traditional tools of interpretation that the Court is required to apply before affording deference. *Arangure v. Whitaker*, 911 F.3d 333, 342–43 (6th Cir. 2018). NLRB has offered no competing interpretive tool supporting its flawed reading of the relevant statutes and regulations. Even if the Court perceives ambiguity or silence in the statute (there is none), deference is still not warranted because such deference is unconstitutional. OB49–53; *see* OB15–20 (discussing the distributive-phrasing canon and other interpretive tools).

Second, NLRB has no special expertise in interpreting written words. That is the unique domain of federal courts. *See FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (rejecting *Chevron* and *Brand X* deference to NLRB's interpretation of "worker," "employee," "independent contractor"); *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017) (*en banc*) (declining deference to NLRB's interpretations of legal terms); *St. Charles Journal, Inc. v. NLRB*, 679 F.2d 759, 761 (8th Cir. 1982) (same). NLRB has no substantive or special expertise—neither in matters of interpretation, nor in methods of proving a proposition through testimony, or circumstantial or documentary evidence in an adversarial evidentiary hearing. *FedEx*, 849 F.3d at 1128; *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292–293 (10th Cir. 1978) (the "basis for deference ebbs" when the "interpretive issu[e] … fall[s] more naturally into a judge's bailiwick").

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 of the United States Constitution. OB49–53. Deference to any aspect of NLRB's decision would be especially egregious here.

CONCLUSION

The Court should vacate NLRB's decision below given NLRB's lack of subject-matter jurisdiction and Region 2's lack of personal jurisdiction in this case, and it should set aside that portion of 29 C.F.R. § 102.9 that allows "[a]ny person" to file a charge regardless of aggrievement.

If the Court finds jurisdiction, it should reverse NLRB's decision and vacate its order, because Mr. Domenech's tweet is not an unfair labor practice and is fully protected speech under the First Amendment and Section 158(c). In answering each of these questions, the Court should afford no deference to NLRB's interpretation of the relevant statutes and regulations.

Respectfully submitted on July 7, 2021, by:

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CERTIFICATES

I certify as follows:

All attorneys except Mark Chenoweth listed in the signature block are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

The brief complies with the requirements of FRAP 32(a)(5) and (6) because it has been prepared in 14-point, plain, roman-style typeface.

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Respectfully submitted, on July 7, 2021,

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