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 OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition to review of FDRLST Media, LLC ("the Company"), and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Order against the Company. The Board's Decision and Order ("D&O") issued on November 24, 2020, and is

reported at 370 NLRB No. 49. (AR.431-36.)[1] The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the National Labor Relations Act ("the Act"). 29 U.S.C. § 160(a). Under Section 10(e) and (f) of the Act, the Court has jurisdiction because the Board's Order is final, and venue is proper because the Company is a Delaware corporation. 29 U.S.C. § 160(e) and (f). The petition and application are timely, as the Act provides no time limit for those filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that the Company, by its Executive Officer and Publisher Ben Domenech, threatened employees with unspecified reprisals if they engaged in protected union activity, in violation of Section 8(a)(1) of the Act, by stating: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine."

2. Whether the Board reasonably rejected the Company's jurisdictional and venue arguments.

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[1] "AR" refers to the agency record that the Board filed electronically with the Court. "Br." refers to the Company's opening brief. Amicus briefs are referenced by name. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF RELATED CASES AND PROCEEDINGS

No related cases are pending in any federal court. This case has not been before the Court previously.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The parties stipulated to the following facts. (D&O 3-4; AR.66-69.) The Company publishes websites, electronic newsletters, and satellite radio shows. (D&O 3; AR.66.) It maintains a Twitter account under the name "@FDRLST." (D&O 3; AR.68.) The Company's Executive Officer and Publisher, Ben Domenech, maintains a separate Twitter account that he uses to promote and discuss the Company's published content. (D&O 4; AR.67-69.) On June 6, 2019, he posted the following message on that account:

> FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine.

(D&O 3; AR.68.) At least one of the Company's employees viewed the message. (D&O 3; AR.68-69.)

II. The Proceedings Before the Board

Acting on an unfair-labor-practice charge filed by an individual who is not, and never has been, employed by the Company (AR.63-65), the Board's General Counsel issued a complaint against the Company alleging that the salt-mine tweet unlawfully threatened reprisals for union activity (AR.43-47). The Company filed

a motion to dismiss based on lack of jurisdiction and improper venue (AR.161-84), in which it took "no position on the propriety" of transferring the case to another location (AR.183). The Board denied the motion. (AR.272-73.) An administrative law judge held a hearing in New York, where the charge was filed. (D&O 3; AR.1-31.) Company counsel participated in the hearing and reasserted that the Board lacked jurisdiction and that venue was improper, but did not request a change of hearing location. (AR.7, 14.) The judge issued a recommended decision and order finding that the Company violated the Act as alleged. (D&O 3-6; AR.274-83.) The Company filed exceptions with the Board. (AR.289-300.)

III. The Board's Conclusions and Order

The Board (then-Chairman Ring, then-Member McFerran, and Member Kaplan) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act. (D&O 1-2.) The Board issued a remedial order requiring the Company to cease and desist from threatening employees with unspecified reprisals if they engage in protected union activity, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (D&O 1-2.) The Order also requires the Company to direct Domenech to delete the threatening statement from his Twitter account and take appropriate steps to ensure that he complies. (D&O 2.) Finally, the Order requires the Company to post a remedial notice at its Washington, D.C.

facility and distribute the notice electronically to its employees if it customarily communicates with them by electronic means. (D&O 2.)

SUMMARY OF THE ARGUMENT

Substantial evidence supports the Board's finding that the Company unlawfully threatened to retaliate against employees if they exercised their statutorily protected right to unionize. The Board applied its longstanding precedent, which the Supreme Court and this Court have approved, in finding that the threat would tend to interfere with employees' free exercise of that right. Under this Circuit's precedent, "the Company's argument that [the threat] w[as] made jokingly must be rejected as irrelevant." *Stein Seal Co. v. NLRB*, 605 F.2d 703, 706 (3d Cir. 1979). Because the statement constituted a threat, it was not protected by Section 8(c) of the Act or the First Amendment.

This straightforward case is complicated by the Company's confusion about basic principles of Board law and procedure, multiplied by its amici's off-base submissions. In particular, the Company and its amici seize on a surface-level novelty—the Company's choice to disseminate its threat publicly on Twitter, which predictably drew an unfair-labor-practice charge from a member of the public—as an excuse to recycle worn-out arguments that the Supreme Court, this Court, and the Board have rejected. Many of amici's arguments are not properly before the Court because the Company did not present them to the Board, or

develop them in the Company's opening brief. In any event, all of the Company's and amici's arguments are meritless. The Board is entitled to enforcement of its Order in full.

STANDARD OF REVIEW

"Whether an employer's conduct tended to coerce or intimidate employees in the exercise of their rights under the Act is a question of fact for the Board and its determinations are conclusive if supported by substantial evidence." *Stein Seal*, 605 F.2d at 706. *See* 29 U.S.C. § 160(e) (Board's findings of fact are "conclusive" if supported by substantial evidence on the record as a whole). The Court will not disturb the Board's factual findings even if it would have made a contrary determination had the matter been before it de novo. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Hedstrom Co. v. NLRB*, 629 F.2d 305, 314 (3d Cir. 1980) (en banc).

The Supreme Court has instructed that "a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969). Likewise, this Court's "precedent indicates that [the Court] must defer to the Board's superior expertise" on that issue. *NLRB v. Triangle Publ'ns, Inc.*, 500 F.2d 597, 598 (3d Cir. 1974). Accordingly, where employer speech is at issue, the Court's "scope of review is limited to inquiry as to

whether the Board's determination is reasonable and supported by substantial evidence." *Mon River Towing, Inc. v. NLRB*, 421 F.2d 1, 9-10 (3d Cir. 1969).

To the extent the Company raises issues of statutory interpretation, "'[f]amiliar principles of judicial deference to an administrative agency apply to the [Board]'s interpretation of the [Act].'" *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175 (3d Cir. 2002) (quoting *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001)). The Court's review is governed by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the reviewing court is whether the agency's answer is based on a permissible construction of the statute." *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 439 (3d Cir. 2016) (quoting *Chevron*, 467 U.S. at 842-43) (internal quotation marks and brackets omitted). The Court will "uphold a Board decision 'as long as it is rational and consistent with the Act, even if [the Court] would have formulated a different rule had [it] sat on the Board.'" *Allegheny Ludlum*, 301 F.3d at 175 (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990)). In other words, the Court upholds the Board's interpretation of the Act if it is "reasonably defensible." *Id.* (citation and internal quotation marks omitted).

The standard of review is no less deferential where the Board addresses an issue that might be characterized as "jurisdictional." *NLRB v. City Disposal Sys.,*

Inc., 465 U.S. 822, 830 n.7 (1984). Regardless of "whether an agency's interpretation of a statutory provision is 'jurisdictional' or 'nonjurisdictional,'" the Supreme Court has held that "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 301 (2013). *Accord 1621 Route 22 West Op. Co., LLC v. NLRB*, 825 F.3d 128, 140 (3d Cir. 2016). Nor does the Board receive less deference where a party raises First Amendment arguments. *Gissel*, 395 U.S. at 620. In that setting, this Court defers to the Board's "rational resolution of the tension between the employer's First Amendment rights and the employee's right to organize freely." *Allegheny Ludlum*, 301 F.3d at 178. Thus, the Company's and amici's attacks on judicial deference to the Board on such issues (Br. 49-53; Pacific Legal Foundation ("PLF") 3, 11-14) fail because they are contrary to the binding law of the Supreme Court and this Circuit.

ARGUMENT

I. Substantial Evidence Supports the Board's Finding that the Company Violated Section 8(a)(1) by Threatening Employees with Unspecified Reprisals if They Chose To Unionize

A. Employer Statements that Tend To Interfere with Employees' Exercise of Their Rights Under the Act Are Unlawful

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of th[ose] rights." 29 U.S.C. § 158(a)(1). "Thus, an employer violates [Section] 8(a)(1) of the [Act] by interfering with its employees' right to unionize." *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1252 (10th Cir. 2005). *Accord NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 937 (3d Cir. 1980).

To assess whether an employer interfered with the right to unionize, the Board applies "an objective test in which the employer's intent is irrelevant and the proper inquiry is the impression of a reasonable employee." *Allegheny Ludlum*, 301 F.3d at 176. "Moreover, the inquiry is also objective as to the effect on employees." *Id.* "There need be no proof of any actual interference with employees' rights; there need only be a finding that the statements or acts of the employer would tend to coerce a reasonable employee." *Garry Mfg.*, 630 F.2d at 938. "'That no one was in fact coerced or intimidated is of no relevance.'" *Triangle Publ'ns*, 500 F.2d at 598 (quoting *Local 542, Int'l Union of Operating Eng. v. NLRB*, 328 F.2d 850 (3d Cir. 1964)).

It is well established that a threat to retaliate against employees for engaging in union activities tends to coerce and interfere with employees' exercise of their rights under the Act. *Gissel*, 395 U.S. at 617-19; *Hedstrom*, 629 F.2d at 316. In

evaluating whether an employer's statement constitutes an unlawful threat, "the Board considers the totality of the relevant circumstances." *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). In particular, the Supreme Court has instructed the Board to take into account "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel*, 395 U.S. at 617. *Accord Garry Mfg.*, 630 F.2d at 940.

B. The Board Reasonably Found that the Company's Threat of Unspecified Reprisals if Employees Engaged in Union Activity Would Tend To Coerce Employees

Substantial evidence supports the Board's common-sense finding that the Company violated the Act when its executive officer and publisher stated on Twitter, in a post that was viewed by at least one of the Company's employees, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." (D&O 1 n.4, 3.) As the Board found, the Company's employees would reasonably interpret the statement "as expressing an intent to take swift action against any employee who tried to unionize the [Company]." (D&O 1 n.4.) The statement was presented as an "FYI @fdrlst"—that is, a statement "for your information" directed at the Company. (D&O 5.) And, self-evidently, the only "you" who could unionize at the Company are its employees. Just as clearly, the

idiom "back to the salt mine" indicated that the response to a unionization effort would be adverse. (D&O 1 n.4.)

As the Board explained, the term "'salt mine' is most often used to refer to tedious and laborious work." (D&O 5.) An online dictionary readily available to any Twitter user confirms that meaning. *See, e.g.,* https://www.dictionary.com/browse/salt-mine (last visited June 1, 2021) (defining salt mine as "a mine from which salt is excavated" or "a place of habitual confinement and drudgery"). The term's ordinary usage is illustrated in *Walter J. Barnes Electrical Co.*, an otherwise non-pertinent Board case in which an employee, upon being transferred to a more physically difficult job, told his foreman "that he was being sent to Siberia," and the foreman replied, "Yeah, to the salt mine." 188 NLRB 183, 196 (1971). Although the foreman later characterized the comment as a joke, "behind this 'joke' there was full recognition by [the foreman] of the fact that he was reassigning [the employee] to more onerous work than he was then doing." *Id.* Consistent with that usage, whether said jokingly or not, going "back to the salt mine" is universally understood to mean undertaking something one would rather not do. No fluent English speaker would mistake the matter by supposing, for example, that being sent back to the salt mine was a reward.

Under established law, threats that use figurative or vague language are unlawful even though they leave the precise nature of the threatened reprisal

ominously unspecified. *See, e.g.*, *Pottsville Bleaching Co.*, 303 NLRB 186, 188 (1991) (supervisor threatened unspecified reprisals by telling employee, "I suggest that you take the Union hat off if you plan to keep your happy home"), *enforced mem.*, 968 F.2d 13 (3d Cir. 1992); *Chem. Solvents, Inc.*, 331 NLRB 706, 706 n.3, 718 (2000) (supervisor's comment "that if the Union went through, he could make employees' lives a living hell"). Here, the reference to salt mines would have been easily understood as conveying a threat by reasonable employees against whom the Company had the power to immediately retaliate by assigning less desirable work (or in countless other ways) if they sought union representation. Considering the statement "in context from the standpoint of employees over whom the employer has a measure of economic power" (D&O 5), the Board reasonably found that it constituted an unlawful threat of unspecified reprisals, (D&O 1 n.4, 5).

Contrary to the claims of the Company (Br. 45), and amici,[2] the Board followed settled precedent in disregarding as irrelevant both Domenech's statements concerning his motives for making the threat and two employees' statements concerning their subjective interpretations of it. (D&O 1 n.3.)[3] As

[2] Cato Institute et al. (collectively, "Cato") 15-16; Southeastern Legal Foundation et al. ("SLF") 9-11.

[3] The Board further found (D&O 1 n.3) that the judge had erred in allowing the Company to enter into evidence the affidavits containing those statements without establishing that the affiants were unavailable to testify. *See Limpco Mfg., Inc.*,

noted above, the Board and this Court have consistently held that the speaker's subjective intent and the listeners' subjective impressions do not provide relevant context under the Board's objective test. *See, e.g.*, *Hedstrom*, 629 F.2d at 317 (rejecting argument that there was no coercion because of the employee's "own testimony that she told [the supervisor who threatened her] that he was drunk and that he didn't know what he was talking about"), and cases cited on p. 9.

In particular, Domenech's characterization of the salt-mine tweet as "satire" (A.R.151), and two employees' subjective interpretations of it as "funny" (A.R.156, 158), are irrelevant. This Court long ago rejected the argument that an employer can avoid a finding of coercion by simply calling its threat a joke. In *Stein Seal Co. v. NLRB*, for example, the employer's president said, in reference to a union supporter who had received raises, that he did not "'feel that someone ought to bite the hand that feeds him.'" 605 F.2d 703, 705 (3d Cir. 1979). Holding up his hand, the president continued, "'I have one finger that is missing, and I think I ought to pull it back before I get the rest of them nibbled off.'" *Id.* The Board found an "implied threat of retaliation." *Id.* at 706.

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225 NLRB 987, 987 (1976) (noting that "the Board has allowed affidavits generally only when the witness was either deceased or so seriously ill that the taking of oral testimony posed a threat to the witness'[s] health"), *enforced mem.*, 565 F.2d 152 (3d Cir. 1977). The Company does not challenge that ruling before the Court.

In upholding the Board's finding, the Court held that the employer's "argument that [the president]'s remarks regarding his missing fingertip were made jokingly must be rejected as irrelevant." *Id.* "The relevant inquiry is not [the employer]'s intent but rather the coercive inferences which the employees could have drawn." *Id.* *Accord Senior Care at the Fountains*, 341 NLRB 1004, 1007 (2004) (manager violated Section 8(a)(1) by singing an implied threat that was "happy and bubbly, like a joke but with a tune"), *enforced sub nom. NLRB v. Alandco Dev. Corp.*, 131 F. App'x 16, 17-18 (3d Cir. 2005).

It is thus well established that employees may reasonably draw coercive inferences from an employer's threat of retaliation for union activity "even when such a threat is made in a seemingly lighthearted fashion." *V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 279 (6th Cir. 1999). As the Board has explained, "the unlawful effect of a coercive statement is not blunted merely because it is 'accompanied by laughter or made in an offhand humorous way.'" *Meisner Elec., Inc.*, 316 NLRB 597, 599 (1995) (quoting *Ethyl Corp.*, 231 NLRB 431, 433-34 (1977))), *aff'd mem.*, 83 F.3d 436 (11th Cir. 1996). After all, "many a true word has been said in jest." *T.C. Bakas & Sons*, 232 NLRB 571, 574 (1977). And "all of us are, no doubt, aware that threatening or manipulative statements can, at times, be couched in ostensibly friendly, or even humorous, terms." *NLRB v.*

Homemaker Shops, Inc., 724 F.2d 535, 550 (6th Cir. 1984). "The threat or manipulation remains nonetheless." *Id.*

Given employers' "control over th[e] [employment] relationship," *Gissel*, 395 U.S. at 620, "executives who threaten in jest run the risk that those subject to their power might take them in earnest and conclude the remarks to be coercive," *A.P. Green Fire Brick Co. v. NLRB*, 326 F.2d 910, 914 (8th Cir. 1964). *See Hogan Transps., Inc.*, 331 NLRB 312, 318 (2000) (manager's laughter "did not mitigate the inherent coerciveness of [his] remark"). And employees whose livelihoods are at stake may muster a "jocular response" even in the face of coercion. *NLRB v. Hotel Conquistador, Inc.*, 398 F.2d 430, 434 (9th Cir. 1968). *See Southwire Co.*, 282 NLRB 916, 918 (1987) (finding unlawful threat despite employee's laughter). Consistent with those well-established principles, the Board reasonably found that the Company's overt threat of reprisal for union activity tended to coerce employees regardless of whether Domenech or two of the Company's employees subjectively found humor in it. (D&O 5.)

The Company and amici cite nothing that undermines the settled law the Board applied. The Company, first of all, misrepresents the authority it cites for its assertion that the Board sometimes considers motive and the probable success or failure of coercive statements. (Br. 46.) It quotes the administrative law judge's recommended decision in *Miller Electric Pump & Plumbing*, 334 NLRB 824, 830

(2001), but neglects to acknowledge that the Board repudiated the excerpted language. In doing so, the Board reaffirmed that it "applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights," and "does not consider either the motivation behind the remark or its actual effect." *Id.* at 824. The General Counsel pointed out the Company's error in briefing before the Board. (AR.325.) That the Company chooses to misuse the same language again is unfortunate.

None of the out-of-circuit cases the Company and amici cite stand for a different rule. (Br. 45; Cato 6, 11, 16; IFS 5-6; SLF 11.) The Sixth Circuit in *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363, 369 (6th Cir. 1993), applied the same objective test that the Board applied here. Disagreeing with the Board, the court concluded that the "reasonable tendency" of the employer's statements was not coercive. *Id.* Similarly, in *NLRB v. Windemuller Elec., Inc.*, the court disagreed with the Board's interpretation of the statement at issue, which the court found a "reasonable person" would interpret as an acknowledgment of union-organizing efforts with no implied threat to break the law in response. 34 F.3d 384, 392 (6th Cir. 1994). But the court also explicitly acknowledged that "threatening statements can sometimes be made in humorous terms." *Id.* And the court in *Federal-Mogul Corp. v. NLRB* simply disagreed with the Board's factual finding that an episode of "horseplay" constituted "destruction of Union literature [that] violated Section

8(a)(1)." 566 F.2d 1245, 1253 (5th Cir. 1978). None of those cases holds that threats of retaliation are lawful as long as someone laughs.[4]

There is little more to the Company's arguments on the merits. The Company makes unexplained bullet-point claims, without legal support, that the Board did not prove Domenech "spoke for" the Company and that the Company proved that his message was a "personal opinion." (Br. 46-47.) Under Federal Rule of Appellate Procedure 28(a), and the Court's Local Appellate Rule 28.1(a), "appellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief." *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993). Because the Company has failed to develop a "substantive argument" on those issues, they are waived. *In re Wettach*, 811 F.3d 99, 115 (3d Cir. 2016).

In any event, substantial evidence supports the Board's finding that the Company was responsible for the threat. (D&O 1 n.4, 5.) The parties stipulated that Domenech, the Company's executive officer and publisher, was a supervisor under Section 2(11) of the Act, 29 U.S.C. § 152(11), and the Company's agent

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[4] Nor does *NLRB v. Champion Laboratories, Inc.*, 99 F.3d 223, 229 (7th Cir. 1996), which Cato cites (Cato 13), support a "bantering" exception to Section 8(a)(1). Disagreeing with the Board in that case, a divided panel of the Seventh Circuit found no specific threat of plant closure when a supervisor paraphrased an employee's comment about moving to Mexico if employees unionized. *Id.* Nonetheless, the panel majority acknowledged that her "remarks as a whole" might have unlawfully coerced employees. *Id.*

under Section 2(13), 29 U.S.C. § 152(13). (D&O 3.) His statement, moreover, was phrased in terms of what he would do to employees in his capacity as their supervisor. *See Hedstrom*, 629 F.2d at 316 (deferring to Board's finding that employer violated the Act when off-duty supervisor threatened employee with job loss); *Cent. Transp., Inc. v. NLRB*, 997 F.2d 1180, 1190 (7th Cir. 1993) (rejecting as "nonsense" employers' argument that they were not responsible for supervisor's threat of plant closure, as "supervisors' threats violate the Act, just as effectively as threats from the CEO").

Also waived by nonargument are the Company's bare assertions that the Board did not prove either that the Company's employees follow the Twitter account where the threat was posted or that it was directed at them. (Br. 47.) If the Company had made an argument in that regard, the answer would be that, as the Board found, "[t]he words of the statement itself leave no doubt that it [was] directed at the [Company]'s employees." (D&O 1 n.4.) As noted above (p. 10), reasonable employees of the Company would understand that they were the ones who could be sent "back to the salt mine" if they tried to unionize.

As a matter of law, then, the parties' stipulation that at least one employee viewed the statement is sufficient to support the Board's unfair-labor-practice finding. (D&O 1 n.4.) That is because threats that employees actually witness violate the Act "whether or not the supervisor intended the coercive remarks to

reach the[m].” *Williams Motor Transfer*, 284 NLRB 1496, 1499 (1987) (citation and internal quotation marks omitted). *See, e.g.*, *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997) (supervisor’s statement threatening discharge of employees who wore union buttons, overheard by an employee hidden from view, violated the Act); *Crown Stationers*, 272 NLRB 164, 164 (1984) (manager’s letter to her father, discovered and read by an employee, violated the Act). Thus, contrary to Cato’s argument (Cato 11-13), whether the threat was subjectively meant for employees’ eyes or intended for public consumption “is not the relevant inquiry.” *Corp. Interiors, Inc.*, 340 NLRB 732, 732 (2003).

Finally, the Company’s passing challenge (Br. 48) to the Board’s remedy falls far short of showing that the Board abused its “broad discretionary” remedial authority. *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953). The Company cites a single, inapposite case discussing when a nonparty may be bound by an injunction under the Federal Rules of Civil Procedure, which do not govern Board proceedings. *See Component Bar Prod., Inc.*, 364 NLRB No. 140, 2016 WL 6662843, at *2 (Nov. 8, 2016). The Company then notes that the charge and complaint in this case were against the Company itself, not Domenech. (Br. 48.)[5] But the same is true of the Board’s Order. It requires *the Company* to stop

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[5] The Company hints at other constitutional or statutory theories (Br. 48), but does not explain or support them. Any such additional arguments are therefore waived.

threatening employees with unspecified reprisals for engaging in protected union activity, to direct its supervisor and agent to remove a threat he issued and take appropriate steps to ensure that he complies, and to post a notice informing employees of those commitments. (D&O 2.) Thus, the Order imposes an affirmative obligation on the Company itself, in its capacity as an employer responsible for its supervisor's violation of employee rights, to remedy the specific unfair labor practice found. The directive that the Company take action to eliminate the written threat accords with the Board's customary remedial practice.[6] Indeed, posting a notice committing to cease threatening employees—a requirement to which the Company does not specifically object—would appear empty if the Company, through its supervisor and agent, continued to post a threat on Twitter.

C. Amici cannot—and do not—make the Company's case for it

The Company raises only cursory challenges to the violation the Board found (Br. 44-48), devoting the bulk of its brief to patently meritless arguments

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[6] *See, e.g.*, *Omega Constr. Servs., LLC*, 365 NLRB No. 72, 2017 WL 2115670, at *5 (May 12, 2017) (ordering employer to rescind threat owner made by text message); *Williams Litho Serv., Inc.*, 260 NLRB 773, 774 (1982) (rescind threat). *Cf. ImageFirst*, 366 NLRB No. 182, 2018 WL 4184228, at *3 (Aug. 27, 2018) (rescind unlawful handbook rule), *enforced*, 794 F. App'x 216 (3d Cir. 2019); *Paragon Sys., Inc.*, 366 NLRB No. 139, 2018 WL 3608310, at *5 (July 25, 2018) (delete unlawful rules); *Pro. Ass'n of Golf Offs.*, 317 NLRB 774, 779 (1995) (delete unlawful complaint allegations); *May Dep't Stores Co.*, 184 NLRB 878, 886 (1970) (delete reference to unlawful discipline from personnel file).

about jurisdiction and venue, which we address below (pp. 31-52). That unusual strategy left a vacuum that the Company's amici have attempted to fill with arguments the Company did not adequately make for itself. But "an amicus cannot expand the scope of an appeal with issues not presented by the parties on appeal." *Nuveen v. WithumSmith Brown, PC*, 692 F.3d 283, 300 n.10 (3d Cir. 2012). Nor can an amicus "resurrect" issues a party has effectively abandoned. *Simko v. U.S. Steel Corp*, 992 F.3d 198, 206 (3d Cir. 2021). To allow amici to do a party's work for it would distort the adversarial process and facilitate the evasion of briefing word limits.

Accordingly, "[t]o the extent that [an] amicus raises issues or make[s] arguments that exceed those properly raised by the parties, [a court] may not consider such issues." *Cellnet Commc'ns, Inc. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998). *See New Jersey v. New York*, 523 U.S. 767, 781 n.3 (1998) (Supreme Court "must pass over the arguments" of amici that were not advanced by a party). Because the Company did not fully articulate or support the arguments addressed below, they are not properly before the Court. In any event, all of amici's arguments fail.

1. Section 8(c) of the Act and the First Amendment Do Not Protect the Company's Threat

Section 8(c) of the Act implements the free-speech rights of employers and unions under the First Amendment by providing that the expression of "views,

argument, or opinion" shall not constitute an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). *Gissel*, 395 U.S. at 617; *Allegheny Ludlum*, 301 F.3d at 177. Thus, as the Board explained, Section 8(c) expressly "excludes threats of reprisal from the protection it otherwise affords" to free expression. (D&O 1 n.4.) Likewise, a "threat of retaliation" is "without the protection of the First Amendment." *Gissel*, 395 U.S. at 618. "Despite the purely verbal quality of such a threat, it surely is no more 'speech' for First Amendment purposes than the robber's demand 'your money or your life.'" *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 208 (3d Cir. 2001) (Alito, J.) (citing *Gissel*, 395 U.S. at 617). Because the Board reasonably found the Company's statement to be a threat of reprisal for union activity, it was unlawful. (D&O 1 n.4, 5 n.9.)

The Company makes no meaningful argument to the contrary. It states that communications on social media are entitled to the same First Amendment protection as other communications. (Br. 44; *see also* PLF 22-23.) The Board did not find otherwise. The salt-mine threat would have been no more protected if it had been delivered face to face, in a press release, during a television interview, by e-mail, or in a pamphlet. The Company also says parody, satire, and political commentary may be protected under the First Amendment. (Br. 45.) But that unremarkable proposition does not dispose of this case. The Company can call its

statement satire, commentary, or anything else, but the fact remains that the Board reasonably found it to be unprotected as a threat. (*See* pp. 12-16.)

The Company also vaguely suggests that *Gissel* "needs to be updated" in some way to line up with more recent First Amendment precedent. Amici echo and expand on that claim. The Company, however, made no such argument before the Board. Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). "The Supreme Court has construed this rule strictly." *NLRB v. Konig*, 79 F.3d 354, 359 (3d Cir. 1996) (citing *Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 665-66 (1982)). Nothing in the Company's filings before the Board sufficed to "put the Board on notice" that it was challenging any aspect of *Gissel*. *New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011). That omission "deprives this court of jurisdiction to address" any challenge now. *Konig*, 79 F.3d at 360. *See 1621 Route 22 W. Operating*, 825 F.3d at 138-43 (emphasizing jurisdictional nature of Section 10(e)). Moreover, because the Company makes no effort to develop its challenge to *Gissel* before the Court, the argument is waived as well. (*See* pp. 17, 20-21.)

In any event, to the extent the Company and amici suggest that *Gissel* should be overruled, this Court cannot oblige. That would be so even if the Company had shown that Supreme Court precedent has evolved in ways that undermine *Gissel*. The Supreme Court has instructed that if one of its precedents "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation and internal quotation marks omitted). This Court "steadfastly appl[ies] the *Agostini* doctrine" in the First Amendment context. *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 156 (3d Cir. 2005). Thus, "the obligation to follow Supreme Court precedent is in no way abrogated" even if "there were merit" to a claim that the Supreme Court's "later decisions have somehow weakened the precedential value" of an older case. *Id.* (citation and internal quotation marks omitted). The cases the Company cites (Br. 46)—*Reed v. Town of Gilbert*, 576 U.S. 155 (2015), and *Elonis v. United States*, 575 U.S. 723 (2015)—arise outside the labor context, and they make no mention of *Gissel*. And the Supreme Court has not suggested that *Gissel* is no longer good law in any other case. Simply put, *Gissel* controls.

Amici attempt to formulate more coherent attacks on *Gissel*, which the Company never raised to the Board or this Court. Even if those arguments were

properly before the Court, they would fail. Some amici contend that *Gissel*'s holding should be limited to that case's facts—either where "an employer was making concrete threats in response to real efforts to unionize" (TechFreedom 4), or where an employer makes "repeated" threats within "a pattern of anti-union campaigning" during a unionization effort. (PLF 28.) This Court, however, long ago rejected such efforts to cabin the broad principles the Supreme Court announced in *Gissel*. That case, this Court held, is "not limited to [the] organizational campaign context." *Garry Mfg.*, 630 F.2d at 938 (citing *Mon River*, 421 F.2d at 9-11). *Accord Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1137-38 (7th Cir. 1974). More generally, an employer violates the Act by threatening employees for engaging in activities protected by Section 7 regardless of whether the employees have already engaged in any such activities. *See, e.g.*, *Brandeis Mach. & Supply Co.*, 342 NLRB 530, 532-33 (2004) (employer unlawfully coerced employees prior to advent of union organizing), *enforced*, 412 F.3d 822 (7th Cir. 2005); *Keller Ford, Inc.*, 336 NLRB 722 (2001) (threat "violated Section 8(a)(1) of the Act regardless of whether [the employee] was actually engaged in protected concerted activity"), *enforced*, 69 F. App'x 672 (6th Cir. 2003).

Amici also imagine a conflict between the Supreme Court's unanimous decision in *Gissel* and its decision several months earlier in *Watts v. United States*, 394 U.S. 705 (1969). (TechFreedom 5-9; PLF 23; Institute for Free Speech

("IFS") 5.) If the decisions were irreconcilable, *Gissel* would govern here for the reasons explained above. But there is no inconsistency. The hypothetical, rhetorical expression of "political opposition to the President" by an antiwar protester in *Watts*, 394 U.S. at 708, is nothing like an employer's credible threat of reprisal for union activity. As the Supreme Court recognized in *Gissel*, employers have the power to "take action solely on [their] own initiative" against their employees for unionizing. 395 U.S. at 618. And reasonable employees take seriously threats to do so that "a more disinterested ear" might dismiss. *Id.* at 617.

Finally, amici's claim (TechFreedom 9-12; PLF 21-22; IFS 14-16) that the Act discriminates against antiunion speech by employers is misguided. The Act evenhandedly prohibits both employers and unions from coercing employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1) and (b)(1)(A). And Section 7, in turn, protects both the right to join a union and the right to refrain from doing so. 29 U.S.C. § 157.

2. Amici fail to joke away the threat's coerciveness

Amici do not advance their case by attempting to make light of the Company's threat. PLF, for example, digs deep in the thesaurus to compile conclusory characterizations of the salt-mine tweet as a "saucy quip," "cheeky wisecrack," "[s]arcastic overstatement," "satirical commentary," and "terse joke." (PLF 5, 20, 25, 28, 29.) But as explained above (pp. 12-16), "just kidding" is not a

defense where, as the Board reasonably found, the purportedly humorous statement would tend to coerce employees in the exercise of their Section 7 rights.

IFS, for its part, says it finds the threat funny because it considers the Company to be antiunion, and therefore assumes that its employees are antiunion as well and would never dream of unionizing; thus the Company would never need to retaliate against them for doing so. (IFS 16-17.) But because the Board's test is objective (p. 9), it is irrelevant whether particular employees were already so strongly antiunion (or prounion) that a threat could not change their minds. *See Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 832-33 (7th Cir. 2005) (rejecting employer's argument that coercive comments about union insignia "did not dissuade [the employees] from touting the Union on their clothing"); *Miller Elec.*, 334 NLRB at 825 (finding speculation on unlikelihood of employees forming a union irrelevant). IFS's factual assumption is also unwarranted, regardless of the Company's position on unions: there is nothing more common than employees selecting union representation despite their employer's antiunion stance.[7]

[7] *See, e.g.*, Meg James, *Times Reaches Historic Deal with Newsroom Union*, L.A. Times, Oct. 16, 2019, *available at* 2019 WLNR 31323196 ("The Los Angeles Times on Wednesday reached a tentative labor agreement with the guild that represents about 475 members of its newsroom, a milestone for a newspaper that for generations was known as a bastion of anti-unionism.").

Cato, on the other hand, is amused because the Company does not own any salt mines. (Cato 5, 14-15.) Thus, Cato says, the threat was "outlandish." (Cato 16.) But there is nothing outlandish about using a common idiom that employees would reasonably understand to refer to adverse consequences. And "[e]ven if a person expresses himself in an outlandish, illogical manner, his statements can be seriously threatening." *United States v. Dierks*, 978 F.3d 585, 590 (8th Cir. 2020) (citation and internal quotation marks omitted).

In fact, unlawful threats often use figurative, even hyperbolic language. For example, in *Advocate South Suburban Hospital v. NLRB*, the court upheld the Board's finding that the employer violated Section 8(a)(1) by stating, "'we make examples' of people who talk about the union," and "'[t]here will be a sacrificial lamb.'" 468 F.3d 1038, 1042 (7th Cir. 2006). And in *Equitable Gas Co. v. NLRB*, the court upheld the Board's finding that an employer threatened employees by characterizing itself as "bunnies," accusing the Union of taking "pot shots," and then stating that it would soon "arm the bunnies and the bunnies would start to shoot back." 966 F.2d 861, 867 (4th Cir. 1992). The Board was not required to find such language noncoercive because employees are not sheep and employers are not bunnies, because there were no altars or guns—or, here, because the Company owns no salt mines. *See also, e.g.*, *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, 2016 WL 4582497, at *1 & n.6, 10 (Aug. 27, 2016) ("If it were up to me,

I'd shoot the union"); *Seton Co.*, 332 NLRB 979, 991 (2000) ("If this Union comes in this plant, it's going to be shitty back here").

3. The Board was not required to create a Twitter exception to Section 8(a)(1)

Cato takes the argument that the Company's statement was a harmless joke one step further, asserting that Twitter is a special, "public and performative" place where no threat could be taken seriously. (Cato 7-13.) That argument is not properly before the Court. The Company did not raise, much less develop, any such challenge before the Board or in its opening brief to the Court. Thus, it is barred by Section 10(e) as well as waived. (*See* pp. 17, 20-21, 23.)

In any event, "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975). In this case, the Board carried out that duty in finding that, in the modern work environment, a threat broadly disseminated on a digital platform and viewable by the public is unlawful. Even if everything on the internet is a joke to Cato, the Board was not required to create an exception to Section 8(a)(1) for employer threats on social media.

Cato also suggests that the Company's use of Twitter is relevant because no employer would dare to widely disseminate an unlawful threat. (Cato 7.) That argument, too, is barred by Section 10(e) and waived by the Company's failure to argue it before the Court. It is also contradicted by employer conduct documented

in countless Board decisions. Employers routinely broadcast threats widely throughout the workplace and beyond—in letters, pamphlets, speeches, and press releases. *See, e.g.*, *TRW-United Greenfield Div.*, 245 NLRB 1135, 1135 (1979) (threat in television interview), *enforced*, 637 F.2d 410 (5th Cir. 1981); *Penn. Glass Sand Corp.*, 172 NLRB 514, 522 (1968) (threat "by a public news release"), *enforced sub nom. Gen. Teamsters & Allied Workers Local Union No. 992 v. NLRB*, 427 F.2d 582 (D.C. Cir. 1970). Some employers are not shy about announcing even the most explicit threats. *See, e.g.*, *United Dairy Farmers Co-op. Ass'n v. NLRB*, 633 F.2d 1054, 1057 (3d Cir. 1980) (employer "announced at a Christmas banquet of salesclerks that '[h]e would fire any girl who had signed a Union card'"). And the Board has learned by long experience that employers often follow through on their threats, whether they are made publicly or privately. *See id.* (noting that employer "followed through on his threat by firing the leading supporter of the union").[8]

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[8] Although criminal-law precedent does not govern here, it is notable that even where substantial prison time is at issue the Court has rejected the simple-minded claim that no one would be foolish enough to make serious threats on the internet. *See generally United States v. Elonis*, 841 F.3d 589 (3d Cir. 2016) (upholding 44-month prison sentence for threats in lyric form posted on Facebook). Unlawful threats appear in internet chatrooms, *United States v. C.S.*, 968 F.3d 237, 244 n.5 (3d Cir. 2020), YouTube videos, *United States v. Stoner*, 781 F. App'x 81, 86 (3d Cir. 2019), *cert. denied,* 140 S. Ct. 2676 (2020), and, of course, on Twitter, *United States v. Abdulkadir*, No. 016CR00002KESVLD, 2016 WL 659711, at *1 (D. Minn. Feb. 18, 2016). The federal courts and the FBI have not "learn[ed] to take a

Finally, there is no merit to Cato's claim (Cato 16-18) that prohibiting employers from violating Section 8(a)(1) on Twitter will inappropriately chill public discourse. Cato collects tweets that it thinks should not be taken seriously, but none of them threaten employees with reprisals for exercising their rights under Section 7. The Act, for example, does not prohibit discrimination based on pizza preferences. (Cato 17.) *See Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86, 90-91 (3d Cir. 1943) ("[A]n employer may discharge an employee for a good reason, a poor reason or no reason at all so long as . . . [it does not] discharge an employee because he has engaged in activities on behalf of a union."). Whether tweets like the ones Cato catalogues could violate another law was not before the Board, and it is not before the Court.

II. The Company's Arguments About Jurisdiction and Venue Fail

The Company's remaining arguments are patently meritless. Because they are built on fundamental misunderstandings of the Act, the Board, and its processes, we begin with an overview of those matters.

"The National Labor Relations Act is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce." *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967). It begins

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joke" (Cato 5) just because a communication appears on social media. *See generally United States v. Dierks*, 978 F.3d 585 (8th Cir. 2020) (affirming conviction and 72-month sentence for Twitter threats).

with an "unequivocal national declaration of policy establishing the legitimacy of labor unionization and encouraging the practice of collective bargaining." *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 190 (1978). *See* 29 U.S.C. § 151.

Section 3(a) of the Act establishes the Board. 29 U.S.C. § 153(a). The Board "does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining.'" *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941) (quoting *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940)). To that end, Section 10(a) of the Act empowers the Board to prevent "any person" from engaging in unfair labor practices affecting commerce. 29 U.S.C. § 160(a). If an employer's operations have more than a de minimis effect on interstate commerce, it is subject to the Board's jurisdiction. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 683-84 (1951).

Under the Act, "the process of adjudicating unfair labor practice cases begins with the filing by a private party of a charge." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975) (internal quotation marks and citations omitted). Section 10(b) of the Act "authorizes the National Labor Relations Board to initiate unfair labor practice proceedings whenever some person charges that another

person has committed such practices." *Nash*, 389 U.S. at 238. "The Board cannot start a proceeding without such a charge being filed with it." *Id.* Thus, the Board's implementation of the Act "is dependent 'upon the initiative of individual persons.'" *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (quoting *Nash*, 389 U.S. at 238). However, "the person or group making the charge does not become the actor in the proceeding." *Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 265 (1940).

Section 3(d) of the Act establishes the office of the General Counsel, who has "final authority" over "the investigation of charges and issuance of complaints under [S]ection 10, and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). Neither the Board nor the courts have authority to review the General Counsel's decision whether or not to issue a complaint. *Sears*, 421 U.S. at 138. "In those cases in which [the General Counsel] decides not to issue a complaint, no proceeding before the Board occurs at all." *Id.* at 139.

"In those cases in which [the General Counsel] decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint." *Sears*, 421 U.S. at 138-39. The General Counsel—not the charging party—determines the issues the complaint covers, *Williams v. NLRB*, 105 F.3d 787, 790 n.3 (2d Cir. 1996), as well as "the theory of the case," *Teamsters Local 282*, 335 NLRB 1253, 1254 (2001) (citation and internal

quotation marks omitted). If the General Counsel issues a complaint and settlement efforts are unsuccessful, the case ordinarily proceeds to hearing before an administrative law judge. 29 C.F.R. § 101.10. The judge issues a recommended decision and order. 29 C.F.R. § 101.11. If any party files exceptions, the Board considers the case and issues its own decision and order. 29 C.F.R. § 101.12.

The Board's orders are not self-enforcing; they impose no legal obligation on any party until they have been enforced by a court. Under Section 10(e) of the Act, 29 U.S.C. § 160(e), the Board alone has authority to petition a court of appeals for enforcement of its order. *Amalgamated Util. Workers*, 309 U.S. at 266. And under Section 10(f), 29 U.S.C. § 160(f), only a party aggrieved by the Board's order may petition a court to review it. *See* 29 C.F.R. § 101.14.

A. Any Person May File an Unfair-Labor-Practice Charge

The Board reasonably rejected the Company's arguments based on the identity of the charging party in this case. (D&O 1 n.4, AR.272-73.) Before the Court, the Company continues to complain that the charging party was not aggrieved by its threat. (Br. 13-32.) But aggrievement does not matter in this context. As the Board recognized, the Act has always permitted any person, aggrieved or not, to file an unfair-labor-practice charge. (AR.272.)

The relevant language, as enacted in 1935, follows:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint.

49 Stat. 146, 453 (codified as amended at 29 U.S.C. § 160(b)).

Interpreting that text over 80 years ago, the Supreme Court concluded that "[t]he Act requires a charge before the Board may issue a complaint, but omits any requirement that the charge be filed by a labor organization or an employee." *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17 (1943). The charging party in *Indiana & Michigan* was a union engaged in an unlawful campaign of dynamiting employer property. 318 U.S. at 11-13. The issue before the Court was whether evidence of the union's misconduct could disqualify it from filing a charge. *Id.* at 17. The Court "h[e]ld that misconduct of the union would not deprive the Board of jurisdiction" because any other person—even a "stranger"—could have filed the same charge in its place. *Id.* at 17-18.[9]

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[9] Similar reasoning underlies subsequent Board decisions. *See, e.g.*, *3 State Contractors, Inc.*, 306 NLRB 711, 716 (1992) (misidentification of charging party irrelevant because any person may file a charge); *Operating Engineers, Local 926*, 254 NLRB 994, 994 n.2 (1981) (whether employer's charter authorized it to file charges was irrelevant because any person may file charge); *Frank L. Sample, Jr., Inc.*, 118 NLRB 1496, 1498 (1957) (irrelevant whether charge was signed by someone authorized to file it for the same reason).

Because the Court's recognition that anyone may file a charge was integral to the resolution of the question before the Court, the Company is wrong to call it dicta. (Br. 21.) "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [the courts] are bound." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996). Reasoning that "formed the basis of the Supreme Court's holding" is not dicta. *Coleman v. Green*, 845 F.3d 73, 75 (3d Cir. 2017). And in any event, this Court does "not idly ignore considered statements the Supreme Court makes in dicta." *In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000). *Accord Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009).

"Since no intervening Supreme Court decision mandates an interpretation of [Section 10(b)] different from the interpretation given" in *Indiana & Michigan*, that case controls. *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 120 (2d Cir. 2001). Moreover, the Board and the courts of appeals—including this Court—have consistently reaffirmed the Supreme Court's holding. *See NLRB v. Television & Radio Broad. Studio Emp., Local 804*, 315 F.2d 398, 400-01 (3d Cir. 1963). *Accord, e.g.*, *Raymond Interior Sys., Inc. v. NLRB*, 812 F.3d 168, 178 (D.C. Cir. 2016); *Ashley v. NLRB*, 255 F. App'x 707, 709 (4th Cir. 2007); *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 121 (2d Cir. 2001); *NLRB v. Teamsters Local 364*, 274 F.2d 19, 25 (7th Cir. 1960); *S. Furniture Mfg. Co. v. NLRB*, 194 F.2d 59, 60-

61 (5th Cir. 1952); *NLRB v. Gen. Shoe Corp.*, 192 F.2d 504, 505 (6th Cir. 1951); *Operating Eng'rs Local 39 (Kaiser Found.)*, 268 NLRB 115, 116 (1983), *enforced sub nom. NLRB v. Stationary Eng'rs, Local 39*, 746 F.2d 530 (9th Cir. 1984).

Even leaving precedent aside, the Board's reasonable interpretation of the statutory text is entitled to the Court's deference. (*See* pp. 7-8.) The Board's regulations provide that "[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. The Board has maintained that rule since the earliest days of the Act. *See, e.g.*, *Gen. Furniture Mfg. Co.*, 26 NLRB 74, 76 & n.3 (1940) (citing then-effective regulation). And it is consistent with the function of a charge (and charging party) in Board proceedings.

As the Supreme Court recognized in *Indiana & Michigan*, "[t]he charge is not proof." 318 U.S. at 18. "The charge does not even serve the purpose of a pleading." *Id.* Rather, "[i]t merely sets in motion the machinery of an inquiry," *id.*, giving "the Board a preliminary basis for determining whether to proceed in the investigation of the case." *NLRB v. Kingston Cake Co.*, 191 F.2d 563, 567 (3d Cir. 1951). Once the charge is filed, "[t]he responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959). Should the inquiry reveal a possible unfair labor practice, only the General

Counsel, on behalf of the Board, has the "power to issue its complaint against the person charged with the unfair labor practice." *Id.* In view of the General Counsel's prosecutorial gatekeeping function, there was no need for Congress to limit who may file a charge.

The General Counsel's prosecutorial discretion also answers the Company's policy argument that allowing any person to file charges "invites abuse" (Br. 17) by allowing non-aggrieved persons, including "ideological adversaries" (Br. 26), to impose litigation on employers.[10] A charge does not initiate litigation. The General Counsel "is not required by the statute to move on every charge." *Ind. & Mich.*, 318 U.S. at 18. In addition, the Board itself has "wide discretion" to dismiss a complaint if the underlying charge appears "to constitute an abuse of the Board's process." *Id.* at 18-19. *See, e.g.*, *Hollywood Ranch Mkt.,* 93 NLRB 1147, 1153-54 (1951) (dismissing complaint allegations where the charge was filed to further a collusive scheme between union and employer).

The same rationale explains why the Company is wrong to imply that it would be inappropriate for "a business competitor" to "jumpstart" the Board's authority. (Br. 19.) Moreover, the Board has long held that the charging party's status as a competitor, in particular, is irrelevant. *Steinberg & Co.*, 78 NLRB 211,

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[10] *See also* IFS 7-10; National Federation of Independent Business ("NFIB") 12-13.

212 n.3, 232-33 n.2 (1948), *enforcement denied on other grounds*, 182 F.2d 850 (5th Cir. 1950). "In some respects [a charge] resembles a simple call of 'Police!'" *Abercrombie, J.S., Co.*, 83 NLRB 524, 540 (1949). "If no burglars are found the matter drops and no prosecution for burglary can be said to have been commenced." *Id.* Just as a business can tip off the authorities if it learns that a competitor is engaging in fraud or other crime, so too competitors can notify the Board of one another's unfair labor practices.

Contrary to the Company's (Br. 18) and NFIB's (NFIB 8, 13) claims, Congress's choice to allow any person to file charges effectuates the policies of the Act, including its recognition of the power imbalance between employers and individual employees. 29 U.S.C. § 151. As the Supreme Court noted in *Indiana & Michigan*, "Senator Wagner, sponsor of the Bill, strongly objected to a limitation on the classes of persons who could lodge [charges] with the Board." 318 U.S. at 17. In the exchange the Court cited, Senator Wagner confirmed that a charge may be filed by "some outsider, some busybody, some social worker in the town, . . . some minister or some other person or some woman's organization, or some labor organization." Hearings before the Committee on Education and Labor, United States Senate, 74th Cong., 1st Sess., on S. 1958, at 440-41 (1935), *reprinted in* 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 1826-27 (1949). That freedom was necessary, he explained, because an employee who files a charge against his employer is "running the risk of being notified the next day

that his job is at an end." *Id.* at 441, *reprinted* at 1827. Because "it [i]s often not prudent for the workman himself to make a complaint against his employer," Congress deliberately drafted the Act to permit even a "stranger" to the employment relationship to file a charge. *Ind. & Mich.*, 318 U.S. at 17-18.

In the teeth of the Act's text, 80 years of precedent, and the Board's reasonable regulation, the Company and amici argue that the Act does not permit the Board to act on a charge filed by a "random" person. (Br. 22; PLF 17-20; NFIB 1-14.) They rely on a reference to aggrievement within a proviso to Section 10(b) that Congress added to the Act in 1947, in which it imposed a six-month limitations period for the filing and service of unfair-labor-practice charges.[11] (Br. 14-19; PLF 8; NFIB 4-5.) But this Court has seen that particular misreading of the Act before. In *NLRB v. Local No. 42, International Association of Heat & Frost Insulators & Asbestos Workers*, the Court expressly rejected the argument that the Board's regulation allowing "any person" to file a charge "exceeds the

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[11] The amendment states:

> 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.

61 Stat. 136, 146 (1947) (codified at 29 U.S.C. § 160(b)).

statutory grant and is invalid" because "the Act grants standing only to an 'aggrieved party.'" 469 F.2d 163, 165 (3d Cir. 1972), *rehearing denied*, 476 F.2d 275 (3d Cir. 1973), *cert. denied*, 412 U.S. 940 (1973). The Board has rejected that claim as well. *See Constr., Prod., Laborers' Local 383*, 221 NLRB 1283, 1286 n.10 (1975) ("[I]t is not requisite that the charge be filed by an 'aggrieved' person.").

With good reason. In adding a statute of limitations to the Act, Congress sought to cut off litigation over long-past events and to promote stability and repose in bargaining relationships. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 419, 425 (1960); *Fant Milling*, 360 U.S. at 309 n.9. Congress, however, included a narrow exception, tolling the limitations period only for a "person aggrieved" by an unfair labor practice, and only if that person "was prevented from filing [a] charge by reason of service in the armed forces." 29 U.S.C. § 160(b). If Congress had said "charging party" instead of "person aggrieved," the amendment would have exposed employers and unions to charges for an indefinite period from anyone leaving the armed forces. That result would have undermined the repose and stability in labor relations that Congress sought to achieve. On the other hand, failing to toll the limitations at all would have forced individuals aggrieved by unfair labor practices to choose between seeking redress and serving in the armed forces. In adding the tolling provision but referencing aggrievement only to limit

the group of charging parties who benefit from it, Congress did not limit the ability of any person to file a charge within the first six months after a violation, but narrowly tailored the sole statutory exception to the new limitations period.

If Congress instead had intended its statutory amendment to overturn both Supreme Court precedent and the Board's reasonable regulation by imposing an aggrievement requirement for any person filing a charge at any time, another provision of the Act "shows that Congress knew how to draft th[at] kind of statutory language." *State Farm Fire & Cas. Co. v. U.S ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016). In 1935, Congress left no doubt about its intention to require aggrievement as a prerequisite to seeking review of Board orders. In Section 10(f) of the Act, Congress provided that "[a]ny person aggrieved by a final order of the Board" may seek review in a court of appeals. 29 U.S.C. § 160(f). Congress made a different choice when it drafted Section 10(b) to permit the Board to issue a complaint "[w]henever it is charged" that an unfair labor practice occurred. 29 U.S.C. § 160(b). Congress's distinct approaches reflect the difference between a charge anyone may file to start an administrative investigation and a case in federal court, which only someone with Article III standing may bring. *See Quick*, 245 F.3d at 251-52 (charging party lacked standing to seek review of Board's order because he was not "aggrieved" under Section 10(f)); *Richards v. NLRB*, 702 F.3d 1010, 1018 (7th Cir. 2012) (distinguishing between status as charging party and

aggrievement under Section 10(f)); *Hobby Lobby Stores, Inc.*, 369 NLRB No. 129, 2020 WL 4339248, at *1 n.2 (July 24, 2020) (noting that D.C. Circuit dismissed petition for review filed by charging party, Committee to Preserve the Religious Right to Organize, for lack of standing).

The Company cites no case—and none exists, to Board counsel's knowledge—dismissing an unfair-labor-practice allegation on the basis that the charging party was not aggrieved. Yet there is no novelty in a charge that was filed by a person who was not, in the Company's view, aggrieved. *Compare* Br. 25 (suggesting that a parent would not have standing to file a charge for a child) *with Kohl's Food Co.*, 249 NLRB 75, 75 (1980) (charge filed by employee's mother). Just as Congress intended, the Board has acted on charges filed by parties one might call busybodies, who have no direct stake in the resulting case. *See, e.g.*, *Bagley Produce, Inc.*, 208 NLRB 20, 21 (1973) (rejecting argument that charge could not be filed by organization "Freedom Through Equality, Inc."). Indeed, in one early Board case, the charging party was a union which "d[id] not admit to membership employees of the [employer]" and appears to have stood to gain nothing from the litigation. *Washougal Woolen Mills*, 23 NLRB 1, 4 (1940). Presaging the Company's argument, the employer moved to dismiss on the ground that "the charge was not filed by a real party in interest." *Id.* at 2. Just as it did

here, the Board denied the motion on the basis that "any person" may file a charge. *Id.* at 2 n.2.

The Company's arguments (Br. 19-28) about standing under Article III of the Constitution are a distraction. First of all, the claim that the Court "should also look to how courts have interpreted aggrievement requirements in other statutes" (Br. 19) fails at the outset, for the Act imposes no aggrievement requirement for filing a charge. Thus, the cases the Company cites (Br. 20) discussing the standing of a "person aggrieved" to sue in federal court are inapposite.

It is unclear why the Company nonetheless spends page after page discussing Article III standing. (Br. 19-28.) That doctrine is a "limitation on federal judicial authority." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "Agencies, of course, are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts." *Envirocare of Utah, Inc. v. Nuclear Regul. Comm'n*, 194 F.3d 72, 74 (D.C. Cir. 1999). *See Prometheus Radio Project v. FCC*, 939 F.3d 567, 578 (3d Cir. 2019) (noting that "Article III standing requirements do not apply to agency proceedings" (citing *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1164 (10th Cir. 2012))), *rev'd on other grounds*, 141 S. Ct. 1150 (2021); *Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997) (same). Indeed, the Company admits that Article III

standing does not "appl[y] to [Board] proceedings themselves." (Br. 24.) Thus the Company's entire discussion of the concept is an aimless detour. It does not matter whether a charging party would have third-party standing, whether an unfair-labor-practice charge might resemble a generalized grievance, or whether a charging party is within the zone of the Act's interests. (Br. 13, 25-28.)

More broadly, the Company's reliance on cases involving a private party's right to sue in federal court reveal the Company's basic misunderstanding of administrative agencies generally and the Board in particular. "[T]here are wide differences between administrative agencies and courts," *Shepard v. NLRB*, 459 U.S. 344, 351 (1983), which "preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts," *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944) (citation and internal quotation marks omitted). As explained above (pp. 32-34, 37-39), a charging party in a Board proceeding is not a private litigant, unlike the plaintiffs in the Company's cases (Br. 19-28). "The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from [unfair labor practices] in order to remove obstructions to interstate commerce." *Amalgamated Util. Workers*, 309 U.S. at 265. Charges "are not cases at all," for "[t]he case between the Board and the employer begins with the complaint prepared by the Board."

NLRB v. Tex-O-Kan Flour Mills Co., 122 F.2d 433, 437 (5th Cir. 1941). And "[t]he Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws." *Shepard*, 459 U.S. at 351.

In short, whether any person may file a charge under the Act "turns not on judicial decisions dealing with standing to sue, but on familiar principles of administrative law regarding an agency's interpretation of the statutes it alone administers." *Envirocare*, 194 F.3d at 75-76 (citing *Chevron*, 467 U.S. at 842). As shown above, the Board's interpretation of Section 10(b) of the Act is reasonable and accords with the binding precedent of the Supreme Court and this Circuit.

The rest of the Company's arguments are even more frivolous. Section 702 of the Administrative Procedure Act, which the Company selectively quotes (Br. 29), states that a "person *suffering legal wrong because of agency action, or* adversely affected or aggrieved *by agency action* within the meaning of a relevant statute, *is entitled to judicial review thereof*." 5 U.S.C. § 702 (emphasis added). By omitting the italicized language, the Company distorts the meaning of the provision, which sets forth who may seek review of agency action—not who may initiate an agency's investigative processes. *Cf.* 29 U.S.C. § 160(f) (authorizing parties aggrieved by Board orders to petition for review). And the Company's discussion (Br. 30-32) of the Board's investigatory powers under Section 11 of the

Act, 29 U.S.C. § 161, is pointless because it hinges, again, on the Company's misconception that a charging party must be aggrieved to bring an alleged unfair labor practice to the Board's attention.

B. The Board's Jurisdiction Is National in Scope

The Company's contentions based on concepts of personal jurisdiction are frivolous as well. (Br. 33-43.) As its name indicates, the National Labor Relations Board's jurisdiction is national in scope. Under Section 10(a) of the Act, the Board has jurisdiction over employers whose operations affect commerce, regardless of their location. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29-43 (1937). Here, the Company stipulated that it met the Board's jurisdictional standards. (AR.66-67.) No further showing as to where the Company conducts its business was required.

The Company argues that the Board lacked jurisdiction to hear this case in New York because the Company has insufficient contacts with that state. (Br. 33.) But as the Board explained, "[t]he venue for filing a charge is not a basis for attacking the validity of a complaint." (AR.273.) In rejecting the Company's contrary argument, the Board reasonably interpreted the Act and its regulations. As with the Company's arguments asserting that only aggrieved persons may file Board charges, the Company's contentions about personal jurisdiction rest on a

mistaken equivalence between the Board's administrative proceedings and private lawsuits in the courts.

The notion that the Board's regions are analogous to courts that may only exercise jurisdiction over persons within their physical borders is fantastical. (Br. 33-34.) The Board's regions are no more bound by rules governing the exercise of judicial power than the Board itself is. (*See* pp. 44-46.) Section 5 of the Act authorizes the Board or its delegates to "prosecute any inquiry necessary to its functions in any part of the United States." 29 U.S.C. § 155. And for practical reasons, the Board handles much of its investigative and prosecutorial work in its regional offices. *See Sears*, 421 U.S. at 139-42 (discussing movement of cases between regional offices and General Counsel's office in Washington, D.C.).[12] But neither the Act nor any Board regulation requires the Board to investigate or prosecute a case only within the region in which the charged party resides or with which it has a certain level of contact—or even where the charge is filed.

On the contrary, as the Board explained, "[d]ecisions regarding where to prosecute a complaint are primarily an administrative function within the [General Counsel]'s discretion, and he has the authority to transfer a case." (AR.273.) The

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[12] The Company's claim that the Board has "kept its regions in place" since 1935 is simply wrong. (Br. 36.) The Board has reconfigured its regions repeatedly. *Compare, e.g.*, *Sears*, 421 U.S. at 139 (noting in 1975 that Board had 31 Regional Directors) with *Regional Offices*, https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices (last visited June 1, 2021) (Board has 26 regional offices).

General Counsel routinely does so. *See, e.g.*, Office of the General Counsel, Memorandum OM 21-10, *available at* https://apps.nlrb.gov/link/document.aspx/09031d4583422873 (last visited June 1, 2021) (discussing transfer for efficient case processing under Interregional Assistance Program). Indeed, the Board's regulations explicitly authorize the General Counsel to accept charges in Washington, D.C., instead of acting through any regional office. 29 C.F.R. § 102.33(a).

The Company notes that the Board's regulations provide, ordinarily, for the filing of charges in the region where the alleged unfair labor practice occurred. (Br. 36 (citing 29 C.F.R. § 102.10).) As the Board observed, however, it has consistently rejected the claim that the regulation on which the Company relies is jurisdictional. (AR.273 & n.4.) *See, e.g.*, *Harris Corp.*, 269 NLRB 733, 734 n.1 (1984) (Board was not deprived of jurisdiction where charge was filed in wrong region under Section 102.10). *Accord Allied Prod. Corp.*, 220 NLRB 732, 733 n.1 (1975); *Valley Hosp., Ltd.*, 226 NLRB 309, 313 (1976); *Cent. Freight Lines, Inc.*, 133 NLRB 393, 394 n.2 (1961). A charging party's noncompliance with Section 102.10 "is not fatally defective." *The Earthgrains Co.*, 351 NLRB 733, 733 n.2 (2007). The Board's reasonable, longstanding interpretation of its regulation is entitled to deference. *AT&T Corp. v. Core Commc'ns, Inc.*, 806 F.3d 715, 725 (3d Cir. 2015).

The Company offers a jumble of other arguments, all beside the point. For example, the Company cites (Br. 34-35) a Board regulation providing that Regional Directors will "as a matter of courtesy, serve a copy of the charge on the charged party . . . in any manner provided for in Rules 4 or 5 of the Federal Rules of Civil Procedure, or in any other agreed-upon method." 29 C.F.R. § 102.14(b). That regulation, however, specifies that service by the Region is a courtesy only, and "[t]he Region will not be responsible for such service." 29 C.F.R. § 102.14(b). It does not import the precedent upon which the Company relies with regard to personal jurisdiction. And the Company further confuses the matter (Br. 35) by referencing the Act's provisions granting jurisdiction to circuit courts to review Board orders, 29 U.S.C. § 160(e), and to district courts to enforce subpoenas upon the Board's application, 29 U.S.C. § 161(2). Those provisions say nothing about where the Board itself may investigate, prosecute, or hear cases.

C. The Regional Director and Administrative Law Judge Did Not Abuse Their Discretion by Not Moving the Hearing Sua Sponte

Aside from its wild claims about personal jurisdiction, the Company separately argues that Region 2 was an "improper venue." (Br. 43.) If the Company means to object to where the hearing was held, the objection is baseless. The courts review the Board's procedural rulings, including its choice of hearing location, for abuse of discretion. *See Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 70-71 (D.C. Cir. 2015); *NLRB v. Sw. Greyhound Lines*, 126 F.2d 883, 887-88 (8th

Cir. 1942). The Company fails to show that the regional director of Region 2 or the administrative law judge abused their discretion here.

Prior to a hearing, a regional director, acting for the General Counsel, has authority to "change the hearing place" based on "proper cause shown." 29 C.F.R. § 102.16. And once a case is assigned to an administrative law judge for hearing, any party may move to relocate the hearing. NLRB Administrative Law Judge Bench Book § 5-600, 2015 WL 6503837 (March 2021). Indeed, hearings in a single case may be held in multiple locations for the convenience of the parties and witnesses. *See, e.g.*, *United Bhd. of Carpenters & Joiners*, 125 NLRB 853, 869-70 (1959), *enforced*, 286 F.2d 533 (D.C. Cir. 1960); *Waterfront Emps. Ass'n of the Pac. Coast*, 71 NLRB 80, 84-85 (1946).

Here, the Company never asked the regional director or the judge to move the hearing to a more convenient location. Instead it was content to demand dismissal of the case. In the absence of a request to move the hearing, the judge acted in conformity with Board rules in hearing the case where the charge was filed. *See* 29 C.F.R. § 101.10(a) (absent extraordinary circumstances, a hearing is "usually conducted in the region where the charge originated").

In any event, even if it was error for the regional director and judge to not relocate the hearing sua sponte, the Company "must show that prejudice resulted from the Board's lapses" to prevail on a claim of "the Board's faulty adherence to

its procedure." *Salem Hosp.*, 808 F.3d at 67 (citation and internal quotation marks omitted). *See Napleton 1050, Inc. v. NLRB*, 976 F.3d 30, 39 (D.C. Cir. 2020) (declining to resolve procedural challenges in the absence of prejudice). The Company does not even attempt to make that showing. The relevant facts were stipulated, and the Company does not identify material evidence missing from the record, much less explain how a different venue would have enabled it to present such evidence. (D&O 1 n.3.) *See Sw. Greyhound Lines*, 126 F.2d at 887 (8th Cir. 1942) (no prejudice where employer "d[id] not allege that it was unable to produce all of its desired witnesses or records at the Kansas City hearing, and so was denied the opportunity for a full, fair hearing"). In short, the Company has not demonstrated that it did not have a "full and fair opportunity to litigate the matter." *NLRB v. Ingredion Inc.*, 930 F.3d 509, 519 (D.C. Cir. 2019). For the same reason, to the extent the Company suggests (Br. 39-43) that hearing the case in New York instead of Washington, D.C., somehow violated due process, the argument cannot succeed. *See Owens v. U.S. Att'y Gen.*, 353 F. App'x 705, 707 (3d Cir. 2009) (denial of requested change of venue did not violate due process or prejudice movant who had full and fair opportunity to litigate issue); *NLRB v. Condenser Corp. of Am.*, 128 F.2d 67, 79 (3d Cir. 1942) ("Personal inconvenience to counsel can hardly be classified as lack of due process of law.").

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition, grant the Board's cross-application, and enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
June 2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FDRLST MEDIA, LLC	)	Nos. 20-3434 & 20-3492
Petitioner/Cross-Respondent	)	
v.	)	Board Case No. 02-CA-243109
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF BAR MEMBERSHIP

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Micah P.S. Jost and Greg P. Lauro certify that they are members in good standing of the State Bars of New York and the District of Columbia, respectively. They are not required to be members of this Court's bar, as they are representing the federal government in this case.

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this 7th day of June 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,960 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 365. Board counsel further certifies that: the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief being filed with the Court; and the PDF file submitted to the Court has been scanned for viruses using Microsoft Defender Antivirus version 1.321.1678.0 and is virus-free according to that program.

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served this date to Aditya Dynar, Esq., Jared McClain, Esq., and Kara M. Rollins, Esq., counsel for petitioner, through the CM/ECF system.

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