UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 2

FDRLST MEDIA, LLC, *Respondent* -and- JOEL F[redacted] *Charging Party*	Case No. 02-CA-243109

REPLY BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

The General Counsel's opposition misunderstands, misconstrues, and avoids Respondent's arguments in support of its Motion to Dismiss.[1] Section 160(b) of the National Labor Relations Act ("NLRA"), codified at 29 U.S.C. § 160(b), imposes a constraint on the subject-matter jurisdiction of the National Labor Relations Board ("NLRB" or "Board"). Congress has not authorized the Board to investigate or prosecute an alleged unfair labor practice unless a person aggrieved by that alleged unfair labor practice files a charge with the Board. Because no aggrieved person has filed a charge in this case, the Board lacks subject-matter jurisdiction to pursue this action against FDRLST Media, LLC ("FDRLST").

Additionally, Region 2 cannot exercise personal jurisdiction over Respondent, a non-resident, because the General Counsel has not alleged—let alone established—that FDRLST purposefully directed any contacts at the forum or that those contacts relate to the current action. Just because Mr. Ben Domenech, a non-party, published a tweet does not mean the company for which he works is subject to personal jurisdiction in every forum with Twitter access, regardless of where the purported injury occurred. The General Counsel has failed to carry its burden of proof and has forfeited any further argument to the contrary.

[1] The General Counsel spends much of its brief contesting the applicability of the Federal Rules of Civil Procedure and the pleading standards for a complaint that the Board files. These points are irrelevant to the jurisdictional issues that Respondent raised in its Motion to Dismiss. Accordingly, Respondent shall reserve its response to the Board's off-point arguments rather than following the Board even further afield. Respondent maintains, however, that the plain language of 29 U.S.C. § 160(b) requires the Board to apply, "so far as practicable," the "rules of civil procedure for the district courts of the United States." Any Board decision to the contrary is incorrect as a matter of law and reinforces the inaccuracy of the General Counsel's position that there are no "due-process concerns." Opp. Br. at 6.

Region 2 is also an improper venue for the present action because the alleged unfair labor practice did not occur within the region. Neither the General Counsel nor Mr. Joel F[redacted] has alleged otherwise.

These issues all implicate FDRLST's constitutional right to the due process of law. No position taken by the General Counsel (or the Board, for that matter) deserves deference or special treatment in the adjudication of purely legal constitutional questions that are collateral to the administrative issues contained in the Complaint. *See Miller v. Johnson*, 515 U.S. 900, 923 (1995) (rejecting agency deference when deciding "serious constitutional questions").

ARGUMENT

I. THE BOARD LACKS SUBJECT-MATTER JURISDICTION

The parties agree that Congress wrote the first sentence of Section 160(b) of the Act in passive voice: "Whenever it is charged that any person has engaged or is engaging in any such unfair labor practice[.]" In the General Counsel's view, the statute's failure to identify explicitly the subject of this sentence leaves the Board free to define the subject as "any person[.]" Gen. Counsel's Opp. to Resp.'s Mot. to Dismiss at 6 [hereinafter "Opp. Br."]. The General Counsel's suggested reading of the statute eliminates any restriction that Section 160(b) imposed on the Board's subject-matter jurisdiction. This approach would authorize an agency to define expansively its own jurisdiction any time Congress speaks in the passive voice—effectively eliminating a restriction that Congress imposed on its authority. Agencies have only those powers that Congress delegates to them. Passive voice in a statute does not alter this fundamental limitation on agency power. And canons of statutory interpretation confirm this reading. Any contrary interpretation offered by the agency represents unlawful administrative overreach.

A statute "should be enforced according to its plain and unambiguous meaning." *U.S. v. Livecchi*, 711 F.3d 345, 351 (2d Cir. 2013). The best understanding of congressional intent can be

gleaned from statutory text. *U.S. v. Monsanto*, 491 U.S. 600, 610 (1989) ("Congress' intent is best determined by looking to the statutory language that it chooses[.]") (cleaned up). Accordingly, statutory interpretation "begins with the text." *Ross v. Blake*, 578 U.S. ___, ___, 136 S. Ct. 1850, 1856 (2016); *see also In re Ames Dep't Stores, Inc.*, 582 F.3d 422, 427 (2d Cir. 2009) ("Statutory interpretation always begins with the plain language of the statute."). "The 'plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Greathouse v. JHS Sec., Inc.*, 784 F.3d 105, 111 (2d Cir. 2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). For this reason, a single term or sentence "cannot be construed in a vacuum." *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. ___, ____, 139 S. Ct. 1743, 1748 (2019) (citation omitted). Instead, its words "must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot*, 139 S. Ct. at 1748 (citation omitted); *see also* Antonin Scalia & Bryan A. Garner, Reading Law 167 (2012) ("The text must be construed as a whole.").

Reading the first sentence of Section 160(b) in context and harmony with the rest of the provision reveals that the Charging Party must be aggrieved by an unfair labor practice to trigger the Board's authority. Section 160(b) states as follows:

> Whenever it is charged that any person has engaged in any **such unfair labor practice**, the Board … shall have power to issue and cause to be served upon such person a complaint … : *Provided*, That no complaint shall issue based upon any unfair labor practice 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.

(Emphasis added). Synthesizing these two sentences, Section 160(b) contemplates that the person "filing such [a] charge" is a "person aggrieved" by "a[n] unfair labor practice." This is the most straightforward reading and gives meaning to the provision in its entirety. By contrast, the General Counsel reads the aggrieved-person requirement as qualifying only the armed-forces tolling provision,

not whose charge authorizes the Board to issue a complaint. *See* Opp. Br. at 5. The General Counsel has offered no support for why Congress, without explanation, would have permitted non-aggrieved persons to file a charge but limited the armed-forces tolling provision to only aggrieved persons. Courts interpret statutes to avoid such absurd results. *See, e.g.*, *N.Y. v. Mountain Tobacco Co.*, 942 F.3d 536, 547 (2d Cir. 2019) ("[A] statute should be interpreted in a way that avoids absurd results."); *see also Repub. of Sudan v. Harrison*, 587 U.S. ___, ____, 139 S. Ct. 1048, 1060 (2019) ("[I]ts ordinary meaning better harmonizes the various provisions in [the statute] and avoids the oddities that respondents' interpretation would create.").

In addition to the absurd implications of the General Counsel's reading, its position also fails because it impermissibly expands the jurisdictional limit that Congress has set on the NLRB. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (citation omitted). Section 160(b) so circumscribes NLRB's authority.

An agency cannot expand its own authority or jurisdiction. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357 (1986); *see also Long Island Radio Co. v. NLRB*, 841 F.2d 474, 477–78 (1988) (holding that the Equal Access to Justice Act restricted to a 30-day period the jurisdiction of an agency to consider an application for attorneys' fees, leaving the NLRB without authority to expand its own jurisdiction by granting a time extension); *Spencer v. Banco Real, S.A.*, 87 F.R.D. 739, 743–44, 746–47 (S.D.N.Y. 1980) (rejecting a regulation promulgated by the Equal Employment Opportunity Commission that permitted the Commission to issue right-to-sue letters to aggrieved persons prior to a 180-day waiting period because Congress made the waiting period mandatory and jurisdictional, and the Commission's regulation had the effect of expanding jurisdiction); *cf. Great Atl. & Pac. Tea Co. v. Supermarket Equip. Co.*, 340 U.S. 147, 156

(1950) (Douglas, J., dissenting) ("The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction."). In fact, when interpreting a statutory limit on jurisdiction, courts will construe provisions more strictly than they "might read the same wording . . . in a non-jurisdictional provision of the Code." *U.S. v. Bond*, 762 F.3d 255, 261 (2d Cir. 2014).

Congress could have easily drafted Section 160(b) to grant NLRB roving authority to investigate and enforce suspected unfair labor practices. Instead, Congress chose to constrain NLRB's authority to instances when "a person aggrieved" by the alleged unfair labor practice files a charge. Reading Section 160(b) to permit "any person"—regardless of whether that person is aggrieved—to trigger NLRB's authority by filing a charge, the General Counsel eviscerates the constraint on its own authority that Congress imposed. Under the General Counsel's expansive reading, a Field Attorney with the NLRB could trigger the Board's authority by filing a charge. The General Counsel's position effectively removes any restriction on the Board's authority. This reading is inconsistent the plain language of Section 160(b).

The Supreme Court's decision in *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9 (1943), is not to the contrary as the General Counsel suggests. *See* Opp. Br. 5-6. In that case, a union (Local B-9 of the International Brotherhood of Electrical Workers) was the Charging Party. *Ind. & Mich. Elec. Co.*, 318 U.S. at 11. Local B-9 alleged that the Company was interfering with its employees right to join or assist labor organizations by promoting a company-dominated union to its employees. *Id.* at 14. According to the Company, however, the Board lacked jurisdiction to investigate or enforce the charged unfair labor practice due to the improper motives of Local B-9: Local B-9's officers and members (including some who were witnesses at the Board's proceedings) committed several crimes to instigate the action for the union's own benefit. *Id.* at 14–16. The question confronting the Supreme Court was whether misconduct or improper motives of the Charging Party deprived the

Board of its jurisdiction. *Id.* at 16–18. The Court held that "[d]ubious character, evil or unlawful motives, or bad faith of the informer cannot deprive[] the Board of its jurisdiction to conduct the inquiry." *Id.* at 18. Any ill motives were merely a consideration for the Board in exercising its own prosecutorial discretion. *Id.*

Without any analysis of the statutory language, the Court in *dicta* relied on one statement by one Senator during a committee hearing for the proposition that Section 160(b) did not require "that the charge be filed by a labor organization or an employee."[2] *Id.* at 17. The Senator objected to construing the provision to exclude strangers to a labor contract because "it was often not prudent for the workman himself to make a complaint against his employer[.]" *Id.* The General Counsel in this case clings to this statement, attempting to elevate *dicta* to law, and misstating Respondent's position in the process. Opp. Br. 5-6.

FDRLST has not argued that only employees and unions may file a charge. In fact, FDRLST agrees that *any* person—regardless of whether an employee, union, or otherwise—may file a charge, so long as that person is statutorily *aggrieved* by the charged unfair labor practice.[3] Aggrievement—not employment status—is the limitation Congress chose to impose on a Charging Party. That is not to say, however, that employment status is irrelevant. Just because a non-employee and non-union person could be aggrieved by an unfair labor practice does not transform Mr. F[redacted] into an "aggrieved person" within the meaning of Section 160(b).

As explained more thoroughly in the Motion to Dismiss, Mr. F[redacted] is not "aggrieved" because he is not within the zone of interests protected by the NLRA. Mr. F[redacted] does not claim

[2] Considering a labor organization filed the charge in *Ind. & Mich. Electric Co.*, the question of whether Section 160(b) permits a non-employee or non-labor organization to file a charge was not before the Court.

[3] To the extent § 102.9 of the Board's Rules and Regulations would permit a non-aggrieved person to file a charge, it is inconsistent with the statute and therefore devoid of any force or effect.

to have any relationship, nexus, or privity with anyone whose interests the Act protects, be it an employee or labor organization. This lack of privity or protected interest excludes Mr. F[redacted] from the class of persons who can trigger NLRB's authority. When Congress uses the term "person aggrieved," it is referring to the class of persons who would have standing to bring a claim in an Article III court. *See, e.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 280 (2d Cir. 2009); *see also Home Depot*, 139 S. Ct. at 1749 (reasoning that a term's use "in related contexts bolsters" a determination of a statute's meaning).

The standing analysis set out in the Motion to Dismiss is relevant not because Article III standing applies to the NLRB proceedings themselves,[4] but because it informs who may be aggrieved by an unfair labor practice. Mr. F[redacted] may not have needed "standing" to file a charge. But a charge invokes NLRB's subject-matter jurisdiction to investigate and prosecute the charge only if the Charging Party is aggrieved. Because no person aggrieved by an alleged unfair labor practice has filed a charge against FDRLST, the Board lacks subject-matter jurisdiction. Accordingly, the case must be dismissed.

II. NLRB REGION 2 LACKS PERSONAL JURISDICTION OVER RESPONDENT

Restrictions on a forum's exercise of personal jurisdiction are territorial limitations, not just "a guarantee of immunity from inconvenient or distant litigation." *Bristol-Myers Squibb Co. v. Superior Court*

[4] The Charging Party, by the Board's own rules, is a party to the enforcement action and may participate fully in the administrative proceedings, including by filing an appeal. *See, e.g.*, 28 C.F.R. § 102.19(a); *see also Ind. & Mich. Elec. Co.*, 318 U.S. at 20-21 ("Local B-9 was a party to the proceedings and appeared throughout the hearings[.]"). In this case, however, Mr. F[redacted] would lack standing to appeal a judgment in favor of FDRLST. *Cf. Richards v. NLRB*, 702 F.3d 1010 (7th Cir. 2012) (concluding the Charging Party did not have standing to appeal because the Charging Party was not "aggrieved" by NLRB's decision in favor of the respondent and against respondent's employees on whose behalf the Charging Party claimed to be pursuing suit). This standing problem lurking in the future illustrates the absurdity of the General Counsel's position. It makes little sense, then, to interpret Congress as having given party-status at the administrative-proceeding stage to a person or entity without Article III standing to appeal the case to federal court.

of Cal., S.F. Cty., 582 U.S. ___, 137 S. Ct. 1773, 1780 (2017) (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). In determining whether personal jurisdiction exists over a non-resident in a particular case, "the primary concern is the burden on the defendant." *Id.* (cleaned up). In addition to various practical burdens, such as the inconvenience of travel to a distant forum, the defendant's burden includes "the more abstract matter of submitting to the coercive power of a state that may have little legitimate interest in the claims in question." *Id.* The party that brings the action—here, the General Counsel or Mr. F[redacted]g as the Charging Party—must prove the propriety of the forum exercising personal jurisdiction over a non-resident. *See Friedman v. Bloomberg L.P.*, 884 F.3d 83, 90 (2d Cir. 2017).

The General Counsel, for its part, fails to articulate any grounds to support Region 2's exercise of personal jurisdiction over FDRLST. In its opposition brief, the General Counsel does not respond to FDRLST's personal-jurisdiction argument except to conclude without explanation that "[t]here is no evidence of prejudice nor are there due-process concerns." Opp. Br. at 6. This does not begin to carry the General Counsel's burden of proof. By not briefing the issue in its Opposition, the General Counsel has forfeited any further argument. Given the importance of the due-process concerns at issue, however, Respondent will enunciate further just how unreasonable it was for the General Counsel to file its complaint in Region 2 rather than a forum in which FDRLST is subject to personal jurisdiction.

An analysis of whether specific personal jurisdiction[5] exists in a case begins with "the long-arm statute of the forum state, in this instance, New York." *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997). If the non-resident's contacts with the forum bring him or her within the reach of the long-arm statute, the contacts must also comport with the Due Process Clause for an exercise of

[5] This brief will address only specific personal jurisdiction because, as FDRLST established in its Motion to Dismiss, it is not "at home" in Region 2 and therefore not subject to general jurisdiction in this region. *See BNSF Ry. Co. v. Tyrell*, 581 U.S. ___, 137 S. Ct. 1549, 1558–59 (2017).

personal jurisdiction to be permissible. *Friedman*, 884 F.3d at 90. The General Counsel fails to satisfy both the long-arm statute and constitutional test.

New York's long-arm statute, as relevant here, permits the exercise of personal jurisdiction over "any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. commits a tortious act within the state[.]" N.Y. C.P.L.R. § 302(a) (McKinney 2019). Moreover, the cause of action against a non-resident defendant must "'relate to' [the] defendant's minimum contacts with the forum." *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 167 (2d Cir. 2010).

The General Counsel asserts, in its discussion of venue, that Mr. Domenech's tweet "occurred on the Internet, not in a specific geographical NLRB Region." Opp. Br. at 7. This is not, however, how the law works. In fact, New York's long-arm statute does not extend to a statement published in media or on the internet that is accessible to New York readers. *See, e.g.*, *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 253 (2d Cir. 2007) (collecting cases that hold that a non-resident's posting of information on a website is insufficient to establish that the non-resident directed tortious conduct or purposefully availed him or herself of the forum). There is no allegation in this case that Mr. Domenech published his tweet from New York or directed his tweet at anyone in New York. Worse yet, the General Counsel doesn't even allege that anyone in New York read the tweet.

In addition to its failure to satisfy the requirements of New York's long-arm statute, the General Counsel's theory that tweets defy regional boundaries also transgresses the Due Process Clause of the U.S. Constitution. By suggesting that statements online subject a non-resident to specific personal jurisdiction in every forum with Internet access, the General Counsel conflates general and specific personal jurisdiction. But as the Supreme Court has made clear repeatedly in its recent jurisprudence, "[s]pecific jurisdiction is very different" than general jurisdiction. *Bristol-Myers Squibb*,

137 S. Ct. at 1780; *see also BNSF Ry. Co. v. Tyrell*, 581 U.S. ___, 137 S. Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

As the Supreme Court has emphasized, due process limits a forum's adjudicatory authority over a defendant to "issues deriving from, or connected with, the very controversy" at issue. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Therefore, a forum's exercise of specific jurisdiction is constitutionally sound only when when the claim "arise[s] out of or relate[s] to the defendant's contacts with the forum[.]" *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). The non-moving party must establish that (1) the defendant has "purposefully directed its activities at residents of the forum"; (2) the claim "arise[s] out of or relate[s] to" those same activities directed at the forum; and (3) the forum's exercise of jurisdiction will not offend "traditional notions of fair place and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citations omitted).

Again, there is no allegation that FDRLST purposefully directed any contacts at the residents of Region 2. Nor does the General Counsel allege that this claim is in any way related to FDRLST's contacts with Region 2. Mr. Domenech tweeted from his personal Twitter account, directing that tweet @FDRLST. The General Counsel has not alleged or established that Mr. Domenech, FDRLST, or any person aggrieved by the tweet resides in Region 2. Consequently, haling FDRLST into Region 2 offends the due process of law. The General Counsel's conclusory protestations to the contrary are insufficient to establish that Region 2 has personal jurisdiction over FDRLST. The case against FDRLST must be dismissed.

III. NLRB REGION 2 IS AN IMPROPER VENUE

Venue is also improper in Region 2 for reasons similar to why Region 2 lacks personal jurisdiction over FDRLST. Tweets don't just "occur" on the Internet. *Contra* Opp. Br. at 7. The

Board's rules set the venue in which an aggrieved party's charge must be filed. *See* 29 C.F.R. § 102.10. Specifically, Section 102.10 reads as follows:

> Except as provided in § 102.33, a charge must be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any of those Regions.

Similarly, the NLRA's venue provisions, 29 U.S.C. § 160(e) and (f), provide geographic limitations on where the Board may petition for an enforcement order and where a party aggrieved by the Board's final order may seek redress. *Brentwood at Hobart v. NLRB*, 675 F.3d 999, 1002 (6th Cir. 2012). Like the Board's rule determining where an aggrieved party must file a charge, both venue provisions provide a place that "turns on classic venue concerns—'choosing a convenient forum.'" *Id.* (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006)). Also, like the Board's rule, Sections 160(e) and (f) "permit[] the action to proceed in the circuit where 'the unfair labor practice in question' occurred." *Brentwood at Hobart*, 675 F.3d at 1002. Unlike 29 C.F.R. § 102.10, the NLRA's venue provisions also permit actions to proceed in the United States court of appeals in the circuit where the Respondent "resides or transacts business" or the D.C. Circuit. 29 U.S.C. § 160(e), (f). The NLRA's venue provisions are focused on convenience and the "provisions ensure that the company will not be forced to defend an action in a faraway circuit." *Id.* NLRB's rule governing where an aggrieved party can file a charge should be subject to the same convenience considerations because a Respondent should not have to defend against a charge in a faraway Region.

The General Counsel's assertion that venue in this case exists in Region 2 runs counter to the Board's own rules and the controlling statute. There is simply no allegation that the alleged unfair labor practice in this case occurred in Region 2; nor is Region 2 the residence of FDRLST, its employees, or any person who could conceivably be statutorily aggrieved by the joke in Mr. Domenech's tweet. Not even Mr. F[redacted] resides in Region 2. He simply chose to file his charge there. So, in addition to not being "aggrieved" as required by the NLRA, Mr. F[redacted] has shown he

is so removed from the alleged unfair labor practice that he was not able to guess accurately where the alleged incident occurred for purposes of filing his charge correctly.[6] Permitting such non-aggrieved persons to file charges sends NLRB on wild goose chases and foments frivolous litigation that innocent parties like FDRLST must finance.

Mr. Domenech's tweet is the alleged unfair labor practice in this instance. While the tweet is visible on the Internet, Mr. Domenech published it at a specific place and time. Neither the Charging Party nor the General Counsel has articulated a connection between Mr. Domenech's tweet and Region 2. According to the Board's own rules, Region 2 is an improper venue. The charge and Complaint in this case should have been filed in the region in which the alleged unfair labor practice occurred, if at all.

CONCLUSION

The Complaint against FDRLST Media, LLC, should be dismissed in its entirety for a lack of subject-matter jurisdiction. Further, the case must be dismissed for a lack of personal jurisdiction.

Respectfully submitted on the 24th day of January 2020.

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[6] Further demonstrating Mr. P[redacted]s lack of connection to FDRLST or the alleged unfair labor practice, Mr. P[redacted] listed a Chicago, IL, address for FDRLST, which is also outside of Region 2.

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, Respondent's "Reply Brief in Support of Respondent's Motion to Dismiss the Complaint" was filed electronically and served by e-mail and/or by certified U.S. Mail, return receipt requested on the following parties:

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