No. 21-60285

In the United States Court of Appeals for the Fifth Circuit

TESLA, INCORPORATED,
Petitioner/Cross-Respondent,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

On Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Brief of the New Civil Liberties Alliance as *Amicus Curiae* in Support of Petitioner/Cross-Respondent Tesla, Incorporated

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September 6, 2023

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 21-60285, *Tesla, Inc. v. NLRB*

Pursuant to Rule 29.2 which requires a "supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief," undersigned counsel of record certifies that, in addition to the persons listed in Petitioner/Cross-Respondent's brief, the following have an interest in this brief, but no financial interest in this litigation. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. *Amicus Curiae* New Civil Liberties Alliance has no parent corporation and no publicly held corporation owns 10% or more of its stock.
2. Sheng Li is Counsel for the New Civil Liberties Alliance.
3. Kara Rollins is Counsel for the New Civil Liberties Alliance.
4. Margot J. Cleveland is Counsel for the New Civil Liberties Alliance.

/s/ Sheng Li
Attorney of record for *Amicus Curiae*

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GLOSSARY

ALJ	Administrative Law Judge
APA	Administrative Procedure Act (Pub. L. 79-404 (1946), codified at 5 U.S.C.)
NLRA	National Labor Relations Act (codified at 29 U.S.C. §§ 151–169)
NLRB	National Labor Relations Board
ROA	Record on Appeal in the Fifth Circuit
Section	Refers to specific sections of the NLRA
Tesla	Tesla, Incorporated

INTERESTS OF AMICUS CURIAE

Amicus curiae, the New Civil Liberties Alliance ("NCLA"), is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state's depredations.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: such as trial by jury, due process of law, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—because Congress, federal administrative agencies such as the National Labor Relations Board ("NLRB" or "Board"), and even sometimes the courts have neglected them for so long.

Although Americans still enjoy the shell of their Republic, that neglect has led to the development within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA aims to defend civil liberties, primarily by reasserting constitutional constraints on the administrative state, through original litigation, *amicus curiae* briefs, and other means of advocacy. NLRB's decision in *Tesla, Inc.*, 370 NLRB No. 101 (Mar.

[1] NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Further, none of the parties objected to the filing of this brief.

25, 2021), proves especially concerning to NCLA because the Board's decision—affirmed by the panel in *Tesla, Inc. v. NLRB*, 63 F.4th 981 (5th Cir. 2023) (*per curiam*)—that Tesla violated Section 8(a)(1) of the National Labor Relations Act relied on NLRB's faulty analysis and conclusion in *FDRLST Media, LLC*, 370 NLRB No. 49 (Nov. 24, 2020). ROA.6222.

NCLA represented FDRLST Media, LLC before the Board and in its appeal to the United States Court of Appeals for the Third Circuit, which set aside NLRB's order as violative of FDRLST Media's First Amendment rights. *FDRLST Media, LLC v. NLRB*, 35 F.4th 108, 127 (3d Cir. 2022). In upholding NLRB's decision against Tesla, the panel decision failed to consider *FDRLST Media*'s important analysis of an employer's right to free speech. This Court should follow the Third Circuit's approach in *FDRLST Media* and consider the entire context of Musk's tweet, including the mode of communication.

NCLA further submits that no deference is owed to NLRB's flawed interpretation of the First Amendment, as to defer would be to eschew the fundamental duty of the judiciary "to say what the law is." At the very least, this Court should follow *Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956 (5th Cir. 2023)—where NCLA also represented the plaintiffs—to hold that the canon of constitutional avoidance precludes deference to an agency's unconstitutional interpretation.

STATEMENT OF THE CASE

In a May 20, 2018, exchange on Twitter, Elon Musk told an activist that claims that Tesla factories did not use yellow paint to provide safety warnings were false. The activist then changed the subject to ask: "How about unions?" Musk responded:

> Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant was UAW & everybody already gets healthcare.

ROA6263; *see also* https://bit.ly/3s0MBKx.

Following this exchange, a union seeking to organize a California-based Tesla factory and several Tesla employees filed an unfair labor practice charge against the company with NLRB. NLRB's General Counsel issued a complaint against Tesla, alleging the tweet constituted a threat in violation of Section 8(a)(1) of the National Labor Relations Act. ROA.6264.

Following a hearing, an ALJ, calling it "an issue of first impression," concluded that Tesla violated Section 8(a)(1)'s prohibition against coercion by "[t]hreatening employees … with loss of stock options if they vote in favor of the Union." ROA.6265. Tesla appealed to the Board. By the time the Board issued its decision in March 2021, ROA.6214, it was no longer an issue of first impression. Rather, in November 2020, NLRB held in *FDRLST Media, LLC*, 370 NLRB No. 49 (Nov. 24, 2020), that a tweet by a FDRLST Media executive represented a threat against employees in violation of Section 8(a)(1).

On appeal, NLRB conclusorily affirmed the ALJ's finding that Musk's May 20, 2018 tweet, "coercively threatened that employees would lose their stock options if they selected the Union as their representative," in violation of Section 8(a)(1). Then, "consistent with [its] recent decision in *FDRLST Media, LLC*," the Board ordered Tesla "to direct Musk to delete the unlawful tweet from the @elonmusk Twitter account and to take appropriate steps to ensure that Musk complies with the directive."[2] *Tesla,* 370 NLRB No. 101 at *11; ROA.6222.

Tesla sought review of NLRB's decision and NLRB filed a cross-application to enforce its order. A panel of this Court denied Tesla's petition for review and granted NLRB's request to enforce its order. *Tesla, Inc. v. NLRB*, 63 F.4th 981 (5th Cir. 2023) (*per curiam*). Thereafter, a majority of the judges in regular active service (and not disqualified) voted in favor of rehearing *en banc*, vacating the panel decision. *Tesla, Inc. v NLRB*, 73 F.4th 960 (5th Cir. 2023) (*per curiam*).

ARGUMENT

The panel's *per curiam* opinion failed to cite, much less address, the Third Circuit's decision in *FDRLST Media*, leaving it to repeat the missteps made by NLRB in its

[2] The Board also affirmed the ALJ's decision that Tesla violated the NLRA by firing union supporter Richard Ortiz, and the ALJ's order to Tesla to reinstate Ortiz, even though the Board found Tesla "terminated Ortiz for lying during [an] investigation." ROA.6285. *Amicus curiae*, NCLA, agrees in full with Tesla's analysis of this issue and encourages the Court to set aside NLRB's decision concerning Ortiz, but limits this brief to addressing the more constitutionally fraught decision of the Board—that Musk's pure speech violated the NLRA.

FDRLST Media case and then replicated by the Board in the *Tesla* case. Those errors are twofold. *First*, the Board's decision ignored the First Amendment's limitations on Section 8(a)(1)—a constitutional check that requires the NLRA to be construed "narrowly when applied to pure speech, recognizing that only statements that constitute a true threat to an employee's exercise of her labor rights are prohibited." *FDRLST Media*, 35 F.4th at 126. *Second*, the Board failed to consider the totality of the circumstances of Musk's tweet, "in its full context, with due consideration of the audience and accompanying circumstances." *Id.* at 127; *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Elonis v. United States*, 575 U.S. 723 (2015); *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245 (5th Cir. 1978).

The Board's decision is also fatally flawed because there is no evidence Musk recklessly conveyed a threat to Tesla employees. The Supreme Court's recent decision in *Counterman v. Colorado* made clear the First Amendment protects speech interpreted as a "true threat" unless the speaker had "consciously disregarded a substantial risk that his communications would be viewed as threatening." 143 S. Ct. 2106, 2112 (2023).

Finally, while NLRB's above errors are plain and reversible, no matter how much deference is afforded the Board, no deference is due. To the contrary, affording NLRB any deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) and *National Cable & Telecom. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), violates the Fifth Amendment's Due Process Clause, undermines Article III of the U.S.

Constitution, and violates the constitutional separation of powers. *See also* Tesla Suppl. Br. 27-34 (asking this Court to reject deference to NLRB's decision).

I. THE BOARD'S *TESLA* DECISION VIOLATES THE FIRST AMENDMENT AS THE THIRD CIRCUIT'S HOLDING IN *FDRLST MEDIA* CONFIRMS

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights to organize. 29 U.S.C. § 158(a)(1). But an "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). That is why Congress specified in Section 8(c) that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). *See also Gissel*, 395 U.S. at 617 (holding Section 8(c) "merely implements the First Amendment").

Section 8(c) thus "manifest[s] a congressional intent to encourage free debate on issues dividing labor and management," *Chamber of Com. of the U.S. v. Brown*, 554 U.S. 60, 67 (2008) (cleaned up), and confirms that the NLRA favors "uninhibited, robust, and wide-open debate in labor disputes, …" *Id.* at 68 (cleaned up). Thus, in passing Section 8(c), Congress "expressly fostered" the "freewheeling use of the written and spoken word." *Id.* Further, as the Third Circuit stressed in *FDRLST Media*, "Section

8(c) reinforces the 'open marketplace' created by the First Amendment, 'in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.'" *FDRLST Media*, 35 F.4th at 126 (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 309 (2012)).

The rights to speak and associate freely are sacrosanct under the First Amendment. Those rights also "do not vary" by "media of communication," *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952), and are neither "confined to any field of human interest," nor "rendered ineffectual because 'interests of workingmen are involved.'" *Thomas*, 323 U.S. at 531. Accordingly, to both give effect to Congress's intent expressed in Section 8(c) and to avoid conflict with the First Amendment, the Third Circuit in *FDRLST Media* held it "must construe the Act narrowly when applied to pure speech, recognizing that only statements that constitute a true threat to an employee's exercise of her labor rights are prohibited." *FDRLST Media*, 35 F.4th at 126-27 (citing *Graham Arch. Prod. Corp. v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983)). *See also Graham*, 697 F.2d at 541 ("What the Act proscribes is only those instances of true 'interrogation' which tend to interfere with the employees' right to organize."). "To interpret the Act otherwise risks expanding Section 8(a)(1)'s prohibition beyond its constitutionally permissible bounds," the Court in *FDRLST Media* stressed. *Id.* at 127.

FDRLST Media concerned a situation strikingly similar to the case at bar. There, after news broke in June of 2019, that unionized employees at the digital media company Vox had walked off the job during labor negotiations, an executive officer for

the online conservative magazine, *The Federalist*, posted a tweet on his personal Twitter account quipping: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." *FDRLST Media*, 35 F.4th at 113.[3] After a third party lodged an unfair labor practice charge, NLRB brought a complaint against FDRLST Media and ruled the tweet constituted an unlawful threat against employees. *Id.*

On appeal, the Third Circuit held the tweet was "pure speech," and in context, did not constitute an illegal threat under Section 8(a)(1), stressing that to hold otherwise risks "expanding Section 8(a)(1)'s prohibition beyond its constitutionally permissible bounds." *Id.* at 127. The Board's decision that Musk violated Section 8(a)(1) by tweeting his views on the impact of unionization on Tesla was based on the Board's flawed *FDRLST Media* precedent, and it commits the same missteps. *See* ROA.6222. It thus also runs afoul of the First Amendment and cannot stand.

In upholding the ALJ's decision that Musk's tweet violated Section 8(a)(1), the Board failed to consider the full context of his tweet, as did the ALJ in its underlying decision. Such acontextual analyses are flawed for the reasons explained by the Third Circuit in *FDRLST Media.*

In reviewing NLRB's decision against FDRLST Media, the Third Circuit explained that the First Amendment requires courts to be "vigilant to see that the [Board] does not read elements of interference, restraint or coercion into speech that is

[3] "The '@fdrlst' tag refers to The Federalist's official Twitter account." *FDRLST Media*, 35 F.4th at 113.

in fact nonthreatening and that would not strike a reasonable person as threatening." *FDRLST Media*, 35 F.4th at 127 (quoting *NLRB v. Windemuller Elec., Inc.*, 34 F.3d 384, 392 (6th Cir. 1994)). To that end—and relying on Fifth Circuit precedent—the Third Circuit in *FDRLST Media* emphasized that an employer's message "is not to be taken out of context" or "viewed in a vacuum" when determining whether it is threatening; rather, the message "'must be considered along with all of the facts and circumstances existing at the time.'" *FDRLST Media*, 35 F.4th at 125 (quoting *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1253 (5th Cir. 1978)).

This Court should follow *FDRLST Media* and hold that "[w]hen considering an alleged unfair labor practice, an employer's conduct must be examined in light of *all* the existing circumstances." *FDRLST Media*, 35 F.4th at 122 (internal quotation omitted). Those circumstances include: (1) the context of the speech; (2) the timing of the speech; (3) the circumstances surrounding the speech; (4) the mode of speech and its audience; (5) whether additional evidence exists indicating a coercive tendency; (6) the labor environment; (7) the intent of the speaker; and (8) how employees interpret the speech.

Applying those factors in *FDRLST Media*, the Third Circuit held the tweet (saying "first one of you tries to unionize I swear I'll send you back to the salt mine") was not an impermissible threat of retaliation in violation of Section 8(a)(1). *Id.* at 121. Specifically, the Court stressed the farcical image created by the tweet, "of writers tapping away on laptops in dimly-lit mineshafts alongside salt deposits and workers swinging pickaxes," indicated it represented banter and not a threat. *Id.* at 123. And with

no "additional evidence of the tweet's coercive tendency," the Court held it could not be reasonably interpreted as a veiled threat. *Id.* The Third Circuit further noted "the context of its labor relations setting" and the "labor environment" at the time of the speech mattered, and the lack of any "history of labor strife" cut against a finding the tweet constituted a threat. *Id.* That the speech consisted of "only one brief tweet, posted from a supervisor's personal Twitter account," "the same day as the Vox Media walkout," further indicated a reasonable employee would view the tweet as a "commentary on a … contemporary newsworthy and controversial topic[ ]" and not as a threat. *Id.* at 123-24. Likewise, the Third Circuit found the fact that "the record contains no evidence that any FDRLST Media employee perceived [the] tweet as a threat" was "significant and should have been considered." *Id.* at 125.

Finally, the Third Circuit found the "mode of communication" weighed against finding a Section 8(a)(1) violation. *Id.* at 126. The message was posted on Twitter, not sent "to the email inboxes of his FDRLST Media employees," and thus was "available to the public—a peculiar choice indeed for a threat supposedly directed at six employees." *Id.* Additionally, at the time, Twitter "limit[ed] tweets to 280 characters, which encourages users to express opinions in exaggerated or sarcastic terms." *Id.* The totality of these circumstances, the Third Circuit held, made clear the tweet was not threatening reprisal in violation of Section 8(a)(1), and "[t]he Board's acontextual analysis of [the] tweet falls far short of" what the First Amendment requires. *Id.* at 127.

This Court should follow the Third Circuit's lead and hold Musk's tweet, when viewed in context of the totality of the circumstances surrounding it, did not constitute a threat to terminate profit-sharing if employees unionized. As in *FDRLST Media*, NLRB found Musk's message an illegal threat by improperly taking it out of context. Musk did not direct the message to Tesla employees but instead posted it on Twitter, a forum for public discussion that requires users to make short posts, often as part of a back-and-forth dialog. And Musk's tweet was in response to another user's inquiry and shared with millions of his followers; he did not direct the comment to Tesla employees. As the Third Circuit observed in *FDRLST Media*, "mak[ing] the tweet available to the public" was "a peculiar choice indeed for a threat supposedly directed at … employees." *FDRLST Media*, 35 F.4th at 126.

NLRB also failed to consider the entire dialog and instead viewed Musk's tweet in isolation and out of context. Notably, two days after the original May 20 tweet, a Twitter user asked Musk whether that tweet was "threatening to take away benefits from unionized workers." ROA.4537. Musk responded on Twitter: "No, UAW does that." *Id.* He reiterated the next day that any risk to Tesla employees' stock options due to unionization is due to UAW's demands.

Users on Twitter understood the full context of Musk's tweet, even if NLRB did not. One user explained that any interpretation of Musk's May 20 tweet as a threat to take away stock options is "out of context," and noted that Musk has since clarified "that UAW does not allow union workers to own stock." ROA.4539. Musk responded

to that user: "Exactly. UAW does not have individual stock ownership as part of the compensation at any other company." *Id.* To clear up any possible misunderstanding, Tesla issued a public statement later that week explaining Musk's tweet "was simply a recognition of the fact that unlike Tesla, we're not aware of a single UAW-represented automaker that provides stock options or restricted stock units to their production employees." ROA.4916.

Such an understanding would have been especially clear to Tesla employees, as the May 20 tweet merely restated Tesla's prior communications to its employees that, unlike Tesla, companies with UAW unions do not offer stock options to unionized workers because of UAW's demands. *See, e.g.*, ROA.4840 and 6255. Analysis of an employer's statement "must be made in the context of its labor relations setting." *FDRLST Media*, 35 F.4th at 123 (quoting *Gissel*, 395 U.S. at 617). Here, that context includes prior labor-relations communications in which Musk stressed the UAW opposes compensation via stock options. So, Tesla employees would have understood Musk's May 20 tweet to refer to their *being forced by UAW* to "give up stock options."

While Musk may not threaten "economic reprisal to be taken solely on his own volition," he has a First Amendment right to express "what he reasonably believes will be the likely economic consequences of unionization that are outside his control." *Gissel*, 395 U.S. at 619 (quotation omitted). Put into the proper context, Musk's May 20 tweet responding to an activist's question was clearly First Amendment-protected speech regarding likely economic consequences of unionization due to *the demands of the*

union.[4] NLRB reached a contrary conclusion by taking "bits and pieces of statements" of the wider conversation "out of context." *Dow Chem. Co., Texas Div. v. NLRB*, 660 F.2d 637, 644 (5th Cir. 1981). Such acontextual analysis violates the First Amendment.

The conspicuous absence of record evidence that any Tesla employee found Musk's tweet to be threatening reinforces that conclusion. *See FDRLST Media*, 35 F.4th at 123. Tesla had nearly 50,000 employees in May 2018. NLRB's inability to find just one who felt threatened speaks volumes. "[T]he 'silence of the record' is significant and should have been considered." *Id.* at 125 (quoting *Windemuller*, 34 F.3d at 393). This Court should reject NLRB's insistence that whether any employees felt threatened is irrelevant, *see* NLRB Br. at 35, and instead follow *FDRLST Media*'s contrary holding.

II. THE BOARD'S DECISION WAS LEGALLY FLAWED BECAUSE IT FAILED TO CONSIDER MUSK'S STATE OF MIND

Musk's lack of a subjective intent to threaten employees further renders NLRB's conclusion that the May 20 tweet violated Section 8(a)(1) fatally flawed.

While Section 8(a)(1) neither defines "threat" nor includes a scienter requirement, the Supreme Court recently clarified in *Counterman*, 143 S. Ct. at 2114, that merely being objectively threatening is not enough for government regulation of speech because "the First Amendment [further] requires proof that the defendant had some subjective understanding of the threatening nature of his statements." *Id.* at 2111.

[4] UAW is a party to this case and does not dispute Musk's assertion that it does not allow unionized employees to participate in stock option plans.

Without such a mental-state requirement, the Court explained, a speaker "may be unsure about the side of a line on which his speech falls," "may worry that the legal system will err," or "may simply be concerned about the expense of becoming entangled in the legal system." *Id.* at 2115. He is thus likely to "self-censor[]" speech that the government could not lawfully restrict. *Id.*

NLRB's decision against Tesla produces the very type of unconstitutional "chilling effect" of which *Counterman* warned: The Board's acontextual position will deter employers from speaking publicly about the disadvantages of unionization. The Supreme Court, however, made clear in *Counterman* that the First Amendment protects the honest speaker from fear of "accidentally or erroneously incur[ring] liability," and that the recklessness *mens rea* adopted in *Counterman*, "provides breathing room for more valuable speech." *Id.* (cleaned up).

Without that breathing room, NLRB would hold the power to convert Section 8(a)(1) into a sword to "force citizens" to remain silent in violation of the First Amendment. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). *Counterman* thus requires NLRB to prove that Musk's tweet was not only a true threat of taking away stock options but that he made the threat with a reckless state of mind, meaning "he consciously disregard[ed] a substantial and unjustifiable risk that the conduct will cause harm to another." 143 S. Ct. at 2117 (cleaned up). The record, however, is devoid of any suggestion that Musk consciously disregarded the risk that Tesla employees would see his May 20 tweet and understand it as a threat against their

stock options. The fact that the tweet was made in response to an activist's question and not directed toward any Tesla employees strongly suggests Musk lacked the requisite state of mind. *FDRLST Media*, 35 F.4th at 126. Moreover, as soon as another Twitter user suggested that the tweet might be taken out of context and misunderstood as a threat, Musk and Tesla responded on Twitter and made other public statements to stress that no threat had been made.

NLRB did not base its decision that Musk's tweet was an unlawful threat on any consideration of his state of mind or motive. To the contrary, the Board insisted that Musk's lack of a threatening motive is not even a relevant consideration, let alone a dispositive one, NLRB Br. at 35. The Board's position conflicts with the Supreme Court's reasoning in *Counterman* and ought to be rejected.[5]

For all these reasons, the Court must set aside NLRB's conclusion that Musk's May 20 tweet threatened Tesla employees in violation of Section 8(a)(1).[6]

[5] The Third Circuit in *FDRLST Media* agreed with NLRB that a Section 8(a)(1) violation "does not turn on the employer's motive," *i.e.*, that such motive is not "dispositive." 35 F.4th at 124 n.7 (quoting *American Freightways Co.*, 124 NLRB 146, 147 (1959)). Since then, however, the Supreme Court in *Counterman*, 143 S. Ct. at 2114, clarified that a speaker's motive *is* dispositive in a "true threat" case because, absent the speaker's recklessness, the First Amendment protects speech interpreted as a threat.

[6] Separately, NLRB cannot constitutionally order Tesla to compel a non-party (and Twitter's owner), Musk, to remain silent by directing him to delete the tweet.

III. THE COURT SHOULD NOT DEFER TO NLRB'S DECISION

NLRB's position that an employer's speech can be deemed an "unfair labor practice" in the absence of a reckless disregard for its threatening nature would render the First Amendment meaningless in the context of labor relations—or at a minimum would leave bureaucrats to decide the contours of First Amendment protection. The Court also should not defer to NLRB's interpretation of Sections 8(a)(1) and 8(c) under *Chevron*, nor to its finding that Musk's tweet represented a threat.

The NLRA's unambiguous and plain words, together with the Constitution and federal-court precedent, control over NLRB's contrary interpretations. And it would be unconstitutional to defer to NLRB's interpretation and application of those statutes, violating the Due Process clause, constitutional Separation of Powers, and Article III's command of judicial independence.

A. Canons of Construction Preclude Deference

The Court should clarify that deference doctrines apply at most in rare instances where the meaning of the statute truly cannot be ascertained using ordinary statutory-construction methods. That approach would be consistent with the approach the Supreme Court took (by analogy) in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), and long before that in *United States v. Dickson*, 40 U.S. 141 (1841). Justice Story, writing for the Court in *Dickson*, refused to defer to a Treasury Department interpretation of an act of Congress when Treasury had argued that its construction was "entitled to great

respect." *Id.* at 161. Justice Story said, "the judicial department has … the solemn duty to interpret the laws[;] … and … in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it." *Id.* at 162.

Canons of construction are traditional tools of interpretation that the Court is required to apply before evaluating whether to defer. *Arangure v. Whitaker*, 911 F.3d 333, 342-43 (6th Cir. 2018). NLRB will be hard pressed to offer any interpretive tool supporting its flawed reading of the undefined term "threat" in Sections 8(a)(1) and 8(c). The Supreme Court has already interpreted the word "threat" in *Elonis*, 575 U.S. 723, to require scienter, and then confirmed in *Counterman*, 143 S. Ct. at 2111, that "the First Amendment requires proof that the defendant had some subjective understanding of the threatening nature of his statements." That should be the "end of the matter." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013).

The Board has no special expertise in interpreting written words. That is the unique domain of federal courts. *See FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (rejecting deference to NLRB's interpretation of "worker," "employee," "independent contractor"); *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017) (*en banc*) (declining deference to NLRB's interpretations of legal terms). NLRB has no substantive or special expertise—either in matters of interpretation, or in evidentiary methods of proving a proposition through testimony, or via circumstantial or documentary evidence in an adversarial hearing. *FedEx*, 849 F.3d at 1128.

Deferring to NLRB in this case would also be misplaced because an agency's interpretation of the Constitution is never entitled to deference. Rather, deference doctrines concern only an "agency's construction of [a] statute" or regulation. *Chevron*, 467 U.S. at 842; *City of Arlington*, 569 U.S. at 296. When pure speech is in issue, Section 8(c) "merely implements the First Amendment." *Gissel*, 395 U.S. at 617. As such, the Board's judgment of whether Musk communicated a threat outside of Section 8(c)'s safe harbor is an interpretation of the First Amendment. Constitutional analysis is thus central and inextricable from NLRB's decision, and it is this Court's job to interpret the Constitution.

At the very least, the canon of constitutional avoidance requires this Court to reject NLRB's interpretation of Sections 8(a)(1) and 8(c) as reaching Musk's tweet. *See Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956, 970-71. (5th Cir. 2023). In *Mexican Gulf*, the agency asserted deference to its interpretation of a statute as authorizing it to force charter boats to install and operate GPS tracking devices that reported the boats' hourly locations to the agency. Because this Court had "serious concerns that the GPS requirement violates the Fourth Amendment," it declined to defer and instead followed its "obligation to construe texts to avoid 'serious constitutional problems'" and rejected the agency's construction. *Id.* (quoting *Hersh v. United States*, 533 F.3d 743, 754-55 (5th Cir. 2008)).

Here, the Court must reject deference to avoid a similar conflict with the First Amendment. If Section 8(a)(1) authorizes NLRB to punish employers for speech about

the likely economic impact of unionization without regard to a speaker's motive, how the speech was interpreted by employees, or any other context needed to determine whether the speech was a "true threat," it would violate the First Amendment. The constitutional avoidance canon supersedes any claim by NLRB to deference. *Id.*

B. Deference Violates the Fifth Amendment's Due Process Clause

Deferring to NLRB's flawed interpretation of a statute "[t]ransfer[s] the job of saying what the law is from the judiciary to the executive." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Such bias and transfer of powers leads to "more than a few due process … problems." *Id.* at 1155.

Deference also removes the judicial blindfold by requiring judges to display systematic bias favoring government litigants and against counterparties like Tesla. Deference "embed[s] perverse incentives in the operations of government" and requires courts to "bow to the nation's most powerful litigant, the government, for no reason other than that it is the government." *Egan v. Delaware River Port Authority*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring). Such deference is especially egregious where the government litigant prevails based on its "permissible," but "inferior" interpretation. And judges deprive citizens of due process when they "engage in *systematic* bias in favor of the government … and against other parties." Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1250 (2016) (emphasis added).

Typically, even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet deference institutionalizes a regime of systematic judicial bias by requiring courts to "defer" to agency litigants even when, as here, the agency openly ignores or disregards written text and federal-court precedent. Deference doctrines thus force judges to replace their own judgment about what the law means in favor of the legal judgment of one of the litigants before them.

All federal judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon [them]." 28 U.S.C. § 453. But in affording deference, judges who are supposed to administer justice "without respect to persons" peek from behind the judicial blindfold, effectively pre-committing in favor of the government agency's position. This violates Americans' due process rights.

C. No Deference Is Due in Cases Arising from Agency Adjudication

The due process violation is especially acute where a court defers to an agency's adjudication—as opposed to notice-and-comment rulemaking—for two reasons.

First, when a federal district court determines a question of law, this Court (as does any federal appellate court) reviews those determinations *de novo*. *Tamez v. City of San Marcos*, 118 F.3d 1085, 1091 (5th Cir. 1997). NLRB cases coming directly to this Court via the agency-adjudication route should be no different.

Second, agency adjudications "impose present legal consequences for past actions, making deference in such instances retroactive in its orientation and undermining reliance interests." Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 Duke L.J. 931, 971 (2021). By contrast, "agency rulemaking typically is prospective. Deference with retroactive application is much harder to defend than deference applied only prospectively." *Id.* (discussing *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015); *Gutierrez-Brizuela*, 834 F.3d 1142). "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Deferring to an agency's novel legal interpretation announced in an adjudication "would seriously undermine the principle that agencies should provide regulated parties fair warning" without which the agency's pronouncement "result[s] in precisely the kind of unfair surprise against which [Supreme Court] cases have long warned." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (cleaned up). Narrowing deference's domain by excluding agency adjudications from *Chevron*'s reach is dictated by the Fifth Amendment's Due Process Clause.

D. Deference Undermines Judicial Independence

Judges also abandon their Article III duty of independent judgment when they "become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first." *Valent v. Commissioner of Social Security*, 918 F.3d 516, 525

(6th Cir. 2019) (Kethledge, J., dissenting). "[T]he agency is [then] free to expand or change the obligations upon our citizenry without any change in the statute's text." *Id.* That truth is especially obvious here because the NLRA has not changed in relevant part since it was enacted.

This Court should properly refuse to abdicate its judicial duty, as other courts have. For instance, in *MikLin*, 861 F.3d at 823, the en banc Eighth Circuit explained that deferring to NLRB "would leave the Board free to disregard any prior Supreme Court or court of appeals interpretation of the NLRA." Refusing to abandon its judicial independence, the *MikLin* Court withheld deference.

Similarly, this Court should refuse to defer to NLRB and instead engage in the rigorous traditional-tools analysis of the statutory language as required by the Supreme Court—something NLRB failed to do. *Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. … If a court, employing traditional tools of statutory construction ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). "First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue." *City of Arlington*, 569 U.S. at 296. In the case of Musk's speech, Congress did speak in amending the NLRA to add Section 8(c). And since the "intent of Congress is clear, that is the end of the matter[.]" *Id.*

E. Deference Violates the Constitution's Separation of Powers

Deference doctrines also "rais[e] serious separation-of-powers questions" because they are "in tension with Article III's Vesting Clause," and "Article I's [Vesting Clause]." *Michigan v. EPA*, 576 U.S. 743, 761-62 (2015) (Thomas, J., concurring). The separation-of-powers concern is acute here because an Article II agency has aggrandized not only its own adjudicatory powers but encroached on Article III courts' adjudicatory authority.

Deference doctrines undermine "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Court should recognize the serious separation-of-powers problem with judicial deference—an issue the Supreme Court has never decided. It should then interpret statutes and apply current First Amendment law and federal-court precedent to the facts in this case *de novo*.

For all the foregoing reasons, NLRB's decision against Tesla must receive no deference.

CONCLUSION

The First Amendment's limitation on Section 8(a)(1)—as interpreted by the Supreme Court in *Gissel*, this Court in *Federal-Mogul*, and the Third Circuit in *FDRLST Media*—presents an insuperable barrier to NLRB's conclusion that Musk's tweet violated the NLRA. While Musk's ideas and the online discussion they generated—which reached over 22 million people—did not sit well with NLRB, the Constitution

protects Musk's and all other employers' right to speak. NLRB's contrary conclusion reeks of censorship and its whims must now be subjected to meaningful judicial review.

The Court should grant Tesla's petition for review, set aside the portions of the Board's Order finding unfair labor practices and imposing remedies based on Musk's tweet, and deny the Board's cross-application to enforce those same parts of the Order.

Dated: September 6, 2023

Respectfully submitted,

/s/ Sheng Li

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2023, I electronically filed this *Amicus Curiae* brief with the Clerk of this Court using the CM/ECF system, which will send notice of such filing to all counsel of record.

Dated: September 6, 2023

/s/ Sheng Li
SHENG LI

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief complies with the type-volume limitation of FRAP 32(a)(7)(B). This Brief contains 5,996 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(b)(iii), and is within the word limit of 6,500 under FRAP 29(a)(5).

This Brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

Dated: September 6, 2023

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ECF CERTIFICATION

I hereby certify that (i) the required privacy redactions have been made pursuant to CA5 R. 25.2.13; (ii) this electronic submission is an exact copy of the paper document pursuant to CA5 R. 25.2.1; (iii) this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses; (iv) the original paper document was signed by the attorney of record and will be maintained for a period of three years after mandate or order closing the case issues, pursuant to CA5 R. 25.2.2.

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