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JARED MCCLAIN & KARA ROLLINS

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*Jared McClain & Kara Rollins**[1]

When Vox Media employees walked out during a bargaining dispute in 2019, Twitter users tweeted along.[2] Among the commentators was Ben Domenech, the publisher of the web magazine *The Federalist*. He tweeted from his personal account, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine."[3] Again, Twitter users reacted. A senior contributor at *The Federalist* replied that workers "demand to be paid in Ben-mixed cocktails."[4] Another Twitter user joked that readers should take *The Federalist*'s views "with literally an entire mine of salt."[5] And others responded with some variation of, "Haha, it's funny because it's illegal."[6] One Twitter user, though, made a federal case out of Domenech's tweet.

Joel Fleming, a Boston attorney—and active Twitter user[7]—filed a charge with the Nation Labor Relations Board alleging that Domenech's tweet was an unfair labor practice. Fleming's charge was vital because NLRB does not have roving jurisdiction; it can investigate unfair labor practices only based on a filed charge.[8] The National Labor Relations Act provides, in passive voice, that the Board shall have power "[w]henever it is charged that any person has engaged in or is engaging in any such unfair labor practice."[9] The next sentence tolls the statute of limitations for unfair-labor-practice

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1* The authors represent FDRLST Media, LLC, in its case against NLRB. They would like to specially acknowledge Aditya Dynar for his work on this case during his time at the New Civil Liberties Alliance.

2 Twitter Event, Vox Media employees stage walkout during contract efforts, TWITTER (June 6, 2019), https://bit.ly/3IBB5xq.

3 Ben Domenech (@bdomenech), TWITTER (June 6, 2019, 11:39 PM), https://bit.ly/3yIKRcx.

4 Inez Feltscher Stepman (@InezFeltscher), TWITTER (June 7, 2019, 9:30 AM), https://bit.ly/3J47xsh; Inez Feltscher Stepman, The Federalist, https://bit.ly/3J3VqLZ (last visited Dec. 17, 2021).

5 Judy Berman (@judyberman), TWITTER (June 7, 2019, 1:50 PM), https://bit.ly/33N13xW.

6 Samer (@Samer), TWITTER (June 7, 2019, 12:13 PM), https://bit.ly/32f1KPZ.

7 At the time of publication, Joel Fleming's Twitter bio was, "A Bernie-supporting class action lawyer in Massachusetts with no ties to The Federalist or anyone who works there." Joel Fleming (@jfleming2870), Twitter, https://bit.ly/3pbX2LM (last visited Dec. 17, 2021). Fleming has made a thing of filing charges against Bens who have different views than him. In 2020, he accused Ben Shapiro of violating the NLRA, before ultimately withdrawing the charge. Jerry Lambe, *Federal Labor Agency Dismisses 'Frivolous Charges' Against Ben Shapiro and* The Daily Wire, LAW & CRIME BLOG (May 17, 2021, 5:34 PM), https://bit.ly/3E930kI.

8 29 U.S.C. § 160(a).

9 *Id.*

charges when "the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces[.]"[10] Whether a charging party must be aggrieved by the alleged practice became a threshold question in NLRB's case against FDRLST Media, LLC, the company that publishes *The Federalist*.

The Board's view is that anyone can file a charge, just like anyone can call the police. That reading of the NLRA caused a comedy of jurisdictional and constitutional errors. Fleming, it turned out, knew so little about FDRLST that he filed his charge in NLRB's Region 2, which covers New York City, a forum with no connection to the case.[11] NLRB rules require a charging party to file a charge in the region where the unfair labor practice occurred.[12] These requirements are scarcely an issue since a charging party nearly always has a personal connection to the alleged conduct.[13] But Fleming's lack of familiarity with FDRLST, and NRLB's willingness to ignore its own rules, created the issue of whether due process limits the ability of a federal agency's subdivision to assert personal jurisdiction over persons with no connection to that forum.

A stranger filing an unfair-labor-practice charge also created a third issue once the Board began to prosecute FDRLST. Because a charging party typically has some connection to an alleged unfair labor practice, important context is baked into the charge—context which is critical to the First Amendment restrictions on NLRB's authority, including the existence of labor strife and how employees perceived the challenged speech. The First Amendment limits the Board's enforcement power by requiring NLRB to assess employer speech "in the context of its labor relations setting."[14]

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[10] *Id.*

[11] Fleming also attempted to serve FDRLST at some address in Chicago, another location with no connection to the company.

[12] 29 C.F.R. § 102.10.

[13] As a former NLRB general counsel has said, the notion that somebody on the street could just file a charge was "a joke at the board … but that rarely if ever happens" and "99.9999%" of the charges filed were by people connected to the labor relationship. Braden Campbell, *Federalist Faces Tall Task in Fighting NLRB's Tweet Ruling*, LAW360 EMP'T AUTH. (Nov. 9, 2021, 11:15AM), https://bit.ly/3pfo30K.

[14] NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

NLRB must investigate and prove how, given the surrounding circumstances, an objective employee at the charged company would feel threatened.[15] But the prosecution of FDRLST revealed how little NLRB believes that the First Amendment applies to its enforcement actions.

NLRB's Case Against FDRLST

Empowered by Fleming's charge, NLRB subpoenaed the testimony of four of FDRLST's six employees and demanded that the company produce an enormous trove of internal documents relating to its *editorial* decisions.[16] After the company objected, the Board's General Counsel stipulated to a sparse record that would constitute the agency's entire case in chief.

FDRLST moved to dismiss the case for lack of jurisdiction, based on two principal arguments: (1) NLRB can prosecute unfair labor practices only when an *aggrieved* person has filed a charge and (2) NLRB Region 2 lacked personal jurisdiction over FDRLST because the company, the charging party, and the allegations lacked any relationship to New York. NLRB proceeded undeterred. Confining its legal analysis to a single paragraph, the Board ruled that "the clear and unambiguous weight of both Board and Supreme Court authority holds that any person may file an initial charge."[17] And without further elaboration, the Board rejected the "attacks on personal jurisdiction" as "similarly inapposite."[18]

NLRB's General Counsel prosecuted the agency's case before an NLRB employee, Administrative Law Judge Kenneth W. Chu. Despite having subpoenaed two-thirds of FDRLST's employees, the NLRB General Counsel called no witnesses. Two FDRLST employees, however,

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[15] NLRB's current test ignores the type of company and the business it produces. By doings so, the Board's "objective" test disfavors companies that publish content or advocate for policies that are critical of unions and, consequently, attract employees of like mind. In other words, the Board creates a fiction in which the objective FDRLST employee and the objective Vox Media employee engaged in labor negotiations would perceive an anti-union joke the same way.

[16] The First Amendment protects editorial rights, making the Board's initial discovery demands particularly egregious. *See*, *e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[17] FDRLST Media, LLC and Joel Fleming, Case 02-CA-243109, Order at 1 (Feb. 7, 2020) *available at* https://bit.ly/3yOxvv9.

[18] *Id.* at 2.

submitted sworn affidavits through independent counsel explaining that they took Domenech's tweet as a joke and did not feel threatened.[19] Domenech also submitted an affidavit explaining that his tweet was a joke. The agency's only evidence was the tweet itself and those articles from *The Federalist*, which the General Counsel used to show an "anti-union editorial position."[20] In ALJ Chu's view, this evidence was enough to satisfy the agency's burden of proving that Domenech's tweet threatened or coerced FDRLST employees. The Board affirmed the ALJ's decision, almost entirely.[21]

FDRLST petitioned for review in the U.S. Court of Appeals for the Third Circuit, asserting its two jurisdictional arguments and that NLRB's enforcement violated the First Amendment because the agency failed to consider any contextual evidence.[22]

Subject-Matter Jurisdiction

The primary issue on appeal is whether NLRB had subject-matter jurisdiction (*i.e.*, statutory authorization) to prosecute FDRLST. As mentioned above, Congress used passive voice in the relevant statutory provision, empowering NLRB to investigate and prosecute "[w]henever it is charged that any person has engaged in … any such unfair labor practice[.]" But charged by whom?

FDRLST maintained that passive voice does not render a law's subject unknowable or ambiguous. Relying on traditional tools of interpretation, courts will look to a statute's structure, purpose, surrounding text and provisions to identify a particular actor. Chief Justice Marshall relied on the constitutional provisions surrounding the Fifth Amendment to determine that the actor

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[19] *See* FDRLST Media, LLC and Joel Fleming, Case 02-CA-243109, Affidavit of Madeline Osbourne (Feb. 7, 2020); FDRLST Media, LLC and Joel Fleming, Case 02-CA-243109, Affidavit of Emily Jashinsky (Feb. 8, 2020). These same employees also attempted to file an *amici curiae* brief before the Board, but NLRB rejected their brief. The Third Circuit, however, permitted them to participate as *amici curiae* on appeal.

[20] FDRLST Media, LLC and Joel Fleming, Case 02-CA-243109, Decision at ¶ 25 (Apr. 22, 2020) *available at* https://bit.ly/3GXlbf5.

[21] FDRLST Media, LLC and Joel Fleming, 370 NLRB No. 49 (Nov. 24, 2020). The only exceptions the Board took with ALJ Chu's decision were that he was too easy on FDRLST: he shouldn't have let FDRLST employees submit affidavits, and he should have made FDRLST order Domenech to delete his tweet. *Id.*

[22] The company also challenged the Board's remedy of requiring FDRLST to require Domenech to delete his tweet and argued that the Court owed no deference to NLRB.

prohibited from taking private property for public use was the federal government, not the states.[23] The same approach prevails today. Writing for a unanimous court in 2019, Justice Ginsburg discerned the subject of a passive-voice provision in the Copyright Act from surrounding sections and context.[24] And most pertinent to FDRLST's case, the Burger Court held that surrounding context showed that Congress intended for "aggrieved persons" to be the subject of a passive-voice provision that authorized suit under § 810 of Title VIII.[25]

In line with this precedent, FDRLST cited several canons of statutory interpretation to support its conclusion that only "aggrieved persons" can file a charge. The phrasing "unless the person aggrieved *thereby* was prevented from filing *such* charge by reason of service in the armed forces" indicates that Congress expected that only aggrieved persons would file such unfair-labor-practice charges. In other words, aggrieved persons may file a charge, but the limitation period will toll for only those aggrieved persons prevented from filing by their services in the armed forces. If just anyone could file a charge, it would negate the charging limitation Congress placed on NLRB and give the agency roving investigative authority that the legislature withheld.

But NLRB reads the statute to permit *anyone* to file a charge and that the aggrievement requirement applies solely to the tolling provision. According to NLRB, Congress created two requirements for the tolling provision—a charging party must file within six months unless they (1) are aggrieved and (2) prevented from filing by service in the armed forces. NLRB says this reading reflects Congress's desire to promote stability and finality in labor disputes through a very narrow statute of limitations. The problem, though, is that Congress did not write Section 10(b) as if it created two tolling requirements. On the contrary, the legislative history shows that Congress did not think it

[23] Barron v. City of Balt., 32 U.S. 243, 248 (1833).
[24] Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 888-89 (2019).
[25] Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 101-05 (1979).

was changing anything at all about who could file a charge; the legislature, in the wake of World War II, was merely protecting the right of servicemembers to file a charge.[26]

Barely bothering with statutory interpretation, the Board relied almost exclusively on a throwaway line in a Supreme Court decision that predates the statute's aggrievement language. In *Indiana & Michigan*, the issue was whether a union's improper motives prevented it from being a charging party.[27] The Court ruled that a charging party's motivation is irrelevant to the Board's authority to investigate an unfair labor practice.[28] Notwithstanding the limited question at issue, the Court said in dicta that even a stranger to a labor contract could file a charge.[29] Elevating this dictum into binding regulation, the Board's rules allow any person to file a charge—presumably even the NLRB General Counsel or any other Board employee.[30]

The problem for NLRB is that Section 10(b) would still limit who can file a charge even if it didn't impose an aggrieved-person requirement. Originating in cases interpreting aggrieved-person provisions, the Supreme Court developed the "zone of interest" inquiry. The basic idea is that a statute applies to only the group of persons that Congress intended to protect. The Court has refined this inquiry over the years, articulating that a zone of interest does not extend as far as Article III standing.[31] And then, in *Lexmark*, the Court offered another important clarification: the zone-of-interest inquiry is a mode of statutory interpretation—not a standing analysis.[32] *Lexmark* held that, despite statutory language permitting "any person" to file a Lanham Act claim, the "zones-of-interests test" requires courts to presume "that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked."[33]

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[26] 93 Cong. Rec. 6494, 6505 (1947).
[27] Nat'l Labor Relations Board v. Indiana & Michigan Electric Co., 318 U.S. 9 (1943).
[28] *Id.* at 18.
[29] *Id.* at 17-18.
[30] 29 C.F.R. § 102.9.
[31] *See, e.g.*, Thompson v. North American Stainless, LP, 562 U.S. 177 (2011).
[32] Lexmark Int'l, Inc. v. Static Ctrl. Components, Inc., 572 U.S. 118, 127 (2014).
[33] *Id.* at 129-30.

The Third Circuit will have to decide whether to interpret Section 10(b)'s charging requirement with traditional and modern tools of statutory interpretation or, instead, rely on a single sentence of dictum that predates the statute's aggrievement language.

Personal Jurisdiction

NLRB's decision to accept Joel Fleming's charge, and prosecute its case, in Region 2 injected a novel issue of personal jurisdiction into the case. A region's personal jurisdiction over a charged party is scarcely an issue because NLRB rules require a charging party to file a charge "with the Regional Director in which the alleged unfair labor practice has occurred or is occurring."[34] But the Board's willingness to flout its own rules to prosecute FDRLST created an extra constitutional issue.

NLRB has delegated its authority to regional directors across 32 regions with distinct geographic jurisdictions.[35] FDRLST challenged Region 2's authority to hale the company into a tribunal without any connection to the case. The Board's sole response was that it has nationwide jurisdiction and is not bound by Article III.

Personal jurisdiction, however, is a matter of individual liberty that derives from the Due Process Clause—not from Article III.[36] Over the centuries, the Supreme Court has adhered to a "general principle"[37] that a sovereign's decision to divide its authority amongst districts "necessarily

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[34] 29 C.F.R. § 102.10.

[35] *See* 29 U.S.C. § 154(a) (authorizing the Board to delegate its authority to regional directors); 29 C.F.R. § 102.1(d) ("Region means that part of the United States or any territory thereof fixed by the Board as a particular region."); *see also* 1 NLRB Ann. Rep. at 4, 16 (1936) ("The [pre-NLRA] Board … established 20 regional boards … to adjust cases and hold hearings in the regions where the controversies arose, and thus expedite the cases and enable the parties to avoid the burden of coming to Washington.").

[36] Ins. Corp. of Ire. v. Compagnie de Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. … It represents a restriction on judicial power not as a matter of sovereignty but as a matter of individual liberty."). Because personal jurisdiction is a due-process requirement, it matters not whether the tribunal is part of a state or the federal government. *See also* Mussat v. IQVIA, Inc., 953 F.3d 441, 446 (7th Cir. 2020) ("[I]n federal court it is the First Amendment's Due Process Clause that is applicable, but the mention of the Fourteenth Amendment ma[kes] no different here."); *cf.* Robertson v. R.R. Labor Bd., 268 U.S. at 623 ("No distinction has been drawn between the case where the plaintiff is the Government and where he is a private citizen.").

[37] Picquet v. Swan, 19 F. Cas. 609, 611 (C.C. D. Mass 1828) (Story, J.).

confines"[38] a local tribunal's jurisdiction to its regional boundaries. As Justice Joseph Story explained, regional limitations on a tribunal's exercise of personal are not an issue of sovereignty:

> It matters not, whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extraterritorial; if the latter, then the judicial interpretation is, that the sovereign has chosen to assign this special limit, short of his general authority.[39]

As administrative agencies proliferated, Justice Louis Brandeis reaffirmed the "default rule from common law," from which courts should not "lightly assume[] that Congress chose to depart."[40] In *Robertson v. Railroad Labor Board*, Justice Brandeis rejected the government's attempt to ignore regional boundaries when issuing an administrative subpoena.[41] He said that this "general rule" was "in accordance with the practice at the common law," and that courts should not "likely … assume[] that Congress intended to depart from a long-established policy."[42]

Like NLRB, the Railroad Labor Board had nationwide jurisdiction and could "hold hearings at any place within the United States."[43] But the Court saw "no reason … why Congress should have wished to compel every person summoned either to obey the Board's administrative order without question, or to litigate his right to refuse to do so in such district, however remote from his home or temporary residence, as the Board might select."[44] "It would be an extraordinary thing," the Court concluded, "if, while guarding so carefully all departure from the general rule, Congress had conferred the exceptional power here invoked upon a board whose functions are purely advisory."[45] More recently, the Court has again reiterated that "specific legislative authorization of extraterritorial service

[38] Ex parte Graham, 10 F. Cas. 911, 912 (C.C. E.D. Pa. 1818) (Washington, J.).
[39] Picquet, 19 F. Ca. at 611.
[40] Robertson v. R.R. Labor Bd., 268 U.S. 619, 626 (1925).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 627.

of summons was required for a court to exercise personal jurisdiction over a person outside the district."[46]

In FDRLST's case, NLRB has failed to identify any specific legislative authorization for its regions to exercise personal jurisdiction beyond their boundaries.[47] That the Board "chose[] to assign" a "special limit, short of [its] general authority," and that the Board's own rules didn't even allow the case to proceed in Region 2, severely undermines that region's exercise of jurisdiction over FDRLST. The case is all set up for the Third Circuit to be the first court to address the due-process limitations on a federal agency's extraterritorial exercise of jurisdiction.

First Amendment

Over 50 years ago, the Supreme Court considered how the First Amendment restricts NLRB's ability to prosecute employer speech. *Gissel Packing* explained that the NLRA "merely implements the First Amendment by requiring that the expression of 'any views, argument, or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of a benefit[.]'"[48] To avoid infringing the First Amendment, NLRB *must* consider the context of the particular labor relationship.[49] The Court also emphasized that NLRB's policies at the time imposed a "duty to focus on the question: 'What did the speaker intend and the listener understand?'"[50] Many courts of appeals, however, have ignored that last portion about employer intent, and upheld NLRB's whittling away of *Gissel Packing*.[51] Because the test is whether an objective

[46] Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 109 (1987).
[47] Section 10(e) limits the Board's authority to petition for judicial enforcement to "within any circuit or district [court,] respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transactions business[.]" 29 U.S.C. § 160(e); *see also id.* § 161(2) (limiting the Board's enforcement of subpoenas to federal courts "within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person … is found or resides or transacts business").
[48] NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).
[49] *Id.*
[50] *Id.* at 619.
[51] *See, e.g.*, Stein Seal Co. v. NLRB, 605 F.2d 703, 706 (3d Cir. 1979) ("The relevant inquiry is not Dr. Stein's intent[.]").

employee would feel threatened, those courts have held that an employer's subjective intent is irrelevant.[52] But even those courts still require NLRB to consider contextual evidence.[53]

FDRLST's Third Circuit case asks just how much context NLRB must consider to avoid violating the First Amendment. As mentioned, the General Counsel withdrew its subpoenas of FDRLST employees and put forward no evidence other than Domenech's tweet and some articles to show that *The Federalist* has an anti-union viewpoint. On appeal, the Board declined to consider the articles (as well as the employee affidavits saying the tweet was an obvious joke), leaving Domenech's tweet as the only evidence.

In FDRLST's view, the Board's refusal to consider any context of the employment relationship at issue, or how a FDRLST employee would have perceived the tweet, violated the First Amendment standard established in *Gissel Packing*. Relying only on a dictionary of idioms, the Board insisted that Domenech's joke about sending employees "back to the salt mine" cannot possibly be read as anything other than a threat.[54]

At oral argument before the Third Circuit, Judge Thomas Hardiman pressed the Board on whether it has ever before found an employer's speech threatening based on so little contextual evidence: "where is the evidence in this record that the ALJ or the Board considered the context in which this tweet was issued? All the facts and circumstances surrounding the tweet including when it was made, how many people worked at the company, all that sort of thing. It seems like a pretty thin record as to whether … the tweet was contextualized. … I'm asking, where? Please point to the ALJ's opinion, the Board's opinion, to give us some confidence that this tweet was contextualized and not

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[52] *See id.*

[53] *See, e.g.*, *Hedstrom Co. v. NLRB*, 629 F.2d 305, 314-15 (3d Cir. 1980) ("This exchange occurred during a discussion of the employee's union activities. Moreover, it took place in a context that included previous coercive interrogatories of employees regarding union activities and previous solicitations by company officials for the purpose of inducing employees to abandon such activities."); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 945 (3d Cir. 1980) (considering an employer's statements "[i]n the context of the election campaign").

[54] FDRLST Media, LLC and Joel Fleming, 370 NLRB No. 49, n.4 (Nov. 24, 2020).

viewed in a vacuum."[55] Judge Hardiman also expressed concern that employer speech on social media presented new challenges and questioned whether this case would just be "a one off."[56] But this case is not a one off. In fact, this isn't even the only charge Joel Fleming has filed—he charged another conservative publication as well.[57]

For his part, Judge Paul Matey identified the link between NLRB allowing a stranger to file a charge and the lack of contextual evidence. Judge Matey saw how these two points would combine to broaden NLRB's powers in future investigations based on "a very creative and novel interpretation" of the Board's power—"[o]ne that extends to expressions that are clearly understood by reasonable speakers of English as humor, because they might have the potential to influence those employee relationships that as we said were not really employer relationships 'cause they were brought by [a] third party."[58]

It seemed from oral argument that the panel appreciated that NLRB's prosecution of FDRLST—based solely on a stranger's charge and the face of a tweet—was an expansion of the agency's enforcement authority. With so many dispositive issues at play, though, it's anyone's guess how the panel might decide the case.

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[55] Oral Argument at 23:05 – 24:16, FDRLST Media v. NLRB, No. 20-3434 (3d Cir., argued Nov. 10, 2021), *available at* https://bit.ly/331HIIV.
[56] *Id.* at 32:40 – 33:04.
[57] *See* Lambe *supra* note 6.
[58] Oral Argument *supra* note 54 at 28:50 – 30:25.