Nos. 20-3434, 20-3492

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FDRLST MEDIA, LLC,

Petitioner/Cross-Respondent,
v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition for Review from the
National Labor Relations Board
Case Number 02-CA-243109

BRIEF OF *AMICI CURIAE* FDRLST MEDIA, LLC EMPLOYEES EMILY JASHINSKY AND MADELINE OSBURN AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER/CROSS-RESPONDENT AND REVERSAL

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March 29, 2021

CORPORATE DISCLOSURE STATEMENT

Amicus Southeastern Legal Foundation (SLF) is a Georgia nonprofit corporation. *Amicus* SLF does not have any parent companies, subsidiaries, or affiliates. *Amicus* SLF does not issues shares to the public.

/s/ Kimberly S. Hermann

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Employees Emily Jashinsky and Madeline Osburn are two of six staff employees at FDRLST Media, LLC (FDRLST). Represented by Southeastern Legal Foundation (SLF), both employees have attempted to lend their personal insight to this matter at each step of the administrative process. First, they submitted affidavits supporting their employer at the February 10, 2020 evidentiary hearing for this claim. The Administrative Law Judge (ALJ) accepted their affidavits, only to determine they offered little probative value. On appeal, the employees submitted an amici curiae brief to the National Labor Relations Board (NLRB) in support of their employer. The NLRB rejected their amici brief. The employees now come before this open and impartial Court seeking an opportunity to be heard.

As members of the press, Amici have a strong interest in protecting First Amendment freedoms to discuss public affairs without fear of reprisal. They also value the freedom to share personal opinions on social media without fear of reprisal and without fear that their personal

[1] The parties have consented to this filing. No one other than Amici and their counsel wrote any part of this brief or paid for its preparation or submission.

opinions will be imputed to their organization. The employees support the same freedoms for their employer.

Founded in 1976, SLF is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, free speech, and free enterprise in the courts of law and public opinion. This case concerns SLF because it has an abiding interest in the protection of our First Amendment freedoms, namely the freedom of speech and the press.

SUMMARY OF ARGUMENT

For better or worse, social media has become a very present part of our lives. It provides a way to communicate with long distance friends and family, it is a creative outlet for people of all ages, and it is a source—if not *the* source—of public news and information for many Americans. In that regard, it is a double-edged sword. It is a "marketplace of ideas" that may offend readers at times. But regardless of our personal views on public affairs, every American has a constitutionally protected right to share their opinions on social media, no matter how disagreeable that speech may be. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

Unfortunately, today's "cancel culture" tries to undermine this First Amendment principle by silencing speakers with whom listeners disagree. This case is just one example. In 2019, one Twitter user stumbled upon a personal tweet by a news editor, Ben Domenech, that teased his colleagues at FDRLST about unionizing. Pet'r Br. 6. As a result, that user not only succeeded in filing a NLRA claim against FDRLST; the ALJ himself agreed with the user that the employer's tweet was a threat, ignoring sworn affidavits by employees averring to the contrary and defending their employer. CAR278–279, 341–344. The NLRB affirmed without giving FDRLST employees an opportunity to be heard through an amici brief. CAR418, 431 n.2. The NLRB reasoned that it "would not assist the Board in deciding this matter." CAR418.

Allowing insulated government actors to make judgments based on personal values not only violates the First Amendment, but it also seriously undermines social media's role in forming a well-rounded, informed, and engaged citizenry. As a result of decisions like the ALJ's and NLRB's, social media users with allegedly unpopular opinions will increasingly self-censor, rather than face consequences for speaking their mind. Social media will only become a louder echo chamber for the

tyranny of the majority, which our Framers warned against in no uncertain terms. *See* The Federalist No. 51 (James Madison) (Clinton Rossiter ed., Signet Classics 2003).

ARGUMENT

I. The First Amendment curbs the tyranny of the majority by encouraging public discussion.

Since 1724, freedom of speech has famously been called the "great Bulwark of liberty[.]" 1 John Trenchard & William Gordon, *Cato's Letters: Essays on Liberty, Civil and Religious* 99 (1724), reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (Oxford University Press 1988). Responding "to the repression of speech and the press that had existed in England" and seeking to curb that tyranny in the future, the Founders created the First Amendment. *Citizens United v. FEC*, 558 U.S. 310, 353 (2010). "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

II. Today's cancel culture undermines the First Amendment by coercing speakers into silence.

Today, the repressive forces the Framers fought to curb are everywhere. We are living in the prime of cancel culture. If a speaker says something that could be interpreted in a remotely offensive way, she is "canceled"—her post is deleted, she is fired from her job, her work is boycotted, and she becomes the subject of vicious threats from strangers.[2] Worse, any peer who stands up for the speaker can face the same fate.[3] In this culture, there is not even room to issue an apology for past mistakes;[4] the stakes are high, and the risk of falling from grace even higher.

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[2] *See, e.g.*, https://www.theguardian.com/books/2020/jun/14/jk-rowling-from-magic-to-the-heart-of-a-twitter-storm. In response to a tweet referring to "people who menstruate," famous author JK Rowling wrote, "I'm sure there used to be a word for those people. Someone help me out. Wumben? Wimpund? Woomud?" *Id.* Twitter users immediately accused Rowling of transphobia and vowed to stop reading her children's books, while celebrities who owed their success to the series distanced themselves from Rowling and tweeted their support for the transgender community. *Id*. Within just a few weeks, Rowling's book sales dropped. https://www.independent.co.uk/arts-entertainment/books/news/jk-rowling-transphobic-book-sales-harry-potter-a9624671.html.

[3] *See* https://www.washingtonpost.com/nation/2020/07/08/letter-harpers-free-speech/. In the wake of Rowling's controversial tweet, over 150 public figures signed a letter making the case for free speech in light of today's culture. *Id*. When that letter was met with more outrage and controversy, many of the public figures backtracked their decision to support the letter's message. *Id*.

[4] *See, e.g.*, https://nypost.com/2020/07/03/boeing-communications-boss-niel-golightly-resigns-over-article/. A Boeing executive resigned after an article he wrote in the

Civility and respect certainly ought to be encouraged among peers. But imposing a moral standard on others at the cost of their free expression is plainly unconstitutional. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Rather, the First Amendment demands "that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978). The government thus cannot make value judgments based on the content of speech or the viewpoint of the speaker. Content-based discrimination is almost always unconstitutional, unless the government can show a compelling interest that is narrowly tailored.[5] *Boos v. Barry*, 485 U.S. 312, 319 (1988). And to discriminate against speech based on viewpoint is *never* constitutional. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

1980s resurfaced. *Id.* In it, the former U.S. Navy pilot argued that women should not participate in combat as part of "a debate that was live at the time." *Id.* Despite stating that his point of view changed since the 1980s, he immediately resigned to avoid embarrassing the company. *Id.*

[5] A compelling interest can be invoked only against "the gravest abuses" that pose an actual or impending danger to the public. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Moreover, "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham*, 137 S. Ct. at 1735. In recent years, the Supreme Court has designated social media as one of "the most important places . . . for the exchange of views." *Id.* Indeed, social media serves multiple purposes: it is a creative outlet to connect with others and to share personal photos, opinions, and anecdotes; but more importantly, it has become a venue for political discussion, news, and civic engagement. It is thus inevitable that, at times, personal views and public discussion will overlap on these sites. But it is not the job of our government to police that speech.

III. The ALJ and NLRB have turned the NLRA standard for employer remarks on its head.

Enacted in 1935, the purpose of the NLRA is to protect the rights and interests of both employees and employers.[6] The NLRA prohibits employers from making a remark that "under all circumstances . . . reasonably tends to restrain, coerce, or interfere with

[6] *See* 29 U.S.C. § 151; *see also* https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act#:~:text=Congress%20enacted%20the%20National%20Labor,businesses%20and%20the%20U.S.%20economy.

the employees' rights[.]" *GM Electrics*, 323 NLRB 125, 127 (1997). Although employees have an avenue to file complaints against their employers, this provision also preserves the employers' constitutional right of due process: the remark must be viewed objectively from the perspective of a reasonable employee in that work environment. *Id.*; *see also Mesker Door, Inc.*, 357 NLRB 591, 595 (2011) (finding that an employer's remarks must be viewed from the standpoint of his employees).

As Petitioner notes, Mr. Domenech shared a tweet on his personal Twitter account, over which he maintains exclusive control, that teased about sending his employees "back to the salt mine" if they unionized. Pet'r Br. 6. His employees understood it to be an "obviously sarcastic" joke. CAR154–158. But Mr. Fleming—a third party complainant with no ties to Mr. Domenech, FDRLST, or FDRLST employees—did not get the joke. Instead, he took a page from the cancel culture handbook and sued FDRLST. The ALJ not only allowed the lawsuit to proceed, but it fully supported Mr. Fleming's argument and held that the tweet was a threat to FDRLST employees. CAR274–281. The NLRB upheld the ALJ's decision. CAR431–432.

The ALJ held that employer "[s]tatements are viewed objectively and . . . from the standpoint of employees over whom the employer has a measure of economic power." CAR279:16–17 (citing *Mesker*, 357 NLRB at 595). However, when provided with statements from employees made under penalty of perjury that they "did not in any manner perceive Mr. Domenech's Tweet as a threat, reprisal, use of force, promise of benefit, or in any manner whatsoever as touching, concerning, or relating to any workplace activity that is protected under the [NLRA]," CAR154–158, the ALJ assigned them "little weight" because the employees did not explicitly state that they were not coerced to make the affidavits. CAR278 n.8.[7] He then held that "[a]ny subjective interpretation from an employee is not of *any* value to this analysis." CAR278:33 (emphasis added). The ALJ went on to find that a reasonable employee would, in fact, feel threatened by Mr. Domenech's tweet. CAR279:25.

This turns the objective NLRA standard on its head. First, the ALJ suggested that the views of the FDRLST employees, taken under oath,

[7] But the employees *did* state that they were not coerced to provide affidavits; each employee swore she produced the affidavit of her own free will and volition, and that no supervisor or representative of FDRLST demanded that she do so. CAR154–158.

were unreasonable.[8] CAR278:26–30. Even if the affidavits were subjective, it cannot be said that they were of no value to the analysis; subjective interpretations from two FDRLST employees—one third of the entire FDRLST staff—could lend some perspective about the general consensus among all FDRLST employees. *See* Pet'r Br. 46–47. And even if the affidavits offered no value to the ALJ's analysis, the ALJ failed to address whether, from the standpoint of reasonable FDRLST employees, the tweet could be considered a joke. *Id.* Rather, he concluded, "[I]n my opinion," the tweet was clearly directed to FDRLST employees and had a hidden meaning. CAR278:4–5, 19. Based on that allegedly hidden meaning, the tweet could have "no other purpose except to threaten the FDRLST employees with unspecified reprisal" for joining a union. CAR278:23–24.

Like the ALJ, the NLRB held that FDRLST employees would offer *no* insight to this matter. This is in direct violation of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). There, the Supreme Court held, "Any

[8] "The Respondent proffered two additional affidavits from FDRLST employees, both stating that the tweet was funny and sarcastic and neither one felt that the expression was a threat of reprisal . . . . However, a threat is assessed in the context in which it is made and whether it tends to coerce a *reasonable* employee." CAR278:26–30 (emphasis added) (internal citation omitted).

assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting." *Id.* at 317. Context can be established by examining the speaker's motive and intended audience. *See Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1253 (5th Cir. 1978). Mr. Domenech had a single motive: humor. More importantly, his intended audience understood his statements to be humorous. The ALJ and NLRB set aside that precedent by entirely ignoring the context in which Mr. Domenech's statement was made. They did so primarily by passing over the affidavits and amici brief of two FDRLST employees, which would have provided insight regarding their relationship with their employer and the nonthreatening nature of the tweet.

The refusal to consider the perspectives of FDRLST employees or the broader context of the tweet, coupled with frequent references to Mr. Domenech's "anti-union" stance, suggest that the ALJ and NLRB personally disagreed with Mr. Domenech's speech from the outset. *See* CAR276–279, 431–432. The holdings by these administrative officials undermine the core First Amendment principle that the government must protect unpopular speech without making a value judgment about the speaker's views or the content of the speech. *FCC*, 438 U.S. at 745–

46. This sets a dangerous precedent, both for the First Amendment and for employer-employee relationships: public profiles, like Mr. Domenech's, are encouraged on Twitter so thoughts can be shared and expanded upon through re-tweets and comments. They are also necessary in the fields in which Amici and Mr. Domenech work, because public engagement is an important component of their personal success. But if and when a user comes along who fails to understand a joke between colleagues, he will now have a platform to sue the colleagues' business itself. The result: businesses crack down on social media use, individuals self-censor, employers cease communicating with their employees, and speech about public affairs dwindles, because being canceled simply is not worth the risk.

IV. This Court should reaffirm our nation's commitment to political liberty and democracy for all speakers, including employers and Twitter users.

Although Mr. Domenech tweeted from his personal account, and not FDRLST's official account, the origins of the tweet should not matter. "Mr. Domenech and FDRLST each have the constitutional and statutory right to speak freely and satirically." Pet'r Br. 10. Indeed, "an employer's free speech right to communicate his views to his employees is firmly

established, and cannot be infringed by a union or the Board." *Gissel Packing*, 395 U.S. at 617. The very section of the NLRA at issue here prohibits silencing "any views, argument, or opinion" of an employer if there is no accompanying "threat of reprisal or force or promise of benefit." *Id.* As Amici averred, and reiterate now, they did not believe Mr. Domenech or the FDRLST were threatening them on Twitter. CAR154–158. In fact, they fully understood that Mr. Domenech was making a joke about an important political event at the time. *Id.*

As the Supreme Court has acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (quoting *Mills v. Alabama*, 384 U.S 214, 218–19 (1966)). The Framers recognized that nowhere are the threats of censorship more dangerous than when a restriction prohibits public discourse on political issues. They sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Smith, at 11. As such, the First Amendment guards against prior restraint or threat of

punishment for voicing one's opinions publicly. *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940)). It protects and encourages discussion about political candidates, government structure, political processes, and ideology. *Mills*, 384 U.S. at 218–19.

Along with providing a check on tyranny, freedom of speech and the press ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Speech about public affairs is thus "the essence of self-government" because citizens must be well-informed. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). They must know "the identities of those who are elected [that] will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); *see also Citizens United*, 558 U.S. at 349. For these reasons, public discussion is not merely a right; "[it] is a political duty." *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

The freedom to speak publicly on political issues, especially in open social media forums, is critical to both a functioning democracy and a well-rounded citizenry. Twitter users are diverse in thought, race,

religion, and culture. For that reason, it is a "marketplace of ideas" that can provide citizens with the knowledge they need to stay informed about public affairs. And, other times, it is simply a platform to share personal photos, funny memes, or friendly debates about the use of the Oxford comma. No matter how an individual chooses to use it, it can hardly be denied that social media allows for thought-provoking and lively discussion. It is users' job to ignore, respond to, or stop following those with whom they disagree. But it is not the job of any court, judge, or board to monitor these posts and perpetuate cancel culture.

CONCLUSION

For the reasons stated in this amici curiae brief, Amici respectfully request that this Court reverse the NLRB decision and vacate its order.

Respectfully submitted,

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March 29, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2021 a copy of the foregoing was filed electronically using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

/s/ Kimberly S. Hermann

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,066 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 14-point type for body text and 12-point type for footnotes.

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