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, CASE NO. 32-CA-197020

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL RETAIL FEDERATION, AND COALITION FOR A DEMOCRATIC WORKFORCE AS *AMICI CURIAE* IN SUPPORT OF TESLA, INCORPORATED AND REVERSAL

JENNIFER B. DICKEY
STEPHANIE A. MALONEY
U.S. Chamber Litigation Center
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

STEFFEN N. JOHNSON
Counsel of Record
PAUL N. HAROLD
Wilson Sonsini Goodrich & Rosati, P.C.
1700 K Street, N.W.
Washington, DC 20006
(202) 973-8000

MICHAEL W. MCCONNELL
Wilson Sonsini Goodrich & Rosati, P.C.
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

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

The undersigned counsel of record certifies that—in addition to the persons and entities listed in Tesla's Certificate of Interested Person—the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Under Fed. R. App. P. 26.1, The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has a 10% or greater ownership interest in the Chamber.

The National Retail Federation states that it is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

The Coalition for a Democratic Workforce states that is a non-profit, tax-exempt organization. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

1. Tesla, Inc. is Petitioner Cross-Respondent.

2. Morgan, Lewis & Bockius LLP is Counsel for Tesla.

3. David B. Salmons is Counsel for Tesla.

4. Michael E. Kenneally is Counsel for Tesla.

5. David R. Broderdorf is Counsel for Tesla.

6. John C. Sullivan is Counsel for Tesla.

7. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("UAW") is Petitioner.

8. Schwartz, Steinsapir, Dohrmann & Sommers LLP is Counsel for the UAW.

9. Daniel E. Curry is Counsel for the UAW.

10. Margo A. Feinberg is Counsel for the UAW.

11. The National Labor Relations Board is a federal agency and Respondent.

12. Ruth E. Burdick is Counsel for the Board.

13. Micah P. S. Jost is Counsel for the Board.

14. Kira Vol is Counsel for the Board.

15. The Chamber of Commerce of the United States of America ("Chamber") is an *amicus curiae* in support of Petitioner Cross-Respondent Tesla, Inc.

16. The National Retail Federation is an *amicus curiae* in support of Petitioner Cross-Respondent Tesla, Inc.

17. The Coalition For A Democratic Workforce is an *amicus curiae* in support of Petitioner Cross-Respondent Tesla, Inc.

17. Wilson Sonsini Goodrich & Rosati, P.C. is Counsel for *Amici Curiae* the Chamber, the National Retail Federation, and The Coalition For A Democratic Workforce.

18. Steffen N. Johnson is Counsel for *Amici Curiae* the Chamber, the National Retail Federation, and The Coalition For A Democratic Workforce.

19. Michael W. McConnell is Counsel for *Amici Curiae* the Chamber, the National Retail Federation, and The Coalition For A Democratic Workforce.

20. Paul N. Harold is Counsel for *Amici Curiae* the Chamber, the National Retail Federation, and The Coalition For A Democratic Workforce.

21. U.S. Chamber Litigation Center is Counsel for *Amicus Curiae* the Chamber.

22. Jennifer B. Dickey is Counsel for *Amicus Curiae* the Chamber.

23. Stephanie A. Maloney is Counsel for *Amicus Curiae* the Chamber.

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI

/s/ *Steffen N. Johnson*
Steffen N. Johnson
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Constitutional Provision and Statutes

Miscellaneous

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community, such as free speech on matters of unionization.

The National Retail Federation (NRF) is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. NRF has filed briefs in support of the retail community on dozens of topics, including the National Labor Relations Act generally and employer speech specifically.

The Coalition for a Democratic Workforce (CDW), which consists of hundreds of members representing millions of employers nationwide, was formed to give its members a meaningful voice on labor reform. The CDW has advocated for

[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No one other than *amici curiae*, their members, or their counsel made a contribution intended to fund the brief's preparation or submission.

its members on several important legal questions, including the First Amendment issues central to this case.

The Board's decision in this case reflects a troubling trend of Board decisions holding employers liable for statements by supervisors on social media about unions or labor policy. These social media statements are speech on matters of public concern, and part of general public discourse on topics of vital importance. The Board, however, has made increasingly aggressive moves to turn political debate into an unfair labor practice—even ordering supervisors to delete statements from their personal social media accounts. *Amici* believe that the Board's overreach in censoring such speech should be corrected.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Labor Relations Act—like the First Amendment itself—protects the right of both sides in labor conflicts to express their "views, argument, or opinion" about unionization. The Act is explicit: such expression "shall not constitute or be evidence of an unfair labor practice," provided it "contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

Unfortunately, the current Board uses its power to make unfair labor practice findings to punish employer speech critical of unions, while employing an entirely different and more permissive standard to union speech. This case exemplifies the problem. This Court's intervention is essential.

ARGUMENT

I. The Board's decision represents a chilling expansion of Board authority over speech on matters of public importance outside the workplace.

A. The Act itself recognizes the importance of free speech about unionization.

"Free discussion concerning the conditions in industry and the causes of labor disputes" is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (citations omitted). Indeed, "[the right] to discuss, and inform people concerning, the advantages *and disadvantages* of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Id.* (emphasis added).

Free and robust speech about unionization is so vital that Congress reiterated First Amendment freedoms in the National Labor Relations Act. Under Section 8(c), the "expressing of any views, argument, or opinion" about unionization "shall not constitute or be evidence of an unfair labor practice," provided "such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This provision not only "implements the First Amendment" (*NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)), but establishes a broad "zone" of free labor speech that is "protected and reserved for market freedom." *Chamber of Commerce v. Brown*, 554 U.S. 60, 66 (2008). As Congress recognized, "uninhibited, robust, and wide-open debate in labor disputes" is the best way to achieve a sound national

labor policy. *Id.* at 68. In labor relations, as elsewhere, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

The NLRA's history confirms Congress's pro-speech intent. The Act was originally silent on the "intersection between employee organizational rights and employer speech rights." *Brown*, 554 U.S. at 66. The Board mistook that silence as an invitation to mandate "complete employer neutrality," imposing draconian speech restrictions on employers and undermining the "free debate" that Congress sought to promote. *Id.* at 66-68. But rather than rely on the courts to correct the Board's First Amendment errors, Congress adopted Section 8(c), making "explicit" its "policy judgment" that the Board should stay out of the "freewheeling" debate over unionization." *Id.*; *see also Linn v. United Plant Guard Workers of Am., Loc. 114*, 383 U.S. 53, 62 (1966) (Section 8(c) "manifests a congressional intent to encourage free debate on issues dividing labor and management"). Thus, Section 8(c) was a reprimand by "Congress[, which] was dissatisfied with Board rulings in the free speech area." *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967).

Congress understood that robust debate best serves the interests of both employers and employees. As this Court has explained, "The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest

over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available." *Id*.

Section 8(c) thus "serves a labor law function of allowing employers to present an alternative view and information that a union would not present." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 955 (D.C. Cir. 2013), *overruled on other grounds by Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). Workers have the "right to receive information opposing unionization." *Brown*, 554 U.S. at 68. Forbidding an employer from expressing its views "would not serve the interests of [its] employees, for unionization might in fact hurt rather than help them in the long run." *NLRB v. Vill. IX, Inc.*, 723 F.2d 1360, 1368 (7th Cir. 1983). Moreover, employers have an independent interest in speaking to employees during unionization drives, as unionization triggers statutory obligations and may have significant economic consequences for the employer.

It follows that an employer "may even make a prediction as to the precise effects he believes unionization will have on his company." *Gissel*, 395 U.S. at 618. Section 8(c) "at an irreducible minimum protects the right of an employer to state its views, argument, or opinion, and to make truthful statements of existing facts." *Dow Chem. Co. v. NLRB*, 660 F.2d 637, 644-45 (5th Cir. 1981). "Any company has a perfect right to be opposed to a union, and such opposition is not an unfair labor

practice." *Fla. Steel Corp. v. NLRB*, 587 F.2d 735, 753 (5th Cir. 1979). And an employer raising Section 8(c) as a defense need not submit "evidence to corroborate its predictions" concerning unionization's economic effects, as that would "defeat the integral purpose of section 8(c)." *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363, 371 (6th Cir. 1993); *accord Vill. IX*, 723 F.2d at 1368 (*Gissel* does not "require the employer to develop detailed advance substantiation" for its predictions).

B. The Board has a constitutional as well as a statutory obligation to be neutral between union and employer speech.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," and that the government's targeting of "particular views" is a "blatant" and "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 827-28 (1995). Indeed, viewpoint-based discrimination is "censorship in its purest form." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 430 (1992). Likewise, "ancient First Amendment principles" prohibit "restrictions based on the identity of the speaker." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 319, 340 (2010). Any approach favoring pro-union speech or speech of union members flouts these principles.

Not surprisingly, then, the Act places employers' and employees' views on equal footing. The same free speech provision—Section 8(c), 29 U.S.C. § 158(c)—

applies without regard to the speaker's viewpoint or identity, "protect[ing] noncoercive speech by employer and labor organization alike." *Int'l Bhd. of Elec. Workers, Loc. 501, A.F. of L. v. NLRB*, 341 U.S. 694, 704 (1951).

In *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), for example, the Court adopted a narrowing construction of the Act's secondary picketing provision to avoid inhibiting union members' speech. That provision forbids unions to "threaten, coerce, or restrain" any person to cease doing business with another person. 29 U.S.C. § 158(b)(4). In holding that the union's handbilling did not violate Section 8(b)(4), the Court noted that the terms "threaten, coerce, or restrain" were "'nonspecific, indeed vague,' and should be interpreted with 'caution' and not given a 'broad sweep'" so as to avoid abridging the union's right to speak. *DeBartolo*, 485 U.S. at 578 (quoting *NLRB v. Drivers, Chauffeurs, Helpers, Loc. Union No. 639*, 362 U.S. 274, 289 (1960)). For the same reason, the phrase "threat of reprisal" must be interpreted with equal caution.

C. The Board must evaluate speech in context.

In deciding whether speech constitutes an unfair labor practice, the Board must consider its full context. In *Gissel*, for example, the Court considered the employer's various statements—made in "speeches, pamphlets, leaflets, and letters"—together to determine "the … message" that the statements collectively "conveyed."

395 U.S. at 619. This Court's longstanding precedent likewise holds that "language should neither be isolated nor analyzed in a vacuum." *NLRB v. Big Three Indus. Gas & Equip. Co.*, 441 F.2d 774, 777 (5th Cir. 1971). When deciding whether statements "rise to the level of a threat," the Board (and courts) must "view[] [them] in the context of the totality of the surrounding circumstances." *TRW, Inc. v. NLRB*, 654 F.2d 307, 313 (5th Cir. 1981). Full stop.

Relevant context can take many forms. It can include background knowledge that the relevant "employee group" might be expected to possess. *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 635 (5th Cir. 2003) (opining that audience would be aware of "context[ual]" facts). It might be informed by employees' "experience[s]" or even their reactions, as the fact that employees do not behave as if threatened "supports a reasonable inference that no threat was conveyed." *Id.* at 636. Employees are "not naïve," and it "cannot be assumed, objectively, that [employees with certain experiences] would be quick to infer threats from otherwise permissible statements of position and fact." *Id.* at 635. Thus, it cannot be assumed that Tesla's workers here were unaware of the UAW's course of conduct, including its objection to worker stock option plans.

The relevant context also includes statements made before and after alleged threats. *See Texas Indus., Inc. v. NLRB*, 336 F.2d 128, 131 (5th Cir. 1964) (different parts of a letter must be "read in context"). Thus, a statement that in isolation might

appear threatening—that an employee "'needed to get some union hospitalization insurance' because he 'was going to lose an arm or a leg'"—might not be actionable if it is "merely one statement in a chain reflecting" personal, "reciprocal animosity" between a supervisor and an employee. *TRW*, 654 F.2d at 313. Just as earlier "statement[s] in a chain" can inform a statement's meaning (*id.*), "later statements" or "additional comments" may "clarify, expand, or otherwise alter the context and reasonable import of [a] statement." *UNF West, Inc. v. NLRB*, 844 F.3d 451, 458 (5th Cir. 2016). Such "remedial statements" can even "dispel[] … misimpressions" if the statements are "specific in nature to the coercive conduct." *Id.* at 458-59 (citing *Plastronics, Inc.*, 233 NLRB 155, 156 (1977)).

Monfort, Inc. v. NLRB, 1994 WL 121150, *16 (10th Cir. Mar. 30, 1994), *aff'd by NLRB v. Monfort, Inc.,* 29 F.3d 525 (10th Cir. 1994), is especially instructive. There, the employer's anti-unionization campaign materials claimed that employees would lose profit sharing if they unionized, resting this prediction on the union's lack of interest in profit-sharing provisions in other contract negotiations. The Board found that certain campaign materials—a banner and a handbill, saying "Protect Your Profit Sharing. Vote No."—implied that the employer would unilaterally eliminate profit sharing because the materials were not "carefully phrased on the basis of objective fact." *Id.* at *16. The Tenth Circuit reversed, explaining that the materials had to be understood "in the context of the entire election campaign." *Id.* That

"economically dependent" employees might "more readily" see "veiled threat[s]" did "not warrant viewing an isolated piece of campaign literature in a vacuum." *Id*.

II. The Board's conclusions concerning protected speech should not receive deference.

The Board cannot avoid its constitutional and statutory obligations to treat employer and employee speech evenhandedly by appealing to the "substantial evidence" standard or other principles of deference to administrative agencies.

A. "[I]n cases raising First Amendment issues," the Supreme Court has "repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). The Board's findings in this regard are no different than those made by juries, district court judges, and non-NLRB Executive Branch officials, none of which receive deference. Given the vital "constitutional values" at stake—and the palpable risk of viewpoint discrimination by the Board—reviewing courts have a "special responsibility" to conduct independent, non-deferential, de novo review of the Board's finding that Musk's tweet was an unprotected threat. *Id.* at 502, 505.

This "constitutional responsibility … cannot be delegated to the trier of fact." *Id.* at 501. On First Amendment issues, "[j]udges, as expositors of the Constitution,

must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold" for a content-based speech restriction. *Id.* at 511. This rule applies across all free-speech contexts. *E.g.*, *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (whether speech addressed matters of public or private concern); *Hurley v. Irish-Am. Gay. Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995) (whether parade contained an element of expression); *Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990) (plurality opinion) (whether commercial advertising could mislead). But it is "vitally important" in cases involving whether "the communication in issue is within one of the few classes of 'unprotected' speech." *Bose*, 466 U.S. at 503. In such cases, courts must conduct "an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505.

This same rule requires appellate courts to conduct an "'independent examination of the whole record'" underlying a Board finding that speech is an unprotected threat. *See Cadillac of Naperville, Inc. v. NLRB*, 14 F.4th 703, 723 (D.C. Cir. 2021) (Katsas, J., concurring in part and dissenting in part) (quoting *Snyder*, 562 U.S. at 453); Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 244 n.84 (1985) (under *Bose*, courts should "not defer to the labor board's conclusion

that certain employer speech is constitutionally unprotected"). A rule that forbids deference to juries, Article III judges, and state courts (*see Bose*, 466 U.S. at 501; *Hurley*, 515 U.S. at 567) cannot tolerate deference to administrative agencies. If anything, the "serious constitutional concerns" raised by the Board's blending of executive, legislative, and judicial functions call for *more searching* judicial review. And the law is clear that the Board gets no deference for its NLRA interpretations that raise First Amendment concerns. *DeBartolo*, 485 U.S. at 574-78; *NLRB v. Cath. Bishop of Chicago*, 440 U.S. 490, 499, 507 (1979).

B. Nothing in the Act, or in precedent, requires deference here. The Board points to 29 U.S.C. § 160(c), *Gissel*, *NLRB v. Riley-Beaird, Inc.*, 681 F.2d 1083, 1086-87 (5th Cir. 1982), and *NLRB v. Mangurian's, Inc.*, 566 F.2d 463, 466 (5th Cir. 1978). None support the Board.

As to the statute, it is of no moment that the Board's factual findings are "conclusive" if supported by "substantial evidence." 29 U.S.C. § 160(e). As the Supreme Court has made clear, the First Amendment demands independent appellate review even where various rules would otherwise mandate deference to the trier of fact. *E.g.*, *Bose*, 466 US. at 499 (independent review required despite Fed. R. Civ. P. 52(a)).

The Board's reliance on *Gissel* is an even bigger stretch. The Court's free speech analysis there never once used the phrase "substantial evidence." 395 U.S.

at 616-20. The closest it came was to state "that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *Id.* at 620. But acknowledging the Board's "competence in the first instance" hardly mandates deference on the ultimate legal question of whether specific speech is constitutionally protected. And it provides no basis for exempting the Board from the independent, non-deferential review required by a wealth of later Supreme Court authorities.

This Court's decisions do not require deference either. Although both *Riley-Beaird* and *Mangurian's* deferred to the Board's interpretation of purported threats, they (like *Gissel*) predate *Bose* and its progeny. In addition, they involved spoken words—unlike this Court's earlier precedent rejecting deference to the Board's interpretation of written speech like the tweet here. In *Big Three Industrial Gas & Equipment Co.*, the Board viewed a company letter as a "threat to withhold" wage increases. 441 F.2d at 777. But this Court rejected that gloss on the letter, explaining that "interpretations of the written word are questions of law, which this court is as capable of making as is the Board." *Id.* And in adopting a "differing legal interpretation of the Company's letter," the Court was not improperly rejecting "a factual determination of the Board." *Id.*

This Court has often followed that reasoning, even when discussing the "substantial evidence" standard, in denying the Board deference on the ultimate legal

question of whether written speech is constitutionally protected. *See, e.g.*, *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 635 (5th Cir. 2003) (although the Board is "accorded deference when a factual finding rests on a resolution of witness credibility, the issue here does not turn on credibility" (citation omitted)); *Fla. Steel Corp.*, 587 F.2d at 751 ("It is well settled that the interpretation of a written instrument is a question of law to be decided by the courts."); *Fed.-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1256 (5th Cir. 1978) ("While the courts may approve and adopt an interpretation of such a document made by an administrative agency if found to be correct, they are not bound to do so.").

The Board's relative expertise in labor matters cannot justify excepting the Board from the general rule. Although factfinders are typically better positioned than appellate courts to find facts, the Supreme Court has conducted independent review of factfinding by subject-matter experts. *E.g.*, *Peel*, 496 U.S. at 108 (rejecting deference to Illinois Supreme Court in its capacity as regulator of the state bar); *Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 144-55 (1994) (giving no deference to state board specifically charged with regulating accountancy); *cf.* Fed. R. Civ. P. 52(a). The rule of independent review applies regardless of the strength of "the presumption of correctness that attaches to factual findings," because it rests on a "constitutional responsibility [of appellate courts] that cannot be delegated." *Bose*, 466 U.S. at 500-501.

The Board also points to other circuits' decisions declining to conduct independent review of Federal Trade Commission rulings restricting deceptive advertising. *ECM Biofilms, Inc. v. FTC*, 851 F.3d 599, 614 (6th Cir. 2017); *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 499 (D.C. Cir. 2015); *Kraft, Inc. v. FTC*, 970 F.2d 311, 316-18 (7th Cir. 1992). But public speech for or against "the benefits of unionism" is not mere "commercial speech" like "advertising" that has sometimes been held to merit lesser protection under the First Amendment. *DeBartolo*, 485 U.S. at 576. It is speech of vital public importance, receives full First Amendment protection, and demands this Court's independent review.

III. Musk's tweet was not a threat.

Without giving attention to what Musk's tweet actually said, to the context in which it was written, or to its evident lack of impact on Tesla's workforce, the ALJ here declared that "[the] tweet can only be read by a reasonable employee to indicate that if the employees vote to unionize that they would give up stock options"—*i.e.*, "as a threat of unilateral discontinuation of existing benefits if the employees unionized." ROA.6289. The full Board affirmed without explanation.

That is a tendentious reading of Musk's tweet. The tweet was a public discussion with a *non-employee* over Musk's personal Twitter account, begun with a photo of a rocket unrelated to Tesla. After some intervening banter about the color yellow, the non-employee replied: "How about unions?" ROA.4536. Musk first

responded by stating: "Nothing stopping Tesla team at our car plan from voting union. Could do so tmrw if they wanted." ROA.4537. The exchange thus began with an *affirmation* of the workers' right to unionize. Yet the ALJ mentioned this only in the statement of facts, treating it as irrelevant to *legally* interpreting the tweet.

Musk went on to explain why Tesla workers did not choose to unionize. He began with a pair of related consequences: "why pay union dues & give up stock options for nothing?" *Id.* Obviously, these were not threats of "unilateral" action. Given his reference to union dues—which employers cannot unilaterally force workers to pay—Musk *had to be* talking about the consequences of union negotiations. Then Musk continued: "Our safety record is 2X better than when plant was UAW & everybody already gets healthcare." *Id.* Again, these factual statements cannot be construed as threats. The first is a claim that things are better now than they were under the union, and the second is a claim that unionizing is unnecessary.

The ALJ's declaration that this tweet "can only be read" as a threat is unfounded. ROA.6289. The straightforward reading—supported by text and context—is that he was explaining to a member of the public, in response to a question, why the workers would choose not to unionize. The ALJ gave no reason beyond *ipse dixit* to interpret the tweet any other way. Certainly, Musk gave no hint of "unilateral discontinuation of existing benefits." *Id.* He was commenting on how Tesla employees are treated, not threatening to treat them worse.

If any doubt remained, it was dispelled later in the same thread. Musk explicitly stated the basis for his prediction—namely that UAW, consistent with its practices at every other automaker, would not seek employee stock options. ROA.4539. All this is true and presumably known to auto workers, who are "not naïve" or uninformed. *Brown & Root*, 333 F.3d at 635. Unions have often undervalued such benefits, and employer comments to that effect have routinely been upheld. *See Monfort*, 1994 WL 121150, at *16; *Noral Color Corp.*, 276 NLRB 567, 570 (1985); *see also TCI Cablevision of Washington, Inc.*, 329 NLRB 700, 700-701 (1999) (employer permitted to report that its nonunion employees received a 401(k) benefit and that the union previously "had not successfully negotiated for this benefit").

In a later tweet, Musk also stressed that he had "never stopped a union vote nor removed a union." ROA.4539; *see id*. ("UAW abandoned this factory. Tesla arrived & gave people back their jobs. They haven't forgotten UAW betrayed them. That's why UAW can't even get people to attend a free BBQ, let alone enough sigs for a vote."). Here too, however, the ALJ's "Legal Analysis" ignores those parts of the thread. This was legal error. The Board must analyze speech in its full context. *Texas Indus.*, 336 F.2d at 131. The Supreme Court in *Gissel* considered *all* of the employer's statements—in "speeches, pamphlets, leaflets, and letters"—together to determine "the … message" that they collectively "conveyed." 395 U.S. at 619. If an earlier statement might be problematic, "later statements" may "clarify, expand,

or otherwise alter the context" or its "reasonable import" or even "dispel[] … misimpressions." *UNF West*, 844 F.3d at 458, 459.

The ALJ nowhere considered these clarifying statements in her Legal Analysis, instead asserting that "Musk presented no objective facts" explaining "his statement that employees would lose their stock options." ROA.6290. But the UAW's track record of not including stock options in negotiated compensation packages is an "objective fact" that directly supported Musk's explanation of why Tesla's workers had not unionized. The ALJ announced that "a statement loses the protection of the First Amendment if the statement is based on misrepresentation regarding the consequences of bargaining if the employees unionized." ROA.6290. Yet the ALJ identified no "misrepresentation." There was none.

Other aspects of the context confirm that Musk's tweets were public discussion of matters of public concern, not threats. First, Musk's tweets were made not to workers, but to the 22 million followers of his personal Twitter page. ROA.6289. Although Musk (like many CEOs and politicians) sometimes makes official announcements from that account, the thread here started with a photo of a rocket unrelated to Tesla and proceeded in response to questions from non-employees. For the Board to treat such comments as an unfair labor practice because a worker theoretically might have read about them is dangerous. It is as if a company president speaking at a trade show were slapped with an unfair labor practice finding based on

a poorly phrased answer to an audience question about unionization. The First Amendment requires much more "breathing space" for speech on matters of public concern. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

Second, as of the exchange, there was no pending petition to recognize a union, let alone a pending vote. The Board has treated employer statements with particular caution during the "critical period" when a union-related vote is pending. *NLRB v. Arkema, Inc.*, 710 F.3d 308, 323 (5th Cir. 2013) (suggesting a possible inference of "anti-union animus" during the critical period). This is at the opposite end of the spectrum—Musk was merely responding to a random gibe from a non-employee. *See Fed.-Mogul Corp.*, 566 F.2d at 1253 (a supervisor's burning union literature was "in jest" where it occurred "before any [election] petition was filed").

Third, there is no evidence that any Tesla employee interpreted Musk's tweets as a threat. "[T]he Board bears the burden of proof and persuasion" to "show[] that section 8(c) does not protect an employer's predictions of the consequences of unionization" (*Pentre Elec.*, 998 F.2d at 371), yet the General Counsel located only one employee who even *read* the tweets (ROA.755), and he did not say he regarded them as threatening (ROA.839-843). The breathing room for speech guaranteed by the Constitution does not countenance requiring *Tesla* to *disprove* that the employees felt threatened. "Where the First Amendment is implicated, the tie goes to the

speaker, not the censor." *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 474 (2007).

In sum, under the totality of the circumstances, Musk's tweet cannot possibly "only be read" as a "threat." Rather, it is most naturally read as an explanation to a member of the public why Tesla's employees had chosen not to unionize, which is an entirely legitimate—and fully protected—subject of public debate.

IV. The unfair labor practice finding against Tesla illustrates the Board's recent abandonment of neutrality on matters involving speech.

Even viewed in isolation, the Board's decision here would have an unconstitutional chilling effect on employer speech. But that decision is not isolated. The Board's recent practices suggest that it has abandoned its duty of neutrality and employs unfair labor practice findings to prevent employers from telling their side of the story. To see that this is so, one need only compare the Board's approach here to its recent analysis in *Int'l Union of Operating Eng'rs, Local Union No. 150*, 2021 NLRB LEXIS 291, 371 NLRB No. 8 (N.L.R.B. July 21, 2021) (the "Scabby the Rat" case), which involved a union's display of a 12-foot inflatable rat, known as "Scabby"—complete with red eyes, fangs, claws, and 8x4 feet banners denouncing "Rat Contractors"—at a trade show where a neutral, secondary employer not involved in the primary labor dispute was participating.

Section 8(b)(4) shields neutral secondary employers from union pressure to stop doing business with companies involved in labor disputes. *NLRB v. Denver*

Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951). It does so by making it an unfair labor practice for unions to "threaten, coerce, or restrain any person engaged in commerce" for the purpose of "forcing or requiring" them to "cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B). Although aimed primarily at picketing, Section 8(b)(4) was "drafted broadly to protect neutral parties, the helpless victims of quarrels that do not concern them." *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 225 (1982). Although not identical, Section 8(b)(4) and Section 8(a)(1) both ask whether expressive activity is threatening or merely persuasive—making the inquiries sufficiently similar to compare the Board's approach to union speech and employer speech. As it turns out, the Board has been anything but neutral.

First, and most obviously, the Board in the "Scabby the Rat" case applied the "constitutional avoidance" doctrine to avoid interfering unduly with speech. Indeed, the Chair and two concurring members expressly stated that constitutional avoidance was "dispositive." 2021 NLRB LEXIS 291, *10. By contrast, in this case, which equally involved expressive freedom, constitutional avoidance was never mentioned. Rather, the ALJ (affirmed by the Board) merely quoted *Gissel*'s observation that "a statement loses the protection of the First Amendment if the statement is based on a misrepresentation regarding the consequences of bargaining if the em-

ployees unionized." ROA.6290. But there has been no allegation, let alone a finding, that Musk misrepresented anything. This non sequitur was the opinion's only acknowledgment that the First Amendment was even involved. For the Board to employ constitutional avoidance only when union speech is involved is viewpoint discrimination.

Second, in the "Scabby the Rat" case, the Board held that "the appropriate question under the constitutional avoidance doctrine is not whether Section 8(b)(4)(ii)(B) *could* be read to apply to the Union's display, but whether it *must* be so read." 2021 NLRB LEXIS 291, *26. That is, unions do not violate the Act if their activities at the neutral site have *any* possible non-violating interpretation. Here, by contrast, the Board did not even consider possible non-violating interpretations, even though the tweet was most naturally read as explaining to an outsider why Tesla workers had not unionized. This difference is especially striking because the Board could offer no reasons why the union would display Scabby outside the trade show *other than* to pressure the neutral employer to cease doing business with the target of the strike, while the alternative, non-threatening purpose of Musk's tweet was obvious from the face of the exchange: he was defending his company against criticism by a Twitter follower.

Third, in holding that the inflatable rat did not constitute signal picketing, the Board parsed the banners' language carefully, noting that "[n]either the banners nor

the inflatable rat called for or declared any kind of job action by employees of any neutral employer." *Id*. at *12 n.3. The Board thus disregarded the highly plausible possibility that "Scabby the Rat" and banners denouncing "Rat Contractors" conveyed the accusation of being a "scab"—a worker who crosses the picket line to work when fellow workers strike—and thus was indeed a call for the neutral employer's employees to take action. By contrast, the Board ignored that Musk's tweet contained no mention of unilateral action, drawing precisely the type of accusatory inference that it refrained from drawing from the rat.

Finally, the Board in the "Scabby the Rat" case treated the lack of evidence of response from the neutral employer or its workers as proof that the inflatable rat was not in fact threatening. *Id*. By contrast, the ALJ here (affirmed by the Board) brushed off the lack of *any* evidence that *any* Tesla worker felt threatened by Musk's tweet. The mere possibility that a "reasonable employee" *might* feel threatened was enough. ROA.6290.

The Board thus assumed the worst of employer speech—or, more accurately, assumed that workers will assume the worst of such speech—even absent evidence that the statements were taken as a threat. The Board justified this approach by placing undue weight on "the economic dependence of the employees on their employers." *Gissel*, 395 U.S. at 617. But that presumption systematically favors employees over employers, and certainly cannot justify finding threats that were not

reasonably implied. "Workingmen do not lack capacity for making rational connections." *Collins*, 323 U.S. at 535.

Believing that workers will see threats where none exist deprives employers of their right to speak and the public of their right to receive accurate information about why workers decline to unionize. That presumption smacks of the "highly paternalistic approach" that the Supreme Court has repeatedly rejected. *E.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976) ("information is not in itself harmful," and "the best means [for people to perceive their own best interest] is to open the channels of communication"); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989) (claim that a state "is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism").

Sadly, the "Scabby the Rat" case is illustrative of broader Board-driven hostility to employer speech. In 2022, the Board's General Counsel issued a memo opining that employer "captive audience" meetings, where an employer may require employees to attend a meeting in which it shares information on union issues, are *unlawful*—a position at odds with decades of practice and Board precedent. Jennifer A. Abruzzo, The Right to Refrain from Captive Audience and other Mandatory Meetings, Memorandum GC 22-04 (April 7, 2022). Moreover, the General Counsel

has recently brought complaints against the CEOs of Amazon and Starbucks for benign public remarks about unionization. *E.g.*, *Amazon.com Services LLC and Amazon Labor Union*, No. 19-CA-297441, Compl. (Oct. 25, 2022) (charging that, during a Bloomberg interview, Amazon's CEO "stated that: (a) employees are better off without a union; (b) it would be more difficult for employees to have direct relationships with their managers if employees were represented by a union; and (c) it would be more bureaucratic and difficult to get things done quickly if employees were represented by a union"); *Starbucks Corporation*, No. 19-CA-294579, Compl. (Aug. 24, 2022) (charging that, when speaking about employee raises during an earnings call, Starbuck's CEO stated "[w]e do not have the same freedom to make these improvements at locations that have a union or where union organizing is underway").

At every step, the Board has been treating the union's speech with indulgence and the employer's speech with hostility. But the Constitution requires the Board to chart a course of neutrality, never using its authority to favor one viewpoint or hamper another. The Board may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392. And if this Court does not reverse, its decision will sanction blatant viewpoint discrimination in the labor context, as one cannot compare the Board's approach to employer speech with its approach to union speech without smelling a rat.

V. The Board's decision represents a chilling expansion of its authority over speech outside the workplace on social media.

Beyond the substance of Musk's tweets, that they were made on a non-Tesla social media account accessible to the general public and having over 22 million followers warrants extra "caution." *DeBartolo*, 485 U.S. at 578. Americans of all stripes use social media "to engage in a wide array of protected First Amended activity." *Packingham v. North Carolina*, 582 U.S. 98, 103 (2017). Indeed, "the most important places … for the exchange of views" today are "the 'vast democratic forums of the Internet' in general, and social media in particular." *Id*. This speech receives "[un]qualif[ied]" protection. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

Employers, supervisors, and employees alike use social media to comment on labor relations matters. The Board has protected employee speech on social media even where it contains "obscene and vulgar language" that might otherwise support termination. *E.g.*, *Pier Sixty, LLC*, 362 NLRB 505, 508 (2015). But it has cracked down on employer speech on matters of public concern on social media, including a recent investigation of a small online media company "because of a facetious and sarcastic tweet." *FDRLST Media, LLC v. NLRB*, 35 F.4th 108, 127 (3d Cir. 2022) (granting petition for review). Indeed, the Board's remedy here reaches individuals unconnected to Tesla. When a tweet is deleted, "[r]etweets of the deleted Tweet will also be removed." *How to delete a Tweet*, https://help.twitter.com/en/using-twitter/delete-tweets. Hundreds of Twitter accounts have retweeted Musk's May 20,

2018, tweet. All those speakers will lose their freedom to speak—whether in support of Musk or in opposition. But when speech is a problem, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Much as it might think otherwise, the Board's powers to regulate speech are not "unlimited." *FDRLST Media*, 35 F.4th at 127. This Court should be "'vigilant'" in ensuring the Board stays within "its constitutionally permissible bounds." *See id.* (quoting *NLRB v. Windemuller Elec., Inc.*, 34 F.3d 384, 392 (6th Cir. 1994)).

CONCLUSION

For the foregoing reasons, Tesla's petition should be granted.

DATED: SEPTEMBER 6, 2023

Respectfully submitted,

/s/ *Steffen N. Johnson*

JENNIFER B. DICKEY
STEPHANIE A. MALONEY
U.S. Chamber Litigation Center
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

STEFFEN N. JOHNSON
Counsel of Record
PAUL N. HAROLD
Wilson Sonsini Goodrich & Rosati, P.C.
1700 K Street, N.W.
Washington, DC 20006
(202) 973-8000
sjohnson@wsgr.com

MICHAEL W. MCCONNELL
Wilson Sonsini Goodrich & Rosati, PC
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on September 6, 2023.

I certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

Ruth E. Burdick
Micah P. S. Jost
Kira Dellinger Vol
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, S.E. Washington, DC 20570
appellatecourt@nlrb.gov
micah.jost@nlrb.gov
kira.vol@nlrb.gov

Counsel for Respondent National Labor Relations Board

Daniel E. Curry
Margo A. Feinberg
SCHWARTZ, STEINSAPIR, DOHRMANN & SOMMERS LLP
6300 Wilshire Boulevard
Suite 2000
Los Angeles, CA 90048
dec@ssdslaw.com
margo@ssdslaw.com

Counsel for Petitioner International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO

David B. Salmons
Michael E. Kenneally
David R. Broderdorf
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com
michael.kenneally@morganlewis.com
david.broderdorf@morganlewis.com

Counsel for Tesla, Incorporated

I certify that I sent a copy of the foregoing document via U.S. Mail to the following counsel:

Timothy L. Watson
NATIONAL LABOR RELATIONS BOARD, REGION 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6178
Timothy.Watson@nlrb.gov

Dated: September 6, 2023

By: */s/ Steffen N. Johnson*
Steffen N. Johnson
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,491 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font.

Dated: September 6, 2023

By: */s/ Steffen N. Johnson*
Steffen N. Johnson
Counsel for Amici Curiae