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 AS *AMICUS CURIAE* IN SUPPORT OF TESLA, INCORPORATED AND REVERSAL

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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.

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

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

3. David B. Salmons is Counsel for Tesla.

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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. Wilson Sonsini Goodrich & Rosati, P.C. is Counsel for the Chamber.

17. Steffen N. Johnson is Counsel for the Chamber.

18. Michael W. McConnell is Counsel for the Chamber.

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20. U.S. Chamber Litigation Center is Counsel for the Chamber.

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Respectfully submitted,

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

[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 the amicus, its members, or its counsel made a contribution intended to fund the brief's preparation or submission.

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. Judicial intervention is essential.

STATEMENT OF THE CASE

Tesla CEO Elon Musk has a personal Twitter account. In 2018, he posted a photo of a rocket. ROA.4536. In response, a Twitter user—and non-Tesla employee—tweeted about an article titled "Report: Tesla Factory Workers Are In Danger Because Elon Musk Hates the Color Yellow." *Id.* Musk replied that the article was "bs"—the Tesla factory "has miles of painted yellow lines & tape." *Id.* The user responded, "Yellow is fine, got it. How about unions?" *Id.* Musk answered:

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

ROA.4537. Two days later, another Twitter user—also a non-Tesla employee—asked, "why would they lose stock options? Are you threatening to take away benefits from unionized workers?" *Id.* Musk answered, "No, UAW does that." *Id.*

In a Twitter exchange the next day, after another user stated that "UAW does not allow union workers to own stock," Musk agreed, tweeting: "Exactly. UAW does not have individual stock ownership as part of the compensation at any other company." ROA.4539. An official Tesla spokesperson likewise separately told the press that not "a single UAW-represented automaker" provided "stock options … to their production employees," noting that "UAW organizers have consistently dismissed the value of Tesla equity as part of our compensation package." ROA.6288 n.110; *see also* Tesla Br. 13–14.

By the time of the tweets, the union had been attempting to unionize Tesla workers for nearly two years without success. There was no pending union election or prospect of one. The union, however, filed a charge with the Board, alleging that Musk's initial tweet was a threat to take away stock options if workers unionized. No Tesla employee was involved in these exchanges; and as far as the record shows, the tweets were seen by only one Tesla employee—who did not testify that he found the tweet threatening. ROA.755, ROA.839-843, ROA.6179-6180.

An ALJ nevertheless found, and the Board agreed, that Musk "threaten[ed] employees with the loss of their stock options" if they unionized—unprotected speech under *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). ROA.6239, 6289-6290. In their view, Musk's tweet was a threat because it "did not reference collective bargaining," "express that the loss of stock options could be a result of negotiations," or contain "objective facts to support" any prediction. ROA.6289.

The ALJ thus required the company to post a notice at the affected facility. She also required Musk or a Board agent (in Musk's presence) to read that notice aloud to employees. ROA.6291. The Board vacated the notice-reading order, but ordered Tesla to "direct Musk to delete the unlawful tweet" and "ensure that Musk complies." ROA.6247.

ARGUMENT

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

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 "implements the First Amendment." *Gissel*, 395 U.S. at 617.

In enacting Section 8(c), however, Congress did more than "'merely implement[] the First Amendment.'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008) (quoting *Gissel*, 395 U.S. at 617). It established a broad "zone" of free labor speech that is "protected and reserved for market freedom." *Id.* at 66. 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 Act'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 simply 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. "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) "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 a "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, an employer has an independent interest in conveying its views to employees during unionization drives, because choosing to unionize places certain statutory obligations on, 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 would flout 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).

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988), powerfully exemplifies this speech-respecting approach. The Court there adopted a narrowing construction of the Act's secondary picketing provision to avoid interfering with union members' speech. *Id.* at 575. That provision forbids a union 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. 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. The Court also explained that, in considering whether the statements together amounted to an unprotected threat, the Board had "a duty to focus on the question: '[w]hat did the speaker intend and the listener understand?'" *Id*. (quoting Archibald Cox, Law and the National Labor Policy 44 (1960)).

Longstanding Fifth Circuit 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 NLRB (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).

Relevant context can take many forms. It might take the form of background knowledge that the "employee group" at issue might be expected to possess. *See 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. In *Brown & Root*, this Court observed that employees are "not naïve," and that it "c[ould] not 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. Here, it may be presumed that Tesla's workers were aware of the UAW's course of conduct at this and other plants, including its objection to worker stock option plans.

The relevant context also includes statements made before or after the alleged threat. *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)).

Other circuits likewise recognize that "[c]ontext is a crucial factor in determining whether a statement is an implied threat." *NLRB v. Champion Labs., Inc.*, 99 F.3d 223, 229 (7th Cir. 1996). In *Champion*, the Seventh Circuit considered whether a supervisor's remark—"I hope you guys are ready to pack up and move to Mexico"—impliedly threatened a plant closure. *Id.* at 228. The court concluded that, in context, it was not—only an "impromptu paraphrase" of another worker's comment made in "bantering terms" during a chance encounter. *Id.* at 229.

The Tenth Circuit's decision in *Monfort, Inc. v. NLRB*, 1994 WL 121150, at *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 fact that the union had not vigorously sought 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. 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. Musk … made this statement as a threat of unilateral discontinuation of existing benefits if the employees unionized." ROA.6289. The full Board affirmed without explanation.

This is a tendentious reading of Musk's tweet. The tweet was not a communication to the workers at all, but 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 part of the tweet only in the statement of facts. She treated it as irrelevant to *legally* interpreting the challenged portion of the tweet.[2]

In the same 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 announcement that this tweet "can only be read" as a threat is unfounded. ROA.6289. The straightforward reading—supported by text and context—is that the tweet was explaining to a member of the public, in response to a

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[2] In another tweet, not even quoted by the ALJ, Musk wrote:

> I've never stopped a union vote nor removed a union. 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.

ROA.4539.

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, the tweet's text contained no hint of "unilateral discontinuation of existing benefits." *Id.* Musk was commenting on how Tesla employees are treated, not threatening to treat them worse.

If any doubt remained, it was dispelled by the follow-up messages in the same thread. *Supra* at 3. These messages explicitly stated the basis for Musk's prediction —namely that UAW, in keeping with its practices at every other automaker, would not seek stock options as part of a compensation package. 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 stock options or similar 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 relevant union previously "had not successfully negotiated for this benefit").

Here too, however, the ALJ's Legal Analysis section never even mentions the later parts of the Twitter thread. This was legal error. The Board must analyze a challenged statement in light of the entire communication. *Texas Indus.*, 336 F.2d at 131. The Supreme Court in *Gissel* considered all of the employer's various statements—made in "speeches, pamphlets, leaflets, and letters"—together to determine "the … message" that they collectively "conveyed." 395 U.S. at 619. Even if an earlier statement might be problematic, "later statements" may "clarify, expand, or otherwise alter the context and reasonable import of [a] statement." *UNF West*, 844 F.3d at 458. Such "remedial statements" can even "dispel[] … misimpressions" if "specific in nature to the coercive conduct." *Id.* at 459

Not only did the ALJ fail to consider these clarifying statements in her legal analysis, she affirmatively stated that "Musk presented no objective facts to support 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 the Tesla workers chose not to unionize. 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 part of a public discussion of a matter of public concern, not a threat directed at Tesla's workers. First, the tweets were made on Musk's personal Twitter page, with over 22 million followers—not directly to workers. ROA.6289. Although Musk (like many CEOs and politicians) sometimes makes official announcements from his personal account, the personal nature of this thread is underscored by the fact that it started with a photo of a rocket unrelated to Tesla and proceeded in response to questions from non-employee Twitter users. For the Board to treat comments made in public discussion forums as an unfair labor practice because it is theoretically possible that a worker might have read about them is a dangerous precedent. 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 far greater "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 petition circulating for recognition of a union, and no vote was pending. Musk was merely responding to a random gibe from a non-employee about the lack of a union at Tesla. 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. *See Fed.-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1253 (5th Cir. 1978) (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 at 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 First Amendment, and the healthy breathing room for speech that it guarantees, does not tolerate the idea that *Tesla* could be compelled 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, there is no basis to conclude that "Musk's tweet can only be read" as a "threat." Rather, his tweet is most naturally read as an explanation to a member of the public why Tesla's employees have chosen not to unionize, which is an entirely legitimate—and fully protected—subject of public debate.

III. 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 a chilling effect on employer speech and should be reversed. But that decision is not isolated. The Board's recent course of conduct suggests that it has abandoned its duty of neutrality and instead has weaponized 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 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) of the Act is designed to shield 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 a labor organization 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). The legal elements obviously are not identical, but Section 8(b)(4) and Section 8(a)(1) both ask whether expressive activity is essentially 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 any interference with First Amendment freedoms. Indeed, the Chairman and the 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 not mentioned. Indeed, in response to Tesla's First Amendment argument, 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 employees 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. In other words, a union does not violate the Act if its activities at the neutral site have *any* possible non-violating interpretation.

In this case, 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 have not unionized. This difference in 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 works when fellow workers strike—and thus was indeed a call for the neutral employer's employees to take action. By contrast, the Board ignored the fact that Musk's tweet contained no mention of unilateral action, drawing precisely the type of accusatory inference 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 whatever the merits of that presumption, it 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 paternalism 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) (rejecting a "highly paternalistic approach" because "information is not in itself harmful" and "the best means [to people perceiving 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").

At every step in these cases, the Board treated the union's speech with indulgence and the employer's speech with hostility. But when free expression is involved, the First Amendment requires the government 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.

IV. 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*, 137 S. Ct. 1730, 1735 (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. As one Board chairman put it, "Many view social media as the new water cooler." Steven Greenhouse, *Even if it Enrages the Boss, Social Net Speech is Protected*, N.Y. Times, Jan. 21, 2013.[3] The Board has thus protected employee speech on social media even where it contains "obscene and vulgar language" that might otherwise support termination. *Pier Sixty, LLC*, 362 NLRB 505, 508 (2015); *see id.* at 505 (employee Facebook post criticizing supervisor as "a NASTY MOTHER F*CKER don't know how to talk to people!!!!!!! F*ck his mother and his entire f*cking family!!!! ... Vote YES for the UNION!!!!!!!" was protected speech). The Second Circuit, in reviewing this Board decision, acknowledged both that Facebook "is a key medium of communication among coworkers and a tool for organization in the modern era" and that, "[w]hile a Facebook post may be visible to the whole world, including actual and potential customers," the post "was not in the immediate presence of customers." *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 125 (2d Cir. 2017), as amended (May 9, 2017).

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[3] Available at: http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html.

The speech of employers and supervisors merits just as much First Amendment protection as the speech of employees. While Musk's tweet may have been "visible to the whole world," it was not in "in the immediate presence of [workers]" (*id.*) and could not reasonably be construed as a threat targeted at them if they vote for a union. *See Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021) (regulating "off-campus speech" restricts "all the speech a student utters during the full 24-hour day," so "courts must be more skeptical of a school's efforts to regulate off-campus speech"). Musk is a prominent business leader who regularly uses social media, engaging with the public on issues from rockets to electric cars. *4,925 Tweets: Elon Musk's Twitter Habit, Dissected*, Wall Street Journal (Aug. 2, 2018), http://graphics.wsj.com/elon-musk-twitter-habit-analysis/ (among "big-company tech CEOs," only one tweeted more than Musk). His messages to the general public over a personal Twitter account should not be treated as if they were directed to workers voting on unionization.

The locus of speech sends a strong signal about its intent and its likely reception. If Musk, speaking to a business school class, were asked "How about unions?," and gave the same answer he tweeted, no one would regard that as a threat directed at workers deciding how to vote on unionization. Yet, ignoring the context here, the Board treated Musk's message as though it was communicated to Tesla workers over a company message board immediately before a vote on unionization.

Although some unknown number of Tesla employees *might* have been aware of Musk's Twitter exchange, it was no more directed to Tesla's workers than the hypothetical statement in a business school class. The opinion below nevertheless treats the social media context as a reason to regulate Musk's message *more* stringently: the parties stipulated that Musk has over 22 million Twitter followers who would have seen the unlawful tweet; these followers included employees and nonemployees. ROA.6289. The implication is that supervisors must self-regulate their social media communications with the same walk-on-eggshells sensitivity that they would apply to company announcements during a unionization campaign. This rule would hamstring company officials in defending their employment policies to the general public. Almost any negative statement about unionization's effects on workers could be treated as an unfair labor practice.

This case is but the latest Board decision finding an unfair labor practice based on social media statements on matters of public concern made by supervisors outside the workplace. *E.g.*, *FDRLST Media, LLC*, 2020 NLRB LEXIS 563, *18 (N.L.R.B. Nov. 24, 2020) (satirical tweet "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine"). The Board apparently draws no distinction between a supervisor's speaking in a work capacity and a supervisor's speaking in a "'personal' capacity" on social media. *Cayuga Med. Ctr. at Ithaca, Inc.*, 2017 NLRB LEXIS 637, *86 (N.L.R.B. December 16, 2017). And its decisions have not been limited to high-ranking officers. *Id*. at *75 (Facebook posts by "Hospital House Supervisor").

The Board's remedy here exacerbates matters. The ALJ deemed it sufficient for Tesla to cease "[t]hreatening employees with loss of benefits" and to post a corresponding notice. ROA.6291-6293.[4] Had there been a violation, these remedies should have been enough. The Board, however, ordered Tesla "to direct Musk to delete the unlawful tweet and to take appropriate steps to ensure that Musk complies." ROA.6247. Forcing the take-down of speech is a form of "prior restraint," wholly at odds with the First Amendment. *Marceaux v. Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 493 (5th Cir. 2013). Unfortunately, the Board's extraordinary remedy is not unique. *E.g*., *FDRLST Media, LLC*, 2020 NLRB LEXIS 563 at *18; *Barstool Sports*, Case No. 31-CA-246638, Decision to Approve Settlement Agreement at 7 (Dec. 18, 2019), https://aboutblaw.com/Oi7.

Indeed, the Board's remedy reaches individuals unconnected to Tesla. When a tweet is deleted, "[r]etweets of the deleted Tweet will also be removed." *How to*

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[4] At the urging of the Board's General Counsel, the ALJ ordered a public reading of the notice by Musk personally or a Board agent in his presence. ROA.6290. This Court has expressed "skepticism regarding public-notice-reading orders," which resemble "mandated 'confessions of sin' … 'devised by Stalin and adopted by Mao.'" *Denton Cty. Elec. Coop., Inc. v. NLRB*, 962 F.3d 161, 174 (5th Cir. 2020) (citation omitted). The Board's majority rightly found that "a notice-reading remedy … [wa]s neither necessary nor appropriate." ROA.6247; *see id*. n.19 (McFerran, Chairman, dissenting).

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). Using prior restraints to remedy unfair labor practices should be nipped in the bud.

CONCLUSION

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

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Respectfully submitted,

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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 August 6, 2021.

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CERTIFICATE OF COMPLIANCE

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