

**UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD**

FDRLST MEDIA, LLC

and

Case No. 02-CA-243109

JOEL FLEMING, an Individual

**GENERAL COUNSEL’S OPPOSITION TO MOTION TO FILE “AMICI CURIAE”
BRIEF BY RESPONDENT EMPLOYEES ON BEHALF OF RESPONDENT**

Two of the employees who were subject to Respondent FDRLST Media, LLC’s Twitter threat now ask to file a brief in support of their Employer’s contention that it did not violate the National Labor Relations Act. Because granting that request would (i) offer this and other respondents a means to circumvent the limits on arguments and briefing set forth in the Board’s Rules and Regulations and (ii) encourage this and other respondents to (further) violate the Section 7 rights of their employees and members by pressuring them to submit arguments on behalf of the entities with power over their working conditions, the Board should deny that request. Further, the proffered brief will not assist the Board in deciding this case, which, notwithstanding the Respondent’s and employees’ claims, does not present any First Amendment concerns. Newspapers and other publishers do not have or need special dispensation under the law to threaten their workers.

The Supreme Court has recognized the power that employers wield over the workers and the potential for witness intimidation and related mischief, dangers which are “particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted.” *NLRB v. Robbins Tire &*

Rubber Co., 437 U.S. 214, 240 (1978);¹ see also *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (“Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged”). Here, employees Madeline Osburn and Emily Jashinsky did not appear and testify in this matter and Respondent said it could not compel their testimony.² In such circumstances, the danger that the employees’ names are simply being used to further the aims of Respondent is significant. Thus, granting the motion made in the name of the employees carries the substantial risk that it is Respondent submitting argument through them.

Even if these two employees support Respondent’s position in this matter, however, allowing them to file a brief in support of Respondent’s position would encourage other respondents to pressure their employees and members to support those respondents’ legal aims at the cost of the employees’ Section 7 rights. Setting a precedent to accept such supplemental briefing would serve to further delay resolution of run-of-the-mill cases—such as this one, which involves a single undisputed Tweet by an admitted supervisor and agent of Respondent—and give respondents additional opportunities to argue their positions, thus undermining the briefing schedules and limitations set forth in Section 102.46 of the Board’s Rules and Regulations.

The arguments proffered in the name of the two employees (i) fail to come to grips with the fact that threats are not protected by the First Amendment and (ii) conflate public disfavor with infringement of First Amendment rights. On the first point, the proposed brief does not address the Supreme Court precedent explicitly holding that threats like the July 6, 2019 Tweet by Respondent’s admitted agent, supervisor, publisher, and chief executive Ben Domenech are unprotected. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Instead, the brief simply repeats the arguments

¹ The Court noted, “A union can often exercise similar authority over its members and officers.” *Ibid.*

² Respondent FDRLST Media, LLC’s Answering Brief to General Counsel’s Cross-Exceptions to The Decision of The Administrative Law Judge, p. 3 (“Respondent could not compel their appearances”).

already made by Respondent against the Board’s objective test, claiming the ALJ should have treated their hearsay affidavits as dispositive of a question on which they have no bearing. Even if that argument had any merit—which it does not—its repetition will not help the Board decide this case.

On the second point, the proposed brief spends significant time complaining about the ability of private individuals to bring social pressure against opinions.³ But vociferous disagreement, criticism, and castigation by private individuals do not violate First Amendment principles. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (“It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state”); see also *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972) (“The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.”). Indeed, the social pressures of which movants complain are themselves protected by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909–910 (1982) (“Petitioners admittedly sought to persuade others to join the boycott through social pressure and the “threat” of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.”). Thus, that part of the proposed brief is also of no use to the Board.

Finally, the proposed brief does not offer any argument that Respondent’s Tweet constituted an exercise of the press. (Indeed, movants cannot plausibly make that claim at the same time Respondent contends it is not responsible for Ben Domenech’s July 6, 2019 Tweet.) But even if it had made that claim, it would have been readily dismissed. Publishers have no special right to threaten their employees with punishment for exercising their Section 7 rights. See *Associated Press v. NLRB*, 301 U.S. 103, 130–131 (1937) (application of the National Labor Relations Act to the

³ Proposed Brief of FDRLST Media, LLC Employees Emily Jashinsky and Madeline Osburn in Support of Respondent, pp. 2–4 (complaining of what the brief calls “cancel culture”).

Associated Press does not “abridge the freedom of speech or of the press safeguarded by the First Amendment”).

In short, the proposed brief offers nothing but a convoluted rehashing of the arguments already made by Respondent. It is therefore no aid to the Board and permitting its filing will serve to weaken protection of employee Section 7 rights and promote procedural gamesmanship. Nor do movants identify any particular interest they have in this case. While the employees characterize themselves as members of the press, they make no arguments which implicate concerns unique to the press or reporting. Instead, movants incorrectly characterize the July 6, 2019 threat as an idea and rely on general First Amendment principles to claim the threat is entitled to Constitutional protection despite the Supreme Court’s clear statement to the contrary. *NLRB v. Gissel Packing Co.*, supra, 395 U.S. at 618.

For the reasons above, the General Counsel respectfully requests that the Board deny the request of employees Madeline Osburn and Emily Jashinsky to file a brief in support of Respondent in this straightforward case, which involves no novel issues and should not be further delayed by additional irrelevant briefings.

DATED at New York New York, this 29th day of July 2020.

Respectfully submitted,

/s/ Jamie Rucker
Jamie Rucker
Counsel for the General Counsel
National Labor Relations Board Region 02
26 Federal Plaza, Room 3614
New York, NY 10278
Telephone: (212) 776-8642
Facsimile: (212) 264-2450
jamie.rucker@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of General Counsel's Opposition to Motion to File "Amici Curiae" Brief by Respondent Employees on Behalf of Respondent were served on the 29th day of July 2020, on the following parties by the methods indicated below:

E-File:

Roxanne Rothschild, Executive
Secretary National Labor Relations
Board
1015 Half St. SE
Washington, D.C. 20570

E-Mail:

Aditya Dynar
Caleb Kruckenberg
Kara Rollins
Jared McClain
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
Adi.Dynar@NCLA.legal
Caleb.Kruckenberg@NCLA.legal
Kara.Rollins@NCLA.legal
Jared.McClain@NCLA.legal
Attorneys for Respondent, FDRLST Media, LLC

Kimberly S. Hermann
Anna Celia Howard
Southeastern Legal Foundation
560 W. Crossville Rd., Ste. 104
Roswell, Georgia 30075
khermann@southeasternlegal.org
choward@southeasternlegal.org
Attorneys for Proposed Amici

Joel Fleming
fleming.joel@gmail.com
Charging Party

Dated: New York, New York
July 29, 2020

/s/ Jamie Rucker
Jamie Rucker
Counsel for the General Counsel
National Labor Relations Board, Region 02
26 Federal Plaza, Room 3614
New York, NY 10278
Telephone: (212) 776-8642
Facsimile: (212) 264-2450
jamie.rucker@nlrb.gov