

NOTE

WORDS CAN BUST MY UNION: HUMOROUS THREATS AND *FDRLST MEDIA, LLC V. NLRB**

I. INTRODUCTION

“Just kidding!” Do these words offer comfort following a threat? “It was only a joke.” Do these words elicit forgiveness? “It’s funny because it’s true.” Would it be funny if it were not true? “Can’t you take a joke?” Should anyone have to laugh at being threatened? This Note argues that American jurisprudence should reflect the conventional wisdom that the answer to these questions is “no.”

In 1935, the National Labor Relations Act (NLRA), a statute whose stated purpose was to encourage collective bargaining, was signed into law.¹ The NLRA created an independent federal agency, the National Labor Relations Board (NLRB), to effectuate the statute.² The statute delegates to the NLRB the authority to prosecute unfair labor practices (ULPs)³ and to process petitions of unions seeking to represent employees for purposes of collective bargaining.⁴ To those ends, Section 8(a)(1) of the NLRA makes it a ULP for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” the NLRA.⁵ With the addition of Section 8(c) of the NLRA as part of the 1947 Taft-Hartley amendments,⁶ Congress limited Section 8(a)(1) violations only to employer expression containing the “threat of reprisal or force or promise of benefit.”⁷

* Josh Rosenberg Daneri, J.D. Candidate, Temple University Beasley School of Law, 2025; Senior Labor Management Relations Examiner, Region 4, National Labor Relations Board; Research Editor, *Temple Law Review*; Master of Industrial & Labor Relations, Cornell University; BA, New College of Florida. The views expressed in this article are solely my own and do not represent the views of the National Labor Relations Board, its General Counsel, or the United States government. I thank Professor Craig Green and the editors at *Temple Law Review* for their support and feedback.

1. 29 U.S.C. § 151 (“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”); James A. Gross, *The NLRB: Then and Now*, 26 A.B.A. J. LAB. & EMP. L. 213, 213 (2011).

2. 29 U.S.C. § 153.

3. *Id.* § 158.

4. *Id.* § 159.

5. *Id.* § 158(a)(1).

6. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

7. See § 158(a)(1), (c).

A court's interpretation of Section 8(a)(1) is as relevant today as it was in 1935. Since the summer of 2021, workers at 642 Starbucks locations in the United States have organized campaigns that resulted in unions winning 389 NLRB elections.⁸ NLRB General Counsel Jennifer Abruzzo has filed over twenty complaints against Starbucks for its ULPs during that organizing campaign.⁹ In one case, the Starbucks CEO made statements that likely violate Section 8(a)(1) of the NLRA.¹⁰ Section 8(a)(1) threats have also been lodged against the CEO of Amazon,¹¹ which since 2021 has undergone a wave of union organizing.¹² In fiscal year 2022, the NLRB saw a 53% increase in union election petitions (the highest single-year increase since 2016),¹³ and in 2023, the number of unionized employees in the United States rose by 191,000 since fiscal year 2022.¹⁴ Accordingly, the interpretation and application of Section 8(a)(1) of the NLRA is not a mere academic endeavor rooted in a bygone era.

Since at least 1953, employers accused of violating Section 8(a)(1) of the NLRA have been raising Section 8(c) defenses on the grounds that the expression was made in a "bantering" tone.¹⁵ In *Monarch Foundry Co.*,¹⁶ the NLRB held that although a

8. *Starbucks Unionization Tracker*, LAW 360, <https://www.law360.com/employment-authority/starbucks-tracker> [https://perma.cc/7RKX-88S3] (last visited Apr. 10, 2024).

9. Dee-Ann Durbin, *Labor Board Files Complaint Against Starbucks for Withholding Raises from Unionized Stores*, PBS (Aug. 25, 2022, 7:29 PM EST), <https://www.pbs.org/newshour/economy/labor-board-files-complaint-against-starbucks-for-withholding-raises-from-unionized-stores> [https://perma.cc/87P7-8ADH]; Kate Rogers, *Starbucks Hit with Sweeping Labor Complaint Including Over 200 Alleged Violations*, CNBC (May 6, 2022, 7:46 PM EDT), <https://www.cnbc.com/2022/05/06/starbucks-accused-of-more-than-200-labor-violations-in-nlrb-complaint.html> [https://perma.cc/6N9T-4LVH].

10. See Robert Iafolla, *Starbucks CEO's Anti-Union Comments Straddle Line of Legality*, BLOOMBERG L. (June 14, 2022, 11:38 AM), <https://news.bloomberglaw.com/daily-labor-report/starbucks-ceos-anti-union-comments-straddle-line-of-legality> [https://perma.cc/S59R-9XGY].

11. See Grace Kay, *Amazon CEO Says Workers Are 'Better Off' Without a Union and the Company's Injury Rate Is 'Misunderstood'*, BUS. INSIDER (Apr. 14, 2022, 12:46 PM), <https://www.businessinsider.com/amazon-ceo-andy-jassy-says-workers-better-off-without-union-2022-4> [https://perma.cc/G5S4-XFTK].

12. Noam Scheiber & Karen Weise, *Amazon Labor Union, with Renewed Momentum, Faces Next Test*, N.Y. TIMES (Oct. 11, 2022), <https://www.nytimes.com/2022/10/11/business/economy/amazon-labor-union.html> [https://perma.cc/7LZW-QKVY].

13. *Election Petitions up 53%, Board Continues To Reduce Case Processing Time in FY22*, NLRB (Oct. 6, 2022), <https://www.nlrb.gov/news-outreach/news-story/election-petitions-up-53-board-continues-to-reduce-case-processing-time-in> [https://perma.cc/WMY8-Z2SA].

14. *Economic News Release: Union Members Summary*, U.S. Bureau of Lab. Stats (Jan. 23, 2024), <https://www.bls.gov/news.release/union2.nr0.htm> [https://perma.cc/5JQ9-UW4T].

15. E.g., *Monarch Foundry Co.*, 106 N.L.R.B. 377, 378, 382 (1953) ("Both Capet and Beck testified that the foregoing questions were asked 'in a kidding way.' Ellis Johns admitted that he asked employees on more than one occasion if they were going to the union meeting to get free chicken and beer, stating, however, that his only object was to 'kid' the employees.").

16. *Id.* In addition, the two following cases both cite to *Monarch Foundry: Com. Controls Corp.*, 118 N.L.R.B. 1344, 1350 (1957) ("Thus, despite the . . . pretense at banter, when it is related to his chagrin occasioned by Donaldson's and O'Neill's union activities and his warning to them that they were being watched, his statement that if he were free to do so he would discharge all employees wearing union buttons conveyed a clear threat . . ."), *enforced*, 258 F.2d 101 (2d Cir. 1958), and *A.P. Green Fire Brick Co.*, 140 N.L.R.B. 1067, 1071 (1963) ("To say, as he does, that on these occasions he was kidding or joking with his subordinates . . . does [not] constitute a defense unless it appears that the employees . . . understood that the threats were not made seriously. But the remarks were not understood by the employees to be jocular in nature . . . Moreover, a threat can be just as effective when made in a bantering tone." (citations omitted)).

supervisor's questions about an employee's union proclivities were "asked in a bantering tone," they still violated Section 8(a)(1) because "[i]nterrogation may be just as effective an invasion of the rights protected by Section 7 of the Act when it is conducted under the guise of an exchange of pleasantries."¹⁷ Nonetheless, courts were sometimes receptive to a defense that the questioning was meant to be humorous.¹⁸ By 1977, though, in *Ethyl Corp.*, the NLRB broadened the *Monarch Foundry* rule beyond just interrogations: "[T]he unlawful nature of a statement is not blunted merely because interrogations of, warnings to, or disparaging statements about union adherents are accompanied by laughter or made in an offhand humorous way."¹⁹ Since that decision, circuit courts reviewing appeals from NLRB decisions have waffled on this issue and have not always deferred to the Board's *Ethyl Corp.* rule.²⁰

On June 6, 2019, media outlets reported that unionized employees of Vox Media engaged in a walkout.²¹ That day, Ben Domenech, the publisher of *The Federalist* (a conservative online magazine and podcast not associated with the Federalist Society),²² publicly posted from his personal Twitter account: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine."²³ In 2020, an NLRB Administrative Law Judge (ALJ) found that the post violated Section 8(a)(1) of the NLRA, despite Domenech's defense that it was made in jest.²⁴ On appeal, the NLRB affirmed the

17. *Monarch Foundry Co.*, 106 N.L.R.B. at 378 (rejecting defense that unlawful interrogation was just "kidding").

18. *E.g.*, *Food Store Emps. Union, Local 347 v. NLRB*, 422 F.2d 685, 692 (D.C. Cir. 1969) ("We also find no reason to tamper with the conclusion . . . that certain remarks made to an employee by a supervisor accusing her of friendship with the union organizer were made in jest and did not violate the [NLRA].").

19. 231 N.L.R.B. 431, 434 (1977) (citing *Lucy Ellen Candy Div. of F & F Lab'ys, Inc.*, 204 N.L.R.B. 121, 122 (1973), *enforced*, 517 F.2d 551 (7th Cir. 1975)). While *Ethyl Corp.* has never been cited by circuit courts for this proposition, the proposition nonetheless remains good law. *See, e.g.*, *Cadillac of Naperville, Inc.*, 368 N.L.R.B. No. 3, slip op. at 17, 2018-2019 NLRB Dec. (CCH) ¶ 16,545 (June 12, 2019) (first citing *Electri-Flex Co.*, 238 N.L.R.B. 713, 716 (1978), *enforced*, 624 F.2d 1103 (7th Cir. 1979); and then citing *Baker Mach. Co.*, 184 N.L.R.B. 358, 361 (1970)), *enforced in part*, 14 F.4th 703 (D.C. Cir. 2021) (*per curiam*).

20. *Compare Fed.-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1253 (5th Cir. 1978) (dismissing Section 8(a)(1) violation because foreman "was merely having fun in responding to what is known in common parlance as 'kidding' and 'horseplay' by the employees"), with *Dow Chem. Co., Texas Div. v. NLRB*, 660 F.2d 637, 651 (5th Cir. 1981) ("That neither Hernandez nor Gary said they felt coerced, and that the question was admittedly put and received in a humorous tone, indicate its noncoercive nature. The record lacks substantial evidence to support a finding that Hargrove's question constituted coercive or unlawful interrogation.").

21. *FDRLST Media, LLC (FDRLST I)*, 370 N.L.R.B. No. 49, slip op. at 4, 2020-21 NLRB Dec. (CCH) ¶ 16,776 (Nov. 24, 2020), *vacated*, 35 F.4th 108 (3d Cir. 2022). A walkout constitutes protected concerted activity under Section 7 of the NLRA, even if employees have no union and do not make an express demand upon the employer. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

22. *See Ben Domenech, Introducing The Federalist*, *THE FEDERALIST* (Sept. 18, 2013), <https://thefederalist.com/2013/09/18/introducing-the-federalist/> [<https://perma.cc/P9C7-MCGE>].

23. Ben Domenech, (@bdomenech), TWITTER (June 6, 2019, 11:39 PM), <https://twitter.com/bdomenech/status/1136839955068534784> [<https://perma.cc/S9HY-MPYS>]; *FDRLST I*, 370 N.L.R.B. No. 49, slip op. at 3. This content was posted ("tweeted") to the social media website, Twitter, which became X in July 2023. *See Ryan Mac & Tiffany Hsu, From Twitter to X: Elon Musk Begins Erasing an Iconic Internet Brand*, *N.Y. TIMES* (July 24, 2023), <https://www.nytimes.com/2023/07/24/technology/twitter-x-elon-musk.html> [<https://perma.cc/AQ4J-SFXX>].

24. *FDRLST I*, 370 N.L.R.B. No. 49, slip op. at 5.

judge's order.²⁵ In 2022, the Third Circuit Court of Appeals set aside the order, explaining that "by failing to consider the tweet in context, [the NLRB] misconstrued a facetious remark as a true threat."²⁶

This Note argues that the *FDRLST II* opinion cannot be squared with NLRB law establishing that humor or jest does not make lawful an otherwise unlawful Section 8(a)(1) statement.²⁷ The Third Circuit panel engaged in a novel reading of longstanding Supreme Court jurisprudence and exaggerated the First Amendment concerns posed by the post.²⁸ The court should have affirmed the NLRB decision. Additionally, the court displayed emotional insensitivity by rendering an otherwise threatening statement lawful because of an allegedly humorous motive.²⁹

Section II of this Note provides the facts and procedural history of the *FDRLST I* opinion, beginning in Part II.A with a summary of the NLRB's administrative procedure. Section III traces the relevant legal history. Part III.A discusses the evolution of Section 8(a)(1) law generally, and Parts III.B and III.C focus specifically on employers' humor defenses. Part III.D discusses the NLRB's nonacquiescence policy, the history of courts' deference to NLRB decisions, and courts' recent trend toward mistrust of administrative agencies. Section IV explains the Third Circuit's legal analysis in *FDRLST II* in detail. Section V offers a critique of the court's opinion, with a focus on Supreme Court jurisprudence and academic literature on emotional intelligence. Ultimately, this Note argues that despite contemporary cynicism about the political biases of jurists, the NLRB's decision in *FDRLST I* represents an exemplary manifestation of administrative expertise insulated from partisan overreach.

II. FACTS AND PROCEDURAL HISTORY

A. NLRB Administrative Procedure

Section 10(b) of the NLRA imposes a six-month statute of limitations for charges to be filed with the NLRB.³⁰ Any individual or organization may file such a charge,³¹ often a single-page document stating the section of the NLRA that was violated and briefly describing the alleged unlawful conduct or ULP.³² The location of the affected

25. *Id.* slip op. at 1.

26. *FDRLST Media, LLC v. NLRB (FDRLST II)*, 35 F.4th 108, 127 (3d Cir. 2022).

27. *See, e.g., Solvay Iron Works, Inc.*, 341 N.L.R.B. 208, 216 (2004).

28. *FDRLST II*, 35 F.4th at 126–27.

29. *See supra* Part V.C.

30. 29 U.S.C. § 160(b).

31. NLRB, NLRB CASEHANDLING MANUAL, PART 1, UNFAIR LABOR PRACTICE PROCEEDINGS § 10018.2 (2023) [hereinafter NLRB CASEHANDLING MANUAL], <https://www.nlr.gov/sites/default/files/attachments/pages/node-174/ulp-manual-december2023.pdf> [<https://perma.cc/Z4AA-WREB>]; *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17–18 (1943) ("Senator Wagner, sponsor of the [NLRA], strongly objected to [standing requirements] . . . [because] it was often not prudent for the workman himself to make a complaint against his employer" (quoting *Hearings on S. 1958 Before the S. Comm. on Educ. & Lab.*, 74th Cong. 430–32 (1935))).

32. NLRB CASEHANDLING MANUAL, *supra* note 31, §§ 10018.2, 10020; NLRB, FORM NLRB-501—CHARGE AGAINST EMPLOYER, https://www.nlr.gov/sites/default/files/attachments/pages/node-195/501_3-21.pdf [<https://perma.cc/5HXR-RW39>] (last visited Apr. 10, 2024).

employees determines which of the twenty-six regional offices will process the charge.³³ Upon receipt by a regional office, the charge is docketed and assigned to an NLRB agent for investigation.³⁴ If the regional director, the highest-ranking official in a regional office, upon concluding the investigation, finds sufficient evidence to prove the allegations in the charge, the director will attempt to resolve the case with an informal settlement agreement.³⁵ Absent settlement, the regional office issues a complaint for a hearing before an NLRB ALJ.³⁶ When a complaint is issued, the NLRB's General Counsel becomes the complainant.³⁷ Thereafter, the General Counsel acts in the public interest and not strictly in the interest of the charging party.³⁸ The parties may appeal the ALJ decision by filing exceptions with the Board,³⁹ a quasi-judicial panel appointed by the President of the United States with the advice and consent of the Senate.⁴⁰ Unlike a regular court order, Board orders are not self-enforcing and must be appealed to a circuit court of appeals for enforcement.⁴¹ "Any person aggrieved by a final order of the Board" may also request review in a circuit court where the ULP occurred or in the D.C. Circuit.⁴²

B. Facts

On June 6, 2019, in response to media outlet reports that unionized employees of Vox Media engaged in a walkout,⁴³ Ben Domenech publicly posted from his *personal* social media account: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine."⁴⁴ At least one FDRLST Media ("FDRLST") employee viewed the post.⁴⁵

On June 7, 2019, Joel Fleming, a Massachusetts resident who was never employed by FDRLST, filed a charge in the NLRB's Manhattan regional office against FDRLST.⁴⁶ The charge alleged that Domenech's social media post violated Section 8(a)(1) of the NLRA.⁴⁷ Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights

33. NLRB CASEHANDLING MANUAL, *supra* note 31, § 10018.3.

34. *Id.* § 10022.

35. *Id.* § 10126.2.

36. *Id.* § 10268; 29 C.F.R. § 102.15 (2024).

37. NLRB CASEHANDLING MANUAL, *supra* note 31, § 10260.

38. *Indep. Stave Co.*, 287 NLRB 740, 741 (1987) ("[I]t is well settled that 'the Board's power to prevent unfair labor practices is exclusive, and that its function is to be performed in the public interest and not in vindication of private rights . . .'" (quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957))).

39. 29 C.F.R. § 102.46(e) (2024).

40. 29 U.S.C. § 153.

41. *Id.* § 160(e) ("The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order . . .").

42. *Id.* § 160(f).

43. *FDRLST I*, 370 N.L.R.B. No. 49, slip op. at 4, 2020-21 NLRB Dec. (CCH) ¶ 16,776 (Nov. 24, 2020), *vacated*, 35 F.4th 108 (3d Cir. 2022).

44. *Id.* slip op. at 3.

45. *Id.*

46. *FDRLST II*, 35 F.4th 108, 113 (3d Cir. 2022).

47. *Id.*

guaranteed in section [7] of this title.”⁴⁸ Section 7 provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁴⁹

After an administrative investigation, the NLRB Regional Director in Manhattan found merit to Fleming’s charge and issued a complaint in September 2019.⁵⁰ In January 2020, FDRLST moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, and improper venue.⁵¹ On February 7, 2020, the NLRB Board (“the Board”) issued an order denying the motion.⁵² On February 10, 2020, the case was tried in New York City, where no witnesses were called.⁵³ Instead, the ALJ entered into the record three affidavits offered by FDRLST, including one from Domenech, over the General Counsel’s hearsay objections.⁵⁴ Two of the affidavits were from FDRLST employees who perceived the social media post to be funny.⁵⁵

C. *ALJ Decision*

In April 2020, the ALJ found that Domenech’s post violated Section 8(a)(1) of the NLRA because “salt mine” was an idiom “most often used to refer to tedious and laborious work [and] . . . a reasonable interpretation of the expression meant that working conditions would worsen or employee benefits would be jeopardized if employees attempted to unionize.”⁵⁶ The case was largely decided on a stipulated record.⁵⁷ The ALJ gave “little weight” to the two employee affidavits because it was unknown whether those employees were coerced into providing such statements.⁵⁸ Moreover, the ALJ asserted that “[a]ny subjective interpretation from an employee is not of any value to th[e] analysis,”⁵⁹ because “[t]he standard for assessing alleged 8(a)(1) threats is objective, not subjective.”⁶⁰ The ALJ rejected FDRLST’s humor⁶¹ and free-expression defenses because union-related communications containing a “threat of reprisal or force” are not protected under the First Amendment.⁶² Finally, because the post was directed

48. 29 U.S.C. § 158(a)(1).

49. *Id.* § 157.

50. *FDRLST I*, 370 N.L.R.B. No. 49, slip op. at 3.

51. *Id.* slip op. at 4 n.6. *The Federalist* is owned by FDRLST Media, LLC, a Delaware corporation with an office in Washington, D.C. *Id.* slip op. at 3.

52. *Id.* slip op. at 4 n.6.

53. *Id.* slip op. at 3 & n.3.

54. *Id.* slip op. at 4 & n.5.

55. *Id.* slip op. at 4.

56. *Id.* slip op. at 5.

57. *Id.* slip op. at 3–5.

58. *Id.* slip op. at 5 n.8.

59. *Id.* slip op. at 5 (first citing *Miami Sys. Corp.*, 320 N.L.R.B. 71, 71 n.4 (1995), *aff’d in part*, 111 F.3d 1284 (6th Cir. 1997); and then citing *Roemer Indus.*, 367 N.L.R.B. No. 133, slip op. at 6, 2018-19 NLRB Dec. (CCH) ¶ 16,541 (2019)).

60. *Id.* (citing *Multi-Ad Servs.*, 331 N.L.R.B. 1226, 1228 (2000), *enforced*, 255 F.3d 363 (7th Cir. 2001)).

61. *Id.* (citing *Champion Road Mach.*, 264 N.L.R.B. 927, 932 (1982)).

62. *Id.* slip op. at 5 & n.9 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)).

from a senior official to his employees, the ALJ found it irrelevant that the post might have contained Domenech's personal opinion or satire expressed through his personal (nonemployer) social media account.⁶³ FDRLST was ordered to cease and desist from Section 8(a)(1) conduct, to delete the post, and to post an official notice to employees describing the ULP.⁶⁴ FDRLST filed timely exceptions.⁶⁵

D. Board Decision

In November 2020, the Board essentially rubber-stamped the ALJ's decision.⁶⁶ Though the Board found merit to the General Counsel's hearsay objection to the entry of the affidavits, it held that "the judge's ruling was harmless error, as the affiants' statements regarding [FDRLST's] motive for its conduct and their subjective interpretations of it are irrelevant."⁶⁷ Thus, the Board found "that employees would reasonably view the message as expressing an intent to take swift action against any employee who tried to unionize the Respondent . . . [and that] the reference to sending that employee 'back to the salt mine' reasonably implied that the response would be adverse."⁶⁸ FDRLST petitioned the Third Circuit for review, and the Board cross-petitioned for enforcement of its order.⁶⁹

E. Third Circuit Opinion

In *FDRLST Media, LLC v. NLRB*,⁷⁰ the Third Circuit set aside the Board's order and denied its petition for enforcement.⁷¹ Though the court rejected FDRLST's procedural arguments,⁷² it nonetheless held that "[b]ecause the Board lost the forest for the trees by failing to consider the post in context, it misconstrued a facetious remark as a true threat."⁷³ Thus, the court found merit in FDRLST's contention that the post constituted protected free speech under both the NLRA and the First Amendment.⁷⁴ Upon the release of the court's opinion, Domenech released a statement: "My thanks to the Third Circuit for this decision, which honors and defends free speech and the right to tell a joke even if a humorless Twitter troll doesn't get it."⁷⁵

63. *Id.* slip op. at 6.

64. *Id.* slip op. at 6–7.

65. *Id.* slip op. at 1.

66. *Id.*

67. *Id.* slip op. at 1 n.3 (citing *Am. Freightways Co.*, 124 N.L.R.B. 146, 147 (1959)).

68. *Id.* slip op. at 1 n.4.

69. *FDRLST II*, 35 F.4th 108, 113 (3d Cir. 2022).

70. *Id.* at 108.

71. *Id.* at 113.

72. *Id.* at 115–19 (noting that the charging party had standing despite not being aggrieved and that, as a federal agency, NLRB was not constrained by Article III of the Constitution).

73. *Id.* at 127.

74. *Id.* at 125–27.

75. Robert Iafolla, *NLRB's 'Salt Mine' Tweet Decision Overturned by 3rd Cir.*, BLOOMBERG L.:DAILY LAB. REP. (May 20, 2022, 1:22 PM EDT), <https://news.bloomberglaw.com/daily-labor-report/nlrbs-salt-mine-tweet-decision-overturned-by-third-circuit> [<https://perma.cc/6JTD-REES>].

III. PRIOR LAW

A. Section 8(a)(1) of the NLRA

The NLRA was signed into law by President Franklin D. Roosevelt in 1935.⁷⁶ Section 1 of the Act provides that “encouraging the practice and procedure of collective bargaining,” along with certain rights repeated in Section 7, “is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce.”⁷⁷ Section 7 provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁷⁸ Section 8(a)(1) provides that “[i]t shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title.”⁷⁹

As is the case for nearly all ULPs, there are no fines, fees, penalties, or compensatory or punitive damages for a Section 8(a)(1) violation.⁸⁰ The remedy invariably involves ceasing and desisting from similar conduct and posting a notice explaining employees’ rights under the NLRA.⁸¹ Sometimes, the remedy also requires dissemination of that same notice via other means such as regular mail, email, the employer’s intranet, or text message.⁸² In extraordinary circumstances where the violations are pervasive (usually involving far more serious conduct than mere Section 8(a)(1) violations), the Board may require that the notice be published in a local media source⁸³ or that it be read aloud either by a responsible management official or a Board agent.⁸⁴

1. Employer Speech Under Section 8(c) of the NLRA

In the NLRA’s early years, Section 8(a)(1) was interpreted to prohibit most anti-union speech by employers to employees.⁸⁵ This included not only threats of discharge but also “urging, persuading, warning, threatening and surveillance” of union

76. Gross, *supra* note 1, at 213.

77. 29 U.S.C. § 151.

78. *Id.* § 157.

79. *Id.* § 158(a)(1).

80. *See id.* § 160(c) (limiting remedial power of the Board).

81. *See, e.g., FDRIST I*, 370 N.L.R.B. No. 49, slip op. at 1, 2020-21 NLRB Dec. (CCH) ¶ 16,776 (Nov. 24, 2020), *vacated*, 35 F.4th 108 (3d Cir. 2022).

82. *See, e.g., id.* (requiring electronic distribution of notice for Section 8(a)(1) violation).

83. *Mylan-Sparta Co.*, 70 N.L.R.B. 574, 582 (1946) (ordering publication of notice in local newspaper for violations of Sections 8(a)(1) and 8(a)(3), including discriminatory discharge of seven employees), *enforced*, 166 F.2d 485 (6th Cir. 1948).

84. *Carey Salt Co.*, 360 N.L.R.B. 201, 202 (2014) (“The Respondent’s violations of the NLRA are sufficiently serious and widespread that the reading of the notice is necessary to enable employees to exercise their Section 7 rights free of coercion.”).

85. *See Heather Handkerchief Works, Inc.*, 47 N.L.R.B. 800, 812 (1943) (“The [NLRA] unconditionally prohibits employers from interfering with union activity.”).

activities.⁸⁶ Accordingly, employers violated Section 8(a)(1) for merely convening “captive audience” meetings in which employees were compelled to listen to anti-union propaganda during work hours.⁸⁷

In 1947, Congress passed the Taft-Hartley amendments, broadening the scope of the NLRA to cover ULPs committed by unions, rather than just those committed by employers.⁸⁸ The amendments included Section 8(c), which provides that “the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of [a ULP] . . . if such expression contains no threat of reprisal or force or promise of benefit.”⁸⁹ As detailed below, this radically altered the Board’s analysis of anti-union employer speech.

With the addition of Section 8(c), the Board rendered lawful the previously unlawful captive-audience meetings.⁹⁰ Thus, in the 1948 case *Babcock & Wilcox Co.*, the Board held that such a meeting, “[a]lthough expressive of the respondent’s antipathy toward the [u]nion, the conduct[,] . . . [did] not contain any threat of reprisal or force or promise of benefit and [wa]s therefore protected by the guaranty of the free speech amendment.”⁹¹ Since then, captive-audience meetings have become a fixture in union-organizing campaigns.⁹² The prevalence of lawful, anti-union speech by employers complicated the Board’s determination of whether such speech crossed the line into Section 8(a)(1) conduct.⁹³ Sometimes employers would “narrowly tread[] the dividing line between right and wrong,” causing the Board to find most of a given speech protected by Section 8(c), while finding 8(a)(1) violations for “step[ping] over the line into the forbidden area.”⁹⁴

86. *Pa. Greyhound Lines, Inc.*, 1 N.L.R.B. 1, 48 (1935), *enforced in part, denied in part*, 91 F.2d 178 (3d Cir. 1938), *rev’d*, 303 U.S. 261 (1938).

87. *Clark Bros. Co.*, 70 N.L.R.B. 802, 805 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).

88. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

89. 29 U.S.C. § 158(c).

90. *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578 (1948).

91. *Id.*

92. JOHN J. LAWLER, UNIONIZATION AND DEUNIONIZATION: STRATEGY, TACTICS, AND OUTCOMES 145 (1990) (study of over 200 employers finding that 67% of them convened captive-audience meetings); Kate Bronfenbrenner & Dorian Warren, *The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence* 6 (ISERP Working Paper Series 2011.01, 2011), <https://academiccommons.columbia.edu/doi/10.7916/D8W38452> [<https://perma.cc/MZ2P-RSGK>] (sample of 1,000 NLRB representation elections from 1999–2003 establishing that employees were required to attend captive-audience meetings in 89% of campaigns).

93. *Compare* *Fontaine Converting Works, Inc.*, 77 N.L.R.B. 1386, 1387, 1396 (1948) (reversing Trial Examiner’s finding of Section 8(a)(1) violations for assistant foreman’s statements that employees “would be sorry” for having brought the union into the plant, and that the plant would never have a union), *with* *Charlotte Union Bus Station, Inc.*, 135 N.L.R.B. 228, 229 (1962) (“Contrary to the Trial Examiner, we find that these systematic [interrogations of employees] interfered with, restrained, and coerced the employees in their right to engage in or refrain from engaging in union activity. The fact that the interrogation did not contain threats of reprisal or promises of benefit did not detract from its otherwise unlawful character.”).

94. *Am. Can Co.*, 157 N.L.R.B. 167, 169 (1966) (“While we agree with the Trial Examiner that the letter and speeches were privileged under Section 8(c), we do not agree that the paragraph in its March 1 notice

2. Section 8(a)(1) and Objectable Election Conduct

Section 9(a) of the NLRA grants the Board the power to administer a process through which private-sector employees become unionized via secret ballot election.⁹⁵ A union may file a petition to represent employees of a given workplace, and Board agents set up an election in which employees cast ballots indicating whether they wish to be represented by the union for purposes of collective bargaining.⁹⁶ In administering such elections, the Board strives to maintain “laboratory conditions” to preserve employees’ Section 7 rights and freedom of choice.⁹⁷ To that end, parties may file objections to the conditions of a Board election, upon its conclusion.⁹⁸ Though the burden of proof is high,⁹⁹ the Board may set aside the results of an election if an employer’s conduct has “the tendency to interfere with employees’ freedom of choice.”¹⁰⁰

When evaluating election conduct, the finding of a Section 8(a)(1) violation automatically constitutes objectionable conduct “because the test of conduct which may interfere with the ‘laboratory conditions’ for an election is considerably more restrictive” for employers than that of a Section 8(a)(1) violation.¹⁰¹ The legal determination of objectionability, however, is separate from that of a Section 8(a)(1) violation. Depending on the procedural posture, the Board may apply one of these legal analyses but not the other.¹⁰² Thus, while objectionability and Section 8(a)(1) violations are separate lines of jurisprudence, their relatedness often results in cross-pollination, whereby Section

warning employees ‘that if a Union were to get in here, it would not work to your benefit, but in the long run, would itself operate to your serious harm’ was similarly privileged.”).

95. 29 U.S.C. § 159(a). The Board may also delegate to the regional directors this power under Section 9. *See id.* § 153(b).

96. *See id.* §§ 153(b), 159(a).

97. *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 126–27 (1948) (setting aside election where employer created “an atmosphere calculated to prevent a free and untrammelled choice by the employees”), *enforced*, 192 F.2d 504 (6th Cir. 1951).

98. 29 C.F.R. § 102.69(a)(8) (2024).

99. *Lockheed Martin Skunk Works*, 331 N.L.R.B. 852, 854 (2000) (“There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” (quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991))).

100. *Cambridge Tool & Mfg. Co.*, 316 N.L.R.B. 716, 716 (1995); *see also Pro. Transp., Inc.*, 370 N.L.R.B. No. 132, slip op. at 4 n.14 (June 9, 2021) (articulating the nine-factor test for setting aside the results of an election from *Taylor Wharton Div. Harsco Corp.*, 336 N.L.R.B. 157, 158 (2001)).

101. *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 1786–87 (1962). The NLRB specified that elections should happen under “laboratory conditions” in *Gen. Shoe Corp.*, 77 N.L.R.B. at 127 (1948) (“In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.”), a test which has since been widely adopted by the circuit courts. *See, e.g., Laurel Baye Healthcare of Lake Lanier, LLC v. NLRB*, 209 F. App’x 345, 348 (4th Cir. 2006); *M & M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567, 1573 (11th Cir. 1987).

102. *Compare Warren Manor Nursing Home, Inc.*, 329 N.L.R.B. 3, 3 (1999) (directing rerun election because of objectionable conduct in failing to inform employees of their rights to return to work after a strike), *with Care One at Madison Ave., LLC*, 361 N.L.R.B. 1462, 1472 (2014) *enforced*, 832 F.3d 351 (D.C. Cir. 2016) (finding Section 8(a)(1) violation for substantially similar conduct).

8(a)(1) law is cited to support objections law and vice versa.¹⁰³ A key difference in these lines of jurisprudence, however, is that “Congress specifically limited Section 8(c) to the adversary proceedings involved in [ULP] cases and it has no application to representation cases,” even though the First Amendment must still be considered.¹⁰⁴

In *NLRB v. Gissel Packing Co.*, a consolidated objections and ULP case, the Supreme Court clarified the parameters of Section 8(a)(1) vis-à-vis Section 8(c).¹⁰⁵ The Court held that Section 8(c) of the NLRA “merely implements the First Amendment,” but that this free speech right had limits.¹⁰⁶ In balancing these two sections of the NLRA, one “must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.”¹⁰⁷ As such, “an employer is free to communicate to his employees any of his general views . . . [and] may even make a prediction as to the precise effects he believes unionization will have on his company,” including facility closure.¹⁰⁸ However, “the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant.”¹⁰⁹ The Court rejected the employer’s argument that the NLRB wielded too much discretion over this blurry standard by violating employers’ First Amendment rights.¹¹⁰ Rather, an employer “can easily make his views known without engaging in ‘brinkmanship’. . . [and can] avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.”¹¹¹

Even with Supreme Court guidance on the issue, it remained challenging to define the proper balance between Sections 8(a)(1) and 8(c).¹¹² At one extreme were situations where an employer was merely communicating an anti-union opinion that constituted free speech,¹¹³ and at another were the instances in which an explicit threat of reprisal

103. See, e.g., *Care One*, 361 N.L.R.B. at 1473 (finding Section 8(a)(1) violation but citing to an objections case, *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369–70 (1968), enforced, 414 F.2d 99 (7th Cir. 1969)).

104. *Dal-Tex Optical Co.*, 137 N.L.R.B. at 1787 n.11.

105. 395 U.S. 575, 617–18 (1969).

106. *Id.* (citing U.S. CONST. amend. I).

107. *Id.* at 617.

108. *Id.* at 618.

109. *Id.*

110. *Id.* at 620.

111. *Id.* (citing *Wausau Steel Corp. v. NLRB*, 377 F.2d 369, 372 (7th Cir. 1967)); see also *Chamber of Com. v. Brown*, 554 U.S. 60, 67–68 (2008) (holding that Section 8(c) evinced “congressional intent to encourage free debate on issues dividing labor and management” and thus did not regulate uncoercive speech (quoting *Linn v. Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 (1966))).

112. See, e.g., *Georgetown Dress Corp.*, 201 N.L.R.B. 102, 115 (1973) (“Although the task of sifting the permissible to ascertain whether it harbors the impermissible in the area of allowable preelection expression under the [NLRA] may be onerous and even difficult, nonetheless it must be essayed if the [NLRA’s] prime purposes are to be fulfilled.”).

113. See, e.g., *KBM Elecs., Inc.*, 218 N.L.R.B. 1352, 1359 (1975) (“Riibner stated that he did not want a union at Carsounds. Since this is an expression of opinion protected by Section 8(c) of the [NLRA], I find that is not forbidden by Section 8(a)(1) thereof.”).

rendered a loss of free speech protection.¹¹⁴ Then there was everything in the middle, where reasonable minds may disagree.¹¹⁵ The Board would sometimes find that an employer lost Section 8(c) privilege because of an *implied* threat of reprisal.¹¹⁶ In other contexts, speech might otherwise seem within the bounds of Section 8(c) but violate Section 8(a)(1) for different reasons.¹¹⁷ For example, coercive interrogation of employees as to their Section 7 activities remained unlawful, as did the promulgation of overbroad no-solicitation rules.¹¹⁸ This sometimes required granular analyses of every utterance by a witness to determine which speech was unlawful and which was Section 8(c) protected.¹¹⁹

Perhaps searching for a bright-line rule amid such ambiguity in the objections context, the Board held, in 1977, that it would no longer probe into the truth or falsity of statements made during union campaigns.¹²⁰ Less than two years later, the Board overruled its holding.¹²¹ By 1982, in *Midland National Life Insurance Co.*, the Board had returned to the 1977 standard.¹²²

In *Midland*, the Board declined to set aside an election where the employer had distributed a document containing false statements about a union.¹²³ The Board emphasized the “ill effects” of the prior rule that would have found such documents

114. See, e.g., *Diamond Standard Fuel Corp.*, 179 N.L.R.B. 702, 703 (1969) (finding a violation where the employer stated, “some wise guys were trying to get the Union in the shop,” that he would “fire everybody before he would let the Union in,” and “sell the trucks rather than deal with the Union”), *enforced*, 437 F.2d 1163 (1st Cir. 1971).

115. See, e.g., *Kawasaki Motors Mfg. Corp.*, 280 N.L.R.B. 491, 492 (1986) (“Contrary to the [ALJ], who found the combination of the videotape and the speeches unlawful based on the effect and timing of both together, we find that neither the statements of the Respondent’s officials nor the showing of the videotape at the employee meetings constituted a violation of Section 8(a)(1). Rather, the statements and the videotape were expository in nature and constituted speech protected by Section 8(c) of the [NLRA].”), *aff’d sub nom.* *Int’l Union, United Auto v. NLRB*, 834 F.2d 816 (9th Cir. 1987).

116. See, e.g., *Int’l Union of Elevator Constructors Local Union No. 8*, 248 N.L.R.B. 951, 951 (1980) (“Respondent argues that the Board incorrectly found that the mere existence of a rule requiring the payment of fines and assessments before dues constitutes an implicit threat to the employment status of an employee who has not paid a fine or an assessment. Respondent argues that some actual threat to the employee’s employment status is required. We find no merit in Respondent’s motion . . .”), *enforced*, 665 F.2d 376 (D.C. Cir. 1981); *Mademoiselle Knitwear, Inc.*, 297 N.L.R.B. 272, 277 (1989) (“Newhouse told employees about a fire in Puerto Rico that had killed many people and had been caused by a labor dispute with another union. . . . [I]n doing so, he impliedly linked that event with Local 155’s organizing activity outside the plant, and explicitly stated that if there was a danger of anyone being hurt he would shut down operations.”).

117. See, e.g., *Paceco*, 237 N.L.R.B. 399, 399 (1978) (finding Section 8(a)(1) violations for interrogation of employees’ union proclivities and maintaining an overbroad no-solicitation rule), *vacated in part*, 601 F.2d 180 (5th Cir. 1979).

118. See, e.g., *id.* at 401. See, e.g., *Dresser Indus., Inc.*, 242 N.L.R.B. 74 (1979) (interrogations); *Pepsi-Cola Bottling Co.*, 211 N.L.R.B. 870 (1974) (no-solicitation rule).

119. See, e.g., *KBM Elecs., Inc.*, 218 N.L.R.B. 1352, 1359–60 (1975) (analyzing eleven statements for potential Section 8(a)(1) violations and finding three to be Section 8(c) protected).

120. *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311, 1311 (1977) (overruling *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962)).

121. *Gen. Knit of Cal., Inc.*, 239 N.L.R.B. 619 (1978) (overruling *Shopping Kart Food Mkt.*, 228 N.L.R.B. 1311), *overruled by Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127 (1982), *enforced*, 621 F.2d 901 (8th Cir. 1980).

122. 263 N.L.R.B. at 131–33 (overruling *Gen. Knit of Cal., Inc.*, 239 N.L.R.B. 619).

123. *Id.* at 129.

objectionable, including “extensive analysis of campaign propaganda, restriction of free speech, variance in application as between the Board and the courts, increasing litigation, and a resulting decrease in the finality of election results.”¹²⁴ The Board created one exception: “where a party has used forged documents which render the voters unable to recognize propaganda for what it is.”¹²⁵ The dissent accused the majority of having “overstepped the bounds of tolerability and substituted an ultra-permissive standard that places a premium on the well-timed use of deception, trickery, and fraud.”¹²⁶ But while *Midland* remains good law, the Board does not necessarily apply it to all potentially coercive statements during an organizing campaign.¹²⁷

Despite the foregoing thorny issues, Board adjudication of Section 8(a)(1) allegations tends to be straightforward, often involving a rubber stamp of the ALJ decision in a footnote.¹²⁸ ALJs often cite to longstanding case law for the proposition that the Board applies an objective standard, examining the totality of the circumstances.¹²⁹ Sometimes, the ALJ will add that the ultimate inquiry is whether the remark would reasonably tend to interfere with the free exercise of employee rights—irrespective of the employer’s motivation behind the remark or the success or failure of any attempted coercion.¹³⁰

B. NLRB & Circuit Court Decisions with Humor Defenses

The applicability of the Section 8(c) privilege is further complicated when an otherwise threatening statement is made in a tone or context that might be perceived as humorous.¹³¹ In the approximately thirty cases where circuit courts have evaluated such

124. *Id.* at 131 (quoting *Shopping Kart Food Mkt.*, 228 N.L.R.B. at 1312).

125. *Id.* at 133.

126. *Id.* (dissenting opinion).

127. See *Didlake, Inc.*, 367 N.L.R.B. No. 125, slip op. at 5–7 (2019) (dissenting opinion) (discussing *Midland* rule and when “mere misstatements” of the law become coercive); *Triple E Produce Corp. v. Agric. Lab. Relations Bd.*, 671 P.2d 1260 (1983). Board Members Ring and Kaplan have signaled that they would be open to reconsidering *Midland* in a future case. *St. Luke’s Hosp.*, 368 N.L.R.B. No. 49, slip op. at 1 n.1, 2019 WL 3935202 (Aug. 19, 2019).

128. See, e.g., *Cnty. Counseling & Mentoring Servs., Inc.*, 371 N.L.R.B. No. 39, slip op. at 1 n.1, 2022-23 NLRB Dec. (CCH) ¶ 16,861 (Dec. 8, 2021).

129. See, for example, the following ALJ opinions, all citing *Mediplex of Danbury*, 314 N.L.R.B. 470, 471 (1994). *Starbucks Corp.*, 10-CA-298974, 2023 WL 6379675 (N.L.R.B. Sept. 29, 2023); *Starbucks Corp.*, 31-CA-299257, 2023 WL 3478211 (N.L.R.B. May 12, 2023); *N. Tex. Inv. Grp.*, 371 N.L.R.B. No. 122, slip op. at 13, 2022 WL 3445200 (Aug. 11, 2022).

130. See, e.g., *Cnty. Counseling*, 371 N.L.R.B. No. 39, slip op. at 11 (citing, *inter alia*, *Midwest Terminals of Toledo Int’l, Inc.*, 365 N.L.R.B. No. 158, slip op. at 21, 2016-17 NLRB Dec. (CCH) ¶ 16,348 (Dec. 15, 2017), *enforced*, 783 F. App’x 1 (D.C. Cir. 2019)).

131. Compare *Great E. Color Lithographic Corp.*, 133 N.L.R.B. 911, 918–19 (1961) (“I do not believe his belated explanation, that the statement ‘need he discharge further union members’ was made in jest, can adequately serve to dispel the naturally coercive effect upon his listeners of such a statement by the highest authority in the plant in which they worked”), *enforced*, 309 F.2d 352 (2d Cir. 1962), with *Cont’l Can Co.*, 148 N.L.R.B. 640, 645 (1964) (affirming the ALJ’s dismissal of complaint where “remarks were made during a friendly conversation with a group of employees who were accustomed to ‘kid’” with their supervisor).

defenses in a parallel context,¹³² with few exceptions¹³³ the Board has generally rejected the defense.¹³⁴ The earliest such case was *Monarch Foundry Co.*, in 1953, when the Board held that questions about an employee’s union proclivities “asked in a bantering tone” still violated Section 8(a)(1), because “[i]nterrogation may be just as effective an invasion of the rights protected by Section 7 of the Act when it is conducted under the guise of an exchange of pleasantries.”¹³⁵

Table 1

Key	
ER: Employer	ULP: Section 8(a)(1) or 8(b)(1)(A) allegation
U: Union	OBJ: Objectionable conduct allegation against a party during election campaign (including employees alleged to be agents of a union)
ALJ: Administrative Law Judge	RD: Regional Director
TE: Trial Examiner	HO: Hearing Officer
*:	Humor defense was not mentioned in opinion

Case	Type	Humor Defense Accepted?			Finding Aff'd in Rel. Pt.
		ALJ/TE/RD/HO	Board	Circuit	
NLRB v. Marval Poultry Co., 292 F.2d	ER ULP	No	No	No	Yes

132. See Table 1 for a listing of all circuit court opinions involving a humor, jest, or friendliness defense raised in either a Section 8(a)(1) context against an employer, a Section 8(b)(1)(A) context against a union, or against a party alleged of election misconduct warranting an election being set aside.

133. See, e.g., *Radio Kemetal Indus., Inc.*, 144 N.L.R.B. 546, 554 (1963) (“[The employee] admitted that it was done in a ‘kidding’ or ‘joking’ manner and that he was smiling at the time. . . . Although I realize that a threat can be concealed within a jest, it appears to have been too well buried in this instance to justify a conclusion that a threat was intended or should have been understood.”); *Food Store Emps. Union, Local 347*, 422 F.2d 685, 692 (D.C. Cir. 1969) (“We also find no reason to tamper with the conclusion of both the trial examiner and the Board that certain remarks made to an employee by a supervisor accusing her of friendship with the union organizer were made in jest and did not violate the [NLRA].”)

134. See *infra* Table 1.

135. 106 N.L.R.B. 377, 378 (1953) (rejecting humor defense that unlawful interrogation was just “kidding”). In addition, the following cases cite to *Monarch Foundry*: *Com. Controls Corp.*, 118 N.L.R.B. 1344, 1350 (1957), *enforced*, 258 F.2d 102 (2d Cir. 1958); *A.P. Green Fire Brick Co.*, 140 N.L.R.B. 1067, 1071 (1963), *enforced*, 326 F.2d 910 (8th Cir. 1964); *Jarva Inc.*, 235 N.L.R.B. 1047, 1051 (1978), *enforced*, 623 F.2d 483, 484 (6th Cir. 1980).

Case	Type	Humor Defense Accepted?			Finding Aff'd in Rel. Pt.
		ALJ/TE/RD/HO	Board	Circuit	
454, 454 (4th Cir. 1961).					
A.P. Green Fire Brick Co. v. NLRB, 326 F.2d 910, 914 (8th Cir. 1964).	ER ULP	No	No	No	Yes
Food Store Emp. Union, Local 347, 422 F.2d 685, 692 (D.C. Cir. 1969).	U ULP	Yes	Yes	Yes	Yes
Sw. Reg'l Joint Bd. v. NLRB, 441 F.2d 1027, 1033 (D.C. Cir. 1970).	U ULP	No	No	No	Yes
NLRB v. Bostik Div., USM Corp., 517 F.2d 971, 976 (6th Cir. 1975).	U OBJ	Yes	Yes	Yes	Yes
Fed.-Mogul Corp. v. NLRB, 566 F.2d 1245, 1253 (5th Cir. 1978).	ER ULP	No	No	Yes	No
NLRB v. Intertherm, Inc., 596 F.2d 267, 272–73 (8th Cir. 1979).	ER ULP	No	No	No	Yes
Methodist Home v. NLRB, 596 F.2d 1173, 1179–80 (4th Cir. 1979).	U OBJ	Yes	Yes	No	No
Stein Seal Co. v. NLRB, 605 F.2d 703, 706 (3d Cir. 1979).	ER ULP	Yes*	No*	No	Yes
NLRB v. Jarva Inc., 623 F.2d 483, 484 (6th Cir. 1980).	ER ULP	No	No	Yes	No
Seligman & Assocs., Inc. v. NLRB, 639 F.2d	ER ULP	No	No	No	Yes

Case	Type	Humor Defense Accepted?			Finding Aff'd in Rel. Pt.
		ALJ/TE/RD/HO	Board	Circuit	
307, 309 (6th Cir. 1981).					
Zeiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1011 (3d Cir. 1981).	U OBJ	No	Yes	No	No
Dow Chem. Co., Tex. Div. v. NLRB, 660 F.2d 637, 651 (5th Cir. 1981).	ER ULP	No*	No*	Yes	No
NLRB v. Keystone Pretzel Bakery, Inc., No. 81-2067, 1982 WL 20488, at *2-3 (3d Cir. 1982).	ER ULP	Yes	No	Yes	No
NLRB v. ARA Servs. Inc., No. 81-1701, 1982 WL 20490, at *6, *12 (3d Cir. 1982).	U OBJ	No	No	No	Yes
Worley Mills, Inc. v. NLRB, 685 F.2d 362, 368 (10th Cir. 1982).	U OBJ	No	No	No	Yes
NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 549-50 (6th Cir. 1984).	ER ULP	No	No	No	Yes
Van Dorn Plastic Mach. Co. v. NLRB, 736 F.2d 343, 351 (6th Cir. 1984).	ER ULP	No	No	No	Yes
Amalgamated Clothing and Textile Workers Union v. NLRB, 736 F.2d 1559, 1567 (D.C. Cir. 1984).	U OBJ	Yes	Yes	Yes	Yes
NLRB v. Int'l Union of Elec., Radio & Mach.	U ULP	No	No	No	Yes

Case	Type	Humor Defense Accepted?			Finding Aff'd in Rel. Pt.
		ALJ/TE/RD/HO	Board	Circuit	
Workers, Local 745, 759 F.2d 533, 534 (6th Cir. 1985).					
Revco D.S., Inc. (DC) v. NLRB, 830 F.2d 70, 72 (6th Cir. 1987).	U OBJ	Yes	Yes	No	No
Birmingham v. NLRB, 17 F.3d 393, 396 (9th Cir. 1994).	U ULP	No	No	No	Yes
NLRB v. Windemuller Elec., Inc., 34 F.3d 384, 392 (6th Cir. 1994).	ER ULP	No	No	Yes	No
NLRB v. Champion Laboratories, Inc., 99 F.3d 223, 229 (7th Cir. 1996).	ER ULP	No	No	Yes	No
Uniroyal Tech. Corp., Royalite Div. v. NLRB, 98 F.3d 993, 1003 (7th Cir. 1996).	U OBJ	Yes	Yes	Yes	Yes
Health Care & Ret. Corp. v. NLRB, 100 F.3d 950, slip op. at 3 (4th Cir. 1996).	U OBJ	Yes	Yes	Yes	Yes
NLRB v. Consol. Biscuit Co., 301 F. App'x 411, 436 (6th Cir. 2008).	ER ULP	No*	No*	No	Yes
ManorCare of Kingston PA, LLC v. NLRB, 823 F.3d 81, 88 (D.C. Cir. 2016).	U OBJ	No	Yes	No	No
Transit Connection, Inc. v. NLRB, 887 F.3d 1097, 1105 (11th Cir. 2018).	U OBJ	Yes	Yes	Yes	Yes

Case	Type	Humor Defense Accepted?			Finding Aff'd in Rel. Pt.
		ALJ/TE/RD/HO	Board	Circuit	
FDRLST Media, LLC v. NLRB, 35 F.4th 108, 121, 124–25 (3d Cir. 2022).	ER ULP	No	No	Yes	No

The earliest humor defense evaluated by a circuit court was in 1961, when the Fourth Circuit enforced a Board order finding numerous threats of discharge.¹³⁶ The court rejected the employer's defense that the statements were intended as mere "horseplay."¹³⁷ Moreover, the court suggested that it might have been permissible to infer that the statements constituted "horseplay," but that the Board's contrary findings were supported by the record.¹³⁸

In enforcing a Board order that rejected a humor defense, the Eighth Circuit remarked, in 1964, that "executives who threaten in jest run the risk that those subject to their power might take them in earnest and conclude the remarks to be coercive."¹³⁹ In that vein, in 1970, a D.C. Circuit majority found an interrogation of an employee's union preference to be unlawful despite the dissent emphasizing the employee's subjective testimony that she had taken the supervisor's conversation "as a joke."¹⁴⁰

In 1977, in *Ethyl Corp.*, the Board expressly set forth the now well-settled¹⁴¹ rule that the "unlawful effect of a statement is not blunted merely because interrogations of, warnings to, or disparaging statements about union adherents are accompanied by laughter or made in an offhand humorous way."¹⁴² As reflected in Table 1, the Board generally applied the *Ethyl Corp.* rule to employers' Section 8(a)(1) statements but did not apply the rule to unions or employees when evaluating objectionable election conduct. But the *Ethyl Corp.* rule never quite got a foothold in the appeals courts, and the case itself has never been cited by a court for the humor-defense proposition.¹⁴³ Thus, in 1978, the Fifth Circuit reversed the Board's rejection of a humor defense to a Section 8(a)(1) allegation, finding instead that the foreman "was merely having fun in responding

136. *NLRB v. Marval Poultry Co.*, 292 F.2d 454, 454 (4th Cir. 1961) (per curiam).

137. *Id.*

138. *Id.*

139. *A.P. Green Fire Brick Co.*, 326 F.2d at 914. *But see* *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 272–73 (8th Cir. 1979) (accepting Board's determination "[w]ith some misgiving" that "[t]he mere fact that there was laughter" did not preclude the finding of a Section 8(a)(1) violation).

140. *Sw. Reg'l Joint Bd. v. NLRB*, 441 F.2d 1027, 1033 (D.C. Cir. 1970).

141. 231 N.L.R.B. 431, 433–34 (1977); *see also* *Meisner Elec., Inc.*, 316 N.L.R.B. 597, 599 (1995) (quoting *Ethyl Corp.*, 231 N.L.R.B. at 433–34), *aff'd*, 83 F.3d 436 (11th Cir. 1996).

142. *See supra* note 19 and accompanying text.

143. *See supra* Table 1.

to what is known in common parlance as ‘kidding’ and ‘horseplay’ by the employees.”¹⁴⁴ In 1979, the Fourth Circuit rejected an employer’s humor defense that had been accepted by an NLRB regional director, but without citing to *Ethyl Corp.*¹⁴⁵

In the 1970s and 1980s, the Sixth Circuit was met with seven cases involving humor defenses in Section 8(a)(1) and objections cases.¹⁴⁶ In four of those cases, the court accepted a humor defense either by an employer or by a union.¹⁴⁷ In one case, the court reasoned that determinations of employees’ subjective reactions to the allegedly coercive remark are material to the analysis.¹⁴⁸ In the remaining three cases, the court agreed with the Board’s rejection of humor defenses.¹⁴⁹ In 1994, the court again accepted a humor defense, relying on unconventional considerations and stating:

Windemuller’s rueful reference to the sudden flood of union applications may not have been politically correct—there is not much laughter, one supposes, where political correctness holds sway—but his one-liner does seem to have had the virtue of being funny. It got a laugh. And there is no suggestion in the record that the little jest made by Mr. Windemuller in response to the question from the audience was anything other than spontaneous, unplanned, and unrehearsed.¹⁵⁰

Nonetheless, the Sixth Circuit thereafter claimed, at least nominally, to adhere to the general rule, that “even when [] a threat is made in a seemingly lighthearted fashion, it still rises to the level of coercive because, in reality, threatening comments are often

144. *Fed-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1253 (5th Cir. 1978). *But see* *Dow Chem. Co., Tex. Div. v. NLRB*, 660 F.2d 637, 651 (5th Cir. 1981).

145. *See* *Methodist Home v. NLRB*, 596 F.2d 1173, 1179 (4th Cir. 1979).

146. *NLRB v. Bostik Div., USM Corp.*, 517 F.2d 971, 973 (6th Cir. 1975); *NLRB v. Jarva Inc.*, 623 F.2d 483, 484 (6th Cir. 1980); *Seligman & Assocs., Inc. v. NLRB*, 639 F.2d 307, 309 (6th Cir. 1981); *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 549 (6th Cir. 1984); *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343, 350 (6th Cir. 1984), *overruled by* *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178 (6th Cir. 1988); *NLRB v. Int’l Union of Elec., Radio & Mach. Workers, Local 745*, 759 F.2d 533, 534 (6th Cir. 1985); *Revco D.S., Inc. v. NLRB*, 830 F.2d 70, 72 (6th Cir. 1987).

147. *See* *Bostik*, 517 F.2d at 973; *Jarva*, 623 F.2d at 484; *Int’l Union of Elec. Workers*, 759 F.2d at 534 (rejecting humor defense and finding violation of Section 8(b)(1)(A), which is analogous to Section 8(a)(1) but for unions who commit the same infraction); *Revco*, 830 F.2d at 72 (accepting humor defense that had been rejected by the Board based on a union official’s one-hundred-dollar bribe).

148. *Jarva*, 623 F.2d at 484 (“Based upon the record as a whole, we cannot accept the Board’s conclusion that these statements, admittedly made jokingly, are evidence of surveillance or interrogation. There is nothing threatening or coercive in the words themselves and the employees who heard, accepted them as part of a joking exchange.”).

149. *Seligman*, 639 F.2d at 309 (“[W]e find it irrelevant that she was friendly with the employees she spoke to and that she eventually married one of them. Section 8(a)(1) prohibits any conduct, friendly or not, which interferes with the free exercise by employees of their rights under the [NLRA].”); *Homemaker Shops*, 724 F.2d at 550 (“[T]hreatening or manipulative statements can, at times, be couched in ostensibly friendly, or even humorous, terms. The threat or manipulation remains nonetheless. The mere existence of friendly relations between a supervisor and an employee does not preclude a finding that the supervisor employed coercion violative of the [NLRA].”); *Van Dorn Plastic*, 736 F.2d at 351 (Contie, J., dissenting) (disagreeing with the majority opinion rejecting a humor defense and emphasizing that the remark was a joke and that the employee was not, in fact, intimidated), *overruled by* *Superior Coatings*, 839 F.2d 1178.

150. *NLRB v. Windemuller Elec., Inc.*, 34 F.3d 384, 392 (6th Cir. 1994).

couched in ostensibly friendly or even humorous terms.”¹⁵¹ Thus, in contexts where the employer claimed that it made a remark in a casual manner, but where there was no defense that the remark was *funny*, the court deferred to the Board’s findings of coercion.¹⁵²

In 1996 in *NLRB v. Champion Laboratories, Inc.*, the Seventh Circuit reversed the Board’s finding that an employer violated Section 8(a)(1) by telling employees at a car supplier, “I hope you guys are ready to pack up and move to Mexico.”¹⁵³ The statement was made after having sent employees a letter indicating that major manufacturers had been pressuring suppliers to move to Mexico.¹⁵⁴ The court found the ALJ’s reading of the testimony sloppy, and it noted that “[t]hreatening statements are not usually made in bantering terms.”¹⁵⁵ Judge Ripple dissented from that finding, noting that while the ALJ had the benefit of observing witness demeanor, the court relied only on a “cold record.”¹⁵⁶ As such, “[t]he pages of a typed transcript make it difficult, if not impossible, to differentiate between good-natured banter among workers and the sort of statement that, even if it be made in jest, threatens and intimidates the worker who is the object of the manager’s remark.”¹⁵⁷

C. Third Circuit Case Law Involving NLRB Humor Defenses

The Third Circuit initially rejected humor defenses, but later accepted them.¹⁵⁸ In 1979, it rejected an employer’s humor defense as “irrelevant [because] . . . [t]he relevant inquiry is not [the] intent but rather the coercive inferences which the employees could have drawn.”¹⁵⁹ In 1981, the court rejected a humor defense to “meaningful threats, having the obvious aim of coercing employees to vote for the union or otherwise suffer physical harm.”¹⁶⁰ Nonetheless, the court suggested that the humor defense may have passed muster had it contained evidentiary support.¹⁶¹

In 1982, the court accepted a humor defense, agreeing with the ALJ that a manager’s statement to an employee, “Here is your check, union steward,” was a mere

151. *V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 279 (6th Cir. 1999) (citing *Homemaker Shops*, 724 F.2d at 550).

152. *E.g.*, *NLRB v. Consol. Biscuit Co.*, 301 F. App’x 411, 436 (6th Cir. 2008).

153. *NLRB v. Champion Lab’ys, Inc.*, 99 F.3d 223, 226 (7th Cir. 1996).

154. *Id.* at 225.

155. *Id.* at 228–29.

156. *Id.* at 231 (Ripple, J., concurring in part and dissenting in part).

157. *Id.* The Sixth Circuit later agreed with Judge Ripple’s reasoning when an employer used *Champion* in its defense. *V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 279 (6th Cir. 1999).

158. *Compare Stein Seal Co. v. NLRB*, 605 F.2d 703, 706 (3d Cir. 1979) (finding remarks regarding missing fingertips coercive even if made jokingly), with *NLRB v. ARA Servs., Inc.*, No. 81-1701, 1982 WL 20490, at *6 n.6 (3d Cir. April 13, 1982) (finding remarks that union would be giving manager a birthday gift not objectionable because “made in jest”), *reh’g en banc granted and opinion vacated on other grounds*, 717 F.2d 57, 67 (3d Cir. 1983) (“Patently the facetious promise by the birthday girls is a trivial matter.”).

159. *Stein Seal*, 605 F.2d at 706.

160. *Zeiglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1011 (3d Cir. 1981).

161. *Id.* at 1010 (first citing *Methodist Home v. NLRB*, 596 F.2d 1173 (4th Cir. 1979); and then citing *NLRB v. Bostik Div., USM Corp.*, 517 F.2d 971 (6th Cir. 1975)).

“jocular remark.”¹⁶² There, the court found that the judge “was in a far better position than the Board to evaluate the incident,” which was “a trivial matter and should not have been elevated to the stature of an unfair labor practice.”¹⁶³ In support of that proposition, the court cited to *Eastern Engineering & Elevator Co. v. NLRB*, a case in which the court emphasized that ALJs, not the Board, are tasked with making credibility determinations, including those based on witness demeanor.¹⁶⁴ Also in 1982, the court found that a manager’s alleged promise of a gift was made in jest and thus did not constitute objectionable election conduct because of the “insubstantial and equivocal nature of the ‘promise’ reflected in [the manager’s] statement.”¹⁶⁵

D. NLRB’s Mixed Record of Success in Enforcement of Its Orders: Nonacquiescence and the Erosion of Deference to Administrative Agencies

The above potpourri prompts a reasonable question: Why do courts not simply defer to the administrative expertise of the NLRB and its longstanding *Ethyl Corp.* rule that rejects humor as a defense to Section 8(a)(1) conduct?¹⁶⁶ Indeed, the Supreme Court has recognized that agencies possess expertise worthy of respect¹⁶⁷ and that a court should defer to a Board decision whose reasoning is based on “substantial evidence”¹⁶⁸ within the meaning of the NLRA¹⁶⁹ and the Administrative Procedure Act.¹⁷⁰ In 1978, the Court even crafted an NLRB-specific deference rule in *Beth Israel Hospital v. NLRB*.¹⁷¹ There, the Court stated, “The rule which the [NLRB] adopts is judicially reviewable for consistency with the [NLRA], and for rationality, but if it satisfies those criteria, the [NLRB]’s application of the rule, if supported by substantial evidence on the record as a whole, must be enforced.”¹⁷²

Six years after *Beth Israel*, the Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, created a test for analyzing whether to defer to an agency’s

162. *NLRB v. Keystone Pretzel Bakery, Inc.*, No. 81-2067, 1982 WL 20488, at *2 (3d Cir. Apr. 1, 1982), *enforced on reh’g en banc*, 696 F.2d 257 (3d Cir. 1982).

163. *Id.* at *3.

164. 637 F.2d 191, 197–98 (3d Cir. 1980) (citing *Standard Dry Wall Prods. Inc.*, 91 N.L.R.B. 544 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951)).

165. *NLRB v. ARA Servs., Inc.*, No. 81-1701, 1982 WL 20490, at *6 n.6 (3d Cir. April 13, 1982) (“Several of the pro-Union girls told me that if I voted for the Union in the NLRB election, the Union would be giving me a birthday gift. Pat Perks and Lee Lawrence were pro-Union activists and were the ones who made this promise to me. Every one [sic] knew they were Union spokesmen.”), *reh’g en banc granted and opinion vacated on other grounds*, 717 F.2d 57 (3d Cir. 1983).

166. 231 N.L.R.B. 431, 433–34 (1977).

167. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 138–40 (1944).

168. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491–92 (1951).

169. 29 U.S.C. § 160(e) (“The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.”).

170. 5 U.S.C. § 706(2) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.”).

171. 437 U.S. 483, 501 (1978).

172. *Id.*

interpretation of a statute.¹⁷³ First, a court reviewing an agency's construction of a statute must determine whether "Congress has directly spoken to the precise question at issue . . . [and] [i]f the intent of Congress is clear . . . the court must give effect to the unambiguously expressed intent of Congress."¹⁷⁴ But if "Congress has not directly addressed the precise question at issue . . . [and] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."¹⁷⁵ Thus, "the court does not simply impose its own construction on the statute."¹⁷⁶

Even post-*Chevron*, the Supreme Court has applied the highly deferential *Beth Israel* standard to NLRB cases.¹⁷⁷ Professor William N. Eskridge, Jr. and attorney Lauren E. Baer suspect that *Beth Israel*'s survival post-*Chevron* stems from practitioners' preferences to cite to the deference standard in their respective practice areas.¹⁷⁸ But, even in nonlabor cases, *Beth Israel* continued to be cited post-*Chevron*, hence Professor Eskridge and attorney Baer also wonder whether the Court simply finds both tests to be functionally analogous.¹⁷⁹ As such, citing to the less controversial *Beth Israel* circumvents the "messy debate as to the 'meaning' of *Chevron*."¹⁸⁰

The NLRA does not define *interference*, *restraint*, *coercion*, or *threat*, nor does it address humor defenses.¹⁸¹ Congress has failed to otherwise provide guidance on these issues—at least in the form of "unambiguously expressed intent."¹⁸² Notwithstanding, the NLRB's reasoned *Ethyl Corp.* rule—that interference, restraint, and coercion within the meaning of Section 8(a)(1) of the NLRA is not magically eliminated because a statement was made in jest—doubtless meets the low "permissible construction of the statute" threshold in *Chevron*.¹⁸³ But while courts may very well be going rogue or simply giving too much discretion to credibility determinations based on subjective reactions of listeners in humor-defense cases, there are two other plausible explanations: the historic antagonism between the federal courts of appeals and the NLRB,¹⁸⁴ and the

173. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

174. *Id.*

175. *Id.* at 843.

176. *Id.*

177. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1107–08 (2008).

178. *Id.* at 1108.

179. *Id.*

180. *Id.*

181. See 29 U.S.C. §§ 151, 152, 158(a)(1).

182. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

183. See *Ethyl Corp.*, 231 N.L.R.B. 431, 433–34 (1977) ("It is well established that the coercive and unlawful effect of a statement is not blunted merely because interrogations of, warnings to, or disparaging statements about union adherents are accompanied by laughter or made in an offhand humorous way."); *Chevron*, 467 U.S. at 842–43.

184. See Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, 5 FIU L. REV. 437, 437–40 (2010); Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 390 (1995); Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255, 2285 n.185 (2019).

general trend against *Chevron* deference writ large,¹⁸⁵ culminating most recently in the “major questions doctrine.”¹⁸⁶

1. The NLRB’s Nonacquiescence Policy

The NLRB has a longstanding policy of *nonacquiescence*, whereby it does not treat the decisions of the federal courts of appeal as precedential.¹⁸⁷ The NLRB will generally treat a decision on *remand* from a circuit court as the “law of the case.”¹⁸⁸ Nonetheless, in 1957 it directed its ALJs (then called “trial examiners”) to apply Board precedent notwithstanding circuit court disagreement, because “[o]nly by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the [NLRA], be achieved.”¹⁸⁹ Unsurprisingly, the policy has not endeared the NLRB to the circuit courts,¹⁹⁰ and some have argued that the policy is counterproductive.¹⁹¹ The courts respond in-kind by denying the Board’s petitions to

185. See generally Amy Semet, *Statutory Interpretation and Chevron Deference in the Appellate Courts: An Empirical Analysis*, 12 U.C. IRVINE L. REV. 621 (2022); Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619 (2021); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017); Letter, *Thirty Years of Chevron v. NRDC and the Administrative Law Review*, 66 ADMIN. L. REV. 235 (2014); Theodore J. St. Antoine, *The NLRB, the Courts, the Administrative Procedure Act, and Chevron: Now and Then*, 64 EMORY L.J. 1529 (2015).

186. *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022).

187. J.G. Kern Enters., Inc., Nos. 07-CA-231802, 07-CA-245744, 07-CA-252759, 2022 WL 14456794, at *2 n.5 (N.L.R.B. Oct. 21, 2022) (first citing Minn. Timberwolves Basketball, LP, 365 N.L.R.B. No. 124, slip op. at 3 n.13, 2016-17 NLRB Dec. ¶ 16,338 (Aug. 18, 2017); and then citing Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 706–09 (1989)).

188. R.J. Smith Constr. Co., 208 N.L.R.B. 615, 615 & n.3 (1974) (“The Board, for reasons it deems sufficient, has not filed a petition for certiorari to review the court’s decision and will here apply the court’s view, respectfully reserving for future cases its position Accordingly, the Board will, for the purposes of this decision only and in accordance with the court’s decision, find that Respondent violated Section 8(a)(5) and (1) of the Act”).

189. *Ins. Agents Int’l Union*, 119 N.L.R.B. 768, 773 (1957), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1958), *aff’d*, 361 U.S. 477 (1960).

190. See, e.g., *Heartland Plymouth Ct. MI, LLC v. NLRB*, 838 F.3d 16, 28 (D.C. Cir. 2016) (“The Board’s obstinacy forced Heartland to waste time and resources fighting for a freedom the Board knew our precedent would provide. The Board did nothing to employ permissible nonacquiescence; it just saved the concept as a post-hoc rationalization in case Heartland had the temerity to ask us not to make it pay for the Board’s hubris.”); *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (“The Board’s statement that it is agreeing to comply with [circuit precedent] in this case only is unacceptable.”).

191. See Donald L. Dotson & Charles M. Williamson, *NLRB v. the Courts: The Need for an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739, 745 (1987) (“[T]he Board’s policy has had the effect of needlessly protracting litigation, establishing a two-tier system of labor law in the same jurisdiction, encouraging disrespect for Board orders, and antagonizing the courts. The two-tier system places an undue burden on those litigants who lack the resources to pursue matters to the circuit court level. Even worse, it compels litigants to expend resources in litigating cases in which it is clear that the appropriate circuit will not enforce the Board’s order.”).

enforce its orders,¹⁹² which are not self-enforcing and must be enforced by a federal court.¹⁹³

Professor Jeffrey Hirsch argues that there are many things the NLRB could do to achieve more success in getting its orders enforced by appellate courts.¹⁹⁴ Of the sixty-one NLRB cases decided by appellate courts in the 2009 fiscal year, “78.7% were enforced in full, 4.9% enforced with modifications, 6.6% remanded in full, 4.9% partially affirmed and partially remanded, and 4.9% set aside in full.”¹⁹⁵ Though this win rate is only slightly lower than those of other federal agencies, Professor Hirsch attributes these successes to the “large percentage of straightforward cases the Board hears.”¹⁹⁶ Thus, he asserts that the Board could do a better job of persuading appellate courts regarding cases involving “highly contested facts or controversial rules.”¹⁹⁷ Professor Hirsch recommends that the Board be less insular and instead write its decisions with the courts in mind, improve the formatting and explanations in its decisions, cite to appellate courts more often, more aggressively emphasize the deferential standard of review, engage in better forum shopping to avoid hostile circuits, engage in more rulemaking rather than case adjudication, and pursue more injunctive relief under Section 10(e) and 10(j) of the NLRA.¹⁹⁸

2. The Erosion of *Chevron* Deference

Looming over the sour relationship between the NLRB and the circuit courts of appeal is the erosion of *Chevron* deference, even outside of the NLRB context.¹⁹⁹ Professor Craig Green charted the history of conservative attitudes toward *Chevron*, demonstrating that anti-*Chevron* sentiment began in the twenty-first century.²⁰⁰ Even Justice Thomas—who ultimately became quite critical of the so-called administrative state²⁰¹—once championed *Chevron*, along with Justice Scalia.²⁰² Professor Green suggests that a likely reason for this shift was the evolution of the ideological compositions of the judiciary and the presidency.²⁰³ In Justice Scalia’s early days as a law professor and judge, courts were viewed as decidedly liberal, and *Chevron* was an extrajudicial mechanism for the Reagan Administration to implement its conservative agenda.²⁰⁴ In contrast, since the 1990s there has been a marked rightward shift in the

192. See, e.g., *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979) (“For the Board to predicate an order on its disagreement with this court’s interpretation of a statute is for it to operate outside the law. Such an order will not be enforced.”), *abrogated on other grounds by* *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606 (1991).

193. See 29 U.S.C. § 160(e)–(f).

194. Hirsch, *supra* note 184, at 437–40.

195. *Id.* at 437.

196. *Id.* at 438.

197. *Id.*

198. *Id.* at 439.

199. See Green, *supra* note 185, at 626.

200. *Id.* at 677.

201. See *id.* at 662, 670.

202. *Id.* at 639, 655, 668–69.

203. See *id.* at 679–98.

204. *Id.* at 680.

judiciary, accompanied by a larger administrative state often accused of effectuating a leftist agenda.²⁰⁵ Professor Green emphasizes conservatives' failure to reconcile the radical shift in its narrative about administrative deference.²⁰⁶ This shift undermines conservatives' ideological consistency vis-à-vis originalist separation-of-powers arguments challenging the legitimacy of the administrative state.²⁰⁷

Given Professor Green's explanation, the Supreme Court opinion authored by Justice Scalia in *Allentown Mack Sales & Service, Inc. v. NLRB* is unsurprising.²⁰⁸ There, the employer inherited a bargaining relationship from its predecessor after taking over a facility, polled employees as to their union sympathies, then withdrew recognition of the union based on remarks from a handful of employees that they no longer wished to be unionized.²⁰⁹ The Board found that the poll itself constituted a Section 8(a)(1) violation, hence the employer could not lawfully rely on the poll or claim a good-faith doubt in the union's loss of majority status.²¹⁰ The Court reversed the D.C. Circuit's judgment enforcing the NLRB order, finding that the Board's factual determinations were not supported by "substantial evidence" in the record.²¹¹ The Court did not even cite to *Chevron*, couching most of its reasoning in narrow failure-of-proof grounds.²¹² Thus, the Court held that while the Board's legal good-faith doubt test was acceptable, the Court's task was to "decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion."²¹³ This latter point is especially curious because NLRB procedures do not provide for jury trials.²¹⁴

3. The Major Questions Doctrine

The Supreme Court continues to exhibit signs of mistrust toward administrative agencies.²¹⁵ In 2023, the Court granted certiorari to two cases squarely involving *Chevron* deference.²¹⁶ In *West Virginia v. EPA*, the Court made explicit the "major questions doctrine," under which "clear congressional authorization" is required for

205. *See id.* ("By [1991], federal appellate judges were almost two-thirds Republican appointees—the opposite of Scalia's generation—and conservatism in the legal community was much stronger than it had been." (citing JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 14–36, 100–25 (Anchor Books 2017) (2016))).

206. *Id.* at 699–700.

207. *Id.*

208. 522 U.S. 359, 380 (1998); *see also* Green, *supra* note 185, at 699.

209. *Allentown Mack Sales & Serv., Inc.*, 316 N.L.R.B. 1199, 1199–1201 (1995), *enforced*, 83 F.3d 1483 (D.C. Cir. 1996), *rev'd*, 522 U.S. 359 (1998).

210. *Id.* at 1201.

211. *Allentown Mack*, 522 U.S. at 380.

212. *See id.* at 366–67.

213. *Id.*

214. *See* 29 C.F.R. § 101.10 (2024) (describing administrative hearing procedure).

215. *See, e.g., Biden v. Nebraska*, 143 S. Ct. 2355, 2368–71 (2023) (reading "waive or modify" narrowly in statutory text, thereby concluding that Department of Education was not authorized to waive student loan debt).

216. *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023); *Relentless, Inc. v. Dep't of Com.*, 144 S. Ct. 325 (2023).

agency action rather than “a merely plausible textual basis.”²¹⁷ The doctrine only attaches in “‘extraordinary cases’ that call for a different approach—cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”²¹⁸

The doctrine has already impacted the NLRB in the Fifth Circuit in two cases involving Tesla, Inc.²¹⁹ In one case, the court, citing *Chevron*, initially enforced a Board order requiring Tesla CEO Elon Musk to delete a coercive post that violated Section 8(a)(1) of the NLRA.²²⁰ Musk’s post stated that employees would lose their stock options if they unionized.²²¹ Yet, four months later, the court granted a rehearing en banc, vacating the previous opinion.²²² In a separate proceeding against Tesla, the Fifth Circuit obliquely invoked the major questions doctrine to deny enforcement of an NLRB order finding a Section 8(a)(1) violation for Tesla’s prohibition of wearing union insignia.²²³ Though the court mentioned *Beth Israel*, *Skidmore* and *Chevron* are nowhere to be found in the opinion.²²⁴

NLRB Solicitor Fred Jacob notes that parties are already borrowing the Supreme Court’s language in arguing that the major questions doctrine should preclude NLRB action.²²⁵ But Solicitor Jacob’s cited examples apply to NLRB actions that have broad scope and potentially costly impact.²²⁶ One such action is a recent notice-and-comment rulemaking to define “joint employer” to include franchisors that have indirect control over employees’ terms and conditions of employment.²²⁷ Another is a case adjudication interpreting “employee” in the statute to permit student-athletes to unionize.²²⁸

In contrast, mere Section 8(a)(1) violations involving statements uttered by supervisors to employees are probably not the type of “extraordinary cases” the Supreme Court had in mind in *West Virginia v. EPA*.²²⁹ Congress expressly delegated to the

217. 142 S. Ct. 2587, 2605, 2609 (2022) (quoting *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

218. *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

219. *See*, *Tesla, Inc. v. NLRB*, 63 F.4th 981, 990 (5th Cir. 2023) (enforcing NLRB order in *Tesla, Inc.*, 370 N.L.R.B. No. 101, slip op. at 11, 2020-21 NLRB Dec. ¶ 16,804 (Mar. 25, 2021)), *reh’g en banc granted, order vacated*, 73 F.4th 960 (5th Cir. 2023); *Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir. 2023).

220. *Tesla, Inc.*, 63 F.4th at 990.

221. *Id.*

222. *Tesla, Inc. v. NLRB*, 73 F.4th 960, 960 (5th Cir. 2023), *vacating* 63 F.4th 981 (5th Cir. 2023).

223. *See Tesla, Inc.*, 86 F.4th at 651 (“[T]hough we base our ruling primarily on the lack of balance shown by the NLRB’s new rule, we also note that the Board has exceeded its statutory authority in crafting the rule. This extremely broad rule would make all company uniforms presumptively unlawful, whether for white-collar workers or blue. Congress likely would not have intended to permit such a major decision without clearer statutory indication.” (footnote omitted)).

224. *Id.* at 647.

225. *See* Fred B. Jacob, *The National Labor Relations Act, the Major Questions Doctrine, and Labor Peace in the Modern Workplace*, 65 B.C. L. REV. (forthcoming 2024) (manuscript at 23), <https://ssrn.com/abstract=4535075> [<https://perma.cc/VV5F-SZBR>].

226. *See id.* at 24–25.

227. *See id.* at 24 nn.138–40.

228. *Id.* at 24–25.

229. 142 S. Ct. 2587, 2608 (2022).

NLRB—in unambiguous terms within the NLRA’s text—the authority to find and remedy violations of Section 8(a)(1).²³⁰ The primary relief to employees in Section 8(a)(1) cases is a modest cease and desist order (that is not self-enforcing), which the statute also expressly permits the NLRB to impose.²³¹ As to the “history and breadth” prong of the *West Virginia v. EPA* analysis, there is supportive caselaw dating to the NLRA’s origins.²³² The prohibition of coercive statements, even if humorous, is not in the same camp of economic and political significance as the agency actions in *Biden v. Nebraska*,²³³ *West Virginia v. EPA*, or even the Fifth Circuit cases involving Tesla.²³⁴ As such, the major questions doctrine is unlikely to attach to most run-of-the-mill NLRB cases, which are generally fact-specific and involve little to no statutory interpretation.²³⁵

IV. COURT’S ANALYSIS

In *FDRLST II*, the Third Circuit “conclude[d] that the Board’s determination that a reasonable employee would view Domenech’s Tweet as a threat [wa]s not supported by substantial evidence.”²³⁶ The court began the analysis by stating that it “exercise[s] plenary review over the Board’s legal conclusions, deferring to its reasonable interpretations of the Act.”²³⁷ To that end, the court accepts factual determinations “supported by substantial evidence on the record considered as a whole,”²³⁸ which “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²³⁹ Even if the court would have made a contrary determination under the substantial evidence as defined above, the court “will not disturb the Board’s factual inferences.”²⁴⁰

The court then presented the legal standard for violations of Section 8(a)(1) of the NLRA.²⁴¹ It emphasized that the test for an unlawful threat is that it “‘would tend to coerce a reasonable employee’ not to exercise her [Section 7] rights.”²⁴² Further, the test is objective, and an employer’s motive and proof of actual coercion are irrelevant.²⁴³ The totality of the circumstances must be considered, as the “alleged threat is not viewed in

230. See 29 U.S.C. § 160(c).

231. *Id.* (“If . . . the Board shall be of the opinion that any person named in the complaint has engaged in . . . unfair labor practice, then the Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice . . .”).

232. *E.g.*, *Fruehauf Trailer Co.*, 1 N.L.R.B. 68, 79 (1935) (finding, in the same year the NLRA was passed, Section 8(a)(1) violations for threats of discharge), *enforcement denied*, 85 F.2d 391 (6th Cir. 1936), *rev’d*, 301 U.S. 49 (1937).

233. 143 S. Ct. 2355 (2023).

234. See *supra* notes 219–223.

235. See Jacob, *supra* note 225, at 52.

236. *FDRLST II*, 35 F.4th 108, 121 (3d Cir. 2022).

237. *Id.* at 121 (citing *NLRB v. ImageFIRST Unif. Rental Serv., Inc.*, 910 F.3d 725, 732 (3d Cir. 2018)).

238. 29 U.S.C. § 160(e)–(f).

239. *FDRLST II*, 35 F.4th at 122 (quoting *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 606 (3d Cir. 2016)).

240. *Id.* (quoting *Citizen’s Publ’g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001)).

241. *Id.*

242. *Id.* (quoting *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 938 (3d Cir. 1980)).

243. *Id.* (first citing *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 176 (3d Cir. 2002); and then citing *Garry Mfg.*, 630 F.2d at 938).

a vacuum” and “[c]ontext is an important part of language . . . especially . . . where . . . pure speech is at issue.”²⁴⁴

In that vein, the court found that the Board erred by “disregard[ing] relevant contextual evidence” and failing to consider circumstances surrounding the post²⁴⁵: “Had the Board considered the tweet’s full context, it could not have concluded that a reasonable FDRLST Media employee would view the tweet as a threat of reprisal.”²⁴⁶ One relevant contextual element is that FDRLST employed only six individuals, all of whom were writers and editors.²⁴⁷ Thus, the court emphasized the incongruity between the post’s content and the reality of the FDRLST workplace:

The tweet’s suggestion that these employees might be sent “back” to work in a “salt mine” is farcical. The image evoked—that of writers tapping away on laptops in dimly-lit [sic] mineshafts alongside salt deposits and workers swinging pickaxes—is as bizarre as it is comical. So from the words of the tweet alone, we cannot conclude that a *reasonable* FDRLST Media employee would view Domenech’s tweet as a plausible threat of reprisal.²⁴⁸

The court conceded that the ALJ correctly understood the meaning of the salt-mine idiom, “but the Board failed to realize that ‘[t]hreatening statements are not usually made in bantering terms’ like these.”²⁴⁹ Without citing to any authority for the proposition, the court then suggested that to find the post to be an implied threat of unspecified reprisal “requires some additional evidence of the tweet’s coercive tendency. But the Board points to none.”²⁵⁰

The court quoted the Supreme Court’s statement in *Gissel Packing* that “[a]ny assessment of the precise scope of [impermissible] employer expression, of course, must be made in the context of its labor relations setting.”²⁵¹ The court then admonished the ALJ and the Board for not having analyzed the “labor environment” in which the post occurred, citing to cases in which the Third Circuit has found Section 8(a)(1) violations in contexts including labor strife.²⁵² In contrast to those cases, the court noted that “the Board points to no history of labor strife, no evidence of antagonism, nor even a single example of labor-management tension” and that the Board did not cite to evidence beyond the tweet itself that would suggest that “a reasonable employee would interpret Domenech’s tweet as a veiled threat.”²⁵³

The court noted that FDRLST publishes on a wide variety of controversial issues, “including matters involving politics and labor relations.”²⁵⁴ Domenech made the infamous post on his personal account, which he never used to communicate with

244. *Id.* (first citing *Wheeling-Pittsburgh Steel Corp. v. NLRB*, 618 F.2d 1009, 1020 (3d Cir. 1980); and then citing *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 479 (1941)).

245. *Id.*

246. *Id.* at 122–23.

247. *Id.* at 123.

248. *Id.*

249. *Id.* (alteration in original) (quoting *NLRB v. Champion Labs., Inc.*, 99 F.3d 223, 229 (7th Cir. 1996)).

250. *Id.*

251. *Id.* (alterations in original) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

252. *Id.* at 123 & n.5.

253. *Id.* at 123.

254. *Id.*

employees, and to which employees were not required to subscribe.²⁵⁵ Therefore, a reasonable employee, seeing the post on the same day as the Vox walkout, “would be far more likely to view the tweet as ‘commentary on a . . . contemporary newsworthy and controversial topic[]’ than as a threat that implicated her status with the Employer.”²⁵⁶

The court chastised the Board for asserting that employees’ subjective impressions were irrelevant: “We have held that employees’ subjective impressions are *not dispositive*; not that they are *irrelevant*.”²⁵⁷ The court also suggested that the Manhattan regional office could have called any FDRLST employee to testify but chose not to.²⁵⁸ Nonetheless, “[t]he Board cannot avoid the reasonable inference that employees of a media company . . . would be aware of a newsworthy and controversial event involving another internet media company simply because the regional counsel chose not to inquire.”²⁵⁹

To justify its reliance on employees’ subjective reactions, the court emphasized the humor of Domenech’s post:

Employees’ subjective impressions are especially helpful where, as here, the employer claims his statement was made in jest. Humor is subjective. What is funny to a fisherman may be lost on a farmer. A quip about New England winters is unlikely to get a laugh in Alaska. The propensity for jokes to fall flat for want of context or audience understanding has given rise to idioms like “I guess you had to be there” and “too soon?” Excluding context and viewing a statement in isolation, as the Board did here, could cause one to conclude that “break a leg” is always a threat. But when expressed to an actor, singer, dancer, or athlete, that phrase can reasonably be interpreted to mean only “good luck.”²⁶⁰

In support of the proposition that employees’ subjective reactions can be helpful in assessing the humorous context of a remark, the court cited to two circuit court opinions.²⁶¹ In *Federal-Mogul Corp. v. NLRB*,²⁶² the Fifth Circuit reversed the Board’s finding of a threat where a supervisor burned a union authorization card in front of employees.²⁶³ There, the court had found that “[i]t [wa]s obvious that the entire incident was a joke,” in part because of an employee having “snickered” and “laughed.”²⁶⁴ In *NLRB v. Windemuller Electric, Inc.*,²⁶⁵ a vice president, in response to an employee’s question in the context of hiring plans, stated “yeah, [we’ve] had a lot of applications from the union.”²⁶⁶ The statement drew laughter because Vice President Mike Windemuller had recently rejected a flood of applications from unionized electrical

255. *Id.* at 124.

256. *Id.* (alteration and omission in original).

257. *Id.*

258. *Id.* at 124 n.6.

259. *Id.*

260. *Id.* at 124.

261. *Id.* at 124–25 (first citing *Fed.-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1253 (5th Cir. 1978); and then citing *NLRB v. Windemuller Elec., Inc.*, 34 F.3d 384, 387 (6th Cir. 1994)).

262. 566 F.2d at 1253.

263. *FDRLST II*, 35 F.4th at 124–25 (citing *Fed.-Mogul*, 566 F.2d at 1253).

264. *Id.* at 125 (3d Cir. 2022) (first alteration in original) (quoting *Fed.-Mogul*, 566 F.2d at 1253).

265. 34 F.3d 384.

266. *FDRLST II*, 35 F.4th at (alteration in original) (quoting *Windemuller Elec.*, 34 F.3d at 387).

workers.²⁶⁷ Though the Board and ALJ had found that the vice president's remark implied an unlawful intent not to hire unionized employees, the Sixth Circuit held that the Board's finding lacked substantial evidence.²⁶⁸ Thus, employees laughed, "people who are being threatened do not usually find it amusing," and the record was silent as to any worker having felt threatened or coerced.²⁶⁹ Similarly, in *FDRLST II* the record was silent as to employees perceiving the post as a threat, and "[b]ecause the charge was filed by an unrelated third party, the alleged unfair labor practice was pure speech, and the meaning of the employer's statement is open to question."²⁷⁰ The court did not address the fact that the employer could have subpoenaed its employees as witnesses, which would have permitted the ALJ to assess their demeanor.

The court then emphasized First Amendment concerns.²⁷¹ The alleged violation consisted of words alone "on Twitter, a public platform that limits posts to 280 characters, which encourages users to express opinions in exaggerated or sarcastic terms."²⁷² The fact that the post was made public militated against a finding that it had been a threat, giving *FDRLST*'s employees "even more reason to read the tweet as mocking a rival internet media company or commenting on a timely socio-political issue than as threatening reprisal."²⁷³ Because "Section 8(c) [of the Act] implements the First Amendment," that Section "manifest[s] a congressional intent to encourage free debate on issues dividing labor and management."²⁷⁴ Accordingly, "[t]o give effect to Congress's intent and avoid conflict with the First Amendment, [the court] must construe the Act narrowly when applied to pure speech, recognizing that only statements that constitute a true threat to an employee's exercise of her labor rights are prohibited."²⁷⁵ Hence, the court set aside the Board's order because "by failing to consider the tweet in context, [the Board] misconstrued a facetious remark as a true threat."²⁷⁶

V. PERSONAL ANALYSIS

The *FDRLST II* decision cannot be squared with well-settled Board law establishing that humor or jest does not make lawful an otherwise unlawful Section 8(a)(1) statement.²⁷⁷ Part V.A of this Note is doctrinal, arguing that the *FDRLST II* court created a new threshold step in the Supreme Court's *Gissel* analysis, subjectivized the "reasonable employee" objective standard, and exaggerated the First Amendment concerns posed by penalizing the post. Part V.B argues that the NLRB's decision was entitled to deference despite the Third Circuit's political leanings. It explores the biographies of the jurists involved in the Board and Third Circuit opinions—nearly all

267. *Id.* (quoting *Windemuller Elec.*, 34 F.3d at 386–87).

268. *Id.* (citing *Windemuller Elec.*, 34 F.3d at 393).

269. *Id.* (citing *Windemuller Elec.*, 34 F.3d at 393).

270. *Id.* at 125.

271. *Id.* at 126–27.

272. *Id.* at 126.

273. *Id.*

274. *Id.* (second alteration in original) (first quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); and then quoting *Chamber of Com. v. Brown*, 554 U.S. 60, 67 (2008)).

275. *Id.*

276. *Id.* at 127.

277. *See, e.g., Solvay Iron Works, Inc.*, 341 N.L.R.B. 208, 216 (2004).

of whom are Republicans. Part V.B thus heralds the Board's decision as a good example of nonpartisan administrative expertise, because the Board panel was not shy about overruling other NLRA precedent but nonetheless left the Section 8(a)(1) standard untouched. Part V.C uses the literature on emotional intelligence to suggest that the *FDRLST II* court rendered an emotionally insensitive opinion.

A. *The FDRLST II Court Misapplied Section 8(a)(1) Doctrine*

This Part argues that the *FDRLST II* court misapplied extant doctrine on Section 8(a)(1) of the NLRA. Part V.A.1 argues that the court engaged in a novel reading of *Gissel Packing* that added a threshold step to the analysis in order to justify its conclusion. Next, Part V.A.2 argues that the court subjectivized the "reasonable employee" standard in a manner inconsistent with the plain language of Section 2(3) of the NLRA and Section 8(a)(1) jurisprudence requiring an objective standard. These maneuvers paved the way for the court to distinguish longstanding Board law rejecting humor defenses. Finally, Part V.A.3 argues that the First Amendment concerns in this case were exaggerated, especially given the light penalty for a Section 8(a)(1) violation.

1. *The FDRLST II Court Added a Threshold Step in the Analysis that Is Inconsistent with Section 8(a)(1) and First Amendment Jurisprudence*

The *FDRLST II* court creatively added a new prong to the *Gissel* analysis of Domenech's post.²⁷⁸ First, the court quoted the Supreme Court's statement that "[a]ny assessment of the precise scope of [impermissible] employer expression, of course, must be made in the context of its labor relations setting."²⁷⁹ Then, the court emphasized the lack of "history of labor strife," "evidence of antagonism," or "labor-management tension."²⁸⁰ Accordingly, the court interpreted *Gissel* as essentially requiring a threshold step: First, analyze the labor-relations environment to determine whether there is labor strife.²⁸¹ If there is strife, then proceed to interpret the speech at issue for its potential interference, restraint, or coercion in employees' exercise of Section 7 rights.²⁸² If there is no strife, then there is a (perhaps rebuttable) presumption that an employer is immune to violating Section 8(a)(1) by speech alone.²⁸³ Unsurprisingly, the court did not cite to any Board or Supreme Court authority for this newfound threshold step—as none exists.²⁸⁴

Though the *Gissel* quote about the "labor relations setting" should perhaps not be dismissed as mere dicta, at the very least the language is incomplete and serves more as a prefatory remark to a more objective consideration of the power relationship between employees and employers:

278. See *FDRLST II*, 35 F.4th at 123.

279. *Id.* (alterations in original) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

280. *Id.*

281. *Id.* (citing *Gissel Packing*, 395 U.S. at 617).

282. See *id.*

283. See *id.*

284. See *id.* at 123 & n.5 ("Significantly, this Court has never affirmed a finding of an unfair labor practice based on employer speech alone absent any indicia of labor friction.")

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8 (a)(1) and the proviso to § 8 (c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. . . . [W]hat is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.²⁸⁵

After these prefatory remarks, the Court stated its test for assessing statements that might violate Section 8(a)(1).²⁸⁶ In affirming the finding of certain Section 8(a)(1) statements, the Court did not reference the labor-relations context in the fact pattern.²⁸⁷ Instead, it invoked objective principles that can be applied to any workplace.²⁸⁸ Therefore, *Gissel* does not stand for the proposition that a Section 8(a)(1) statement can be found only where there is labor strife.

2. The “Reasonable Employee” Standard Is Objective, Not Subjective

The *FDRLST II* court applied a subjective standard inconsistent with the plain text of the NLRA and decades of Section 8(a)(1) jurisprudence.²⁸⁹ In assessing the reasonableness of an employee reading the post, it considered the Vox walkout that had recently occurred.²⁹⁰ This contravenes the Board's clear statement: “[W]e do not rely on evidence that the Respondent's website hosts editorials about unionization or that Vox Media employees engaged in a walkout on June 6, 2019, as there is no evidence that employees who viewed the tweet were aware of either the editorials or the walkout.”²⁹¹ Additionally, the court faulted the Manhattan regional office for not having compelled FDRLST employees to testify, even though FDRLST chose not to have them testify in its defense.²⁹² To justify this foray into subjectivity, the court criticized the Board for asserting that employees' subjective impressions were irrelevant: “We have held that employees' subjective impressions are *not dispositive*; not that they are *irrelevant*.”²⁹³

But despite this valid distinction, the court relied heavily on FDRLST's cherry-picked evidence of employee affidavits, stating that employees found

285. *Gissel Packing*, 395 U.S. at 617–18.

286. *Id.* at 618–19.

287. *See id.* at 618–20.

288. *See id.* at 617–20.

289. *FDRLST II*, 35 F.4th at 127–31.

290. *Id.* at 125.

291. *FDRLST I*, 370 N.L.R.B. No. 49, slip op. at 1 n.4, 2020-21 NLRB Dec. (CCH) ¶ 16,776 (Nov. 24, 2020), *vacated*, 35 F.4th 108 (3d Cir. 2022).

292. *FDRLST II*, 35 F.4th at 114.

293. *Id.* at 124.

Domenech's post to have been funny.²⁹⁴ The Board had properly deemed these affidavits to be hearsay, and evidence of employees' reactions to Section 8(a)(1) statements is typically in the form of trial testimony.²⁹⁵ Further, the court's reasoning relied solely on the fact pattern at hand, without consideration of the larger theoretical framework articulated in *Gissel*.²⁹⁶

Even if the court properly considered subjective reactions,²⁹⁷ one could posit that the court's scope was improperly limited only to employees of FDRLST itself. Section 2(3) of the NLRA provides: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer"²⁹⁸ Further, the court affirmed that the NLRA does not have strict standing requirements.²⁹⁹ Domenech's post might have been read by an employee who is not employed by FDRLST. Unlike contexts in which the recipient of the Section 8(a)(1) statement is limited to the employees of a given employer, here the coercive remark traveled beyond that limited scope. By the court's own logic, FDRLST's "arguments based on judicial doctrines of standing and zone-of-interests [we]re no[t] . . . persuasive" in dismissing the complaint merely because a disinterested party filed the charge that commenced the litigation.³⁰⁰ As such, there is a colorable argument that the court should have analyzed the post expansively and should not have relied so heavily on FDRLST employees' subjective affidavit testimony.

3. The *Ethyl Corp.* Rule Is Consistent with First Amendment Law

The First Amendment concerns regarding Section 8(a)(1) violations are overblown. A finding of a violation of Section 8(a)(1) does not ordinarily rise to the level of a prior restraint³⁰¹ or content-based discrimination,³⁰² because the Section 8(c) right to communicate uncoercive anti-union opinions remains in the statute.³⁰³ A true threat is not entitled to free-speech protections.³⁰⁴ The Section 8(a)(1) muzzle is closer to the *secondary effects* line of cases in which exceptions to free speech are justified based on justifiable proscription of "nonspeech" consequences or characteristics that accompany

294. See *id.* at 114.

295. *FDRLST I*, slip op. at 1 n.3.

296. Compare *FDRLST II*, 35 F.4th at 128–32, with *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

297. I agree with the court that subjective reactions should be considered potentially relevant, though not dispositive, even if the reactions are ultimately rejected as immaterial. Besides the conclusory argument that a Section 8(a)(1) analysis is based on an objective standard, the Board has never articulated why subjective considerations cannot *inform* the objective analysis as part of the totality of the circumstances. However, this issue is beyond the scope of this Note.

298. 29 U.S.C. § 152(3).

299. *FDRLST II*, 35 F.4th at 119 ("We reaffirm today that Section 10(b) places no limitations on who may file an actionable unfair labor practice charge.").

300. *Id.*

301. See *Near v. Minnesota*, 283 U.S. 697, 737 (1931).

302. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

303. 29 U.S.C. § 158(c).

304. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

the speech.³⁰⁵ Thus, employers remain able to contribute their anti-union views to the marketplace of ideas without the government banning such speech.³⁰⁶

It bears repeating that the remedy for a Section 8(a)(1) violation is a slap on the wrist: no fines, no penalties, no damages.³⁰⁷ Instead, the employer must post and distribute a notice often containing generic language stating that it will not violate the NLRA in a like or related manner.³⁰⁸ Where criminal liability is at stake, the Supreme Court has been wary of interpreting threats from a “reasonable person” standard.³⁰⁹ But NLRA law is not criminal law, where life and liberty are at issue and elements must be proved beyond a reasonable doubt.³¹⁰ Rather, the NLRA requires only a preponderance of the evidence,³¹¹ and the worst-case scenario in a standard Section 8(a)(1) case is that a manager might have to read an NLRB notice to employees informing them of their rights.³¹² Concededly, the finding of a Section 8(a)(1) violation is strong evidence to prove unlawful motive for Section 8(a)(3)³¹³ violations of Section 7 discrimination, which can require backpay and reinstatement,³¹⁴ along with damages for direct or foreseeable pecuniary harm.³¹⁵ But as I have argued elsewhere, resource-constrained NLRB regional offices are reluctant to find merit to Section 8(a)(3) cases with equivocal evidence, frequently resulting in litigated cases having ample evidentiary support.³¹⁶ A minor Section 8(a)(1) violation is also unlikely to tip the scales in the context of the Board’s momentous decision in *Cemex Construction Materials Pacific, LLC*.³¹⁷ Under *Cemex*, after a union has demanded bargaining upon demonstrating majority support, an

305. *E.g., R.A.V.*, 505 U.S. at 386 (excluding “fighting words” and loud noise from scope of First Amendment because proscription not based on mere content).

306. *Cf. Virginia v. Black*, 538 U.S. at 359–60 (finding law banning cross burnings unconstitutional because it prohibited any cross burning without requiring accompanying threats and intimidation of specific individuals).

307. *See* § 160(c).

308. *See, e.g., FDR LST I*, 370 N.L.R.B. No. 49, slip op. at 1, 2020-21 NLRB Dec. (CCH) ¶ 16,776 (Nov. 24, 2020) (posting an electronic distribution of notice for Section 8(a)(1) violation), *vacated*, 35 F.4th 108 (3d Cir. 2022).

309. *See, e.g., Elonis v. United States*, 575 U.S. 723, 740 (2015) (finding no criminal liability for threatening rap lyrics in Facebook post where jury was instructed that the government needed only to prove whether a reasonable person would view the post as threatening, rather than whether the defendant intended to threaten).

310. *In re Winship*, 397 U.S. 358, 361 (1970).

311. *See* § 160(c).

312. *Carey Salt Co.*, 360 N.L.R.B. 201, 202 (2014) (“The Respondent’s violations of the NLRA are sufficiently serious and widespread that the reading of the notice is necessary to enable employees to exercise their Section 7 rights free of coercion.”).

313. § 158(a)(3) (ULP for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization”).

314. *Id.* § 160(c).

315. *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 6, 2022 WL 17974951 (Dec. 13, 2022).

316. Joshua D. Rosenberg Daneri & Paul F. Thomas, *Wrong Line: Proposing a New Test for Discrimination under the National Labor Relations Act*, 56 U. MICH. J.L. REFORM 1 (2022); *see also* Braden Campbell, *NLRB Offices Pursue Charges at Varying Rates, Data Show*, LAW360 (Sep. 12, 2022), <https://www.law360.com/employment-authority/articles/1529251/nlrb-offices-pursue-charges-at-varying-rates-data-show> [https://perma.cc/GHM7-7V98] (describing approaches to assessment of evidence and risk aversion that may impact rates of finding merit to charges filed against employers).

317. 372 N.L.R.B. No. 130, 2023 WL 5506930 (Aug. 25, 2023).

employer's ULP can result in the issuance of a bargaining order.³¹⁸ Indeed, the General Counsel has instructed regional offices not to issue a *Cemex* bargaining order when "the violations are so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results."³¹⁹

B. The Board's Decision Is a Good Example of Administrative Expertise Worthy of Deference Because the NLRB's Conservative Politics Did Not Interfere with Its Application of Longstanding and Uncontroversial Precedent

The Third Circuit's opinion seems to have been animated by conservative ideology to the detriment of well-settled precedent. In contrast, the underlying Board decision suggests that, despite contemporary realism and cynicism about what animates judicial decision-making, there exist at least some enduring legal rules insulated from political manipulation. This Part demonstrates that two of three members of the NLRB panel and all three judges in the Third Circuit panel were unambiguously conservative. Yet, perhaps because the NLRB panel was more familiar with certain time-honored and nonpartisan principles such as the *Ethyl Corp.* rule, the Board did not decide *FDRLST I* in a manner paralleling the Board's own contemporaneous radical, anti-union jurisprudence.³²⁰

Two of the members on the three-member panel in the NLRB decision were Republicans, appointed by President Donald J. Trump, who themselves have been hostile³²¹ to the principles of labor law in their own jurisprudence.³²² Yet, neither dissented in the opinion.³²³ Board Member Ring was nominated by President Trump in 2018 and named chairman shortly after his Senate confirmation.³²⁴ As a partner for Morgan, Lewis & Bockius, a premier management-side firm where he worked for almost thirty years, Board Member Ring served as co-chair of the firm's U.S. Labor/Management Relations practice and practice group leader for the Washington, D.C. office of its Labor, Employment & Benefits practice.³²⁵ President Trump appointed Board Member Kaplan in 2017.³²⁶ In a letter from the AFL-CIO to the Senate opposing Board Member Kaplan's nomination, Government Affairs Department Director William

318. *Id.*, slip op. at 27.

319. Memorandum from Jennifer A. Abruzzo, Gen. Counsel, to all regional directors, officers-in-charge, and resident officers of the NLRB, Memorandum GC 24-01, Guidance in Response to Inquiries about the Board's Decision in *Cemex Construction Materials Pacific, LLC* (Nov. 2, 2023), <https://apps.nlr.gov/link/document.aspx/09031d4583baa9f3> [<https://perma.cc/ZTR2-4RZJ>].

320. See Susan Davis & Daniel M. Nesbitt, *A New Dawn at the NLRB: Promoting Collective Bargaining in the Workplace*, 36 ABA J. LAB. & EMP. L. 75, 75-77 (2022), https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v36/no-1/a-new-dawn-at-the-nlr.pdf [<https://perma.cc/JCZ3-E9WF>].

321. See *id.* at 76.

322. *FDRLST I*, 370 N.L.R.B. No. 49, slip op. at 1, 2020-21 NLRB Dec. (CCH) ¶ 16,776 (Nov. 24, 2020), vacated, 35 F.4th 108 (3d Cir. 2022).

323. *Id.*

324. *John F. Ring*, NLRB, <https://www.nlr.gov/bio/john-f-ring> [<https://perma.cc/NL29-Z2A2>] (last visited Apr. 10, 2024).

325. *Id.*

326. *Marvin E. Kaplan*, NLRB, <https://www.nlr.gov/bio/marvin-e-kaplan> [<https://perma.cc/CRA4-BNQC>] (last visited Apr. 10, 2024).

Samuel noted that “his sole experience with labor law is on a policy level, drafting legislation to weaken worker protections under the NLRA and holding hearings to criticize the NLRB during the Obama Administration.”³²⁷

The three judges on the Third Circuit panel were nominated by Republican presidents: Judge Scirica by President Ronald Reagan,³²⁸ Judge Hardiman by President George W. Bush,³²⁹ and Judge Matey by President Trump.³³⁰ Judge Hardiman was on President Trump’s shortlist for the U.S. Supreme Court seat ultimately given to Justice Neil Gorsuch.³³¹ Speaking on a panel at the 2018 Federalist Society Convention, Judge Hardiman drew applause for stating that he would be in favor of a federal rule whereby any case worth less than \$500,000 would be tried without discovery.³³² Judge Matey “has served in several leadership roles for The Federalist Society.”³³³ Based on their biographies, it should come as no surprise that the Third Circuit panel was inclined to accept an employer’s defense in a labor-related case instead of deferring to the expertise of an administrative agency.

But how to make sense of the NLRB panel, which had similar conservative credentials and had a history of opposing the very law they were tasked with enforcing? If political affiliation alone perfectly correlated with the way that an adjudicator will rule on a case, one might have expected the Board to have reversed the ALJ in *FDRLST II*. During the Trump Administration, the Board notoriously upended precedent in many arenas,³³⁴ even in the Section 8(a)(1) context regarding the interpretation of workplace rules.³³⁵ For example, in the 2017 case *The Boeing Company*, the Board permitted employers to lawfully maintain rules that previously would have been unlawful if employees would reasonably construe the language to interfere with Section 7 rights.³³⁶ Under *Boeing*, to determine whether the mere text of a rule violated Section 8(a)(1), the Board would weigh the potential interference with Section 7 rights against an employer’s

327. William Samuel, Gov’t Affs. Dep’t, *Letter Opposing NLRB Nominations of Marvin Kaplan and William Emanuel*, AFL-CIO (Jul. 18, 2017), <https://aflcio.org/about/advocacy/legislative-alerts/letter-opposing-nlr-b-nominations-marvin-kaplan-and-william> [https://perma.cc/T979-WR4C].

328. Scirica, Anthony Joseph, FED. JUD. CTR., <https://www.fjc.gov/history/judges/scirica-anthony-joseph> [https://perma.cc/MG4M-ZMQP] (last visited Apr. 10, 2024).

329. *The Front-Runners and Full List of Potential Supreme Court Nominees*, N.Y. TIMES (June 27, 2018) [hereinafter *The Front-Runners*], <https://www.nytimes.com/2018/06/27/us/politics/trump-list-supreme-court-nominees.html> [https://perma.cc/2N9G-PQTU].

330. Charles Toutant, *Confirmation of Lowenstein’s Paul Matey Flips 3rd Circuit to Republicans*, N.J. L.J. (Mar. 12, 2019, 4:07 PM), <https://www.law.com/njlawjournal/2019/03/12/confirmation-of-lowensteins-paul-matey-flips-3rd-circuit-to-republicans/> [https://perma.cc/2SM8-ZS7Z].

331. *The Front-Runners*, *supra* note 329.

332. Terry Gerstein, *Two Top Conservative Judges Offer Plan To End Discovery for Most Litigants*, SLATE (Dec. 6, 2018, 12:37 PM), <https://slate.com/news-and-politics/2018/12/federalist-society-meeting-cap-discovery-claims.html> [https://perma.cc/E4CM-Z2CF].

333. Carrie Campbell Severino, *Who Is Paul Matey?*, NAT’L REV. (Apr. 10, 2018, 12:31 PM), <https://www.nationalreview.com/bench-memos/paul-matey-third-circuit-nomination-trump/> [https://perma.cc/8468-5BQM].

334. See Davis & Nesbitt, *supra* note 320, at 75–77.

335. See *Boeing Co. (The Boeing Company)*, 365 N.L.R.B. No. 154, slip op. at 4, 2016-17 NLRB Dec. ¶ 16,363 (Dec. 14, 2017).

336. See *id.* slip op. at 2–4 (overruling the “reasonably construe” prong in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 647 (2004)).

business justifications.³³⁷ Predictably, in 2023, *Boeing* was overruled by a panel majority comprised of Democratic appointees.³³⁸

Perhaps legal realism is not as thoroughgoing as once thought.³³⁹ Perhaps even if critical legal studies explain much of judicial decision-making,³⁴⁰ there might be some formalism³⁴¹ for principles that transcend interests of race, class, power, and hierarchy. Or, on a less theoretical level, perhaps there really is something to the notion of administrative expertise, cultivated by eighty-five years of common law interpreting an ambiguous statute. Perhaps some of this expertise is insulated from partisan pressures and outcome-focused ulterior motives: the kind of expertise—based on substantial evidence and a long history of interpreting the statute—worthy of deference under *Beth Israel*, *Skidmore*, and *Chevron*.

C. The Court Displayed Emotional Insensitivity by Failing To Recognize How a Humorous Post Can Still Coerce a Conservative Audience

Independent of the foregoing legal considerations as to how to analyze humor defenses, adjudicators inevitably assess employee testimony through the prisms of their psychological schemas. Thus, before any doctrine is applied, the adjudicator, at least subconsciously, evaluates not only the words uttered, but also the interpersonal dynamic between the supervisor and the subordinate. A determination that a comment was made in jest, jokingly, or was indeed funny might then hinge on the judge's own sense of humor. If the judge is inclined to factor subjective reactions into the analysis, she might simply rely on whether the employee indeed laughed or at least testified that she found the remark funny or playful. Another option (and an admittedly more challenging one) is to honor the Board's objective standard for evaluating Section 8(a)(1) statements and put oneself in the shoes of a reasonable employee in the given context. This requires emotional intelligence, a quality not necessarily coextensive with a high LSAT score.³⁴²

337. *Id.*

338. See *Stericycle, Inc.*, 372 N.L.R.B. No. 113, 2023 WL 4947792 (Aug. 2, 2023).

339. 6 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 23.4 (5th ed. 2023) (“[Legal] realists believed that the rulings of judges were personal to those judges and reflected only the views of individual judges with the power to decree the outcome of a case before them. They went beyond the sociological jurisprudence by claiming not only that judges made law but that there was no law that existed apart from governmental decisionmakers.”).

340. See generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

341. See *id.* at 564 (“[F]ormalism in this context is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary. . . . [Formalism] characteristically invokes impersonal purposes, policies, and principles as an indispensable component of legal reasoning. Formalism in the conventional sense—the search for a method of deduction from a gapless system of rules—is merely the anomalous, limiting case of this jurisprudence.”).

342. See Alexia Brunet Marks & Scott A. Moss, *What Predicts Law Student Success? A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 13 J. EMPIRICAL LEGAL STUD. 205, 217 (2016) (“Lawyers have enough intellect to pass law school and bar exams, and most gain needed skills early in their careers—but they vary widely in EQ, which can help them in several ways: dealing with emotions like anxiety and anger; making them leaders; and improving how clients or juries view them.” (footnote omitted)); Kenneth Kleppel, *Emotional Intelligence is Key to Success*, 2007 OHIO LAW. 18, 18–21 (2007).

The legal profession would benefit from judges who value emotional intelligence. Professor Harold Anthony Lloyd argues that the legal community is obsessed with viewing law as a scientific enterprise committed to reason as its only mode of analysis, even though neurological evidence demonstrates the inseparability of emotion and reason.³⁴³ He offers the Oxford Dictionary of Psychology's definition of emotional intelligence: "the '[a]bility to monitor one's own and other people's emotions, to discriminate between different emotions and label them appropriately, and to use emotional information to guide thinking and behaviour.'"³⁴⁴ He ascribes the legal community's rejection of emotional considerations to incorrect definitions of "emotion" that reduce the concept to irrationality, mere feelings, or outbursts like a child's tantrum.³⁴⁵ But "emotion" is an expansive category and not simply a synonym for "irrationality."³⁴⁶ As such, even judges who are not themselves emotionally intelligent might benefit from at least considering the emotive dimensions and consequences of their craft.

Speech rarely is conducted in vain, and sometimes speech might be calculated to communicate a hidden, implicit, or emotive message.³⁴⁷ In *Cohen v. California*, the Supreme Court noted:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.³⁴⁸

While interpersonal communication often conforms to linguist Paul Grice's maxims of quantity, quality, relation, and manner, humor may violate these maxims for comedic effect.³⁴⁹ Further, while humor is often intended to elicit positive mood, even when used in the workplace, it can also be used for "barbed, competitive or

343. Harold Anthony Lloyd, *Law and the Cognitive Nature of Emotion: A Brief Introduction*, 54 WAKE FOREST L. REV. 909, 910–11 (2019); see also Harold Anthony Lloyd, *Cognitive Emotion and the Law*, 41 L. & PSYCH. REV. 53 (2017).

344. Lloyd, *Law and the Cognitive Nature of Emotion*, *supra* note 345, at 917 (citing *Emotional Intelligence*, OXFORD DICTIONARY OF PSYCH. (3d ed. 2009)).

345. See *id.* at 911–12.

346. Lloyd suggests that Klaus R. Scherer's "five major checks" can guide jurists: assessment of novelty, intrinsic pleasantness, goal/need significance, coping potential, and norm/self-compatibility. *Id.* at 915 (citing Klaus R. Scherer, *Evidence for Both Universality and Cultural Specificity of Emotion Elicitation*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 172, 174 (Paul Ekman & Richard J. Davidson eds., 1994)).

347. See Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 85 (1998).

348. *Cohen v. California*, 403 U.S. 15, 19, 26 (1971) ("[T]he First and Fourteenth Amendment have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses.").

349. See Salvatore Attardo, *The Violation of Grice's Maxims in Jokes*, in *PROCEEDINGS OF THE SIXTEENTH ANNUAL MEETING OF THE BERKELEY LINGUISTICS SOCIETY* 355, 355 (Kira Hall et al. eds., 1990).

confrontational” motives.³⁵⁰ In that vein, it may constitute *superiority humor*—a disparaging form of humor that scholars tend to disfavor³⁵¹ and that courts tend not to accept as a valid defense in other areas of law.³⁵²

The *Ethyl Corp.* rule reflects emotional intelligence in its recognition that implicit messages are often disguised in seemingly innocuous humorous terms. It is unsurprising that out of thirty possible circuit court opinions, including several by the Third Circuit itself that adopted the *Ethyl Corp.* rule, the *FDRLST II* panel instead relied on *Federal-Mogul*,³⁵³ *Windemuller Electric*,³⁵⁴ and *Champion Laboratories*.³⁵⁵ These cases are outliers in their insensitivity regarding hidden coercive messages sugarcoated as superiority humor. Would the employees in *Federal-Mogul* have felt comfortable revealing their pro-union support to the supervisor who burned a union card in front of them, just because it was “horseplay”?³⁵⁶ Would the employees in *Windemuller* have felt comfortable joining a union just because they laughed at the boss’s joke suggesting that union employees had no chance of being hired—especially where the Sixth Circuit agreed that three pro-union employees had been discriminatorily laid off four months thereafter?³⁵⁷ It is telling that the Third Circuit cited to the holding in *Champion* without mentioning its cruel facts: is “I hope you guys are ready to pack up and move to Mexico”³⁵⁸ truly an example of “bantering”³⁵⁹ when the employer had previously sent employees a letter suggesting that the plant could indeed be offshored?³⁶⁰ Did the courts in these three cases even ask the foregoing questions, or did they conveniently limit the scope of the analysis to the immediate humorous context, without assessing the possible chilling effect of the words and actions?

The emotional insensitivity of the *FDRLST II*, *Windmuller*, *Federal-Mogul*, and *Champion* opinions share two features. First, these opinions limited the time frame for the analysis to the immediate context, arguably failing to consider the totality of the circumstances. Relatedly, the courts ignored the chilling effect that a single utterance can cause. When a boss speaks, the subordinate listens. Directives need not be repeated for an employee to obey orders, whether they are subtle interpersonal and sociocultural norms or productivity-related expectations.

350. Janet Holmes, *Politeness, Power and Provocation: How Humour Functions in the Workplace*, 2 DISCOURSE STUD. 159, 159 (2000).

351. See Laura E. Little, *Just A Joke: Defamatory Humor and Incongruity’s Promise*, 21 S. CAL. INTERDISC. L.J. 95, 110–11 (2011) (“With some exceptions, social and natural scientists as well as humanities theorists find the greatest value in humor that is high in incongruity, mixed value for jokes associated with release humor, and frequent problems with superiority humor.”).

352. See Laura E. Little, *Regulating Funny: Humor and the Law*, 94 CORNELL L. REV. 1235, 1239 (2009) (“Courts are more likely to protect humor based on incongruity than humor tied to superiority or release: incongruous humor thus tends to avoid law’s grip, while superiority humor or release humor triggers legal control.”).

353. *Fed.-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1253 (5th Cir. 1978).

354. *NLRB v. Windemuller Elec., Inc.*, 34 F.3d 384, 392 (6th Cir. 1994).

355. *NLRB v. Champion Lab’ys, Inc.*, 99 F.3d 223, 228–29 (7th Cir. 1996).

356. *FDRLST II*, 35 F.4th 108, 124–25 (3d Cir. 2022) (citing *Fed.-Mogul*, 566 F.2d at 1253).

357. *Windemuller Elec.*, 34 F.3d at 392, 395.

358. *Champion Lab’ys*, 99 F.3d at 226.

359. *Id.* at 229.

360. *Id.* at 225.

Imagine you love peanut butter, and you work for a small organization whose speech and actions could be interpreted to be inimical to nut butter interests. Nonetheless, you agree with most of that organization's views and have no reason to believe that the organization would do anything to undermine your love of peanut butter. You bring peanut butter sandwiches to work, post T-shirts bearing the logos of prominent peanut butter brands on social media, and leave peanut butter cookies in the break room for all to enjoy. Imagine that the organization's senior official posted on social media that whoever keeps leaving peanut butter cookies in the break room has no taste and that the next time he hears or sees anything peanut butter-related at the workplace, he will see to it that the employee is dunked into a vat of peanut butter and fed to his dogs. Imagine that this post is read aloud by a colleague and everyone, including you, laugh. Would it impact your decision to mention peanut butter at work, to bring anything related to peanut butter to work, or to hide your identity to the senior official? Does it matter that the post passed the laugh test?

The parallels between this hypothetical and the facts of *FDRLST II* are almost too obvious to warrant further comment. Employees of a conservative publication might lean to the right on most issues, but it is conceivable that when it comes to their own self-interest as employees, they may be inclined to unionize if things got bad. As humans, employees are prone to changing their minds, to holding mutually inconsistent or even contradictory opinions, and to holding a given opinion in one context but perhaps not in another. And while we can reasonably assume that white-collar employees might generally support the mission of the organization, that assumption is weaker when it comes to custodial or administrative staff. Is *FDRLST* likely to hire a janitor based on her politics, or on her ability to clean? From the conservative white-collar employee who finds herself in favor of unionizing (either contradictorily or for her own self-interest), to the secretary hired for his reliability and not his politics, Domenech's post will make them think twice as to whether to exercise their Section 7 rights in the workplace. Maybe the chilling effect would not occur at the exact time of the post. But if *FDRLST* were to suddenly slash wages, engage in layoffs, and arbitrarily change workplace rules, what then? Would the astute journalist truly feel free to begin an organizing effort, not to effectuate a leftist agenda, but for her own financial self-interest? Would the janitor feel comfortable engaging in a concerted walkout to protest abhorrent working conditions? The post might have been a contemporaneous reaction to the news of the day. But until Domenech deletes it, it is also an enduring record of the boss's contempt for Section 7 rights.

VI. CONCLUSION

Eighty-five years of Board and Supreme Court jurisprudence has distilled reliable criteria for evaluating violations of Section 8(a)(1) of the NLRA, including in the context of humorous expression. The Third Circuit's *FDRLST II* opinion opted not to defer to the Board's reasonable construction of the NLRA, for reasons that are inconsistent with Supreme Court and Board precedent. Though the Board is not immune to swings in the interpretation of the NLRA based on partisanship, the *Ethyl Corp.* rule appears to be an exception to this trend. This exception validates the notion that administrative agencies at least sometimes possess nonpartisan expertise worthy of deference.

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