Nos. 24-1406 & 24-1513

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HOME DEPOT U.S.A., INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

On Petition For Review and Cross-Application For Enforcement of a Final Order of The National Labor Relations Board
Case No. 18-CA-273796

BRIEF OF COALITION FOR A DEMOCRATIC WORKPLACE AND 5 OTHER ASSOCIATIONS REPRESENTING EMPLOYERS AS *AMICI CURIAE* IN SUPPORT OF HOME DEPOT U.S.A., INC.

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INTEREST OF *AMICI CURIAE*[1]

Amicus Coalition for a Democratic Workplace represents millions of businesses that employ tens of millions of workers across the country in nearly every industry. Its purpose is to combat regulatory overreach by the National Labor Relations Board that threatens the wellbeing of employers, employees, and the national economy.

Amicus HR Policy Association is the leading organization representing the Chief Human Resource Officers of the largest corporations doing business in the United States and globally. Collectively, the Association's nearly 400 member companies employ more than ten million employees in the United States—nearly nine percent of the private sector workforce—and 20 million employees worldwide. The Association brings Chief Human Resource Officers together to discuss and advocate for improvements in human resource policy and practices, and to pursue initiatives that promote job growth, employment security, and competitiveness.

Amicus Associated Builders and Contractors ("ABC") is a national construction industry trade association representing more than 23,000 members. Founded on the merit shop philosophy, ABC and its 68 Chapters help members

[1] *Amici* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

Amicus National Association of Wholesaler-Distributors ("NAW") is an employer and a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct member companies and a federation of 59 national, regional, and state associations across 19 commodity lines of trade which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size, closely held businesses. As an industry, wholesale distribution generates more than $8 trillion in annual sales volume providing stable and well-paying jobs to more than 6 million workers.

Amicus National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and

industry partners from the United States and more than 45 countries abroad. NRF has filed briefs in support of the retail community on dozens of policy issues.

Amicus The Restaurant Law Center ("Law Center") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private sector employers in the United States. Through amicus participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Law Center's amicus briefs have been cited favorably by state and federal courts.

INTRODUCTION

This case is about a retailer's ability to maintain a welcoming and orderly shopping experience for its customers in an increasingly polarized world. The National Labor Relations Board ("NLRB" or "the Board") pushed the National Labor Relations Act ("NLRA" or "the Act") beyond its limits yet again. Here, the Board granted customer-facing employees a federal right to coopt their place of employment as a political soapbox. Such unlawful overreach by the Board substantially interferes with retail-employers' legitimate interests in establishing a

pleasant and safe environment for customers and coworkers. The Board's decision is inconsistent with established precedent and is arbitrary and capricious. The decision threatens retailers' ability to regulate their sales environment, and it cannot stand.

Home Depot U.S.A., Inc. encourages sales specialists—employees stationed on the sales floor to be customers' first resource—to decorate their signature orange Home Depot aprons to show off their personality. *See* Home Depot Br. 4-5 (discussing the iconic Home Depot apron). Sales specialists create custom designs, attach logos of their favorite sports team or college, pictures of their family, and more. App.830/AR2163 (NLRB). Sales specialists, however, may not use their aprons to promote or display "religious beliefs, causes or political messages unrelated to workplace matters." App.853/AR2186 (ALJ).

In the summer of 2020, Home Depot's New Brighton, Minnesota store found itself just six and a half miles from the eye of the Black Lives Matter (or "BLM") storm that erupted in worldwide protests, burning, and looting—Minneapolis. The store witnessed civil unrest outside its doors; a neighboring store was looted; and the New Brighton location closed on multiple occasions due to riots. App.841/AR2174 (Member Kaplan, dissenting). Home Depot informed its sales specialists that wearing BLM-related markings (as well as opposing markings saying, for example, "Blue Lives Matter") on their aprons was an impermissible promotion or display of

a cause or political message unrelated to workplace matters. App.858/AR2191 (ALJ). One New Brighton sales specialist (Cáro Linda Bo)[2] insisted on wearing the BLM initials and resigned.

The question presented is whether Home Depot's policy, as applied to Bo, was an unfair labor practice under Section 8 of the Act. 29 U.S.C. § 158(a)(1). The answer is no.[3]

ARGUMENT

I. There was no Section 7 activity.

An "unfair labor practice" must involve an employee's exercise of Section 7 rights under the NLRA. 29 U.S.C. § 158(a)(1). Those rights include "the right to self-organization, … to bargain collectively …, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157. Section 7 activity thus has two elements: concertedness and a protected purpose (either collective bargaining or mutual aid/protection). *NLRB v. City Disposal Sys.*, 465 U.S. 822, 840 (1984). Neither was present here.

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[2] Bo, formerly named Antonio Morales Jr., recently began the process of a legal name change. All record mentions of "Morales" refer to Bo.

[3] *Amici* do not focus on the First Amendment issues in this case but agree that Home Depot's use of its iconic orange apron is expressive activity and that Home Depot therefore has a First Amendment right to restrict employees from altering that expression in ways Home Depot does not agree with. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995); Home Depot Br. 47-48.

A. The Board's "concertedness" analysis is implausible and sets a dangerous precedent.

There is no dispute that wearing the BLM initials did not involve obviously concerted activity. For activity to be "concerted," it must generally be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 785 (8th Cir. 2013) (citation omitted). In this case, Bo's decision to wear the BLM initials in the first month of employment was made alone. Bo had not discussed wearing the BLM message with coworkers. Other employees neither encouraged putting the initials on Bo's apron nor "subsequently informed" Bo that they "approved of, or supported" the display. App.862/AR2195 (ALJ).

Individual action can, however, be deemed concerted in certain circumstances. If the employee intended to "initiate or to induce or to prepare for group action" or if the individual employee is "bringing truly group complaints to the attention of management," that counts. *Meyers Indus., Inc.*, 281 NLRB 882, 887 (1986). So too if an individual employee's action "represents either a continuation of earlier concerted activities or a logical outgrowth of concerted activities." *RELCO Locomotives*, 734 F.3d at 785 (citation omitted). Here, the Board relied on the logical-outgrowth theory of concertedness.

A logical outgrowth must, by definition, succeed an earlier concerted activity. The individual activity comes within the Act only because it is "steps taken by

individuals in furtherance of the group's goals" and thus qualifies as "a *continuation* of activity protected by Section 7 of the Act." *Every Woman's Place*, 282 NLRB 413, 413 (1986) (emphasis added). Board decisions referring to logical outgrowths have long treated the individual's activity as equivalent to "continued" concerted activity, *i.e.* individual activity similar to, and later in time than, the concerted activity. *See Salisbury Hotel, Inc.*, 283 NLRB 685, 687 & n.15 (1987) ("Her call logically grew out of the employees' concerted efforts and is therefore a 'continuation' of that concerted activity."); *Every Woman's Place*, 282 NLRB at 413 (referring to individual activity interchangeably as "a logical outgrowth of the original protest" and "a continuation of protected activity").

As the ALJ concluded, the facts here seem to obviously *not* demonstrate a logical outgrowth. Bo added BLM to the apron "at the outset of employment," which began in August 2020. App.862-63/AR2195-96 (ALJ); *see* App.827/AR2160 (NLRB) (referring to the "first month" of employment). Later, at the beginning in September, Bo (and coworkers) had discussions with members of management regarding working conditions. App.855/AR2188 (ALJ). And then not until two February 2021 meetings was Bo asked to remove the BLM marking. App.856-57/AR2189-90 (ALJ). Only at this point did anyone suggest a connection between the BLM initials and Bo's workplace complaints. *See* App.827-28/AR2160-61 (NLRB). In the ALJ's words, the BLM display could not have been a logical

outgrowth of group activities because "[t]he evidence does not show that those group concerns preceded [Bo's] display of the BLM message." App.862/AR2195.

To find a logical outgrowth and overturn the ALJ, the Board had to get around the indisputable fact that Bo had been displaying the BLM moniker long before these purported links emerged. To do so, the Board distinguished Bo's decision to "add" the BLM initials to the apron (which occurred before the February 2021 meetings) from the refusal to remove the initials (which occurred during and after those meetings). App.827, 837/AR2160, 2170. The latter, the Board concluded, was a logical outgrowth of the group complaints. App.827/AR2160.

This makes no sense, and even the Board had trouble sticking to this tortured logic. In a separate part of its opinion, the Board took the exact opposite position and said that putting on the BLM initials and refusing to remove them were *not* "materially different" acts. App.835 n.34/AR2168 n.34. The issue was that the General Counsel's complaint had alleged only that the protected activity "[b]eg[an] about August 2020" and included "displaying the lettering 'BLM' on [Bo's] apron"; it did not list refusing to remove the initials in February 2021 as protected activity. *Id.*; App.848/AR2181 (Member Kaplan, dissenting). In dissent, Member Kaplan charged that this discrepancy between the allegations filed and the Board's basis for finding liability denied Home Depot due process. App.848/AR2181. The Board retorted that the two acts were one and the same: Bo's "refusal to remove [the

initials] was, in substance, an insistence on continuing to 'display' [them]." App.835 n.34/AR2168 n.34. But this about-face simply confirms the absurdity of the Board's logical outgrowth reasoning. And it adds another error on top of everything else: the inconsistent positions are paradigmatic arbitrary and capricious decision-making.[4] *See Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) ("We have often declined to affirm an agency decision if there are unexplained inconsistences in the final rule.").[5]

If the Board's decision is left undisturbed, employees may retroactively attribute new Section 7 meaning to prior misconduct and then insist that future refusal to abide by the rules is a logical outgrowth of that Section 7 activity. This would swallow the concerted-activity requirement. At a minimum, the Act requires that individual action can only be deemed "concerted" when it is *actually* subsequent to a related concerted activity or group complaint.

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[4] Board adjudications are "subject to the [Administrative Procedure Act's] requirement of reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); 5 U.S.C. § 706. A reviewing court asks whether "the Board correctly applied the law" and whether "its findings are supported by substantial evidence" based on the record as a whole. *Miklin Enters., Inc. v. NLRB*, 861 F.3d 812, 824, 826 (8th Cir. 2017) (en banc).

[5] The Board included an alternative holding that Bo's "wearing of the insignia was an attempt to bring 'truly group complaints to the attention of management.'" App.828 n.23/AR2161 n.23 (citation omitted). But the same temporal problem remains. As the ALJ found, Bo "created the display at the outset of employment and at a time when … the evidence does not show that [Bo] had begun to engage in concerted communications" for mutual aid or protection. App.862-63/AR2195-96.

B. The Board erased the NLRA's requirement that activity be for "mutual aid or protection" by treating political and social issues as employment-related matters.

1. Whether the BLM marking was for mutual aid or protection must be judged objectively from the perspective of a reasonable customer.

Even concerted activity is not protected unless it is for employees' "mutual aid or protection." 29 U.S.C. § 157. That means activity taken for the purpose of "improv[ing] their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978); *Kysor Indus. Corp.*, 309 NLRB 237, 237 n.3 (1992). The "Board may not broaden Section 7 to protect activities which have no bearing on the employment relationship. The entire Act revolves around the protection of workers' efforts to better their working conditions through collective action." *Office & Pro. Emps. Int'l Union v. NLRB*, 981 F.2d 76, 82 (2d Cir. 1992); *see New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991) (listing several "well identified" "conditions of employment which employees may seek to improve" under Section 7).

Though some "political" activity may be protected by Section 7, *Eastex*, 437 U.S. at 570 n.20, the range of protected political activity is limited. The activity must always "bear an identifiable relationship or nexus to legitimate employee

concerns about employment-related matters," *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1143 (D.C. Cir. 2002); *Kysor Indus.*, 309 NLRB at 237 n.3.[6]

This inquiry into whether there is an "identifiable relationship or nexus," *Tradesmen*, 275 F.3d at 1143, is an "objective" one, *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014). It looks at "reality as it is apart from self-consciousness" or subjective belief. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 367 n.2 (1998) (citation omitted) (distinguishing objective and subjective). In other words, the Board's finding of mutual aid or protection must be "supported by evidence external to the [employee's] own (*subjective*) impressions." *Id.*

The question, therefore, is not what the *employee* performing the activity thought or perceived. "An employee's subjective motive for taking action is not … relevant to whether activity is for 'mutual aid or protection.'" *Fresh & Easy*, 361 NLRB at 153. Thus, in *New River Industries*, the Fourth Circuit held that a satirical

[6] For examples of political activity with a clear relationship to employment-related matters, see, for example *Eastex*, 437 U.S. at 558 (newsletter regarding "right-to-work" laws and the federal minimum wage); *Kaiser Eng'rs v. NLRB*, 538 F.2d 1379, 1385 (9th Cir. 1976) ("lobbying legislators regarding changes in national policy which affect [employees'] job security"); *Nellis Cab Co.*, 362 NLRB 1587, 1587-88 (2015) (protest by taxicab drivers regarding government issuance of taxicab medallions); Mem. from Ronald Meisburg, Gen. Counsel, to All Reg'l Directors, et al., Mem. GC 08-10, *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy*, 2008 WL 6708138, at *2-*3 (July 22, 2008) (discussing examples).

letter written by employees that "express[ed] criticism about" management's decision to hold an ice cream social was not for mutual aid or protection, 945 F.2d at 1294-95, even though at least one employee involved had been critical of the ice cream social because it did not make up for difficult working conditions, 299 NLRB 773, 774 (1990).

But solely focusing on the *employer's* perspective is also not correct. In *Five Star Transportation*, a group of unionized bus drivers feared that the school district's new bus transportation service provider would not recognize their union and match their existing wage and benefit packages. 349 NLRB 42, 42-43 (2007). The drivers engaged in a letter-writing campaign to the school committee, raising concerns about the new provider, with the objective to persuade the committee to revert back to the earlier provider that the drivers preferred. *Id.* at 43. The drivers simultaneously contacted the new service provider seeking assurances that their terms of employment would remain the same and that their union would continue to be recognized. *Id.* The drivers were thereafter discharged as a result of the letters. *Id.* The Board analyzed whether "the content of [each] letter[]" was "sufficiently related to the drivers' terms and conditions of employment to constitute protected conduct." *Id.* at 44. The Board did not inquire into whether the evidence supported a finding that the new *provider*, through its managers, understood the relationship between the

letters and terms and conditions of employment based on managers' contemporaneous discussions with the drivers; it surely did.

Instead, the starting place in analyzing the activity in question is to identify *the audience likely to see the activity*. For example, in *Five Star*, the Board focused solely on the contents of each letter and read them just as the school committee members to whom the letters were addressed would read them. *See id.* at 44-47. Similarly in *Eastex*, the Court held that a union's newsletter to employees "criticizing a Presidential veto of an increase in the federal minimum wage and urging employees to register to vote to 'defeat our enemies and elect our friends'" was protected based on how employees receiving the newsletter would understand the particular message. 437 U.S. at 569-70. The Court pointed to "the widely recognized impact that a rise in the minimum wage may have on the level of negotiated wages generally, a phenomenon that would not have been lost on [the] employees." *Id.* at 570 (footnote omitted); *see also Media Gen. Operations, Inc. v. NLRB*, 394 F.3d 207, 212 (4th Cir. 2005) (looking at the "substantive content" of the employee's "words").

This required analytical approach is consistent with how courts ascertain the meaning or existence of a message in numerous other contexts. For example, statutory interpretation requires looking at a text from the perspective of a "reasonable reader" (or "ordinary reader"). *Niz-Chavez v. Garland*, 593 U.S. 155,

161 (2021); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012). So too does contract interpretation. *Safeco Ins. Co. of Ill. v. Palazzolo*, 15 F.4th 1204, 1207 (8th Cir. 2021). In defamation law, "[s]tatements of opinion are protected by the First Amendment," but only so long as "the ordinary reader would have interpreted the statement as an opinion." *Others First, Inc. v. Better Bus. Bureau of Greater St. Louis, Inc.*, 829 F.3d 576, 580-81 (8th Cir. 2016). And in the free-speech context, conduct may be deemed "expressive" only if an observer would likely understand the would-be speaker's message. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

Critically, this reasonable observer likely to view the message knows a limited set of facts: "the nature of [the] activity" or message, "combined with the factual context and environment in which it was undertaken." *Spence v. Washington*, 418 U.S. 405, 409-10 (1974) (expressive conduct). Context includes current world events, *id.* at 410 (same); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969) (same), and common meanings of words and symbols, *Niz-Chavez*, 593 U.S. at 160-61 (statutory interpretation).

2. A reasonable customer would have understood BLM to be a political or social issue, not one related to the workplace.

Here, the audience most likely to see a message on the customer-facing employee's uniform is the customer.[7] It is from this perspective—the reasonable customer interacting with a sales specialist at Home Depot's New Brighton store—that the Board should have looked at the content of Bo's message. And it is clear such a customer would have understood the BLM initials to be a message regarding racial equality in society, police brutality, defunding the police, or any number of other political and social causes associated with the moniker. *See* App.854/AR2187 (ALJ); Home Depot Br. 25-28. What no customer would intuit is that Bo was speaking out against a supervisor's alleged mistreatment of minority employees or customers, the tearing down of Black History Month posters, or management's alleged failure to adequately address these intra-store conflicts. Indeed, "*[n]o one*" in the proceedings below "testified that they understood [Bo's] display of the BLM message to relate to [a supervisor's] conduct, the vandalism, or any other complaints regarding employees' treatment *qua* employees at the New Brighton store." App.863/AR2196 (ALJ) (emphasis added).

[7] In cases involving non-customer-facing employees, the relevant audience may instead be management personnel or co-workers. *Cf. Eastex*, 437 U.S. at 569-70 (considering the perspective of co-workers to whom the newsletter was handed out).

Bo began working at Home Depot and wearing the BLM initials in or around August 2020 on the tail end of months of "protests … by, among others, persons identifying themselves with the Black Lives Matter movement[,] … counter protests," and "civil unrest" in the greater Minneapolis metropolitan area, including New Brighton. "Some of this unrest was visible directly outside the New Brighton store." A store in the same shopping center as Home Depot was "looted." And "[o]n two occasions, [Home Depot] found it necessary to close the New Brighton store as a result of protest-related disruptions." At the time that Bo was instructed to remove the BLM initials, there was a renewed "period of heightened concern" in the area because of the upcoming murder trial of Derek Chauvin. App.854/AR2187 (ALJ). At all times relevant to this case, BLM and its associated movement were a flashpoint for the Twin Cities community. *See Spence*, 418 U.S. at 410 (analyzing how "the great majority of citizens" would have understood a display "at the time [the defendant] made it"); *S. New England Tel. Co. v. NLRB,*, 793 F.3d 93, 95 (D.C. Cir. 2015) (Kavanaugh, J.) (acknowledging the employer's concern that customers would perceive a t-shirt with the word "inmate" badly "in light of a recent and widely publicized home invasion" in the area); Home Depot Br. 41. It is through that lens that any customer would have viewed the markings on Bo's apron.

3. The Board erred by applying a subjective standard and by making a finding that lacks substantial evidence in the record.

The Board gave lip service to an "objective standard." App.824, 829 & n.26, 837/AR2157, 2162 & n.26, 2170. But the Board did not cite any contextual evidence visible to a reasonable observer to support its result. *Cf.* App.847/AR2180 (Member Kaplan, dissenting) (hypothesizing an apron that says "BLM at Home Depot" or "BLM in this store"); App.863 n.25/AR2196 n.25 (ALJ) ("I might have reached a different result had [Bo's] BLM display been augmented with messaging that connected it to working conditions[.]"). Instead, the Board determined that a factfinder looking at all the evidence would understand that Bo's subjective intent was to express a statement regarding the workplace. App.828-29, 829 n.26/AR2161-62, 2162 n.26. It asked whether, based on the evidence of Bo's statements to management behind closed doors about the BLM initials and Bo's prior meetings with management about work-place issues, "a purpose for [the] display of the BLM marking—objectively speaking—was to further protest racial discrimination" at the New Brighton store and management's "failure to adequately address it." App.829 & n.26/AR2162 & n.26; *see* App.828-29/AR2161-62.

That is not an inquiry into the message conveyed to the most likely audience. Just as an individual does not engage in expressive conduct by claiming he has a message, *United States v. O'Brien*, 391 U.S. 367, 376 (1968), and a statute does not

contain whatever hidden meaning its drafter relayed to a congressional committee, *Lansdown v. Faris*, 66 F.2d 939, 942-43 (8th Cir. 1933), a statement in the workplace does not relate to the terms or conditions of employment just because the speaker says so behind closed doors. *See New River Indus.*, 945 F.2d at 1295; *Five Star Transp.*, 349 NLRB at 43-47. What the Board actually did is search for Bo's subjective intent. *See United States v. Kosh*, 674 F. App'x 592, 593-94 (8th Cir. 2017) (unpublished per curiam) (analyzing whether a reasonable fact-finder could find that the defendant did not "hold[] a good-faith, subjective belief").

The Board's prioritization in this case of the *employee's* understanding of the message is also a dangerous precedent. It gives customer-facing employees free rein to expand their Section 7 rights unilaterally to virtually any issue no matter how a customer will understand the messaging. All an employee needs to do is to tell management before walking onto the sales floor that the employee is going to display an objectionable message as a symbol of discontent with the terms and conditions of employment. *Cf. O'Brien*, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). Each employee would have a magic bullet to immunize himself from discipline.

Consider some potential examples. One employee could claim that her sticker saying "Build the Wall" sends a message to her employer to hire citizens only; a

second could wear a pin supporting President Biden for reelection because the employee thinks the President favors unions; and a third could wear a National Rifle Association hat because he thinks the store should have armed security.

II. Retailers' interest in maintaining customer relations and order outweighs any right of customer-facing employees to use their employment as a platform for political or social advocacy.

Even if there was Section 7 activity, the Board must ask a "second question": whether the employer has a "countervailing interest that outweighs the exercise of [Section] 7 rights" in the particular context. *Eastex*, 437 U.S. at 563; *see Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945) (discussing the need for an "adjustment between the undisputed right to self-organization assured to employees" and "the equally undisputed right of employers to maintain discipline in their establishments"). When the employer's interests outweigh the employee's rights, there is no Section 8 violation. *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 268-69 (1965). The inquiry is case-specific and "may largely depend upon the content and the context of the [Section] 7 rights being asserted." *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976).

Here, the NLRA balance weighs heavily in retailers' favor, at least in the context of customer-facing employees. Even if a customer-facing employee like Bo has a Section 7 right to wear messaging related to a political or social cause while engaging with customers, retailers have a substantial and legitimate interest in

controlling the messaging that their customer-facing employees express when they are acting as the retailers' agents. *See generally* Home Depot Br. 43-50. That remains true when a retailer allows, as Home Depot does, its employees to personalize their uniform in some ways but not others. Personalization can create a more energetic and welcoming environment for customers. *Id.* at 20. A business need not clamp down on all creativity and expression of its employees in order to avoid associating itself with divisive political and social issues. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569-70 (1995) (explaining in the First Amendment context that a speaker does not forfeit constitutional protections by being "lenient in admitting" other viewpoints).

Allowing customer-facing employees to use the workplace as a bulletin board for their political and social views undermines a business's ability to appeal to customers from all walks of life with all types of views. That appeal is the key to success for any retailer.

Beyond wanting to broaden the tent of potential customers, retailers have a legitimate interest in ensuring order and safety in their stores. In this very case, Home Depot submitted uncontroverted evidence that "the display of Black Lives Matter/BLM and similar messages have led to workplace conflict." App.853/AR2186 (ALJ); Home Depot Br. 41. And conflict could also ensue if another employee, feeling differently about management's handling of intra-store

race relations wore an opposing design that said "All Lives Matter." Indeed, when confronted with that slogan by a manager, Bo "became [so] upset" that the manager "agreed to end the meeting." App.822/AR2155 (NLRB); *see also* App.856 n.8/AR2189 n.8 (ALJ) (listing various "messaging" that Bo would deem "offensive if co-workers were permitted to wear" them).

The risk for conflict is only elevated in light of another recent Board decision curtailing employers' ability to discipline employees for "abusive conduct" while engaging in Section 7 activity. *Lion Elastomers LLC*, 372 NLRB No. 83, 2023 WL 3173759, at *1-*2 (May 1, 2023) (returning to *Atlantic Steel*, 245 NLRB 814 (1979) and progeny), *pet. for review docketed*, No. 23-60270 (5th Cir. May 23, 2023); *see City Disposal Sys.*, 465 U.S. at 837 ("An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7."). The NLRA, the Board explained, "imposes no obligation on employees to be 'civil' in exercising their statutory rights." *Lion Elastomers*, 2023 WL 3173759, at *13. It thus rejected prior precedent that "insisted that 'it is reasonable for employers to expect employees to engage all challenging topics in the workplace with a modicum of civility.'" *Id.* at *12 (quoting *General Motors*, 369 NLRB No. 127, 2020 WL 4193017, at *13 (July 21, 2020)) (brackets omitted). Now under *Lion Elastomers* and *Home Depot*, "indefensible" expressive attire that is tangentially related to the workplace will be protected even if it includes "profane ad hominem attacks" or "racist epithets." *Id.*

at *21 (Member Kaplan, dissenting) (citing examples of activity deemed protected under *Atlantic Steel*).

On the other side of the ledger, employees have no cognizable interest in coopting their employers as a megaphone for their viewpoints. *See Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577, 583 (8th Cir. 1965) (calling the notion that an employer cannot deny employees "the right to wear [non-union-related] buttons in certain ways on company time" "doubtful"). They may speak about whatever they desire off the clock and have every opportunity to do so on the clock too so long as they are not on the sales floor with customers, just as Bo did here through various meetings. As Bo conceded at one point, "[t]here's *plenty* of other ways" to express a message that race relations in the workplace need improvement. App.823/AR2156 (NLRB) (emphasis altered).

Instead of simply balancing Home Depot's interests and Bo's rights in this case, the Board reflexively applied its "special circumstances" limitation. App.830/AR2163. In certain cases, the Board has concluded that "particular employer restriction[s]" cannot prevail in the balancing analysis absent "special circumstances" and are thus "presumptively an unreasonable interference with [Section] 7 rights." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 493 (1978).

But the Board neither cited precedent nor provided any explanation why the special-circumstances doctrine is applicable in these circumstances. The prior

decisions cited by the Board all involve employers' restrictions on the ability of employees to wear union-related insignia or messages unmistakably related to terms and conditions of employment. App.830/AR2163; *see, e.g.*, *Am. Med. Resp. W.*, 370 NLRB No. 58, 2020 WL 7338078, at *1 (Dec. 10, 2020) (union-affiliated insignia); *In-N-Out Burger, Inc.*, 365 NLRB No. 39, 2017 WL 1103798, at *1 n.2 (Mar. 21, 2017) ("Fight for Fifteen" button). That is very different from customer-facing employees wearing political or social messages not explicitly related to the workplace. *See Tesla, Inc. v. NLRB*, 86 F.4th 640, 652 (5th Cir. 2023) (rejecting an extension of the special-circumstances doctrine); *cf. Beth Israel*, 437 U.S. at 493 (noting that Board precedent applied the special-circumstances doctrine to solicitation-and-distribution restrictions except in "retail marketing establishments, including public restaurants").

III. There are numerous other indicators that the Board did not engage in reasoned decision-making.

In addition to the legal errors already discussed, there are several other signals that the Board did not engage in this case in the "reasoned decisionmaking" demanded by the Administrative Procedure Act. *Allentown Mack*, 522 U.S. at 374.

On the face of the Board's opinion alone are multiple such indicators. For one thing, the Board departed from its longstanding recognition of an ALJ's superior ability to make credibility findings based on his observation of witnesses. *See Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950). The ALJ "d[id] not

find" Bo's testimony that the BLM initials referred in part to racism in "the store" to be "credible." App.858/AR2191. On appeal, the Board "f[ound] no basis for reversing" the ALJ's credibility findings in this case, App.820 n.2/AR2153 n.2, but nevertheless effectively deemed Bo's "not … credible" testimony to be truthful when deciding that Bo's intent was to pursue mutual aid and protection.

Additionally, as Member Kaplan pointed out in dissent, the Board contravened the core principle that "an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Lamar Cent. Outdoor*, 343 NLRB 261, 265 (2004) (citation omitted). Despite the fact that the General Counsel's allegations were limited to Bo engaging in protected activity by "*displaying*" the BLM initials beginning in August 2020, the Board found Home Depot liable based on Bo's "*refus[al] to remove*" the initials in February 2021. App.848/AR2181 (Member Kaplan, dissenting); *see* pp. 8-9, *supra*. Home Depot had no opportunity to rebut that theory.

This case, moreover, comes in the midst of a particularly troubled stretch of decision-making by the Board. The Board "frequently changes its mind, seesawing back and forth between statutory interpretations, depending on its political composition, leaving workers, employers, and unions in the lurch." *Valley Hosp. Med. Ctr., Inc. v. NLRB*, 100 F.4th 994 (9th Cir. 2024) (O'Scannlain, J., specially

concurring).[8] In just a brief snapshot, the NLRB during the Obama administration "overturned a total of 4,105 years of collective years of precedent in 91 cases and rejected an additional 454 years of case law." Michael J. Lotito, *et al.*, Coal. for a Democratic Workplace & Littler's Workplace Pol'y Inst., *Was the Obama NLRB the Most Partisan Board in History?* 1 (Dec. 6, 2016). Under the Trump administration, the NLRB reversed a significant number of decisions issued during the prior administration.[9] And under the Biden administration, the NLRB is reversing course again.[10]

At the same time, the Board has suffered stinging rebukes in court for trying to improperly extend the reach of the Act. The Fifth Circuit stopped the NLRB's attempt to venture "well beyond the scope of the NLRA" and "irrationally impose [a] new rule" making "all company uniforms presumptively unlawful." *Tesla*, 86 F.4th at 644, 650-51. The NLRB had taken the position that employees must be able to wear union-affiliated clothing and that a nondiscriminatory company uniform or

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[8] *See generally* Br. of Coal. for a Democratic Workplace & 7 Other Ass'ns Representing Employers as *Amici Curiae* in Supp. of Neither Party 12-17, *Loper Bright Enters. v. Raimondo* (U.S. July 24, 2023) (No. 22-451).

[9] *See, e.g.*, *800 River Rd. Operating Co.*, 369 NLRB No. 109 (2020); *Valley Hosp. Med. Ctr., Inc*., 368 NLRB No. 139 (2019); *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017); *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156 (2017).

[10] *See, e.g.*, *Stericycle*, 372 NLRB No. 113 (2023); *Atlanta Opera*, 372 NLRB No. 95 (2023); *Am. Steel Constr., Inc.*, 372 NLRB No. 23 (2022).

dress code was unlawful insofar as it stopped the employees from doing so, even if they were free to wear all the union stickers they wanted. *Id.* at 646, 650.

A few months later, the D.C. Circuit rejected as "nonsense" the Board's argument that a single text message reminding a truck driver to abide an unambiguous rule is an unfair labor practice. *Stern Produce Co. v. NLRB*, 97 F.4th 1, 8-9 (D.C. Cir. 2024) (citation omitted). The court called this "misguided attempt to find a labor-law violation in one text message" the "product of a familiar phenomenon" in which the NLRB "t[a]k[es] an expansive view of the scope of the Act and then, over time, … presse[s] the rationale of that expansion to the limits of logic." *Id.* at 11 (quotation marks and citation omitted). *See also, e.g.*, *New Concepts for Living, Inc. v. NLRB*, 94 F.4th 272, 276 (3d Cir. 2024) (holding the Board's findings lacked substantial evidence); *PG Pub'g Co. v. NLRB*, 83 F.4th 200, 204 (3d Cir. 2023) (holding that the Board legally erred by not applying "ordinary contract principles").

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"Common sense sometimes matters in resolving legal disputes." *S. New England Tel.*, 793 F.3d at 94. This is just such a case, and common sense is not on the Board's side.

CONCLUSION

This Court should grant the petition for review in No. 24-1406, and deny the cross-application for enforcement in No. 24-1513.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,172 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Times New Roman font, using Microsoft Word.

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/s/ Elbert Lin
Elbert Lin

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I hereby certify that on this 31st day of May, 2024, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which shall send notification of such filing to all CM/ECF participants.

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