

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO DIVISION OF JUDGES

WHOLE FOODS MARKET SERVICES, INC.

and

SAVANNAH KINZER, SUVERINO FRITH,  
LYLA STYLES, ABDULAI BARRY, KIRBY  
BURT, KAELEB CANDRILLI, LEEA MARY  
KELLY, TRUMAN READ, HALEY EVANS,  
JUSTINE O'NEILL, JOLINA CHRISTIE,  
SARITA WILSON, CAMILE TUCKER-  
TOLBERT, CASSIDY VISCO, YURI LONDON,  
ANA BELÉN DEL RIO RAMIREZ, and  
CHRISTOPHER MICHNO, as Individuals

|                     |               |
|---------------------|---------------|
| Cases 01-CA-263079; | 01-CA-263108; |
| 01-CA-264917;       | 01-CA-265183; |
| 01-CA-266440;       | 01-CA-273840; |
| 04-CA-262738;       | 04-CA-263142; |
| 04-CA-264240;       | 04-CA-264841; |
| 05-CA-264906;       | 05-CA-266403; |
| 10-CA-264875;       | 19-CA-263263; |
| 20-CA-264834;       | 25-CA-264904; |
| 32-CA-263226;       | 32-CA-266442  |

**RESPONDENT WHOLE FOODS MARKET'S SUPPLEMENTAL POST HEARING  
BRIEF TO THE ADMINISTRATIVE LAW JUDGE ON ADDITIONAL LEGAL  
AUTHORITY**

*For Respondent Whole Foods Market*

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Submitted this 11<sup>th</sup> day of September 2023.

ALJ Sotolongo should dismiss the Consolidated Complaint against Whole Foods Market (“WFM”) in its entirety. The facts, extant Board law, and Supreme Court precedent compel this conclusion. WFM’s supplemental brief<sup>1</sup> addresses the decision of the United States Supreme Court in *303 Creative v Elenis*, which highlights the overreach of the General Counsel (“GC”) here in seeking to force WFM to speak on social, political and/or human rights topics in violation of its First Amendment rights not to engage in such speech. We also address the recent National Labor Relations Board (“NLRB”) decision in *Stericycle*, which does not impact the analysis or the determination in this litigation.

**I. 303 Creative v. Elenis**

On June 30, 2023, the Supreme Court issued its decision in *303 Creative LLC v. Elenis*, 143 S.Ct. 2298 (2023). The case concerned Lorie Smith, an individual who sought to operate a wedding website in Colorado but believed that the Colorado Anti-Discrimination Act (“CADA”) might require her to convey a message via wedding websites she designed that were inconsistent with her religious beliefs opposing gay marriage.

The Supreme Court struck down CADA finding that it would compel Smith to create speech in the form of designing wedding websites for gay couples, which speech Smith did not, or may not, wish to make. In so holding, the Supreme Court noted that, “[a]ll manner of speech—from ‘pictures, films, paintings, drawings, and engravings,’ to ‘oral utterance and the printed word’—qualify for the First Amendment’s protections.” *Id.* at 2312, citing *Kaplan v. California*, 413 U. S. 115, 119–120, 93 S.Ct. 2680 (1973). Indeed, the Court acknowledged that Smith’s speech might combine with the putative couple’s speech in the resulting wedding website but held that did not alter the fact that it was still *Smith’s* speech. CADA, the Court observed, would compel

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<sup>1</sup> See ALJ Sotolongo’s Order Directing the Parties to File Supplemental Briefs issued August 7, 2023, due date subsequently extended by Associate Chief Etchingham’s August 9, 2023 Order.

Smith to speak a message she does not wish to make, explaining, “[i]f she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in ‘remedial ... training,’ filing periodic compliance reports as officials deem necessary, and paying monetary fines. Under our precedents, that ‘is enough,’ more than enough, to represent an impermissible abridgment of the First Amendment’s right to speak freely.” *Id.* at 4, citing *Hurley*, 515 U. S. 557, 574, 115 S. Ct. 2338 (1995) (internal citations omitted).

It made no difference to the Court that Smith had chosen to form a corporation and perform services for others because speakers do not “shed their First Amendment protections by employing the corporate form to disseminate their speech.” *Id.* at 2318 (citations omitted).

The Court also took the State to task for compelling a corporation to espouse the government’s preferred message, noting that “the government may not compel a person to speak its own preferred messages. Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include.” *Id.* at 8-9 (internal citations omitted). The Court held that the express purpose of the Colorado law was to compel speech “in order to ‘excise certain ideas or viewpoints from the public dialogue,’” an expressly impermissible purpose. *Id.* at 18-19 (internal citations omitted).

**A. 303 Creative protects employers’ First Amendment rights.**

*303 Creative* confirms that the GC’s Complaint and the Order it seeks against WFM violates the First Amendment. In addition to confirming that First Amendment rights apply to entities that “employ the corporate form,” (*Id.* at 16-17), the Supreme Court further held that the government may not compel a corporation to speak on a topic when it chooses to remain silent,

particularly on a subject of political significance. (*Id.* at 19.) The Court’s logic in striking down CADA provides a clear roadmap to determining that the GC’s application of Section 7 to the Black Lives Matter messaging at issue in this case violates WFM’s First Amendment Rights.

First, the GC has singled out a specific message that she prefers, namely “Black Lives Matter” or “BLM,” for special treatment. Second, the GC seeks to compel WFM to espouse that speech by requiring that WFM permit team members to emblazon that approved political and social justice message on WFM’s branded aprons, hats, and facemasks, and to require that WFM permit such social and political advocacy in its stores by team members while in uniform on paid time representing WFM’s brand to its customers. Third, team members testified that they expressly intended and understood that when they were working in customer facing roles they were speaking to customers on behalf of WFM.

In short, the GC is seeking an order compelling WFM to change its public image by forcing it to accommodate the views of some team members on topics of major political and social importance, where the Company adhering to its Dress Code policy would rather remain silent or choose a different message. In doing so, the GC’s Complaint and requested order seek to alter the expressive content of WFM’s chosen speech, including its First Amendment right not to speak on the issue. That, *303 Creative* confirms, the government may not do.

The GC chooses to ignore the First Amendment issues raised by her Complaint, and points to *Republic Aviation* to argue that the Supreme Court has already spoken authoritatively on the issue at hand. That argument, however, grossly overstates *Republic Aviation*’s holding. *Republic Aviation*, decided over 75 years ago, concerned the termination of three employees for wearing UAW-CIO union steward buttons in the employer’s plant after being asked to remove them, where the employer argued that the union was not the duly designated representative of the employees

and the pin might create confusion about the employer's neutrality in union matters. The First Amendment was not at issue and the Court did not address at all in its decision the First Amendment and the issue of compelling employer speech on social and political issues. Instead, the Court in *Republic Aviation* explained:

[T]he gravamen of the objection of both Republic and Le Tourneau to the Board's orders is that they rest on a policy formulated without due administrative procedure. To be more specific it is that the Board cannot substitute its knowledge of industrial relations for substantive evidence. The contention is that there must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company.

As such, *Republic Aviation* concerned whether the Board's decision comported with agency procedures and administrative law in reaching its conclusion. *Republic Aviation* did not address employer free speech where an employee chooses to use her company uniform to speak on social, political and/or human rights topics, even those the GC chooses to argue Section 7 of the NLRA ought to cover. Instead, where called on to address the First Amendment concerns in the labor space, the Supreme Court has determined that compelled speech runs afoul of the First Amendment. In *Janus v. AFSCME*, relying on many of the same cases relied upon in *303 Creative*, the Court held that a state law compelling employees to pay agency fees to a union they chose not to join violated the First Amendment because it forces the employee to "subsidize the speech of other private persons." 138 S. Ct. 2448, 2464 (2018). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.*

**B. The General Counsel's Complaint infringes on WFM's First Amendment rights.**

The GC's Complaint violates WFM's First Amendment rights for at least three reasons. *First*, the GC has singled out a specific message that she prefers, namely "Black Lives Matter" or "BLM" for special treatment. The GC selected "Black Lives Matter" or "BLM" as its preferred

social or political phrase, designating it for protection, and seeking to isolate it for special treatment with total disregard for the manner that the phrase was used by the individuals at issue in this case. The GC's theory seeks to look at the phrase in isolation, so that wherever it appears, even adjacent to what the GC admits are unprotected phrases like "I Can't Breathe," "No Justice, No Peace," "Say Their Names," and images of unarmed Black people killed by police or white vigilantes, images of fists raised in protest, the names "George Floyd" and "Breonna Taylor," the phrase "BLM" or "Black Lives Matter" should be singled out for workplace protection. The GC's theory is a blunt instrument, calling for a bright line protection for a specific phrase regardless of circumstance. It is the same sort of blunt attempt to force citizens to espouse or express a platform on a specific ideological viewpoint that the Supreme Court in *303 Creative* made clear the government cannot do. *303 Creative* at 3, citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505. "Nor can a State use a public accommodations statute to deny a speaker the right "to choose the content of his own message." *Hurley*, 515 U. S., at 573; see *Boy Scouts of America v. Dale*, 530 U.S. 640, 650–56 (2000). The same is true of the NLRA.

*Second*, the GC seeks to compel WFM to espouse her preferred speech by requiring that WFM permit its own message to customers be diluted by the GC's preferred social, political and/or human rights message, and force WFM to allow team members to emblazon the message on WFM's apron, hats, branded facemasks, and be displayed by team members while working on paid time, when engaging with customers, thus forcing WFM (and all employers) to provide a platform for speech where the employer does not wish to speak. Indeed, the GC would compel an employer to turn its employee uniform into a mobile billboard for the GC's preferred ideological message, which the Supreme Court has already resoundingly rejected. See *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178 (1943) (holding that New Hampshire

may not require drivers to espouse the state’s preferred message by requiring “Live Free or Die” on license plates.) Indeed, the GC’s Complaint makes clear that any message or expression the NLRB deems related to work – no matter how attenuated any nexus to a term or condition of employment, and even if the purpose is not to advertise a labor dispute between employees and their employer or any employer – would enjoy NLRA protection, effectively rendering employers’ First Amendment rights moot.

*Finally*, the GC’s theory relies on the unsupported premise here that team members wear social, political and/or human rights slogans while working in stores on company paid time, in WFM-branded uniforms and clothing, but customers will somehow know better than to impute those slogans to WFM. That argument ignores reality and flies in the face of *303 Creative’s* holding. *303 Creative* recognized that an organization’s speech, even when combined with the speech of others, is still the speech of that organization – which the employer has a First Amendment right not to participate in. Here, team members testified that when interacting with customers, while working and wearing WFM branded aprons, hats, and chef coats, they understood they did so as representatives of WFM to customers. (*See, e.g.*, Styles 989; Burt 824-26; Frith 734-35, 834.) They also understood that wearing “Black Lives Matter” facemasks might offend some customers and that customers may choose to shop elsewhere—a choice that punishes WFM for the “speech” the GC seeks to compel WFM to engage in. (*See* R1; R2.) For example, Charging Party Kinzer testified that she was aware the “Black Lives Matter” face mask would “offend some customers,” but she did not care. *Id.* In Kinzer’s view, customers who were uncomfortable with her “Black Lives Matter” face mask, or disagreed with its message, should shop elsewhere and WFM should be willing to lose those customers. (R1; R2; R10; Kinzer 350.) Charging Party Frith said the same. (Frith, 834.) The point of wearing BLM messaging at work was to leverage WFM’s

brand and customer base to advance their own social, political and/or human rights beliefs—and not workplace concerns—because as Kinzer made clear, employees were “not asking for higher pay, more time off, or better benefits.” (R2.)

*303 Creative* confirmed the long-established principle that governments cannot designate certain speech for special treatment and require an employer to provide a platform for speech about which it chooses not to speak. The GC’s theory would require every employer in the country to provide a paid platform for employees to speak on a variety of social, political and/or human rights topics only tangentially connected (if at all) to working conditions. This could include topics from abortion to gun control, or voting for a pro- or anti- union President. Indeed, the GC is quoted as stating that an employer would be required to permit employees to wear “Black Lives Matter” with an X through it (meaning, ‘Black Lives Do Not Matter’) as that, too, would, in the opinion of the GC, constitute protected speech under Section 7 of the NLRA. While employees may wear union insignia (with proper restrictions where special circumstances are present), the GC’s expansion of that right without limitation to social, political and/or human rights speech trespasses heavily into compelled speech in violation of the First Amendment. *303 Creative* requires the ALJ and Board to cleave very closely to the *Eastex* standard that the activity protected under Section 7 of the NLRA bear a direct nexus or immediate relationship to employees’ interests as employees, and to heed the Supreme Court’s admonition that it not become “so attenuated that an activity cannot fairly be deemed to come within the ‘mutual aid or protection’ clause.” *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

## II. *Stericycle*

### A. The ALJ must dismiss the Consolidated Complaint against WFM.

On August 2, 2023, the NLRB issued its decision in *Stericycle Inc.*, 372, NLRB No. 113 (2023), explicitly overruling *Boeing, Co.*, 365 NLRB No. 154 (2017), and re-instituting,



retroactively, a slightly modified framework under *Lutheran Heritage*, 343 NLRB 646 (2004), for reviewing employer work rules. While *Stericycle* addresses an employer's maintenance and enforcement of work rules, it does not alter the inescapable conclusion in this case that BLM messaging when worn by team members while working in the days following George Floyd's May 2020 murder was then, and is now, *not* objectively understood by the team members and American public to be directly related to employees expressing a specific employment-related concern.

To the extent *Stericycle* has any bearing on the peripheral allegations in the Consolidated Complaint concerning the adoption and application of WFM's May 2020 and November 2020 Dress Codes policies (collectively "Dress Codes"), it does not alter the conclusion that WFM did not violate the Act by enforcing the Dress Codes against conduct not protected by Section 7. Nor did WFM violate the Act by simply maintaining the Dress Code policies. WFM's May 2020 Dress Code was drafted and approved by the Regional Directors of Region 1 and 13 while *Lutheran Heritage*, the decision *Stericycle* effectively reinstated, was in effect.

To the extent the GC alleges that WFM unlawfully promulgated the November 2020 Dress Code in response to protected activity, that allegation must fail because the GC cannot establish predicate protected activity. Further, special circumstances justified the Dress Code's size and appearance restrictions, which are only applicable to the sales floor.

Finally, WFM has established that its Dress Codes did not and do not prohibit team members from wearing union insignia. Indeed, team members wore union insignia at work without any management action. (R77; Stegeman 2455.) Likewise, WFM management testified that the Dress Codes never prohibited team members from wearing union insignia. (Smith 3601-02; Stegeman 2456.) It is axiomatic that if team members wore union insignia, and management permitted it, no one reasonably interpreted the Dress Codes to preclude that protected conduct.

**B. *Stericycle's* return to the *Lutheran Heritage* standard does not change the outcome in this case.**

In *Stericycle*, the Board majority overturned *Boeing's* three category framework and reinstated the *Lutheran Heritage* standard, which had been in place from 2004 until *Boeing* was decided in 2017. *Stericycle* at 1. Under *Lutheran Heritage*, the GC must establish that a challenged work rule has a “reasonable tendency to chill employees from exercising their [S]ection 7 rights.” *Id.* at 9. The Board will now review workplace rules from the perspective of the reasonable employee, who is not a lawyer, and who is economically dependent on her employer and inclined to interpret an ambiguous rule to prohibit protected activity. *Id.* If such an employee could reasonably interpret a rule to restrict or prohibit Section 7 activity, then the GC has satisfied its burden that the rule is presumptively unlawful. *Id.* “[A]n employer may rebut this presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule.” *Id.* at 10.

The Board in *Stericycle* stated that its return to *Lutheran Heritage* “does not disturb the Board’s long-established doctrines covering work rules that address union (or other protected) solicitation, distribution, or insignia.” *Id.* at 3. Instead, cases involving an employer’s outright prohibition of union insignia fall under the Supreme Court’s decision in *Republic Aviation*, 324 U.S. 793 (1945), and the “special circumstances” test that the Board recently clarified in *Tesla*, 371 NLRB No. 131(2022), and which overruled *Wal-Mart.*, 368 NLRB No. 146 (2019). In *Tesla*, the Board held that an employer’s workplace rule that limits or restricts wearing or display of union insignia may survive upon a showing of special circumstances.

As shown in WFM’s post hearing brief, whether applying the *Tesla/Republic Aviation* standard, or the *Stericycle/Lutheran Heritage* standard, the GC cannot meet its burden of proving that WFM’s Dress Codes operated to prohibit team members from wearing union insignia.

Conspicuously absent from the record is any evidence that any reasonable WFM team member ever read the Dress Codes to do so, and to the extent the November 2020 Dress Code provides certain size and appearance limitations, special circumstances justify them. (See *infra* at pp. 6-8.)

C. **The May 2020 Dress Code was drafted by the GC under *Republic Aviation* as part of a Settlement Agreement that has not been set aside nor breached by WFM.**

As set forth in WFM’s prior brief, the May 2020 Dress Code was the result of a 2013 Settlement Agreement between WFM and representatives of the GC. The substantive legal framework in place today is the same as 2013, when representatives of the GC executed and approved it. Then, as now, under *Republic Aviation* an employer must prove special circumstances to maintain such a work rule. The Regional Directors of Regions 1 and 13 drafted the language they required WFM to adopt in its May 2020 Dress Code. (R99.) WFM’s Dress Code, as approved by the GC, then remained unchanged from 2014 to November 2020. GC3, R117). The GC has never set aside the Settlement Agreement, nor alleged WFM was in default. Indeed, as late as 2019 the Regional Director of Region 1 certified that WFM complied in full. (Ex. 99, pp. 35-36.)

Yet, the GC now argues that the Dress Code implemented as part of the Settlement Agreement did not comply with *Republic Aviation*, an argument the GC did not raise during the compliance stage of the case from 2014 to 2019.<sup>2</sup> Instead, just over a year *after* the Regional Director of Region 1 certified that WFM was in full compliance with the Settlement Agreement and related Board Order, the GC alleges – without setting aside the Settlement Agreement – that WFM’s unchanged Dress Code violated the law. This, the GC cannot do, as the Board “will not

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<sup>2</sup> The General Counsel has raised, but failed to sufficiently articulate any meaningful difference between the 2013 Settlement Agreement (i.e., “without any visible slogan, message, logo or advertising printed on them”) and the phrase in the May 2020 Dress Code policy (i.e., “without any visible slogan, message, logo or advertising on them”). The General Counsel has not sufficiently articulated how these phrases are different, nor has it explained why, if they are in fact different, the Regional Directors of Region 1 or 13 did not raise this issue prior to certifying compliance with the 2013 Settlement Agreement in 2019. They are not meaningfully different and the record lacks any evidence that the omission of the word “printed” ever functioned to prohibit protected activity.

find an unfair labor practice based on the subject of a settlement agreement unless the settlement is first set aside, and the Board will not set aside a settlement agreement unless there is a breach of the agreement or a subsequent related violation of the Act.” *St. Francis Hotel*, 260 NLRB 1259, 1259 (1982), citing *Henry I. Siegel Co., Inc.*, 143 NLRB 386 (1963).

**D. It would be manifestly unjust to apply *Stericycle* retroactively to this litigation.**

To the extent the ALJ were to find that applying the Board’s decision in *Stericycle* to this case would affect the outcome, then, for the same reasons articulated in WFM’s post-hearing brief related to *Tesla*, it would be manifestly unjust to apply *Stericycle* retroactively to this litigation. At all times relevant to this dispute, WFM maintained Dress Codes that, at the time of their promulgation, complied with extant Board law. Board precedent does not apply changes in law retroactively if doing so “would work a ‘manifest injustice.’” *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005). “In making that determination, the Board considers ‘the *reliance of the parties on preexisting law*, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.’” *Id.* at 673. (emphasis added).

In *Stericycle* (and in *Tesla*), the Board stated that *Boeing* and *LA Specialty Produce* 468 NLRB No. 93 (2019), were “announced less than 4 years ago, so parties have not had an extended period to rely on *Boeing’s* purportedly clarified standard.” *Stericycle* at 13. The Board majority also opined, without any support, that “reliance on *Boeing* as a practical matter was minimal.” *Id.* Here, however, it could not be clearer that WFM looked to the Board for guidance and applied extant Board law in crafting each of its Dress Codes. Specifically, in May 2013, WFM changed its Dress Code to comply with the GC’s demand, which remained unchanged until November 2020. Subsequently, in November 2020, after Board law substantively changed, WFM re-crafted its Dress Code so that it complied to the letter with the law under *Boeing* and *Wal-Mart*.

In 2022, the GC issued a Consolidated Complaint alleging that WFM’s 2013-2020 Dress Code was unlawful under *Lutheran Heritage*, and that WFM unlawfully promulgated its November 2020 Dress Code, despite clear reliance on and compliance with Board standards at the time. That is manifestly unjust. Indeed, as the current Board Chairman McFerran explained in her dissent in *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015), retroactive application would “cause manifest injustice to [those] that relied on *Lincoln Lutheran* in negotiating their collective-bargaining agreements.” 368 NLRB No. 139, \*14 (Dec. 16, 2019) (McFerran, dissenting).

**E. The May 2020 Dress Code complies with *Republic Aviation* and *Lutheran Heritage*.**

Notwithstanding the estoppel argument and the manifest injustice of waiting to litigate a charge for two years and then applying later enacted legal standards, it is also nonsensical to argue that WFM’s 2013-to-May-2020 Dress Code violated the law when it was drafted pursuant to a settlement agreement with the GC at a time when *Lutheran Heritage* was in effect. The language prohibiting team members from wearing shirts with “any visible slogan, message, logo, or advertising” is identical in all material respects to the language that Regions 1 and 13 approved in the 2013 Settlement Agreement, which resolved charges contending that the prior dress code violated *Republic Aviation* and *Lutheran Heritage*. The GC cannot contend that language it mandated to bring WFM’s Dress Code into compliance with the NLRA also violates the Act.

Moreover, the rule *does not* prohibit team members from wearing union insignia. Rather, as negotiated with the NLRB Regional Directors, WFM’s Dress Codes carefully balanced WFM’s special circumstances and desire to maintain a specific appearance of its team members and brand to its customers, while also allowing team members to wear union insignia if they so choose.

There is also no evidence (or even an allegation) that WFM ever prevented a team member from wearing union insignia. Indeed, all of the evidence at trial is that team members understood that they could, *and did* in fact, wear union insignia without management ever attempting to

enforce the Dress Code to prohibit such conduct. This is not theoretical. As WFM's Vice President of Team Member Services, Barbara Smith, testified, WFM team members routinely wore union buttons, shirts, t-shirts, lanyards, jackets, and hats, and WFM did not issue corrective action to any team member for such conduct. (Smith 3601-02; *see also* Stegeman 2456.) For example, Charging Party Team Member Justine O'Neill wore a "Union's Protect Workers" pin while working without incident, or comment from store leadership. (R77; Stegeman 2455.) In fact, all of the evidence introduced by the GC in support of this allegation centered on BLM messaging alone, and not union insignia. The GC did not even attempt to introduce evidence that the Dress Codes prevented team members from wearing union insignia or other legitimately protected insignia.

Even if the GC could establish that the Dress Codes were unlawful, which she cannot, WFM has demonstrated that special circumstances permit it to prohibit BLM and other social, political and/or human rights messaging on the Company's sales floor. First, WFM established a legitimate interest in maintaining the safety of team members and customers, and to avoid divisiveness and resentments within the workplace among those who held objectively different beliefs about the term's meaning. Second, WFM established that the prohibition on BLM messaging interfered with its public image. WFM demonstrated that its November 2020 Dress Code, to the extent it limits wearing union insignia, is narrowly drafted to apply only to customer-facing team members and permits team members to wear union insignia while still allowing them to be easily identifiable to customers and present in a clean and neat manner as befits the public image WFM intends to project. Thus, WFM permitted team members to "ma[k]e known" their "union affiliation and union activities" without unduly infringing upon WFM's right to project a certain public image. See *United Parcel Service*, 195 NLRB at 450 (noting that driver was "giving up very little" in not wearing an additional union button where policy allowed him to wear one).

Here, there is simply no evidence that reasonable team members ever interpreted either the May 2020 or November 2020 Dress Code to prohibit them from wearing union insignia (and some did in fact wear union insignia without any adverse consequence). Not even the Regional Director of Region 1 thought the May 2020 Dress Code prohibited union insignia, as evidenced by the Regional Directors' approval of a settlement agreement requiring its implementation.

**F. The November 2020 Dress Code is lawful.**

The GC alleges that WFM violated the Act by promulgating a new Dress Code in November 2020, "in response to its employees protected concerted activities," namely wearing BLM messaging. (Peterson, Tr. 83, 23-25). Because wearing BLM messaging is not protected concerted activity, the GC cannot sustain her burden of demonstrating that WFM unlawfully promulgated the Dress Code.

The November 2020 Dress Code expressly permits employees to wear union insignia and is consistent with WFM's demonstration that special circumstances exist to permit narrowly tailored size and appearance restrictions when on the sales floor. This legal framework is intended to comply with the Supreme Court's mandate in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945), wherein the Board is charged with "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments."

WFM has amply demonstrated that its November 2020 Dress Code's limitations on union insignia are narrowly tailored to protect its public image and to make sure that team members dress is consistent with the WFM brand, that team members are easily identifiable to customers, and meet various safety requirements in departments throughout the store, while creating a safe, pleasant atmosphere for team members. (Smith 3600; GC3, p. 2.) Balancing that interest against

team members' Section 7 rights, the November 2020 Dress Code expressly provides that nothing therein prohibited team members from wearing pro- or anti-union pins or other paraphernalia worn for the purpose of mutual aid or protection, (GC5; Smith 3648) permitting team members to wear union insignia on the sales floor, provided it is non-distracting and not larger than their name tag. None of these restrictions apply to team members in non-customer facing roles or when team members are off the sales floor or working in the back of the store. (Smith 3649.) FAQ's issued to store leadership further clarified that nothing in the updated Dress Code prohibited team members from wearing a union-affiliated pin, button or insignia, provided that it otherwise complied with the policy. (GC5, p. 14.) Moreover, the GC's case is utterly devoid of any evidence of anti-union animus by WFM.<sup>3</sup>

Thus, WFM demonstrated that its Dress Code was narrowly tailored to balance team members' rights to display union and other protected slogans with WFM's desire to maintain a deliberately curated public image and maintain team member harmony.

Respectfully Submitted this 11<sup>th</sup> day of September 2023.

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<sup>3</sup> See *Sw. Bell Tel.*, 200 NLRB 667, 671 (1972) (Board was "fortified" in its conclusion that restrictions on union insignia were valid because of absence of anti-union animus); *United Parcel Service, Inc.*, 195 NLRB 441, 450 (1972) (conclusion that employer's prohibition on union button did not violate Act was "strongly supported ... by the absence of any showing in this record of union animus on the part of the employer); *Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577, 586 (8th Cir. 1965) (upholding restriction because, *inter alia*, "there was no anti-union animus present").



**CERTIFICATE OF SERVICE**

I hereby certify that in on September 11, 2022, I served the foregoing *Respondent Whole Foods Market's Supplemental Post Hearing Brief To The Administrative Law Judge On Additional Legal Authority* on the Parties set forth below, by service in the manner set forth below, with confirmation of delivery:

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