UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TESLA, INC.

and

MICHAEL SANCHEZ, an Individual

and

JONATHAN GALESCU, an Individual

and

RICHARD ORTIZ, an Individual

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO

Cases 32-CA-197020
32-CA-197058
32-CA-197091
32-CA-197197
32-CA-200530
32-CA-208614
32-CA-210879
32-CA-220777

ACTING GENERAL COUNSEL'S BRIEF OF POSITION ON THE STANDARD TO APPLY TO UNIFORM POLICIES

On February 12, 2021, the Board invited the parties and interested amici to file briefs addressing two questions:

1. Does [*Stabilus, Inc.*, 355 NLRB 836 (2010)] specify the correct standard to apply when an employer maintains and consistently enforces a nondiscriminatory uniform policy that implicitly allows employees to wear union insignia (buttons, pins, stickers, etc.) on their uniforms?

2. If *Stabilus* does not specify the correct standard to apply in those circumstances, what standard should the Board apply?

I. SUMMARY OF THE ACTING GENERAL COUNSEL'S POSITION

Stabilus correctly specified that the longstanding test approved in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), applies when an employer maintains and consistently enforces a uniform policy that necessarily precludes wearing union attire, even when the policy allows employees to wear union insignia on items like buttons, pins, and stickers. That standard gives proper weight to the fundamental employee rights and legitimate managerial interests at stake under these circumstances. Thus, no departure from precedent is warranted here.

II. STATEMENT OF THE CASE

On March 30, 2018, the Regional Director issued complaint (the second amended consolidated complaint in this case) alleging, among other things, that Respondent Tesla, Inc. violated Section 8(a)(1) of the Act by maintaining a rule at its automotive manufacturing facility in Fremont, California, requiring certain employees to wear assigned "team wear," and by disparately enforcing that rule against shirts with union insignia. The case was heard over 13 days from June to October 2018. On September 27, 2019, Administrative Law Judge Amita Baman Tracy issued a decision finding, among other things, that Respondent violated Section 8(a)(1) by maintaining its team wear policy and enforcing it to prevent employees from wearing shirts bearing union insignia, but that the Respondent had not enforced the rule in a disparate manner. Respondent filed exceptions on December 9, 2019.[1]

[1] The General Counsel did not except to the judge's failure to find disparate enforcement.

III. ARGUMENT

A. *Stabilus* correctly specified that the *Republic Aviation* framework is the proper standard to apply to uniform policies that effectively prohibit employees from wearing union attire instead of company-required attire.

As the Supreme Court has held, employees have a Section 7 right to wear union insignia on their employer's premises, and this right may not be infringed absent a showing of special circumstances. *See Republic Aviation*, 324 U.S. at 801-03. In *Stabilus*, the Board stated that "[a]n employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia." 355 NLRB at 838.

Stabilus correctly stated extant law. The right to wear union insignia has always encompassed articles of clothing, including pro-union T-shirts, and the Board has applied the *Republic Aviation* framework to employer prohibitions thereof. *See, e.g.*, *De Vilbiss Company*, 102 NLRB 1317, 1321-22 (1953). This has been the Board's approach even when employer prohibitions on union attire resulted from enforcement of uniform or appearance policies. *See, e.g.*, *Meijer, Inc.*, 318 NLRB 50, 52, 56-57 (1995) (employer lawfully prohibited wearing union jackets and hats instead of uniform jackets and hats in customer areas of grocery store but unlawfully prohibited employee from wearing union jacket outside customer contact area), *enforced*, 130 F.3d 1209 (6th Cir. 1997); *Con-Way Central Express*, 333 NLRB 1073, 1075-77 (2001) (employer lawfully prohibited wearing union hat instead of company-issued hat based on need to maintain public image); *Produce Warehouse of Coram*, 329 NLRB 915, 917-19 (1999) (employer lawfully prohibited grocery worker from wearing union hat instead of uniform hat based on employee's contact with the public and the employer's desire to present a neat and clean image); *Quantum Electric, Inc.*, 341 NLRB 1270, 1274, 1280 (2004) (employer unlawfully enforced ban on all shirts with graphics or printed text other than company-issued shirts to

discharge employee for wearing union shirt because ban was not justified by special circumstances); *North Hills Office Services*, 346 NLRB 1099, 1099 & n.6, 1113-14 (2006) (employer unlawfully required employees to wear company uniforms that obscured the message of union T-shirts the employees were also wearing because the uniform policy was not justified by special circumstances and was promulgated in response to union activity). Similarly, both the Board and a reviewing court applied the special circumstances test (albeit with different outcomes) in assessing the lawfulness of a collectively bargained-for requirement that employees wear a uniform bearing union insignia, thus infringing on employees' Section 7 right to refrain from wearing union insignia. *See BellSouth Telecommunications*, 335 NLRB 1066, 1068-71 (2001) (special circumstances justified uniform policy),[2] *enforcement denied sub nom. Lee v. NLRB*, 393 F.3d 491, 494-97 (4th Cir. 2005) (no special circumstances established), *on remand*, 346 NLRB 637, 637 (2006) (finding violations based on court's decision). Thus, *Stabilus* correctly stated that the *Republic Aviation* framework applies to prohibitions on union attire even when those prohibitions flow from a requirement to wear employer-designated clothing. *See Stabilus*, 355 NLRB at 838.

No break from precedent is warranted because the *Republic Aviation* framework gives appropriate weight to the fundamental Section 7 rights and legitimate managerial interests at issue. Since the earliest days of the Act, the Board and the Supreme Court have recognized "the importance of freedom of communication to the free exercise of organization rights." *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (citing *Peyton Packing Co.*, 49 NLRB 828

[2] The Board stated that the analysis was not precisely the same as the *Republic Aviation* test because "the 'special circumstances' to be balanced against Section 7 interests [were] derived from the legitimate interests of both the [e]mployer and the [u]nion." *BellSouth Telecommunications*, 335 NLRB at 1068.

(1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944)). Indeed, "organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." *Id.* "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). And, the Court has recognized that the workplace is "uniquely appropriate" for such communications. *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974); *see also, e.g.*, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) ("[T]he plant is a particularly appropriate place for the distribution of § 7 material, because it 'is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'" (quoting *Gale Products*, 142 NLRB 1246, 1249 (1963))).

Consistent with these principles, in *Republic Aviation*, the Court affirmed that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the [employer's] curtailment of that right is clearly violative of the Act." 324 U.S. at 802 n.7. Wearing union insignia is a uniquely important expression of union support, particularly because it may be the only form of advocacy permitted on work time. *See, e.g.*, *Peyton Packing*, 49 NLRB at 843 (because "[w]orking time is for work," an employer may prohibit union solicitation during working time); *Walton Manufacturing Company*, 126 NLRB 697, 698 (1960) (same for distribution of union literature), *enforced*, 289 F.2d 177 (5th Cir. 1961).[3] Moreover, in wearing union insignia at work, "employees' interests

[3] The vital importance of this right is demonstrated by the broad range of contexts in which employees have worn union insignia, such as supporting organizing campaigns, *see, e.g.*, *Malta Construction Co.*, 276 NLRB 1494, 1498 (1985), *enforced*, 806 F.2d 1009 (11th Cir. 1986);

are at their strongest, for . . . '[the] activity [is] carried on by employees already rightfully on the employer's property.'" *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 504-05 (1978) (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976)). Thus, it is with good reason that, pursuant to *Republic Aviation*, employer limitations on the display of union insignia are presumptively invalid, with the burden on the employer to establish special circumstances to overcome the presumption. *See* 324 U.S. at 803-04.

The *Republic Aviation* framework gives due regard to legitimate managerial prerogatives to regulate employee appearance. It simply places the burden of justifying infringements of important Section 7 rights on the party claiming a need for the infringement. The Supreme Court has endorsed such approaches not only in *Republic Aviation* but also subsequently. *See, e.g.*, *Beth Israel Hosp.*, 437 U.S. at 492-93 (restrictions on employee solicitation during nonworking time and on literature distribution during nonworking time in nonworking areas unlawful absent employer justification by a showing of special circumstances). And employers are logically in the best position to offer evidence on the business necessity of restrictions on employees' exercise of organizational rights. *See id.* at 502 (observing that hospital employer wishing to limit union solicitation in its cafeteria was in the best position to offer evidence of untoward

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Mayrath Co., 132 NLRB 1628, 1643 (1961), *enforced in relevant part*, 319 F.2d 424 (7th Cir. 1963), demonstrating solidarity, *see, e.g.*, *Mt. Clemens General Hospital*, 335 NLRB 48, 49 (2001) (wearing buttons in protest after fellow employee had been forced to work overtime), *enforced*, 328 F.3d 837 (6th Cir. 2003), and advocating for issues during collective bargaining and even after contract ratification, *see, e.g.*, *Escanaba Paper Co.*, 314 NLRB 732, 732 (1994) (wearing buttons to pressure employer into a favorable successor agreement and T-shirts and other items protesting unfavorable contract terms), *enforced sub nom. NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996); *Holladay Park Hospital*, 262 NLRB 278, 278 (1982) (wearing buttons and yellow ribbons to support the union's bargaining position). *See generally* John W. Teeter, Jr., *Banning the Buttons: Employer Interference with the Right to Wear Union Insignia in the Workplace*, 80 Ky. L.J. 377, 379 (1992) ("By engaging in this simple act of reaffirmation, the worker assures both herself and others that they belong to an entity devoted to protecting their statutory rights, economic interests, and quest for dignity in their work.").

effects of such solicitation). The employer's burden to provide such evidence is a reasonable one, as evidenced by the many Board decisions finding employer restrictions on wearing union insignia justified by special circumstances. *See, e.g.*, *Sam's Club*, 349 NLRB 1007, 1011-12 (2007) (prohibition on non-breakaway lanyards justified by substantial safety concerns); *Con-Way Central Express*, 333 NLRB at 1075-77 (employer lawfully prohibited wearing union hat instead of company-issued hat based on need to maintain public image); *Produce Warehouse of Coram*, 329 NLRB at 917-19 (same); *Meijer*, 318 NLRB at 57 (requirement to wear uniform jacket and hat lawful in customer areas of grocery store); *Noah's New York Bagels*, 324 NLRB 266, 275 (1997) (employer lawfully prohibited employee from wearing company-required T-shirt that had been defaced to mock employer); *Casa San Miguel*, 320 NLRB 534, 540 (1995) (prohibition on wearing hospital smock with added pro-union message was lawful). As these illustrative decisions demonstrate, reasonable uniform and appearance policies have lawfully coexisted with the *Republic Aviation* framework for more than 70 years. In short, departing from such longstanding precedent is wholly unnecessary and, indeed, a solution in search of a problem.

The questions posed by the Board's invitation for briefs in this case appear to presuppose that a unique test less protective of employees' well-established right to wear union attire absent special circumstances might be appropriate for employers that permit employees to accessorize their uniforms, such as with buttons, pins, or stickers. Such an approach would be unsound and imprudent. First, it would be fundamentally at odds with Supreme Court jurisprudence governing when alternative means of exercising Section 7 rights become legally relevant. Second, as a practical matter, adopting a legal test applicable only to prohibitions on union attire flowing from

company uniform requirements would invite unnecessary litigation and potentially complicate enforcement of Board orders in the circuit courts.

The adoption of a framework less protective of employee rights for situations where an employer permits some forms of union insignia, like buttons, pins, or stickers, while prohibiting union attire would run counter to longstanding principles embraced by the Supreme Court. It is well-established that the availability of "alternative channels of communication" is simply immaterial to whether the Act affords protection for activities engaged in by employees rightfully on the employer's property. *See, e.g.*, *Republic Aviation*, 324 U.S. at 798-99 (effectiveness of solicitation off employer properties did not factor into employees' right to distribute literature or solicit on employer properties); *Magnavox*, 415 U.S. at 325-27 (availability of "alternative channels of communication" was not a consideration in lawfulness of union's waiver of literature distribution rights protected by Section 7); *Beth Israel Hosp.*, 437 U.S. at 505 ("[T]he availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry . . . ."). As the Board has observed, "[i]t certainly does not lie in the mouth of [the employer] to tell the [u]nion, or [the employer's] employees, how to exercise their rights under the Act." *Monarch Machine Tool Co.*, 102 NLRB 1242, 1249 (1953) (rejecting argument that employer's prohibition on literature distribution by employees in company parking lot was justified by the availability of other means of communication), *enforced*, 210 F.2d 183 (6th Cir. 1954). Indeed, the Board has required employers to show special circumstances even where an employer prohibition overall "did not interfere to any significant extent" with employees' right to wear union insignia. *See Sam's Club*, 349 NLRB at 1011-12 (employer required employee lanyards to have breakaway snap, thus prohibiting union-provided lanyard lacking that safety device; prohibition was justified by safety

concerns).[4] Thus, regardless of alternative means of wearing union insignia, the *Republic Aviation* framework is the appropriate standard to protect employees' fundamental right to wear union attire. Finding otherwise would contradict these longstanding legal principles and would be imprudent if not impermissible.

Practically speaking, devising an unnecessary new standard just for uniform policies would also needlessly complicate labor law, threaten judicial enforcement of Board decisions, and impede employees' exercise of their Section 7 rights by encouraging litigation over ancillary questions that currently have no bearing on the applicable standard. Among those questions:

- How consistent must the appearance required by an employer policy be for the policy to warrant application of a legal framework other than *Republic Aviation*? *Compare, e.g.*, *Wal-Mart Stores, Inc.* ("*Wal-Mart I*"), 364 NLRB No. 118, slip op. at 32-33 (Aug. 27, 2016) (employer maintained "broad-brush dress code" where employees chose their own clothing within employer's parameters), *with W San Diego*, 348 NLRB 372, 372 (2006) (employer commissioned special uniforms to achieve a trendy, distinct, and chic look).

[4] Other cases where the Board has sometimes considered permissible alternative placement of insignia in evaluating whether employers met special circumstances sufficient to justify certain prohibitions involved bans on adding insignia to company-owned hard hats. *Compare, e.g.*, *Andrews Wire Corp.*, 189 NLRB 108, 109 (1971) (finding that employer lawfully prohibited union insignia on its hard hats, relying in part on evidence that employees could wear insignia on any item of clothing except the hard hats), *with Malta Construction Co.*, 276 NLRB at 1494 (finding unlawful employer's prohibition on helmet stickers even though it "allowed its employees to wear union insignia on articles of their personal attire, such as T-shirts"). Such cases implicate employers' right to control their property in addition to their managerial interests in production and discipline, yet the Board has still applied the *Republic Aviation* framework to those bans. Wearing union attire in place of or in addition to a company uniform does not implicate employer property interests and, thus, there is even less reason to apply a test less protective of employee rights here than in cases involving the placement of insignia on company hard hats.

- How many alternative ways for employees to accessorize would be sufficient to invoke the new special standard? Since some accessories might need to be limited for legitimate business reasons, such as safety concerns, some employees' alternative options could be very narrow while others may have a broad range of alternatives.
- What exactly is considered part of an employer's required "uniform"? For example, is a company cap part of a uniform where the cap is the only permitted cap, but employees can opt to wear no cap? *See World Color (USA) Corp.*, 360 NLRB 227, 227 n.3 (2014) (finding unlawful cap policy was not part of employer's uniform policy, but noting this did not influence the applicable legal test), *enforcement denied on other grounds*, 776 F.3d 17 (D.C. Cir. 2015), *on remand*, 369 NLRB No. 104 (June 12, 2020). Is a badge reel part of the company uniform, subject to a new standard, or is it an adornment to a uniform subject to *Republic Aviation*? *See Long Beach Memorial Medical Center, Inc.*, 366 NLRB No. 66, slip op. at 1-3 (2018) (no special circumstances justified hospital's policy requiring badge reels to bear only employer-approved logos and text), *enforced*, 774 F. App'x 1 (D.C. Cir. 2019) (unpublished).
- Which test applies to employer bans of union clothing worn in *addition* to company-required clothing, rather than as a substitute, such as a union vest worn over a company shirt?
- Which test would be used to assess prohibitions on altering company-required apparel to make it look exactly like union apparel, for example, sewing a union emblem over a company logo?

If the Board adopts a different standard for uniform policies, such questions would distract from the real issue: whether, in a particular case, an employer's legitimate interests in prohibiting variances from its desired employee appearance—whether achieved by addition, substitution, or defacement—outweigh employees' right to wear particular pro-union (or anti-union) items. At the same time, rulings as to the appropriate standard in these types of cases at the margins run the risk of enforcement being denied in the federal courts, as the courts will review such rulings de novo. *See, e.g.*, *NLRB v. CWI of Md., Inc.*, 127 F.3d 319, 330 (4th Cir. 1997) (court will review de novo the legal standards used to assess the evidence); *Turnbull Cone Baking Co. of Tenn. v. NLRB*, 778 F.2d 292, 295 (6th Cir. 1985) ("If the Board errs in determining the proper legal standard, the appellate court may refuse enforcement on the grounds that the order has 'no reasonable basis in law.'" (quoting *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497 (1979))). Consistent application of the *Republic Aviation* standard avoids unnecessary litigation of threshold questions and supports the enforceability of Board decisions while affording appropriate weight to both Section 7 rights and legitimate employer interests.

Overall, *Stabilus* correctly stated that the *Republic Aviation* framework is the proper standard to apply to uniform and appearance policies that effectively prohibit wearing union attire instead of company-required attire. No other framework is needed.

B. The *Boeing* framework is inapplicable to uniform policies that effectively prohibit wearing union attire.

In *Wal-Mart Stores, Inc.* ("*Wal-Mart II*"), 368 NLRB No. 146, slip op. at 2-3 & n.10 (Dec. 16, 2019), the Board held that the test set forth in *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), rather than the *Republic Aviation* framework, would apply to purely facial challenges to facially neutral employer policies that limit the size and/or appearance of union buttons and insignia that employees can wear but do not prohibit them. *Wal-Mart II* does not purport to

displace *Republic Aviation* as the framework applicable to uniform policies that prohibit wearing union attire, and extending *Wal-Mart II* to this context is unwarranted.

For numerous independent reasons, *Wal-Mart II* is inapplicable here. First, *Wal-Mart II* did not purport to encroach on the *Republic Aviation* standard's scope, but, rather, applied *Boeing* to a specific context where *Republic Aviation* had apparently not been applied. *See Wal-Mart II*, 368 NLRB No. 146, slip op. at 2-3 & nn. 10, 13; *cf. Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 1 n.4 (Jan. 4, 2021) (noting that *Boeing* did not disturb longstanding precedent governing employer restrictions on solicitation and distribution, "which already strikes a balance between employee rights and employer interests"). Thus, *Wal-Mart II* did not overrule the precedent cited above, *supra* pp. 3-4, applying the *Republic Aviation* framework to uniform and appearance policies.

Second, *Wal-Mart II* applies only to "content-neutral" policies. *See* 368 NLRB No. 146, slip op. at 1, 3 n.13. Respondent's uniform policy is not content-neutral in that it requires clothing bearing a company logo, while prohibiting clothing bearing other logos.

Third, *Boeing* is inapplicable to policies that have "been applied to restrict NLRA-protected activity." *Wal-Mart II*, 368 NLRB No. 146, slip op. at 3 n.11. In the instant case, Respondent has applied its uniform policy to prohibit employees from wearing pro-union shirts.[5]

[5] Although the instant case does not involve a pure facial challenge to a uniform policy since the team wear policy has been applied against employees who wore union T-shirts, *Republic Aviation* would apply even if it did. *See, e.g.*, *Boch Honda*, 362 NLRB 706, 706-08, 716 (2015) (applying *Republic Aviation* framework to facial challenge to employer prohibition of "pins, insignias, or other message clothing"), *enforced*, 826 F.3d 558 (1st Cir. 2016); *cf. BellSouth Telecommunications*, 335 NLRB at 1067-71 (variant "special circumstances" test applied to pure facial challenge to requirement to wear uniform bearing union insignia).

Fourth, as explained above, *supra* pp. 9-11, displacing *Republic Aviation* as the framework to apply to uniform policies would unnecessarily complicate labor law with litigation of threshold issues to determine the applicable standard and could hinder court enforcement.

Finally, the Board in *Wal-Mart II* found the *Boeing* framework appropriate to apply to a facially neutral rule "that limit[ed] the size and/or appearance of union buttons and insignia . . . but d[id] not prohibit them" because the rule's infringement on Section 7 rights was necessarily "less severe" than a prohibition's. *Wal-Mart II*, 368 NLRB No. 146, slip op. at 2-3. But uniform policies like Respondent's prohibit all pro-union clothing, rather than merely limiting their size and/or appearance, and thus the proper framework is *Republic Aviation*, not *Boeing*.[6] The detrimental effect on Section 7 rights of a prohibition on union clothing is no less severe when the prohibition results from application of a uniform policy. Likewise, the fact that an employer may permit union insignia in forms other than apparel in no way warrants applying a legal framework less protective of the right to wear union attire — and doing so would effectively grant an employer control over the manner of employees' expression of their Section 7 rights. *See supra* pp. 8-9. The *Republic Aviation* framework appropriately balances the Section 7 rights and managerial interests relevant to all prohibitions of union insignia. It follows that the *Boeing* framework does not.

For all the foregoing reasons, *Boeing* is inapplicable here.

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[6] Indeed, *Republic Aviation* would be the appropriate framework even if Respondent's policy prohibited just one union shirt, rather than all union attire. *See, e.g.*, *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 3-7 (Aug. 27, 2016) (no special circumstances justified ban of shirt criticizing company program); *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (special circumstances justified ban on shirt that made "clear appeal to ethnic prejudices").

C. Member Schaumber's approach in *Stabilus* proposes an unwarranted abrogation of Section 7 rights.

Dissenting in *Stabilus*, Member Schaumber proposed that where an employer maintains and consistently enforces a lawful uniform rule, prohibitions on wearing union attire in place of the required company uniform should be categorically lawful. *See* 355 NLRB at 844 (Member Schaumber, dissenting). Member Schaumber's approach is deeply flawed.

Initially, Member Schaumber predicated his approach on a false premise: that *Stabilus* was a case of first impression. *Id.* at 842, 843 n.7. However, the cases cited above, *supra* pp. 3-4, demonstrate that the Board has consistently applied the "special circumstances" test when employers with a uniform or appearance policy prohibited employees from wearing union attire instead of the required attire.[7] Thus, contrary to Member Schaumber's assertions, continuing to apply the *Republic Aviation* framework was not a "radical rebalancing of the relevant interests." *Stabilus*, 355 NLRB at 841.

Member Schaumber also mistakenly relied on the proposition that "the Board ha[d] implicitly recognized that an employer may promulgate and enforce a nondiscriminatory uniform rule," *id.* at 843, citing *Noah's New York Bagels*, 324 NLRB at 275, and *Casa San Miguel*, 320

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[7] None but *Meijer* and *North Hills Office Services* were mentioned in Member Schaumber's dissent. With respect to *Meijer*, Member Schaumber suggested the case is inapposite because it involved discriminatory enforcement, and because it is unclear whether exceptions were filed to the finding that a supervisor unlawfully prevented an employee from wearing a union jacket in a noncustomer area. But the Board's analysis of hats and coats did not rely on discriminatory enforcement, *see* 318 NLRB at 57, and Member Schaumber's speculation that there were no exceptions to the relevant findings ignores the Board's practice of identifying the absence of exceptions to particular rulings, *see, e.g.*, *P.S.K. Supermarkets*, 349 NLRB 34, 34 n.1 (2007).

As to *North Hills Office Services*, Member Schaumber failed to address the employer's unlawful uniform policy, instead mentioning only an unlawful directive by the employer to remove union T-shirts, which preceded promulgation of the uniform policy. *See Stabilus*, 355 NLRB at 842 n.3.

NLRB at 540. Neither case suggests that employers' rights to promulgate and enforce uniform rules categorically override employees' Section 7 rights, dispensing with employers' burden under the *Republic Aviation* framework. Indeed, as indicated above, *supra* p. 7, the results in both cases stemmed from findings that the employers demonstrated special circumstances sufficient to justify their prohibition of certain alterations to the employer-required uniforms. There is simply no basis for Member Schaumber's suggestion that these cases did not turn on the employers showing "special circumstances." *Stabilus*, 355 NLRB at 843.

Likewise, just because employers' uniform rules go unchallenged in many cases does not mean that employers should not be required to justify those rules when they are challenged. *See id.* at 843 & n.7. If anything, the fact that cases involving the substitution of protected clothing for uniform attire are rare in comparison to cases involving adornments like buttons or pins underscores that the *Republic Aviation* framework adequately safeguards legitimate employer interests in having uniform policies. Member Schaumber's concerns that the *Republic Aviation* framework will "submerge" employers' rights and allow employees to "cavalierly disregard preexisting and consistently enforced uniform policies," *Stabilus*, 355 NLRB at 841, 843, ring hollow. The fact is that *Republic Aviation* has been the rule for over seven decades, employer interests are given due regard within that balancing framework, and uniform policies have coexisted with it. *See supra* p. 7.

While unnecessary to safeguard legitimate employer interests, Member Schaumber's approach would abdicate the Board's responsibility to protect employees' right to wear union insignia at work. As explained above, *supra* pp. 4-6, the right to wear union clothing in the workplace is an especially important aspect of organizational activity, and the Board appropriately finds restrictions on that right presumptively unlawful. Yet Member Schaumber's

approach would allow employers to quash that activity entirely by simply pointing to a uniform policy.[8] In removing such uniform policies from Board scrutiny entirely, Member Schaumber's approach would significantly chill employees from expressing their Section 7 views at the workplace and give employers free rein to discipline or discharge employees simply because they showed up for work in union attire, without any showing of genuine business necessity. Given that employees' Section 7 rights are at their zenith when employees are exercising their own non-derivative rights in a setting that is uniquely appropriate to communicate with other employees, Member Schaumber's approach unjustifiably tips the scale in favor of employers in every instance.

In sum, adopting Member Schaumber's approach would be an unwarranted departure from longstanding precedent.

IV. CONCLUSION

The *Republic Aviation* framework is the proper standard to apply in this case and other cases involving prohibitions on union clothing resulting from the maintenance and enforcement of uniform policies. Applying that framework here, the judge correctly found that Respondent

[8] Member Schaumber suggested his approach's abrogation of employee rights is acceptable where employees have alternative means to wear union insignia. *See Stabilus*, 355 NLRB at 843. However, as explained above, *supra* pp. 8-9, alternative means of wearing union insignia are no basis for dispensing with the employer's burden to justify restrictions on union attire.

has failed to prove special circumstances justifying its requirement that its employees refrain from wearing union shirts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Acting General Counsel's Brief of Position on the Standard to Apply to Uniform Policies in Cases 32-CA-197020 et al. was electronically filed with the National Labor Relations Board via the NLRB E-Filing System and served in the manner indicated to the parties listed below on this 22nd day of March, 2021.

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