

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

**TESLA, INC.**

**and**

**MICHAEL SANCHEZ, an Individual**

**Case No. 32-CA-197020**

**and**

**JONATHAN GALESCU, an Individual**

**Case No. 32-CA-197058**

**and**

**RICHARD ORTIZ, an Individual**

**Case No. 32-CA-197091**

**and**

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

**Case No. 32-CA-197197**

**Case No. 32-CA-200530**

**Case No. 32-CA-208614**

**Case No. 32-CA-210879**

**RESPONDENT TESLA, INC.'S BRIEF IN RESPONSE TO THE BOARD'S FEBRUARY  
12, 2021 INVITATION TO FILE BRIEFS CONCERNING UNIFORM POLICIES**

Mark S. Ross  
mross@sheppardmullin.com  
Keahn N. Morris  
kmorris@sheppardmullin.com  
SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP  
4 Embarcadero Center, 17th Floor  
San Francisco, CA 94111  
Telephone: (415) 434-9100

*Attorneys for Tesla, Inc.*

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## I. INTRODUCTION AND EXECUTIVE SUMMARY OF POSITION

Respondent Tesla Inc.'s<sup>1</sup> General Assembly Team Wear Policy<sup>2</sup> is a facially neutral rule mandating that employees assigned to Tesla's General Assembly Department<sup>3</sup> wear a department-specific, chamois-like and abrasion resistant uniform commonly referred to as Team Wear. The question presented here is whether Tesla's mere maintenance of its facially neutral Team Wear policy violates Section 8(a)(1).<sup>4</sup>

Employer-provided and approved, Team Wear is specially designed to reduce the risk of freshly painted automobile bodies and new car interiors being damaged during the assembly process. Team Wear's distinctive appearance also distinguishes GA employees from non-GA employees who happen to be in the GA area, thereby enabling GA managers to visually manage their workers from afar, across the length and breadth of the GA line.

Nothing in the Policy's text suggests that it is directed at the wearing of union-branded apparel or that it bans the display of union insignias. To the contrary and despite the Policy's uniform mandate, GA employees are permitted to wear hats as well as to accessorize their Team Wear by placing flat, non-abrasive adhesive stickers bearing union insignias on their uniforms. Employees assigned to non-GA positions commonly wear all sorts of union-tagged apparel and stickers in and around the workplace without interference or objection from Tesla. Further, there is no evidence or allegation that Tesla's Team Wear Policy was put in place in response to union organizing or for the purpose of chilling unionism. Nor is there any credited evidence that the Team Wear Policy has been applied in a disparate fashion, singling out the wearing of union apparel or insignias for prohibition<sup>5</sup>.

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<sup>1</sup> Respondent is hereinafter referred to as "Tesla" or "the Employer."

<sup>2</sup> Tesla's General Assembly Team Wear Policy is hereinafter referred to as "the Team Wear Policy" or "the Policy."

<sup>3</sup> Tesla's General Assembly Department is hereinafter referred to as "GA Department."

<sup>4</sup> Cases presenting the issue of whether the maintenance of a given facially neutral policy or rule violates Section 8(a)(1) are hereinafter referred to as "mere maintenance cases".

<sup>5</sup> Based on her credibility resolutions, the Administrative Law Judge ("ALJ") found that the General Counsel ("GC") failed to prove that Tesla applied its Team Wear Policy in a

Based on these facts, Tesla excepted to the Administrative Law Judge’s misapplication of the allocation of proof and the special circumstances test found in *Republic Aviation*<sup>6</sup> and her finding that the mere maintenance of the Team Wear Policy violated Section 8(a)(1)<sup>7</sup>. Tesla asserts instead, that the Board’s *Boeing*<sup>8</sup> decision should be applied to determine this mere maintenance issue: that the Board should reverse the ALJ’s finding of the Policy’s facial unlawfulness and find that the mere maintenance of Tesla’s facially neutral Team Wear Policy does not interfere with Section 7 rights in violation Section 8(a)(1) of the Act.

On February 12, 2021, the Board issued an order *sua sponte*, inviting the parties and interested amici to file briefs (“Invitation”) addressing the following legal questions.

1. Does *Stabilus*<sup>9</sup> 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?

This brief is Tesla’s initial response to the Board’s Invitation.

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discriminatory fashion in response to union activity and recommended that GC’s allegations to that effect be dismissed. The GC did not except to this finding or to the ALJ’s recommended dismissal of this claim. Accordingly, the ALJ’s finding of “no discriminatory enforcement” and “recommended dismissal” are now final. Nor did the GC ever allege or present evidence that Tesla’s Team Wear Policy was promulgated in response to union or other NLRA-protected activity.

<sup>6</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (“*Republic Aviation*”).

<sup>7</sup> References to the ALJ’s findings and conclusions are made to by use of the notation, “ALJD”, followed by the designation of a page and line from the ALJD containing said finding and conclusion. References to the Tesla’s Exceptions to the ALJ’s findings and conclusions are made to by use of the notation, “Resp. Excep.” followed by the number of said exception(s).

<sup>8</sup> *The Boeing Company*, 365 NLRB No. 154 (2017) (“*Boeing*”).

<sup>9</sup> *Stabilus, Inc.*, 355 NLRB 836, 838 (2010) (“*Stabilus*”).

The “special circumstances” test found in *Republic Aviation* and upon which the *Stabilus* is based, does *not* provide the correct standard to apply in this case. The *Stabilus* text cited by the Board in its Invitation is mere *obiter dictum* and thus, not to be accorded precedential effect. It also gives no weight to the legitimate interests that employers have for maintaining facially neutral uniform policies, allowing employees to totally disregard such policies, their employer’s legitimate business interests notwithstanding. Moreover, insofar as *Stabilus* derives from *Republic Aviation*’s “special circumstances” test, neither *Stabilus* nor *Republic Aviation* should be applied here because Tesla’s facially neutral Team Wear Policy neither explicitly bans NLRRA-protected conduct nor has it been applied in a discriminatory fashion to single out the wearing of union apparel or insignias for adverse treatment (unlike the employers in *Republic Aviation* and *Stabilus*). Accordingly, and contrary to the ALJ, the Team Wear Policy is not presumptively unlawful on its face and Tesla did not need to satisfy the “special circumstances” under *Republic Aviation*. Rather, as a facially neutral rule, the Team Wear Policy is presumptively lawful, having little to no impact on Section 7 rights. Accordingly, Tesla is under no obligation to prove the existence of “special circumstances” in order to maintain this rule. Its mere maintenance of its Team Wear Policy should be adjudged and ultimately declared lawful pursuant to the *Boeing* standard.

## **II. STATEMENT OF MATERIAL FACTS**

Tesla designs and produces electric automobiles at its Fremont, California facility. (ALJD 3:10-15) There, it manufactures most of the components and parts that go into the making of a Tesla automobile, fabricates Tesla auto bodies in its Body in White Department and then paints the fabricated car bodies in its Paint Department. (ALJD 6:30-40)

From the Paint Department, freshly painted but uncured auto bodies proceed to the GA Department where they move down several assembly lines by means of a complicated conveyor through/past various GA workstations and where GA employees “assemble” cars by physically installing parts on and in the auto bodies. Assembly compels GA employees to make physical

contact with these auto bodies as they move down the assembly line. (ALJD 7:30-8:5; Tr. 1347:8-1348:8, 1351:19-1352:12, 1353:12-24, 1354:16-23, 1355:2-15, 1356:10-1357:19, 1358:1-13, 1358:17-1359:18, 1363:23-1365:9) The assembly process converts what begins as an empty auto body into a finished car that is ready for customer delivery. Only approximately 1,000-3,000 of Fremont's 12,000 employees are assigned to the GA Department and perform this assembly function (depending on time period).<sup>10</sup> (ALJD 4:18-19, 7:5-7; Tr. 191, 1115:18-23; 1116; 1346:3-17)

The remainder of the Fremont workforce is assigned to other departments to perform non-GA functions ("non-GA employees"). From time to time, non-GA workers have occasion to be in the GA Department. However, they do not perform assembly work and, unlike GA employees, they have no reason or opportunity to come into physical contact with the auto bodies moving down the GA line. (Tr. 1342:22-1343:8, 1378:12-1379:7, 1408:12-24)

Autos that emerge from the GA line are expected to be ready for transport to the market and customer delivery. So they must be defect free and in factory-perfect condition. Cars that come out of GA with defects and dings are not delivery ready; they must be repaired and reworked into factory-perfect condition. Such rework is not only time and cost inefficient, but it delays a car's sale and delivery to a Tesla customer. Accordingly, Tesla goes to great lengths to minimize the risks of damage and dings to car bodies and interiors during the assembly

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<sup>10</sup> The GA department is relatively small compared to the overall facility. The GA employees work in a confined space of approximately 500 yards in length compared to the rest of the five million square foot facility. (ALJD 4:18-19, 7:5-7; Tr. 191, 1116) Within GA though, the manufacturing process is extremely complicated and physically complex, with an extensive meandering conveyor system, overhead carriers, and giant robots. (Tr. 1346:25-1347:7, 1357:10-13, 1351:16-1352:1, 1353:12-14, 1354:3-15, 1355:3-6, 1356:2-9, 1356:20-24, 1357:25-1358:4, 1358:17-1359:9)

process.<sup>11</sup> (Tr. 1346:25-1347:7, 1357:10-13, 1351:16-1352:1, 1353:12-14, 1354:3-15, 1355:3-6, 1356:2-9, 1356:20-24, 1357:25-1358:4, 1358:17-1359:9)

The physical contact that GA employees must have with a car's exterior and interior surfaces heightens the risk that a car will be inadvertently damaged or mutilated during the GA process. (Tr. 1347:8-1348:8, 1351:19-1352:12, 1353:12-24, 1354:16-23, 1355:2-15, 1356:10-1357:19, 1358:1-13, 1358:17-1359:18, 1363:23-1365:9) Accordingly, Tesla's GA Team Wear Policy requiring all GA employees to receive and wear a Tesla-provided GA Department uniform is integral to the other efforts made to prevent such assembly-related mutilation. (ALJD 7:12-15; Tr. 1369:13-1370:20, 1373:5-8) Consisting of a department-distinctive shirt and trouser set made from smooth, soft and non-abrasive cotton fabric, the uniform is devoid of any zippers, buttons or other hard or sharp objects that may damage a car. (ALJD 7:12-15; Tr. 1369:13-1370:20, 1373:5-8) The mandatory wearing of this chamois-like clothing on the GA line mitigates the risk of assembly-related mutilation. (Tr. 1347:8-1348:8, 1351:19-1352:12, 1353:12-24, 1354:16-23, 1355:2-15, 1356:10-1357:19, 1358:1-13, 1358:17-1359:18, 1363:23-1365:9, 1369:13-1370:20, 1372:5-1373:4, 1373:5-8, 2398:24-2399:5, 2545:10-15, 2524:13-2525:1)

Additionally, because Team Wear is GA Department-distinctive in appearance as well as color coded, it visually distinguishes GA employees from non-GA employees who are in and

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<sup>11</sup> For example, Tesla's assembly robots and conveyor system are specially designed to mitigate mutilation risks. (Tr. 1375:3-1376:12, 1377:11-1378:11) Likewise, one of the very first things done after a freshly painted car body reaches GA, is the placement of protective covers over areas that have the highest risk of mutilation during assembly. (Tr. 1655:8-1656:2) These covered areas include doors and fenders. Further, in order to work on painted doors with minimal risk of damage, doors are separated from their car bodies, transported down a separate door line for assembly and, then, later re-mated with their body on the Final line at the end of the GA process. (Tr. 1363:24-1364:22)

around the GA Department area performing non-GA work. It also visually distinguishes duties/roles within the GA department (black, red, and white for production associates, team leads, and quality inspectors). (ALJD 7:16-20; Tr. 392:14-16, 1369:13-1370:20, 1372:12-17, 1372:24-1373:1, 2398:24-2399:5, 2545:10-15, 2524:13-2525:1) Team Wear's GA department-distinctive appearance allows GA managers to more easily survey their respective areas of responsibility at a glance by visually separating GA employees from non-GA employees in order to effectively and safely manage those they supervise. (ALJD 7:16-20; Tr. 1372:12-17, 1372:24-1373:1, 1375:3-1376:12, 1377:11-1378:11, 1596:14-19, 1673:-1674:5)

Based on these dual business concerns, Tesla has long maintained a practice of calling on all GA employees to wear Team Wear. In mid-Summer 2016, Tesla published a document known as "General Assembly Expectations" containing a section entitled Mutilation Protection.<sup>12</sup> (Tr. 1379:11-21; R-17) This section codified the requirement that GA employees wear Team Wear. (1379:11-21; R-17) These Expectations and the Mutilation Protection Section contained therein applied only to GA. (ALJD 40:24-35; Tr. 1369:13-1370:5, 1379:11-21; R-17) The Mutilation Protection Section reads, in relevant part, as follows:

#### **Mutilation Protection**

- Mutilation protection must be worn at all time (no exposed belt buckles, rings, watches, metal rivets on pants, no metal exposed).
- Badges must be worn closer to the back side of your hip with the badge itself tucked into your back pocket (if you do not have a back pocket, do not wear it while you work).
- Aprons cannot contain metal objects that can potentially mutilate cars (pens, metal tools).
- When working inside the vehicle, yoga mats must be used.

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<sup>12</sup> Tesla's 2016 General Assembly Expectations is hereinafter referred to as "2016 Expectations."

- Team wear is mandatory for all team members and leads.

(R-17)

On its face, the 2016 GA Expectation's Mutilation Protection Section makes no mention of the wearing of union apparel or insignias, much less singles out such activity for prohibition or restriction. Nor is there any allegation or proof that the section was issued in response to Union or NLRA protected activity, for the purpose of chilling organizing, or with the intent to interfere with the wearing or display of union logos or messages.

In 2017, Tesla released a new version of its General Assembly Expectations in order to achieve *inter alia*, "improve[d] quality" and to "cultivate a productive environment."<sup>13</sup> (Tr. 1386:14-1388:1) Like the 2016 Expectations, the 2017 Expectations applied only to GA employees, reminding them that they were expected to wear Team Wear when working on the GA line. The 2017 Expectations provide, in pertinent part, as follows:

**Team Wear:** It is mandatory that all Production Associates and Leads wear assigned team wear.

- On occasion, team wear may be substituted with all black clothing if approved by supervisor (sic).
- Alternative clothing must be mutilation free, work appropriate and pose no safety risk (no zippers, yoga pants, hoodies with hood up, etc.)

(GC 37-01)

It is this facially neutral 2017 Team Wear text, reaffirming the GA Department's uniform requirements, that is the subject of this dispute. However, as in the case of its policy predecessor, the 2017 Expectations do not explicitly restrict NLRA-protected activity. Nor is there any allegation or evidence that this policy statement was issued in response to union or other protected, concerted activity. Quite to the contrary, Tesla's employees did not construe the Team Wear Policy to be a ban on the wearing of union insignia as evidenced by the many instances of GA employees wearing hats with union insignia as well as accessorizing their Team

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<sup>13</sup> Tesla's 2017 General Assembly Expectations is hereinafter referred to as "2017 Expectations."

Wear by placing flat, non-abrasive adhesive stickers bearing union insignias on their uniforms. (Tr. 204:14-205:2, 209:11-210:6, 260:12-15, 307:22-24, 308:21-23, 333:23-334:3, 759:12-13, 1388:16-1389:10, 1636:5-1637:6, 2408:18-2409:2, 2535:18-2536:7) Further, employees assigned to non-GA positions commonly wear all sorts of union tagged apparel and stickers in and around the workplace without interference or objection from Tesla. (ALJD 25:35-26:5, 26:45-47, 40:10-46:19; Tr. 49:8-15, 204:14-205:2, 209:11-210:6, 223:16-19, 244:1-6, 260:12-15, 267:23-268:3, 296:15-24, 307:22-308:2, 308:21-23, 310:3-17, 333:23-334:3, 352:23-353:9, 368:11-18, 369:13-370:7, 388:9-389:6, 704:5-16, 759:12-13, 842:2-15, 1068:5-1069:18, 1071:2-4, 1072:9-20, 1388:16-1389:10, 1636:5-1637:6, 2139:8-2140:4, 2144:19-21, 2408:18-2409:2, 2535:18-2536:7) Finally, there is no credited evidence that the Policy was applied in a disparate or discriminatory fashion in order to ban such protected conduct. Thus, the sole question presented for the Board's decision here is whether Tesla's mere maintenance of this facially neutral policy violates Section 8(a)(1).

### III. LEGAL ANALYSIS

#### A. ***STABILUS* (AND *REPUBLIC AVIATION*) DO NOT PROVIDE THE APPROPRIATE STANDARD TO BE APPLIED TO MERE MAINTENANCE UNIFORM POLICY CASES**

Unlike Tesla, the employer in *Stabilus* discriminatorily applied its uniform policy to single out and ban the wearing of union T-shirts during an election, asserting that its uniform policy constituted a "special circumstance" that authorized disparate enforcement. Noting that an employee's right to wear union insignia at work is protected by Section 7, the ALJ declared the *Stabilus*' uniform policy "presumptively invalid" *because of the employer's discriminatory interpretation and enforcement* of the policy and found that *Stabilus* had demonstrated no special circumstances to justify its *discriminatory restriction* on the wearing of union T-shirts.

On exceptions and in ultimate agreement with the ALJ, but for different reasons, the Board affirmed the ALJ's finding that the employer violated Section 8(a)(1) by discriminatorily prohibiting employees from wearing union T-shirts. However, it specifically carved out the

judge’s conclusion that [Stabilus] failed to make the required showing that special circumstances justified the application of its uniform policy under the facts of this case because “we find that, even if [Stabilus] had made the required showing, its actions here would have violated the Act for two independent reasons.”<sup>14</sup> *Stabilus* at 837.

Despite that express carve out, though unnecessary to their ultimate decision-making in the case and without any reference to any supporting Board case authority, Members Liebman and Becker mentioned in passing that “an 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.” *Stabilus* at 838. The Board’s February 12 Invitation cites this text and asks whether this categorical *dictum* should be applied as the test to determine whether the mere maintenance of Tesla’s facially neutral Team Wear Policy violates Section 8(a)(1). For the reasons that follow, the answer to that question is a resounding “no.”

**1. Because it is mere *obiter dictum*, the text cited from *Stabilus* should not be accorded precedential status.**

The Supreme Court has defined *dictum* as any discussion in an opinion that is non-essential to the disposition of the actual issue being decided. *Central Green Co. v. United States*, 531 U.S. 425, 431, 121 S.Ct. 1005 (2000); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994).. Thus, anything that is said in passing in a decision or a judicial comment that is unnecessary to the decision in a case is non-precedential and need not be

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<sup>14</sup> The two independent reasons the *Stabilus* Board held the employer’s conduct to be in violation of Section 8(a)(1) were: (1) the employer impinged on employee Section 7 rights because its agents went beyond enforcing the employer’s uniform policy by requiring union supporters to remove union T-shirts and other displays of support for the union that could have been worn consistent with the policy; and (2) the employer acted unlawfully by disparately enforcing the policy against statutorily protected activity while not enforcing it against other similar activities under similar circumstances.

followed in subsequent cases. *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) (dicta “may be followed if sufficiently persuasive” but are not binding).

The *Stabilus* text cited by the Board in its Invitation need not be followed by the Board because the *Stabilus* Board plainly stated that it was neither addressing nor deciding the case based on the issue of special circumstances, and because the Board decision focused instead on the fact that the employer applied its uniform policy in a discriminatory and excessive manner that singled out the wearing of union T-shirts for prohibition in violation of Section 8(a)(1). Thus, the comments made by Members Liebman and Becker as to whether and when an employer can rely upon its uniform policy to avoid (or satisfy) the “special circumstances” test were nonessential to the grounds upon which the Board actually decided *Stabilus*. This renders those gratuitous, nonessential remarks pure *dicta* which should be disregarded as nonbinding precedent and not relied upon for the purpose of giving rise to a legal standard to be applied here.

The *Stabilus dicta* should also be disregarded here because those nonessential passing comments paint with too broad a brush; they are couched terms that are one-sided, far too absolute, and categorical. Further, the comments are outdated and are out of sync with modern Board law that validates facially neutral employment policies and strikes an appropriate balance between employee and managerial rights. Indeed, requiring job-specific uniforms as a condition of employment is a fundamental managerial right that simply cannot be ignored. Contrary to the *Stabilus dicta*, the Board has long recognized many compelling business reasons that support the existence of and consistent enforcement of such facially neutral policies. Further, it has consistently sanctioned the nondiscriminatory enforcement of these policies, an employee’s right to wear union apparel or union insignias notwithstanding. *Noah’s New York Bagels*, 324 NLRB 266, 275 (1997); *Casa San Miguel*, 320 NLRB 534 (1995); *Pathmark Stores, Inc.*, 342 NLRB 378, 379 (2004) (holding that a grocery store could, because of its “legitimate interest in protecting its customer relationship,” lawfully prohibit its employees from wearing clothing displaying the message, “Don’t Cheat About the Meat!” in protest of the store’s use of prepackaged meat products); *In Re Bell-Atl. Pennsylvania, Inc.*, 339 NLRB 1084, 1085 (2003)

(deferring to the arbitration award and concluding the employer had established a legitimate interest in maintaining and protecting its image and reputation, thereby justifying the enforcement of appearance standards for employees performing their work tasks in public during working time).

A plain reading of the *Stabilus dicta* and its application to the facts of this case, run counter to this Board precedent. It also leaves no room for the compelling business concerns that animate the promulgation and maintenance of facially neutral uniform policies like Tesla's Team Wear Policy by erroneously and automatically elevating the right to wear union insignia under almost *all* circumstances over almost *all* legitimate management concerns that justify a uniform policy. It ignores that an appropriate and non-discriminatory ban of all non-compliant, non-uniform work wear from a particular workplace may counterbalance and even outweigh the right to wear union insignia. Taken to its logical extreme, an application of the *Stabilus dicta* to Tesla's mere maintenance of its GA Team Wear Policy would completely submerge Tesla's right to promulgate and enforce its reasonable workplace apparel rules, rules promoting the assembly of damage-free cars and facilitating visual management of GA employees' safety. Accordingly, the *Stabilus dicta* should not be applied as the standard for determining whether the mere maintenance of Tesla's Team Wear Policy violates Section 8(a)(1).

**2. *Stabilus* was not a mere maintenance case and it has never successfully been applied in mere maintenance cases**

Assuming, *arguendo*, that the *Stabilus* text cited by the Board in its invitation is good Board law, it still does not apply here. *Stabilus* was not a mere maintenance case; rather it was a case involving the discriminatory and undue enforcement of a uniform policy that singled out the wearing of union apparel for prohibition. Here, that is simply untrue. Indeed, even though the GC alleged discriminatory enforcement of the Team Wear Policy, the ALJ rejected and recommended the dismissal of that claim, discrediting all of GC's witnesses on this issue and finding that the GC failed to sustain the burden of proving such discriminatory enforcement. Accordingly, this case presents none of the facts and issues appearing in *Stabilus*. To the

contrary, the only issue here is one never addressed by *Stabilus*: whether the mere maintenance of the employer’s facially neutral uniform policy violates Section 8(a)(1).

*Stabilus* plainly never addressed the issue of mere maintenance. Indeed, a review of the decisions issued to date citing *Stabilus* reveals that that the so-called *Stabilus* test has never been applied by the Board to decide a mere maintenance case, much less to invalidate a facially neutral uniform policy, absent proof of the policies’ discriminatory enforcement. To the contrary, in *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019), the Board recently overturned an ALJ’s finding that an employer’s mere maintenance of a policy regulating the wearing of logos and/or graphics to be a 8(a)(1) violation based on *Stabilus*. Indeed, the ALJ in *Wal-Mart* cited *Stabilus* four times to support the judge’s erroneous conclusion that Wal-Mart’s neutral uniform policy was unlawful, a finding that the *Wal-Mart* Board majority expressly rejected. Rather, the Board concluded that the appropriate analytical framework for determining the lawfulness of an employer’s facially neutral logo or apparel graphics policies was the Board’s test for facially neutral employer policies set forth in *Boeing*. *Wal-Mart’s sub silentio* rejection of *Stabilus* as the legal standard in *Wal-Mart* is proof that *Stabilus* has no application in mere maintenance cases and that it should not be used to test the facial validity of Tesla’s Team Wear Policy.

**3. The special circumstances test has no application to facially neutral policies that are not discriminatorily applied to prohibit NLRA-protected conduct.**

Since *Stabilus* is grounded on *Republic Aviation*, a showing that *Republic Aviation* and its “special circumstances” test are inapposite to mere maintenance cases disqualifies *Stabilus* as the test to be applied here. In *Republic Aviation*, the Court affirmed a Board decision in which an employer was found to violate Section 8(a)(1) by its promulgation of a facially overbroad “no solicitation” policy thwarting workers from wearing union shop steward buttons on the employer’s premises. In its famous and much cited footnote 10, the *Republic Aviation* Court laid down an order and allocation of proof to be applied in rule cases:

“The Act . . . does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Work time

is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule is presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, . . . is an employee's time to use as he wishes . . . without unreasonable restraint. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours . . . Such a rule must be presumed to be an unreasonable impediment to self-organization, and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

Read together, *Republic Aviation's* facts and its footnote 10 teach that an employer violates the Act when it promulgates a policy that *explicitly* bans NLRA-protected-activity like the wearing of union apparel and/or, as in the case of *Stabilus*, it *disparately enforces a policy to single out protected activity for prohibition* because the explicit policy exists and/or is enforced for a purpose of impinging on such protected conduct.<sup>15</sup> Because of its discriminatory intent, *Republic Aviation* declares such discriminatory conduct to be presumptively unlawful unless proven necessary to advancement of an overriding managerial concern.

On the other hand, *Republic Aviation* also teaches that an employment policy like Tesla's Team Wear Policy that is neither explicitly aimed at NLRA protected-activity nor disparately

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<sup>15</sup> *Republic Aviation's* special circumstances test has been applied to explicit rules banning Section 7 conduct. *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (finding employer did not violate the Act by banning offensive t-shirts that compared its outsourcing to the Japanese attack on Pearl Harbor because the ban was necessary to maintain a harmonious workplace); *Mack's Supermarkets*, 288 NLRB 1082, 1098 (1988); *Healthbridge Mgmt.*, 360 NLRB No. 118, slip op. at 2 (2014), enforced, 798 F.3d 1059 (D.C. Cir. 2015). Likewise, it has been applied in cases in which an employer interpreted and applied its policies to prohibit workers from engaging in Section 7 conduct. *W San Diego*, 348 NLRB 372, 375 (2006) (employer presented health and safety special circumstances and lawfully banned wearing union stickers in hotel kitchen pursuant to attire policy where employer observed stickers peeling from employees' clothing after only a short while, thus presenting health and safety risk of falling into and contaminating food); *Albis Plastics & United Steelworkers of Am., Dist. #12, Afl-Cio, Clc*, 335 NLRB 923 (2001) (holding that special circumstances justified the employer's ban on union stickers on employees' bump caps/safety helmets); *Pay'n Save Corp.*, 247 NLRB 1346 (1980), enforced, 641 F.2d 697, 701-02 (9th Cir. 1981) (finding substantial evidence to support the NLRB's finding that Pay'n Save violated Section 8(a)(1) of the Act by disparately applying a rule against wearing political or controversial buttons, including union buttons). However, the special circumstances test has never been applied to mere maintenance cases involving facially neutral policies.

enforced to ban protected conduct is a lawful management prerogative, falling outside the Act's prohibitions and *Republic's* special circumstance requirement. *Republic Aviation* supports the idea that the NLRA can't be read to obliterate "working time" rules related to order and production in the workplace. Thus, a facially neutral policy's promulgation and maintenance is presumptively lawful even though it may have some incidental effect on Section 7 conduct, absent evidence that the policy was adopted for a discriminatory purpose or enforced in a discriminatory manner.

Here, Tesla's Team Wear Policy is neither patently overbroad nor explicitly directed at union apparel or union insignias. Nor has it been applied in a discriminatory fashion to single out the wearing of union apparel or union insignias for prohibition. Accordingly, it is presumptively lawful, meaning that the special circumstances test enunciated in *Republic Aviation* and later mentioned in passing in *Stabilus* has no application here. *Stabilus* cannot, therefore, provide the legal standard or test for determining whether the mere maintenance of Tesla's Team Wear Policy violates Section 8(a)(1).

The D.C. Circuit's decision in *World Color (USA) Corp. v. NLRB*, 776 F.3d 17 (D.C. Cir. 2015) ("*World Color*") agrees with this analysis. There, a printing company's safety policy banned the wearing of all baseball caps in the workplace except for those caps bearing the company's name/logo to which an ALJ applied *Republic Aviation* and concluded that the policy violated Section 8(a)(1) because it discriminatorily banned the wearing of hats bearing union insignias and logos and because the employer failed to substantiate its claim of special circumstances. On exceptions, the Board affirmed the ALJ's conclusion, finding that the employer's policy to be overbroad and a violation of Section 8(a)(1), citing *Stabilus*.

The D.C. Circuit disagreed. Noting that the facial neutrality of the policy was always at issue in the case, the court, in effect, declared the special circumstances test of *Republic Aviation* and *Stabilus* off limits to cases challenging facially neutral policies. Instead, it requires the Board to employ the following non-*Republic Aviation/Stabilus* two-step inquiry:

First, the Board examines whether the rule explicitly restricts Section 7 activity; if it does, the rule violates the Act. . . . If the policy does not explicitly restrict protected activity, the Board considers whether . . . employees would reasonably construe the language to prohibit Section 7 activity”

(citing the Board’s then extant *Lutheran Heritage*<sup>16</sup> standard).

According to the *World Color* court, the Board erred by short-circuiting its inquiry at the first step by concluding that there was no dispute regarding whether the policy facially prohibited employees from wearing caps bearing union insignia. On that crucial preliminary point, the court disagreed because, although the hat policy restricted the type of hat that might be worn on the job, it did not say anything about whether union insignia could be attached to the hat. Further, *World Color* asserted throughout the case that the hat policy did not expressly prohibit employees from wearing union insignia at work. To the contrary and as here, the evidence revealed that *World Color*’s employees accessorized their company-logoed hats with union pins. The court, therefore, granted *World Color*’s petition for review, denied enforcement of the Board’s decision and remanded the case to the Board for reconsideration<sup>17</sup>.

As in *World Color*, Tesla’s Team Wear Policy does not expressly prohibit employees from wearing union apparel or union insignia. Further, also as in *World Color*, Tesla’s GA employees can and do accessorize their Team Wear by wearing union-branded hats and placing flat, non-abrasive stickers bearing union insignia on their Team Wear. Thus, as in *World Color*, Tesla’s Team Wear Policy is not a policy that explicitly bans the wearing of union apparel or a display of union insignia but, rather, is a facially neutral policy. As such and as per *World Color*, it is not subject to special circumstances scrutiny under either *Republic Aviation* or *Stabilus*. Therefore, the *Stabilus* text cited in the Board’s Invitation cannot properly serve as the test for

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<sup>16</sup> 343 NLRB 646 (2004).

<sup>17</sup> On remand, the Board applied the *Boeing* standard to the *World Color* policy. Based on business considerations far less substantial than those presented here and noting that employees were permitted to accessorize their caps and not prohibited from donning company caps bearing union insignia, the Board concluded the policy, originally condemned under *Republic Aviation*’s special circumstances test was a facially neutral rule under *Boeing*. *World Color (USA)*, 369 NLRB No. 104 (2020).

determining whether the mere maintenance of Tesla’s Team Wear Policy violates Section 8(a)(1).

**B. *BOEING PRESENTS THE APPROPRIATE TEST FOR DETERMINING THE LAWFULNESS IN MERE MAINTENANCE CASES INVOLVING FACIALLY NEUTRAL UNIFORM POLICIES***

In *Boeing*, the Board overruled *Lutheran Heritage’s* “reasonably construe” standard, opting in its stead for a new standard by which to evaluate a facially neutral policy, rule or handbook provision. There, the Board said that it would no longer require a policy to be linguistically perfect to pass muster. Rather, focusing on the perspective of employees, the Board said that it would assign their everyday workplace meaning to a rule’s words for the purpose of determining how workers would likely read and understand a facially neutral rule. But where a facially neutral employment policy or rule could reasonably be interpreted to potentially interfere with the exercise of NLRB rights, it would evaluate the policy in question against two criteria: (i) the nature and extent of the potential impact on NLRA rights, and (ii) the legitimate justifications associated with the rule. The Board further emphasized that it would conduct this evaluation, consistent with the Board’s duty to strike the proper balance between asserted business justifications and the invasion of employee rights, in light of the Act and its policy. The Boeing standard provides the test by which the lawfulness of Tesla’s facially neutral Team Wear Policy should be measured.

At issue in *Boeing* was a rule that restricted the use of camera-enabled devices on the Company’s property without a valid business need. Like Tesla’s Team Wear Policy, Boeing’s camera rule did not explicitly mention or restrict any activity protected by the Act. Nor, as here, was Boeing’s camera rule disparately applied to discriminatorily restrict such protected conduct. Neither was it adopted in response to union or protected concerted activity. Rather, it was promulgated out of the Company’s genuine need to protect its facilities and work, some of which is classified, from espionage.

The Board found that Boeing's maintenance of its facially neutral no-camera use rule did not constitute unlawful interference with protected rights in violation of Section 8(a)(1) even though, in some circumstances, the rule might potentially affect the exercise of Section 7 rights because that adverse impact was comparatively slight. Further, the Board found that the rule's adverse impact on Section 7 rights was outweighed by substantial and important justifications associated with the Boeing's maintenance of the rule.

That *Boeing* provides the correct standard here is demonstrated by the *Wal-Mart* decision, *supra*. The Board recently applied *Boeing* and upheld content neutral rules regulating the size and appearance of logos and graphics that Wal-Mart employees could wear in public sales areas – even though the rules might operate to disqualify the wearing of non-compliant union insignia. Because Wal-Mart's rules did not prohibit employees from wearing union buttons, but merely limited the permissible size and appearance of buttons that, in general, could be worn, the Board concluded that the *Republic Aviation's* presumption of invalidity and special circumstances test could not be used to determine the facial lawfulness of Wal-Mart's logo/graphic policies. According to the Board, the infringement that Wal-Mart's policy had on Section 7 rights was "less severe", meaning that the employer's legitimate justification for its policy did not need to be as compelling as those required in special circumstance cases in *Republic Aviation* cases. Thus, the Board concluded that in such cases (involving facially neutral policies), it would apply the analytical framework in *Boeing*, stating "it would apply the standard articulated in that case to determine the lawfulness of *all facially neutral policies, rules, and handbook provisions* that do not expressly restrict Sec. 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity." *Wal-Mart*, 365 NLRB No. 154, slip op. at 1 fn. 4.

As in the case of Boeing's no camera rule and Wal-Mart's logo/graphics policy, Tesla's Team Wear Policy is both neutral on its face and justified by compelling business needs. Apart from Team Wear Policy enabling Tesla supervisors to visually manage GA employees, the Policy is an integral part of Tesla's effort to promote the mutilation-free assembly of a new Tesla

automobiles. Indeed, cars that emerge from the GA department with defects and dings cannot be sent to market. They must be reworked and put into the factory perfect condition that is a hallmark of Tesla. The Team Wear Policy minimizes the need to rework cars, getting cars off the assembly line the first time and out to consumers as soon as possible.

Moreover, the mere maintenance of this policy has no to little effect on Section 7 rights. The only Section 7 right implicated here is the right to wear union-branded apparel or to display union insignias or union messaging. Not only does the Team Wear Policy not address or restrict this protected conduct, but the record shows that GA employees wear union branded hats and non-abrasive union stickers on their Team Wear, Tesla's uniform policy notwithstanding. This practice demonstrates that the mere existence of this Policy neither precludes nor discourages workers from exercising their right to display or wear such union messaging in the workplace. Moreover, insofar as the Policy operates to restrict the union apparel a GA employee may wear, that restriction is slight because it applies only to non-compliant union apparel and not to the employee's right to wear union apparel, i.e. union hats, or to display union insignia, i.e. that do not run afoul of the Team Wear Policy or pose an undue risk of costly product mutilation.

As in *Wal-Mart* and *World Color*, Tesla's Team Wear Policy does not prohibit the wearing of either union insignia or even of union apparel. Rather, it establishes a generic uniform standard that facilitates visual management of the GA Department work force and the assembly of factory-perfect automobiles. Further, even though the policy may incidentally ban certain non-compliant union branded apparel from the GA Department, it does not ban the wearing or display of union insignia or union messaging unless that insignia/messaging is in a form that increases the risk of mutilation or interferes with the visual management of the GA Department staff. Thus, under *Boeing* and as in *Wal-Mart* and *World Color*, Tesla's mere maintenance of its Team Wear Policy does not interfere with Section 7 rights in violation of Section 8(a)(1). GC's allegations alleging that the mere maintenance of this presumptively valid uniform Policy should, therefore, be dismissed.

#### IV. CONCLUSION

Tesla's Team Wear Policy is not presumptively unlawful on its face and Tesla did not need to satisfy the "special circumstances" under *Stabilus* and *Republic Aviation*. Rather, as a facially neutral rule, the Team Wear Policy is presumptively lawful, having little to no impact on Section 7 rights. Accordingly, Tesla is under no obligation to prove the existence of "special circumstances" in order to maintain this rule. Its mere maintenance of its Team Wear Policy should be adjudged and ultimately declared lawful pursuant to the *Boeing* standard.

Dated: March 22, 2021

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By:



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MARK S. ROSS  
KEAHN N. MORRIS

Attorneys for  
TESLA, INC.

**CERTIFICATE OF SERVICE**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Four Embarcadero Center, 17th Floor, San Francisco, CA 94111-4109.

On March 22, 2021, I served a true copy of the document(s) described as:

**RESPONDENT TESLA, INC.'S BRIEF IN RESPONSE TO THE BOARD'S FEBRUARY 12, 2021 INVITATION TO FILE BRIEFS CONCERNING UNIFORM POLICIES**

on the interested parties in this action as follows:

Catherine Ventola  
E-mail: catherine.ventola@nlrb.gov  
Christy Kwon  
E-mail: christy.kwon@nlrb.gov  
Counsels for the General Counsel  
National Labor Relations Board  
Region 32  
1301 Clay Street, Ste. 300N  
Oakland, CA 94612-5224  
T: (510) 671-3041

Margo Feinberg  
E-mail: margo@ssdslaw.com  
Daniel E. Curry  
E-mail: dec@ssdslaw.com  
Schwartz, Steinsapir, Dohrmann & Sommers, LLP  
6300 Wilshire Blvd., Suite 2000  
Los Angeles, CA 90048  
T: (323) 655-4700

Jeffery Sodko  
E-mail: jsodko@uaw.net  
United Automobile, Aerospace and Agricultural Workers of America  
AFL-CIO  
8000 E. Jefferson Avenue  
Detroit, MI 48214  
T: (313) 926-5000

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address sasmith@sheppardmullin.com to the persons at the

e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Office of the Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, D.C. 20570  
T: (202) 273-1000

**VIA E-FILING**

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 22, 2021, at San Francisco, California.



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Sarah Smith