UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

HOME DEPOT USA, INC.

and

ANTONIO MORALES JR., an Individual

Case 18-CA-273796

BRIEF TO THE ADMINISTRATIVE LAW JUDGE ON
BEHALF OF THE COUNSELS FOR GENERAL COUNSEL

Submitted by:

David Stolzberg, Esq.
Counsel for the General Counsel
National Labor Relations Board,
Region 18 212 Second Ave. South, Suite 200
Minneapolis, Minnesota 55401
Telephone (763) 270-7057
David.stolzberg@nlrb.gov

Tyler Wiese, Esq.
Counsel for the General Counsel
National Labor Relations Board,
Region 18 212 Second Ave. South, Suite 200
Minneapolis, Minnesota 55401
Telephone: (952) 703-2891
Tyler.wiese@nlrb.gov
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I. Statement of the Case

This case involves the combined efforts of employees to combat racism in the workplace, and an employer who, while publicly claiming to support these efforts, ultimately acted to thwart them at the source. This case also involves the right of employees to concertedly display a symbol in support of their protests while working—a right that has been affirmed by the Supreme Court since 1945. And it involves the unfortunate targeting by Home Depot (Respondent) of the face of these protests in the workplace, Charging Party Antonio Morales, culminating in their\(^1\) constructive discharge. As its heart, then, this case rests on the application of largely settled law to an all-too-familiar set of facts—one where the central evidence is undisputed, as it largely contained on a recording and established through Respondent’s documentary evidence.

Respondent’s case, on the other hand, rests on the following novel tenets: 1) it has the legal right to decide that because an otherwise protected symbol is viewed controversially by some people, it can be excluded from the workplace; 2) it can allow employees, supervisors, and managers to extensively customize their uniforms and advertise this customization yet still prohibit work-related messages that it disagrees with, contrary to its own policy on which it purports to rely; 3) it has the legal right to present an employee with the Hobson’s Choice between engaging in activities protected by the Act and the employee’s job; and 4) that, contrary to decades of Supreme Court precedent, the Board’s ability to regulate employee apparel in the

\[^1\] Counsel for the General Counsel inaccurately referred to Antonio Morales using the pronouns he and him at the hearing. Morales’s pronouns are in fact they and them. To the extent direct quotes or other documents in the record contain the incorrect pronouns, they will remain unchanged in General Counsel's brief. All other pronouns throughout General Counsel’s brief will reflect Morales’s identity. Respondent's Counsel has been informed of General Counsel's intentions.
workplace now violates the First Amendment. These are the truly revolutionary principles being argued in this case, and they must be rejected.

The symbol chosen by these employees, BLM and its connected movement, Black Lives Matter, does not otherwise change these fundamental facts. Black Lives Matter itself is an expansive movement that, as demonstrated at trial through documentary and testimonial evidence, foundationally connects to racism in all forums—including the workplace. That co-workers sought to show support for one another and for customers of color using this popular symbol is neither unexpected nor radical—and certainly does not exclude them from statutory protections under the National Labor Relations Act. Indeed, given the centrality of race relations in the workplace, such activity is not only protected under the Act, it is inherently concerted.

This brief will open with a short background discussion of the facts in this case and the credibility of each parties’ witnesses. Next, it will address the facts of Morales’s employment and constructive discharge and demonstrate the unlawfulness of Respondent’s actions towards Morales. It will then discuss why BLM is protected by Section 7 of the Act and why, on that basis, Respondent’s interpretation of its dress code policy prohibiting that symbol is unlawful. Finally, the brief will close with an analysis of Respondent’s numerous affirmative defenses, including why they are without merit, and why the requested remedies are appropriate.

II. Background

Respondent, Home Depot, is a well-known home improvement retailer. It operates approximately 2,200 stores in the United States, Canada, and Mexico. (GCX 23 at 2.) In total, it
employs approximately 500,000 associates, or employees, across its operations. (Id.) The company’s headquarters are located in Atlanta, Georgia. (Tr. 288, 794.) ²

The store involved in this case is located in New Brighton, Minnesota (Store 2807). It is part of the Northern Division of Respondent’s operations, which is headed by President of Northern Operations Crystal Hanlon. (Tr. 288.) The store falls within District 103, which contains 11 stores throughout the Minneapolis/St. Paul metro area and is headed by District Manager Melissa Belford. (Tr. 559–60, 694.) Human resources functions for this store are handled by Casey Whitley, District Human Resources Manager (who, prior to his current position, served as Store Manager for the New Brighton facility). (Tr. 694.) Throughout the events of this case, Jason Bergeland has served as the store manager. He is the highest-level manager at the New Brighton store and reports to District Manager Belford. In turn, there are five assistant store managers (ASMs) who report to Bergeland and numerous supervisors below the assistant managers. (Tr. 493.) The store employs approximately 250 associates. (Tr. 493.)

² This case is based on an unfair labor practice charge filed by Charging Party Morales on March 8, 2021. (GCX 1(a).) On April 7, 2021, Morales filed the first amended charge (GCX 1(c)) and filed a second amended charge on July 27, 2021. (GCX 1(e).)

The Regional Director issued its Complaint based on this charge on August 12, 2021 (GCX 1(g)), an Amended Complaint on September 13, 2021 (GCX 1(j)), and a Second Amended Complaint on September 28, 2021. (GCX 1(m).) Respondent filed timely Answers to all Complaints, denying the substance of the allegations. (GCX 1(i); GCX 1(l); GCX 1(p).) At the outset of hearing, Counsel for the General Counsel made an oral amendment, adding an additional 8(a)(1) allegation as Paragraph 6(c). (Tr. 8.) Respondent denied this allegation (Id. at 9.)

After the Second Amended Complaint issued in this matter, Respondent filed a Motion for Summary Judgment with the National Labor Relations Board on October 5, 2021. (GCX 1(o).) Counsel filed an Opposition to this Motion on October 12, 2021. (GCX 1(q).) Respondent thereafter filed a Reply on October 19, 2021. (GCX 1(r).) On November 9, 2021, after the close of the hearing, the Board denied Respondent’s Motion. National Labor Relations Board, Order Denying Summary Judgment dated November 9, 2021, Case 18-CA-273796, available at https://apps.nlrb.gov/link/document.aspx/09031d45835c1224.
The Charging Party in this case, Antonio Morales, worked at the New Brighton store from August 2020 to February 2021. (Tr. 41.) During their time working for Home Depot, Morales worked as a flooring sales specialist. Their job involved assisting customers with flooring orders and otherwise ensuring that the flooring department remained stocked and operational. (Tr. 42.) Morales worked full-time in this position, starting with the closing shift and later moving to the mid-day shift. Their supervisors in the flooring department through most of Morales’s employment were supervisor Michelle Theis and ASM Taylor Fleming (who was later replaced in early 2021 by ASM David Stolhanske). (Tr. 44–45.)

As part of its operations, Home Depot maintains numerous standard operating procedures, or SOPs, that govern company policy. (Tr. 781.) These policies are developed and promulgated through the associate relations department. (Tr. 830.) Relevant to this case, Respondent maintains both an apron and dress code policy. (JTX 1 at 3–8.) Per the stipulation of the parties, these policies apply at all of Respondent’s operations in the United States. (Id. at 1.) The relevant portion of the policies prohibit the display of “causes or political messages unrelated to workplace matters.” (Id. at 4, 6 (emphasis added).) The parties further stipulated that Respondent interpreted this policy, at all material times, to prohibit employees from displaying “BLM” and/or “Black Lives Matter.” (Id. at 1.)

Respondent requires all individuals, including associates, supervisors, managers, and executives, to wear an orange apron, provided by Respondent, while on its retail floors. (Tr. 293.) These aprons are part of the self-proclaimed “brand” of Home Depot. (Id. at 294.) Every apron is embossed with Respondent’s “Value Wheel.” The Value Wheel includes eight core values for the company, including “Respect for All People.” (GCX 15.) As will be discussed in more detail below, however, while Respondent requires all staff to wear an apron, it liberally
allows (and indeed publicizes) extensive customization of aprons by employees, managers, and executives. (*E.g.*, GCX 13; GCX 16; GCX 21; GCX 22.)

### III. Credibility

This case does not, in most respects, center on the credibility of either parties’ witnesses. The parties have stipulated that Respondent’s interpretation of its apron policy prohibits the display of BLM and it cannot be seriously disputed that Respondent conditioned Morales’s continued employment on their removal of BLM from their apron, as is demonstrated by the tape recording entered into evidence as General Counsel Exhibit 4. Nonetheless, to the extent that credibility resolutions are necessary to resolve the allegations in this matter, there are three material subjects on which Respondent’s witnesses demonstrated evasiveness: 1) claiming that no manager noticed BLM on Morales’s apron prior to the February 17, 2021 meeting between Morales, Store Manager Bergeland, and ASM Enrique Ellis; 2) Belford claiming that Morales only raised personal issues regarding their co-worker Allison Gumm’s behavior and that there were not concerns raised by other employees; and 3) failing to identify gay pride flags on Respondent’s aprons.

An initial issue casting doubt on the credibility of several of Respondent’s managers is their consistent denials regarding ever seeing BLM on Morales’s apron. Specifically, ASM Fleming (*id.* at 765) and Store Manager Bergeland (*id.* at 496, 511) both testified that they never saw BLM on Morales’s apron; indeed, Fleming even testified that he would have noticed BLM if it were on Morales’s apron. (*Id.* at 765.) The documentary and testimonial evidence, however, establishes that Morales wore BLM on their apron every day at work from September 29, 2020 until February 18, 2021. (GCX 50; Tr. 74.) During this time, Bergeland testified that he saw Morales and would say hi to Morales about two to three times a week (Tr. 496)—meaning that
Bergeland saw Morales, while they were wearing BLM on their apron, at least 40 times, and possibly as many as 60 times. Similarly, Morales testified that they saw Fleming daily while working and that they were wearing the BLM apron the entire time. (Tr. 74.) And although Fleming did not testify to the number of times that he saw Morales working on the floor, he stated that he had several one-on-one meetings with Morales in the fall of 2020, with an unobstructed view of Morales’s apron. (Id. at 765; see also Tr. 114, 118.) Given the frequency of Bergeland’s and Fleming’s interactions with Morales, it is simply not credible for these witnesses to deny that they ever saw BLM on Morales’s apron (or in Bergeland’s case, only noticed it for the first time on February 17, 2021).³

These denials become particularly suspicious in light of District Manager Belford’s acknowledgement of the decorations on Morales’s apron at the meeting where they were constructively discharged on February 18, 2021. Belford testified to having only seen Morales “maybe twice” prior to the video meeting and only “in passing as I was going through the store I noticed him.” (Tr. 605.) Yet, despite these fleeting and “in passing” interactions, Belford admitted during her meeting with Morales that she somehow still noticed and remembered that they had a pumpkin on their apron. (GCX 5 at 38–39; GCX 4 at 44:15–44:30.) The pumpkin Belford referenced, however, is visibly smaller and less prominent than the letters BLM on Morales’s apron, yet appears right next to that larger symbol:

³ ASM Suzette Johnson, by contrast, candidly admitted that she could not recall whether Morales was wearing BLM on their apron during her meeting with them. (Tr. 843.)
It is difficult to imagine that Belford would be able to notice, in passing, the pumpkin without also noticing the prominent **BLM** on his apron. Given, however, that Belford noticed the pumpkin after only a handful of times seeing Morales, it is simply *impossible* that managers and supervisors who worked side-by-side with Morales on a daily basis never saw **BLM** on their apron. Thus, these denials are not credible.
A second issue, with respect to District Manager Belford, is her claim that Morales only raised issues on their own behalf at the February 18 meeting, as it contradicts the recording and transcript of that meeting. Specifically, during her testimony, Belford claimed on two separate occasions that Morales focused almost solely on issues of personal concern and not other associates. (Tr. 608, 622.) Morales, however, repeatedly claimed that other associates shared their concern about Gumm’s behavior and provided examples to support it. (GCX 5 at 23–25.) And while it might be somewhat understandable for Belford to have testified in such a matter had she not reviewed the transcript of the meeting prior to her testimony, Belford testified that she had reviewed the transcript in preparation for the hearing. (Tr. 558–59.) As such, her testimony that Morales limited their concerns with Gumm to personal concerns is not only not credible, but demonstrably inaccurate.

Third, and finally, Respondent’s witnesses demonstrated a curious confusion around gay pride flags being displayed in the workplace. Counsel for the General Counsel introduced photographic evidence of numerous individuals, including high-level executive Crystal Hanlon, wearing Pride flags on aprons on a store floor: (GCX 16 at 18)4

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4 Additional examples of Hanlon and other employees wearing Pride flags on aprons is available at Twitter, Crystal Hanlon, Tweets dated June 9, 2021, available at https://twitter.com/crystal_hanlon?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwdgr%5Eauthor (last accessed December 3, 2021).
Despite being presented with this evidence, however, Hanlon denied that she could identify the picture as showing a gay pride flag or whether she had ever worn a gay pride flag on her apron. (Tr. 315.) Similarly, District Human Resources Manager Casey Whitley denied being able to identify that it was a gay pride flag, despite admitting to knowing what a gay pride flag looks like. (Tr. 711–12.) And Chief Diversity Officer Derek Bottoms incredibly claimed to not even be certain about whether the rainbow flag was even associated with LGBTQ+ rights. (Tr. 814.) There was also confusion about whether gay pride flags were allowed to be worn by Respondent’s representatives in the workplace. For example, Bottoms unequivocally stated that a gay pride flag displayed in the workplace would violate Respondent’s apron policies. (Id. at
District Manager Belford, however, contradicted this testimony by stating that a gay pride flag is allowed in the workplace. (Id. at 642.) Although this case is primarily about BLM, and not gay pride flags, Respondent’s inconsistent and evasive testimony on this front casts doubt on these witnesses’ credibility.

By contrast, employee witnesses who testified on behalf of the General Counsel gave candid and honest testimony. This included, at times, admitting facts that were not favorable towards Counsel’s case. For example, Charging Party Morales admitted that they had not been truthful in stating that they had a family emergency when they left work on February 17, 2021. (Tr. 172–73.) Morales also admitted several other unfavorable facts during Respondent’s cross-examination, such as admitting that management complimented an e-mail they sent regarding race (Tr. 244) and that their resignation letter did not reference BLM. (Tr. 261–62.) Morales’s candor and even tone in the face of a lengthy and difficult meeting with District Manager Belford further supports their credibility. (See GCX 4.) Finally, to extent that Morales appeared evasive at certain other points in their testimony, this can be attributed, at least in part, to the length of their testimony and the skill of Respondent’s cross-examination and should not otherwise lead to their testimony being discredited as a whole. E.g., NLRB v. Universal Camera Corp., 179 F.2d 749, 754 (2d Cir. 1950) (“It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.”), vacated, 340 U.S. 474 (1951).
IV. Respondent Constructively Discharged Charging Party Antonio Morales for Wearing BLM on Their Workplace Apron

A. Morales and Their Co-workers Persistent Complaints to Management Regarding Racism in the Workplace and Their Display of BLM

During Charging Party Antonio Morales’s brief tenure working for Respondent, they and their coworkers observed and experienced egregious and persistent racial harassment toward themselves and other people of color by their coworker, Allison Gumm. During their first week of employment, Morales and their coworkers in the flooring department began discussing Gumm’s racist behavior and concluded they were not merely isolated incidents; in turn, each of them shared their own experiences. (Tr. 71, 72, 84–87, 343–44, 387–89; GCX 3(a).) As will be described below, there were many of these discussions among employees, leading Morales and others to collectively address the issues concerning racism in the workplace with their managers.

Morales first raised these concerns with management on September 14, 2020. At this time, Morales and their coworker Sarah “Sadie” Ward approached their supervisor, Michelle Theis. After Morales and Ward relayed several examples of racial harassment to manager Theis, Theis assured them she would communicate what she learned to her superior, ASM Taylor Fleming. (Tr. 91, 344–45; GCX 3(b).)

Around the time of this initial meeting with Theis, amidst themselves, their coworkers, and Respondent’s customers at the store being racially harassed, Morales wrote the letters BLM in big, black, and unmistakable capital letters. (Tr. 63–65; GCX 2; GCX 50 at 2–3.) Morales

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5 Counsel is withdrawing Complaint Allegations 5(b) and 5(c), which allege that Morales was constructively suspended for engaging in protected concerted activities. (GCX 1(m) at 4.) Counsel has notified Respondent that it intended to do so prior to the filing of briefs.

6 General Counsel Exhibits 3(a)–(h) are contemporaneous Facebook messenger messages communicated by Morales to another. (Tr. 75, 79–80.)
explained that they wrote BLM on their apron “so that people knew to approach me. I am a person of color myself so it’s a form of solidarity. It’s a way to keep – for people to feel safe around me” and “I wanted coworkers and customers to be able to see the BLM and approach me.” (Tr. 64, 68; GCX 2.) Morales further explained that they chose to write BLM specifically because “BLM was the most recognizable. It’s the easiest to understand and it meant the most to me.” (Tr. 279.) Morales’s prominent display of BLM on their apron remained unchanged over the following four to five months.⁷ (Tr. 70–71, 866; GCX 50.)

Morales spoke again with manager Theis on about November 2 regarding continuing issues of racism in the workplace that affected them and their coworkers. Morales again wore BLM on their apron during this meeting.⁸ (Tr. 98–104.) At this November 2 meeting, Morales conveyed additional stories from their coworkers to Theis and pleaded with her to speak with them to corroborate the complaints regarding Gumm’s racist behavior. (Tr. 102; GCX 3(c).) Theis, in response to these concerns, referred to Gumm’s behavior as “very serious” and again told Morales that she would speak with ASM Fleming. (Tr. 101, 104.)

Morales’s first audience with ASM Fleming took place three weeks later on November 27, 2020.⁹ The meeting was not precipitated by Morales and their coworkers’ complaints, but by

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⁷ As discussed below, Morales was one of several employees to display BLM while at work.
⁸ Around this time, Ward also testified that she was called into a conversation with ASMs Suzette Johnson and Taylor Fleming. (Tr. 346.) They were following up on a prior conversation between Theis, Ward, and Morales and asking clarifying questions. (Tr. 346.) Ward relayed to the managers some specifics regarding how Gumm’s consistent racist behavior affected coworkers and customers. (Tr. 347.) Ward recalled Fleming stating he was surprised to be hearing this for the first time. (Tr. 347.)

⁹ By two separate e-mails dated February 18 and 22, 2021, Fleming wrote to Human Resources Manager Casey Whitely that he had met with Morales and Sadie Ward during October 2020; Fleming did not testify regarding these meetings. (GCX 36.)
Gumm’s spurious and quickly dispelled allegations toward Morales themself. (Tr. 112; GCX 3(d).) Despite repeated assurances over the prior two months by Theis that she would elevate the workplace concerns to Fleming, she apparently had not done so, as Fleming told Morales that he “had no idea that this was going on” and that these were “very serious allegations.” (Tr. 110.) Fleming made yet another promise to Morales that he would elevate the matter with manager Jordan Meissner from human resources. (Tr. 113.)

After another three weeks, on about December 18, ASM Fleming finally followed up with Morales by telling them he had spoken with Gumm and told her she must change her behavior. During this meeting, Fleming offered Morales to switch departments. (Tr. 116.) Relying on Fleming’s assertions during the meeting that things would change, Morales declined and told him that they “would think about the situation and if it doesn’t get better, I would switch departments.” (Tr. 115, 117; GCX 3(e).)

Morales’s concerns were shared by their co-workers during this timeframe, as evidenced by other meetings that they independently initiated with management. For example, around the fall or winter of 2020, Nebiy Tesfaldet and Sadie Ward met with managers Fleming and Theis. (Tr. 349, 389–90.) The two employees discussed various behaviors they had observed from their coworker Allison Gumm, noting that she “was doing a lot of microaggression stuff towards customers of color.” Id. Tesfaldet also testified to another conversation with multiple managers that took place with his coworker Jamesha Kimmons. This conversation was also triggered by Gumm’s persistent racism towards co-workers and customers of color. (Tr. 392–97.) By this point, Gumm’s behavior had risen to the level that it sparked weekly informal conversations

10 Respondent did not produce Theis at the hearing.

11 Respondent did not produce Meissner at the hearing.
among coworkers, with Ward stating, “there reached a point where we were making comments to say how racist [do] you actually have to be to be fired from Home Depot?” (Tr. 355.)

Unfortunately, Gumm’s racist and harassing behavior did not change, which caused Morales and two of their coworkers, Jamesha Kimmons and Blessing Roberts, to have yet another conversation regarding the continued harassment. This group conversation culminated in the three of them meeting with ASM Enrique Ellis on February 2, 2021. (Tr. 118–23, 467–69; GCX 3(f); GCX 39.) During the meeting, and in response to these three employees telling him of various harassing and racist behavior they experienced and observed from Gumm in the workplace, Ellis stated he would be bringing the issue up with corporate human resources. (Tr. 129.)

The very next day, February 3, Morales brought these same group concerns regarding Gumm’s racist treatment of people of color to yet another ASM, Suzette Johnson. (Tr. 132.) After Morales finished relaying the litany of abuses, Johnson repeated the, by then, familiar expression of shock and promise that Morales had heard at least four times before from various high-level managers at Store 2807: that these were “very serious allegations” and that she would bring the matter up with corporate human resources. (Tr. 134–37, 843–44, 847; GCX 3(g); GCX 46.)

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12 Reports of racial harassment toward people of color were not new at Respondent’s New Brighton store. Tesfaldet, a person of color himself, testified he brought his experiences of racial harassment to the attention of ASM Suzette Johnson during late February 2020 after repeatedly being called both the “N-word” and a “dancing monkey” while at work. (Tr. 87, 398, 400–03.) During this meeting, Tesfaldet told Johnson the store hadn’t done anything to celebrate Black History Month during that year. (Tr. 403.) After hearing this about the lack of celebration, Johnson’s only response to Tesfaldet was “wow, I didn’t even realize it. That’s crazy.” (Tr. 403–04.)
These concerns regarding racial issues in the workplace continued to escalate during Black History Month in February 2021. (Tr. 407–08). Around the beginning of this month, David Stolhanske (the new flooring ASM) spoke with Tesfaldet about what he had planned for the store’s 2021 Black History Month celebration (Tesfaldet had previously raised issues about how the store’s efforts on this front were lacking). Tesfaldet told Stolhanske that the plan was insufficient and, therefore, disrespectful. In response, Stolhanske told Tesfaldet he should make posters to celebrate. (Tr. 409, 436.) Tesfaldet agreed and was permitted to use his regularly scheduled work time and Respondent’s materials free of cost to create posters that he posted in and near the staff break room. (Tr. 410–13, 435–36; GCX 24; GCX 25.)

The Black History Month displays were repeatedly vandalized. In particular, one of the repeatedly torn down pictures was of the former football quarterback Colin Kaepernick.13 (Tr. 139, 160, 358, 414, 471, 474, 501–02; GCX 24.) On February 13, ASM Stolhanske sent an e-mail regarding the vandalism. (GCX 7 at 4.) The repeated vandalism, along with Stolhanske’s e-mail, prompted employees from the flooring department to again discuss among themselves Respondent’s perceived lack of support for Black History Month.

As a result of these discussions, Morales and Jamesha Kimmons decided to meet with Stolhanske about these issues. (Tr. 146.) Stolhanske visited Morales at the flooring desk on the same day. (Tr. 147.) Morales told Stolhanske that they “thought that while the e-mail was a good start, I didn’t think that the e-mail was enough, and I told David that I wanted this incident to be a storewide conversation because I wanted people of color to feel safe at this store.”

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148.) Dismissing Morales’s plea for a storewide conversation to ensure people of color felt safe at work, Stolhanske simply said that the e-mail was sufficient and that he was taking care of the issue. (Tr. 149.) But much like the prior repeated promises by management that they would elevate the issue regarding racial harassment in the workplace, Stolhanske didn’t take care of the issue and the defacement of the Black History Month displays continued. (GCX 7 at 2.)

On February 17, Morales began their work shift, as scheduled. While working, they noticed an e-mail from ASM Enrique Ellis, referencing the fact that the Colin Kapernick picture in the breakroom had yet again been taken down. (GCX 7 at 2.) After receiving this e-mail, Morales sought out their co-worker Tesfaldet (who, as a reminder, had created the posters) and asked him if it was true. Tesfaldet confirmed that it was true, and they discussed how management had not been dealing with the incidents of vandalism around Black History Month. (Tr. 161, 407–08.)

Morales, at this point, decided that more needed to be done. They sought out their co-workers Sadie Ward and Jamesha Kimmons to show them the e-mail. (Tr. 161–62.) They first spoke with their co-worker Sadie, via text; during the text conversation, Morales showed Ward a screenshot of Ellis’s e-mail. Morales then had an in-person, one-on-one, conversation with Kimmons, near the flooring desk. Morales told her that the poster incident “was just a small sign of what had really been going on at Home Depot, mainly that I feel that there is a lot of prejudice at Home Depot.” (Id. at 162.)

Morales then told Kimmons that their plan was to send a reply e-mail addressing these issues. Kimmons replied that this was a good idea, and that if Morales did draft a reply that they should show it to her. (Tr. 163.) Morales proceeded to draft a response to Ellis, using the shared Flooring Department e-mail, stating that they wanted to have a wider discussion about the “very
serious underlying issue” of racism in the store. (GCX 7 at 1.) Morales wrote that this conversation was needed to make people of color feel supported and safer about the environment that they work in. (Id. at 1.) After drafting their response, they showed it to Kimmons. Kimmons reviewed the e-mail, said that it was very well-written, and then suggested that Morales sign the e-mail using their name. Morales agreed, and sent the e-mail under their signature. (Tr. 163–64.)

B. Respondent’s Retaliation Towards Morales for Their Display of BLM and Other Protected Concerted Activities

Meanwhile, after Morales replied to ASM Ellis’s e-mail, they continued to work their normal shift. Ellis later called Morales while they were working at the flooring desk and told them to come to a meeting at Store Manager Jason Bergeland’s office. (Tr. 166.) When Morales arrived at the office, they found ASM Ellis and Store Manager Bergeland waiting for them. Morales sat down across from Bergeland, approximately 6 feet away from them, who had an unobstructed view of Morales’s apron. (Tr. 166–67.) The meeting, in total, lasted about an hour, with Bergeland speaking for management. (Id.)

Bergeland opened the meeting by talking about Morales’s e-mail. He told Morales that while the e-mail was very well-written, he had concerns about sending out a message of that nature. He told Morales that the e-mail was really meant for management and heads of various departments. (Tr. 168.) After stating this, Bergeland emphasized that Morales should not have sent out the e-mail, that management was taking care of the issues of vandalism to the Black History Month posters, and that Morales should just let them handle it. (Tr. 171.)

Bergeland then transitioned the meeting to a discussion about the store’s efforts to celebrate Black History Month. He told Morales that he had been making efforts to improve the store’s celebrations. He also explained to Morales that he had not been the manager in the past,
and that he wanted to change how the store celebrated Black History Month moving forward. (Tr. 168, 509.) Bergeland then suggested that Morales should help him with developing ideas to celebrate Black History Month and other heritage months. He then brought up Black Lives Matter and while doing so raised the fact that Morales had the letters BLM on his apron. (Tr. 169.)

At this time, Bergeland shifted the focus of the conversation to BLM. He told Morales that the letters BLM could mean different things to different people and that Morales was not allowed to wear it in the store. (Tr. 478.) Bergeland then said that if it were up to him, he would allow BLM to be worn—but that if he did so, he would then also have to allow someone to wear a swastika. (Tr. 169.) Morales responded that they just didn’t understand this argument, and that if they saw someone wearing BLM and another person wearing a swastika, they would know which was right and which was wrong. (Tr. 170.) Bergeland replied that, “yes, technically black lives matter but in reality all lives matter.” (Id.) This caused Morales to “shut down” because, as they explained, saying “all lives matter” in response to Black Lives Matter demonstrated Bergeland’s bias. Morales then asked if this was the end of the meeting, and Bergeland said yes. (Id.) Morales then left the office.

After leaving the office, Morales texted their supervisor, Michelle Theis, and told her that they had a family emergency and had to leave work. Although not technically true, Morales texted this to Theis because they were not able to explain the entire conversation and “wanted to get out as soon as [they] could.” (Id. at 173; GCX 6.)

The following day, Morales returned to work, as scheduled. They arrived at work to find an e-mail from District Manager Melissa Belford, requesting to meet with them. The two
exchanged e-mails, eventually agreeing to set up a WebEx virtual meeting at 1:30 pm on February 18. (GCX 8.)

At the scheduled time, ASM Stolhanske escorted Morales to an office in the back of the store. Stolhanske set up the video conference software and then left the office. (Tr. 182.) On the other end of the call were District Manager Melissa Belford (who Morales had only met in passing before the meeting) and District Human Resources Manager Casey Whitley. (Tr. 183–84.) Morales recorded this meeting. (Tr. 277.) During the meeting, Belford spoke on behalf of Respondent; Whitley took notes but did not otherwise speak. In total, the meeting lasted almost 90 minutes. (GCX 4.)

The meeting opened with Belford acknowledging that Morales had a “really tough” conversation with Store Manager Jason Bergland the prior day. (GCX 5 at 5.14) Belford then transitioned to questioning Morales about the behaviors displayed by their co-worker Allison Gumm. Morales explained that Gumm had issues with both customers and co-workers who were people of color. (Id. at 6.) They told Belford that from the very beginning of their employment, Gumm had singled out Somalians as customers who should not be trusted and that she had questioned Morales’s ability to accurately convey information in Spanish (despite the fact that they speak Spanish). (Id. at 7.) Rather than these issues being resolved, Morales told Belford that the issues continued to escalate. (Id. at 8.) Morales then relayed several other instances of Gumm displaying racist behavior. (Id. at 9–14.)

After hearing about these behaviors, Belford then questioned Morales about what, if any, reports they had made to management. (Id. at 14.) Morales responded that they had raised these

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14 For ease of reference, Counsel will be using the pagination in the transcript (as opposed to the pagination in the exhibit).
issues with numerous managers, including Michelle Theis, Taylor Fleming, Suzette Johnson, Enrique Ellis, and Jordan Meissner, on numerous occasions over the six months of their employment. (Id. at 15.) Belford acknowledged that these were “really concerning behaviors” and that she was going to follow up on the investigation. (Id. at 17.) Belford then admitted that Home Depot had “failed [Morales] because this has continued to happen” with regard to Gumm’s behavior. (Id. at 22.) After doing so, Belford questioned whether other employees had witnessed Gumm’s racism; Morales replied that several associates, including Nebiy Tesfaldet, Sadie Ward, Blessing Roberts, and Jamesha Kimmons (amongst others) would be able to attest to these behaviors. (Id. at 24–25.) Belford closed this portion of the meeting by instructing Morales to keep the investigation confidential (an unlawful directive which will be analyzed and discussed in more detail below). (Id. at 26; GCX 4 at 29:55–30:30.)

Belford then transitioned to discussing the Bergeland-Morales meeting from the prior day. She questioned what Morales’s perspective was on the meeting. Morales replied that they had sought to raise awareness of the issues with vandalism through their e-mail, and in return had been reprimanded for doing so. (GCX 5 at 27.) Belford questioned whether Morales had actually been reprimanded at the meeting, and Morales confirmed that they had and that Bergeland had told them they should not have sent the e-mail. (Id. at 28.)

Morales then pleaded to Belford that “this needs to be kind of announced more, . . ., better, . . because we are the people that need to hear that we are being supported. We are the people that need to hear that we are being backed up in this situation.” (Id. at 28–29; GCX 4 at 33:30–33:55.) Belford replied by questioning what Morales thought management could have done differently; Morales responded that they could bring it up at group meetings. They then again emphasized to Belford that “I haven’t felt supported, and I haven’t felt like I am safe at this
job because of the actions of Allison, because of the actions of other associates.” (GCX 5 at 31; GCX 4 at 37:10–37:30.) Belford replied by pointing out that the New Brighton store had taken actions to celebrate Black History Month, such as creating posters and bringing in food from Black-owned businesses. (GCX 5 at 34.) Belford also asked Morales whether they would be willing to join a diversity committee, and Morales replied that they would—indicating that, at least at that point in the meeting, they were looking to continue working for Respondent. (Id. at 38.)

Belford then shifted the focus of the conversation to Morales’s apron. Belford questioned why Morales put BLM on their apron. (Id. at 39.) Morales responded that “I put it on as a signal to show that I support black people; I support people of color.” (Id.; GCX 4 at 44:30–45:00.) Belford acknowledged that Respondent needed to be a company that supported people. In an attempt to connect with Morales, Belford then tried to compare several of her life experiences to the discrimination that Morales faced as a person of color. (GCX 5 at 41–44.)

After doing so, Belford told Morales that having BLM on their apron was against Home Depot dress code. (Id. at 45.) Belford explained that Home Depot sought to avoid controversy on aprons, and that if she allowed BLM, she would have to allow the opposite, including Nazi swastikas. (Id. at 45–48.) Morales disputed this, stating that “there’s a clear right and wrong

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15 Some of Belford’s attempts to empathize with Morales were so off-base as to be offensive. For example, she compared her experiences as having blonde hair and people assuming she was a cheerleader to the discrimination Morales faced as a person of color. (GCX 5 at 44.) She similarly compared people assuming that someone being tall would play basketball to the mistreatment Morales was experiencing. (GCX 5 at 43–44.) That Morales remained calm in the face of such off-color remarks further speaks to their overall character and credibility.

16 It is peculiar that both Bergeland and Belford immediately jumped to swastikas when thinking of symbols that were equivalent to BLM. It suggests that there may have been some training or guidance on the subject that equated the two or that they coordinated their approach ahead of
there . . . [i]f BLM reflects the values of Home Depot, whereas, say, a Nazi symbol does not. . .” and pointed out that other companies allowed BLM.  (Id. at 49.) Belford retorted that Home Depot had “different values” and stated, somewhat quizzically, that even swastikas can mean different things to different people. Morales responded by again questioning how BLM could be compared to a Nazi hate symbol.  (Id. at 49–52.) In return, Belford suggested that Morales do something else to celebrate people of color such as wearing a diversity pin.  (Id. at 52.) Morales responded that they would consider these other avenues, but that they would also continue to wear BLM on their apron because “this is the best way” to celebrate diversity in their view.  (Id. at 53.)

After Morales asserted that they were going to continue to wear BLM, Belford gave them an ultimatum: “Unfortunately, Antonio, because it’s against dress code, I can’t have you work in the store if you’re going to have that on your apron.”  (Id.) Morales then said that they were willing to be terminated over this issue; Belford responded that they were not being fired, but again confirmed that they could not work with BLM on their apron, stating “if you choose not to follow dress code . . . you can’t be at work.”  (Id. at 54.) Belford encouraged Morales to change their mind and continue working at Home Depot; Morales replied that they didn’t “think there’s any other choice. It seems like no one is listening . . . It’s been six months and nothing has been done.”  (Id. at 55–56; GCX 4 at 1:03:45–1:04:00.) Belford replied that, in her view, Morales could be an asset to the company, but (for a third time) reiterated that “you won’t be able to work until you come to the store in dress code.”  (Id. at 57.) Belford again requested that Morales consider alternatives, and Morales replied that they would do so.  (Id. at 57–58.)

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time. And regardless of whether there was any such training, it displays a level of callousness that would clearly be upsetting to an individual in Morales’s position.
The remainder of the meeting involved Belford continuing to suggest that Morales engage in alternative displays in support of diversity and Morales standing firm in their position regarding displaying BLM. Morales explained to Belford that the reason that they were not going to remove BLM was because of their frustration “as a person of color, coming to you, having these meetings so that you guys can listen, and it doesn’t seem like there’s any resolution from what I can see.” (Id. at 62–63.) After going back and forth on the subject a few more times, Morales confirmed that they were not going to change their apron; Belford told them that they needed to clock out, and again requested them to consider alternatives to BLM. (Id. at 72–73.) Morales replied that they would and would text any ideas to Belford. The meeting concluded with Morales agreeing to Belford’s request to write a statement documenting “some of those incidents that happened to you.” (Id. at 76.)

After the meeting concluded, Morales did as instructed and wrote out a statement detailing some of the incidents that they had with Gumm and provided it to management. (Tr. 198–99, 256–57; RX 14.) Though Respondent attempted to make hay as to why Morales didn’t write anything about BLM in this statement, Morales simply followed Belford’s instruction: “to fill out those – just a statement form or on a regular piece of paper, from your book about some of those incidents that happened to you[.]” (GCX 5 at 76.)

The following day, February 19, Morales e-mailed a resignation letter to Belford, Bergeland, and Theis. (Tr. 201–02; GCX 9.) In that letter, Morales included some of the reasons they quit, but did not include Belford’s condition that they remove BLM in order to return to work. (Tr. 201–02, 261–62.) Morales explained why they didn’t include all the reasons they quit this way: “I had made the decision after talking with Sadie and a couple of my other
coworkers that I didn’t want to include them in this [letter] and in fear of them losing their jobs so I decided to omit certain parts of the reasons why I left.” (Tr. 201–02.)

Respondent, during the hearing, insinuated Morales didn’t in fact quit because of BLM because they didn’t refer to it in the resignation letter. (Tr. 263.) But Morales bluntly, yet truthfully, stated that they were under no obligation to provide Respondent with a full explanation for their resignation in the letter. (Tr. 263, 271.) Additionally, and most importantly, the taped conversation reveals that Morales had clearly conveyed during that meeting that if Respondent would not allow them to express their support for racial justice in the workplace by displaying BLM on their apron, then they were no longer going to work for Respondent.

Within eight days of Morales’s discharge, Respondent investigated and substantiated the allegations brought up by Morales and their coworkers over the prior six months and discharged Gumm without providing her a final warning. (Tr. 359–63, 622–23, 742; GCX 23 at 32–33.) According to Human Resources Manager Whitely, based on “[Gumm’s] lack of respect shown towards her coworkers and customers we made the decision that she was not living up to Home Depot’s values and terminated her for that.” (Tr. 742–43.)

Right on the heels of all of these discussions and meetings regarding racism in Respondent’s workplace, spearheaded by Morales, Respondent began instructing other employees to remove BLM from their aprons. (Tr. 341, 422.) Tesfaldet testified, that after wearing his apron with BLM on it for over six months, Bergeland told him to take it off as it was against policy. (Tr. 420, 422–423, 512–14.) However, Tesfaldet did not remove this from his apron and continued to wear it for two to three weeks until after Human Resources Manager Whitely told him he had to do so again. (Tr. 425–26.)
Prior to Morales’s second to last day of employment, they were not aware of any restrictions on what clothing they or their coworkers could wear while at work or what they could display on their aprons. They testified the first time they saw either a written dress code or apron policy was after their coworker e-mailed a picture of it to them after they were fired. (Tr. 53–56, 332.) Unaware of any written dress code policies during their employment, Morales understood what was generally acceptable by observing others in the store. (Tr. 53–55.) Their observations comported with what they had been told by ASM Fleming during their interview: closed toed shoes, plain or graphic shirts, plain pants, shorts. (Tr. 52–53.) The record is replete with examples of what employees wore while at work, including sports-team jerseys, hats, and masks, and a Black Lives Matter t-shirt. (Tr. 329–30, 342.)

Also unaware of a written apron policy during their employment, Morales’s understanding for what was acceptable to display on the aprons derived from observing what coworkers had displayed on theirs. (Tr. 51–52, 55–56, 61.) Morales observed that “it was a pretty open policy from what I could see just because everyone kind of wore something different and something unique to their personality. I observed a lot of different drawings, a lot of different initials, different things on people’s aprons.” (Tr. 56.) Some examples of what they saw on multiple coworkers’ aprons throughout their employment included: multicolored LGBTQ flag pins, BLM pins, sports team emblems,17 glitter, unicorns, skulls, and spiders, and “all sorts of stuff.” (Tr. 56–59.)18 Witnesses testified there were at least four associates, other than


18 See discussion in Section VII.A regarding additional apron art.
Morales, with BLM written on their aprons, including Jamesha Kimmons, and also Nebiy Tesfaldet, who displayed #BLM on his apron from the summer or spring 2020 until after Morales’s discharge. (Tr. 419–21, 437–38; GCX 12; GCX 50.) Sadie Ward also testified about two other associates who had displayed BLM on their aprons: Anna (last name unknown) “from paint [department]” as well as an unidentified customer service associate.19 (Tr. 337–38, 420.) Again, until these issues came to a head at the New Brighton store, the display of BLM was widely permitted.

C. Morales Engaged in Protected Concerted Activity Through Their Conversations with Co-Workers and Management and By Wearing BLM on Their Apron

Employee conduct under Section 7 of the Act is considered protected when it is both “concerted” and engaged in for the purpose of “mutual aid or protection.” Fresh & Easy Neighborhood Market, 361 NLRB 151, 153 (2014). Both prongs must be satisfied for activity to be protected under Section 7 of the Act.

The Board in Meyers II defined traditional protected concerted activity “where individual employees seek to initiate or to induce or prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” Meyers II, 281 NLRB 882, 887 (1986). The Board uses an objective standard to evaluate “concertedness” or concerted activity. Id. at 4 (citing Circle K Corp., 305 NLRB 932, 933 (1991), enforced mem., 989 F.2d 498 (6th Cir. 1993).)

The Board’s evaluation, in turn, as to whether an employee’s activity is for mutual aid or protection focuses on the purpose of the concerted activity and whether the employees are

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19 The undisputed testimony was that Anna, from paint, and the other unidentified customer service agent wore BLM in 6 to 8 inch lettering on the chest and abdomen areas on their aprons. (Tr. 337–38.)
seeking to “improve terms and conditions of employment or otherwise improve their lot as employees.” Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978). And specific to this case, employee protests to alleviate racial discrimination in the workplace have long been held to be for purposes of mutual aid or protection. Churchill’s Restaurant, 276 NLRB 775, 777 (1985) (finding employee statement protesting employer’s alleged discriminatory treatment against Hispanic employees regarding terms and conditions of employment was protected activity); Vought Corp., 273 NLRB 1290, 1294 (1984) (employee statement was protected because it concerned employer’s alleged racial discrimination), enforced, 788 F.2d 1378 (8th Cir. 1986); see also Honeywell, Inc., 250 NLRB 160, 161 n.6 (1980), enforced, 659 F.2d 1069 (3d Cir. 1981).

In light of these well-established principles, there can be no doubt Morales engaged in concerted activity when they persistently discussed and protested issues of racism in the workplace with other coworkers throughout their employment. Such activity included, among other things, prominently wearing BLM on their apron along with at least two other employees, Tesfaldet and Kimmons; having multiple conversations with coworkers, supervisors, and managers regarding the race discrimination and seeking to end the same; and e-mailing Ellis in the midst of ongoing vandalism to Black History Month posters.

There also can be no serious doubt that Morales engaged in concerted activity in pursuit of combating the persistent issues of racism and racial harassment at Store 2807 that both they, their coworkers, and Respondent’s customers20 were facing. Morales and their coworkers were

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20 The fact that Morales and other employees included the racist treatment of Respondent’s customers among the litany of other abuses employees faced over many months, as part of their concerted drive to rid the workplace of racial discrimination, does not remove such activity from protection. The Board has held, in certain narrow circumstances, that employee complaints directed solely to customer well-being are unprotected by Section 7 of the Act. E.g., Waters of
concertedly attempting to change their lot as employees by upholding the very ideals Respondent stipulated to at hearing:

    diversity, equity and inclusion, as well as preventing racial discrimination in the workplace are important issues for employees and employers, including Respondent and its employees, that implicate terms and conditions of employment by providing a work environment free of discrimination. (Tr. 529.)

Respondent, in turn, defines “inclusion” itself as “[e]mbracing and enabling our associates to feel safe, respected, engaged, motivated and valued.” (GCX 43 at 3 (emphasis added).)

These very same values animated Morales’s display of BLM. 21 Both Morales and Tesfaldet testified they used the BLM symbol to show others that Respondent’s store was a safe place for people of color. (Tr. 68–69, 224, 226–27, 419.) These same concerns of racial injustice and safety in the workplace are woven throughout the more traditional protected concerted activities in this case. For example, in the context of, and in response to, persistent

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21 Respondent will likely conflate BLM with the organization Black Lives Matter in its arguments. As articulated by Morales, the two are distinguishable: “The idea of Black Lives Matter is a statement and not an organization and there is an organization called Black Lives Matters. There is two separate meanings there.” (Tr. 214.) Here, as we have demonstrated, however, both the employees’ testimony and the popular understanding of the term BLM independently support that is a symbol protected by Section 7 of the Act.
racial harassment and repeated vandalism to Black History Month materials, Morales put it this way in their e-mail to Ellis: “I believe it is important to help our fellow coworkers of color feel safer about the environment they work in starting with opening up this discussion in a more public manner that shows us that we are as valued as everyone else at Home Depot.” (GCX 7 at 1–2.) Morales and his-coworker Nebiy Tesfaldet wore BLM as a display of safety to people of color, and continued to do so, while repeatedly complaining to management about these exact same safety issues in the workplace—demonstrating the clear connection between these concerted complaints and BLM. (E.g., Tr. 148 (Morales raising safety concerns with ASM Stolhanske), Tr. 391 (Tesfaldet noting Gumm’s “microaggressions”), Tr. 393 (Tesfaldet flagging Gumm’s “aggressive” behavior towards customers); GCX 5 at 31 (Morales stating “I haven’t felt like I am safe at this job because of the actions of Allison, because of the actions of other associates.”); GCX 7 at 2 (Morales e-mail noting safety concerns for associates of color); see also GCX 49; GCX 50 (demonstrating continued wearing of BLM on aprons by Morales and Tesfaldet).) In the face of this evidence, any attempt by Respondent to divorce Morales’s display of BLM from his other protected concerted activities must fail.

Further, that Morales in particular did not explicitly connect BLM to any particular incident with Gumm is of no moment; the Board has recognized that, though a message may not be clear to all, “[s]pecificity and/or articulation are not the touchstone of . . . protected concerted activity” but rather, “the nexus between the activity and working conditions must be gleaned from the totality of the circumstances . . .” Senior Citizens Coordinating Council of Riverbay Community, Inc., 330 NLRB 1100, 1104 n.15 (2000) (internal citations omitted). By wearing BLM to display an image of safety to his co-workers and customers of color, while raising those exact same concerns repeatedly with management, the requisite nexus is established.

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It is clear then, that despite how Respondent may couch it, Morales and their coworkers demonstrated purpose in their actions was to improve their lot as employees and, as such, was for “mutual aid or protection.” Eastex, Inc. v. NLRB, 437 U.S. 556, 565–68 (1978).

D. Respondent Constructively Discharged Morales By Presenting Them With a Hobson’s Choice

An employee who resigns their employment “will be considered a constructive discharge when an employer conditions an employee’s continued employment on the employee’s abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition.” Intercon I (Zercom), 333 NLRB 223, 223 n.4 (2001) (citing Hoerner Waldorf Corp., 227 NLRB 612, 613 (1976)). These situations have broadly been recognized by the Board under its “Hobson’s Choice” doctrine.

This Hobson’s Choice analysis has two elements: first, continued employment must be conditioned on the abandonment of Section 7 rights; and second, the imposition of the condition must result in the employee quitting rather than complying with the condition. Mercy Hospital, 366 NLRB No. 165, slip op. at 4 (Aug. 20, 2018). To be considered a Hobson’s Choice, the Board requires the confrontation to be “clear and unequivocal and the employee’s predicament not one which is left to inference or guesswork on his part.” Comgeneral Corp., 251 NLRB 653, 658 (1980).

Although the Board requires the confrontation to be unmistakable, it does not require an overt threat of discharge to find a Hobson’s Choice. Titus Electric Contracting, Inc., 355 NLRB 1357, 1358 (2010); see also Mayrath Co., 132 NLRB 1628, 1630 (1961) (finding that, when an employer instructed employees to take off their union buttons or “leave,” it “conveyed to the employees the idea that they had no right to wear the buttons at work and gave them a Hobson's Choice of either foregoing the protected right or being discharged”), enforced in rel. part, 319
F.2d 424 (7th Cir. 1963); Cf. Mercy Hospital, 366 NLRB No. 165, slip op. at 4 (Hobson’s Choice not applicable where employee is left to speculate as to the nature of the condition).

The Board in Intercon I (Zercom) articulated this expansive application, wherein it overturned the ALJ to find an employer violated the Act despite not having expressly told a pro-union employee she would be fired if she failed to relinquish her union sentiments. 333 NLRB at 224. The Board reasoned that the employer, by telling the employee she had four days to change her pro-union attitude, effectively told her to relinquish her pro-union attitude to keep her job. Id. The fact that the employer didn’t immediately fire the employee, as relied upon by the administrative law judge as a basis for not finding this a Hobson’s Choice, did not persuade the Board. The Board instead held that a reasonable employee would have come to the “inescapable conclusion” she would be fired if she did not relinquish her pro-union attitude in the designated period. Id.

Applying those principles enumerated in Intercon I (Zercom), the Board’s reasoning in Titus Electric Contracting particularly informs the analysis in the instant matter. In that case, the discriminatee was told by the employer to remove his union shirt or to go home as he would not be allowed to work if he was wearing the shirt. 355 NLRB at 1357. The administrative law judge reasoned that since the employee was not explicitly threatened with discharge, there were three options before him: 1) the employee could have obeyed the rule and removed his union shirt; 2) he could have protested the rule by refusing to remove the shirt; or 3) he could quit. Because the employee chose to quit without a threat of discharge, the ALJ reasoned it was not a true Hobson’s Choice. Id. at 1383. Though the Board agreed with the ALJ that the employer did not explicitly threaten the employee with discharge for wearing the shirt, the Board nevertheless
found the employer levied an unlawful Hobson’s Choice on the employee, as the circumstances established two options: the employee could change his union shirt or be fired. *Id* at 1358.

Under the precedent discussed above, Respondent unmistakably conditioned Morales’s employment on removing BLM from their apron. Bergeland told Morales they could not work until BLM was removed. Then, District Manager Belford summoned Morales’s to a final meeting, during which Belford, at four separate points, clearly and unmistakably articulated the choice between wearing BLM on their apron and remaining employed by Respondent:

1) Belford: “Unfortunately, because it’s against dress code, I can’t have you work in the store if you’re going to have that on your apron.” (GCX 5 at 53 (emphasis added); GCX 4 at 1:01:15–1:01:40);

2) Belford: “If you choose not to follow dress code and know that these are all legal things, even though I’m trying to give you options on other ways that you could show support and still be a part of the Home Depot team, you can’t be at work . . . if you won’t be in dress code . . . Okay? So that would be your choice. So what would happen is you would clock out when you’re done, and then you would go home and basically wouldn’t come back to work until you can find a different way to express your belief and your support of Black History Month or black people in general and racial equality, right?” (GCX 5 at 54–55 (emphasis added); GCX 4 at 1:02:20–1:03:10);

3) Belford: “Now, I understand if for you it is something that you don’t want to walk away from or don’t want to find an alternative, but that is absolutely your choice, Antonio. I’m not going to fire you. That’s not going to happen. But inevitably, you won’t be able to work until you come to the store in dress code.” (GCX 5 at 57 (emphasis added); GCX 4 at 1:05:35–1:06:10);

4) Belford: “And then I will wait to hear from you tonight on if you have any ideas. And if you don’t, then I’ll wait until, obviously, you know, can’t come back to work until you’re willing to abide by the dress code.” (GCX 5 at 77 (emphasis added); GCX 4 at 1:30:15–1:30:35.)
The context in which the Belford meeting took place further informs why Respondent’s instructions to Morales left them no choice but to abandon BLM or their employment. Months and months of Morales’s and their coworkers’ concerted protests were met without any perceived action. The vandalism to Black History Month displays was ongoing. And Morales’s February 17 e-mail to management, seeking to address these issues of racism in the workplace, was shut down by Bergeland telling Morales they should not have sent it. At that point, Morales was finally met with the conclusion: management doesn’t hear us, they don’t want to hear us, and things would not change at the facility. And after all these failed concerted efforts, Belford broke the camel’s back during the February 18 meeting by repeatedly telling Morales that they must remove their chosen symbol of racial protest, BLM, from their apron.

Indeed, and as discussed briefly above, the facts of this case suggest that in fact Respondent seized upon its apron policy to retaliate against Morales for their escalating course of protected concerted activities in the workplace, rather than any alleged violation of the apron policy. In this regard, BLM was merely a symbol of employees’ protected concerted activities around issues of racism in the workplace—a display which had been tolerated for months before these issues came to a head. Thus, while this conclusion, that Respondent seized on the display of BLM as a pretext for terminating an employee for their efforts to address racism is not necessary to prove the first element of the Hobson’s Choice theory, it is supported by the facts of the case and will be discussed in more detail below.

Initially, it is beyond dispute that Morales continuously wore an apron that prominently displayed the letters BLM for the last five months of their employment and that, during those five months, they had dozens (if not hundreds) of interactions with management at the store. It is simply not credible that not a single member of management ever noticed this prominent symbol
on their apron during these months of full-time employment. These implausible denials also place Respondent on the horns of a dilemma: either the managers are being untruthful about not seeing BLM on Morales’s apron, or what is on an employee’s apron is so insignificant that it would not be noticed by any manager and supervisor over the course of hundreds of interactions over a period of months. Either way, the evidence points to the fact that something other than the display of BLM on their apron triggered this severe reaction from Respondent’s management.

Next, Respondent’s apron policy on its face does not prohibit BLM; it only prohibits “causes or political messages unrelated to workplace matters.” (JTX 1 at 1 (emphasis added).) It is certainly by no means self-evident that BLM in fact violates this policy. As established by the evidence in this case, BLM is in fact intimately related to workplace matters and was certainly viewed by the employees who displayed it as a symbol connected to the workplace. Further, although all managers who testified on the subject claimed that BLM violated the policy, they were curiously unable to establish when or how they came to this uniform conclusion—even when questioned repeatedly on the subject. (Tr. 579–81, 702–05, 765, 802–05, 849.) Bergeland even said that if it were up to him, he would allow BLM to be worn. (Tr. 169.) This is particularly strange in light of Respondent’s human resources guidance on the subject, which suggested that these managers should have raised the issue with human resources instead of unilaterally making such a fraught policy decision. (GCX 31; Tr. 822–23.)

Finally, the timing of Respondent’s “revelation” that 1) Morales was wearing BLM on their apron and 2) that it violated Respondent’s apron policy, drives home that it was their protected concerted activities that caused Respondent to invoke the Hobson’s Choice. Respondent first issued this directive to Morales on February 17, the same day that they
sent an e-mail to their co-workers rallying them to do something about what was being done during Black History Month. Indeed, in the same meeting where this ultimatum was issued, Respondent, through Store Manager Bergeland, unlawfully threatened Morales for sending this protected e-mail. See Section VI, infra. The extremely suspicious timing of Bergeland’s instruction regarding BLM simply cannot be explained by neutral circumstances, which leads to the inevitable conclusion that it was Morales’s underlying protected concerted activities (most notably, the February 17 e-mail) that led to the unlawful instruction being issued to them. E.g., Relco Locomotives, 358 NLRB 228, 229 (2012) (relying on fact that employer was aware of alleged misconduct for almost two weeks and only seized on it after protected activity to find discharge unlawful), enforced, 734 F.3d 764 (8th Cir. 2013).

Turning to the second element of the Hobson’s Choice analysis—i.e., whether the employee, in fact, quit based on the unlawful condition—this element is also satisfied. In this respect, the evidence establishes that Respondent presented an unlawful condition—remove BLM to continue working—and Morales repeatedly said that they were not going to do so. After stating this, Respondent excused Morales from work for the day and they never again worked for Respondent. This establishes that Respondent’s unlawful condition resulted in the end of Morales’s employment. Titus Electric Contracting, 355 NLRB at 1357–58.

Respondent will likely point out that BLM was not specifically referred to in Morales’s resignation letter, supposedly demonstrating that this was a mere post hoc rationalization. This argument should be firmly rejected. Morales’s resignation letter can only be understood in the context of the February 18 meeting with Belford—which were the last moments of Morales’s employment with Respondent. At that meeting, Morales stopped working for Respondent because, contrary to Belford’s unlawful instruction, they refused to remove BLM from their
Respondent cannot dispute this position and therefore the evidence demonstrates that it was Belford’s instructions that literally ended Morales’s employment. In other words, if Belford had not instructed Morales to remove BLM from their apron, the evidence demonstrates that they would have returned to their shift on February 18.

Even setting aside these facts, that Morales’s resignation letter does not explicitly reference BLM is irrelevant as it occurred after they had already been presented with the unlawful Hobson’s Choice. The record is devoid of any evidence the reasons articulated in Morales’s resignation letter were the only reasons or even the primary reasons for their resignation. In fact, Morales clearly testified why they didn’t include BLM in the letter: they discussed with coworkers, were fearful for others to meet their same fate of discharge, and therefore left certain reasons out. (Tr. 201–02.) On cross examination, Morales was more specific, stating they left anything related to BLM out of the letter. (Tr. 262.) And, further, Morales testified they didn’t want their coworkers to be put through something similar to them, as some still had BLM on their aprons. (Tr. 272.) After being pressed on cross examination as to why Morales couldn’t have mentioned BLM in the letter without stating others continued to wear it, Morales said that was a difficult question to answer and “I’m not legally smart. I don’t know the logistics, the legalese of everything. I just know that it wasn’t right and so I wanted to save that for an occasion where someone who was smarter than me could bring this up.” (Tr. 273.)

There is also no evidence in the record to suggest the reasons articulated by Morales in their resignation letter somehow supplanted Belford’s ultimatum to remove BLM from their apron or they could not work. And, of course, even setting aside this concern, the letter itself contains references to the very same issues of racism in the workplace that caused Morales to put
BLM on their apron in the first place *(compare GCX 9* (noting, among other reasons, lack of feeling safe) *with Tr. 69*)—demonstrating that there is little to no daylight between the resignation letter and the reason for his leaving employment the prior day.

Applying the principles set forth above to the choice foisted by Respondent onto Morales, there is absolutely no wiggle room nor any room for speculation; they were forced to choose between two alternatives: 1) remove the BLM display from their apron and maintain employment; or 2) cease working for Respondent. This is a Hobson’s Choice and finding Respondent constructively discharged Morales under this theory and in violation of Section 8(a)(1) of the Act is inescapable. *See Titus Electric Contracting, 355 NLRB at 1358; Intercon I, 333 NLRB at 224; Hoerner Waldorf Corp., 227 NLRB 612, 612–13 (1976).*

V. Concerns About Racial Discrimination Are Protected and Respondent’s Application of Its Policy to Prohibit BLM Violated the Act

A. Racial Issues in the Workplace Are Essential Terms and Conditions of Employment and Should Be Found Inherently Concerted Under the Act

The Board has long recognized that certain essential subjects in the workplace can fall within the scope of concerted activity, even without the traditional element of group action, under the “inherently concerted” doctrine. This doctrine emerged in *Trayco of South Carolina, Inc.*, 297 NLRB 630 (1990), *enforcement denied*, 927 F.2d 597 (4th Cir. 1991), where the Board held that an employee’s discussions with her co-workers about higher wages constituted concerted activity even though the discussions did not contemplate group action. In reaching that decision, the Board observed that the object of inducing group action need not be expressed but can instead be implied from the subject matter of discussion. Because higher wages are a “frequent objective of organizational activity,” the Board reasoned that the employee’s discussions about that subject impliedly were concerted. *Id. at 634; accord Automatic Screw Products, 306 NLRB 1072, 1072 (1992), enforced mem.*, 977 F.2d 582 (6th Cir. 1992).
The doctrine was enlarged in *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995), *enforcement denied in part on other grounds*, 81 F.3d 209 (D.C. Cir. 1996), where the Board decided that discussions about changes in work schedules were inherently concerted activity despite the absence of any talk about the initiation of group action. Like wages, the Board concluded that work schedules are a “vital term and condition of employment” that is “likely to spawn collective action.” *Id.* at 220. Lastly, in *Hoodview Vending Co.*, 359 NLRB 355 (2014), *vacated*, 2014 WL 2929781 (June 27, 2014), *reconsidered & affirmed*, 362 NLRB 690 (2015), the Board added the subject of “job security” to the list of vital terms and conditions of employment that, when discussed between two or more employees, will be regarded as inherently concerted activity. Such discussions concern “the very existence of the employment relationship and [will] quickly ripple through, and resonate with, the work force.” *Id.* at 357; see also *Northwest Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 15 (July 19, 2018) (ALJ Randazzo finding discussions of workplace safety inherently concerted); *id* at 1, n.1 (declining to pass on inherent concert theory and finding that Facebook post qualified as traditional concerted activity).

The inclusion of racism among the subjects of workplace discussions deemed to be inherently concerted activity is a logical and necessary extension of this doctrine. Discussions concerning an employer’s alleged discrimination raise the same considerations identified by the Board with respect to discussion over other “vital” terms and conditions as a rationale for finding them inherently concerted. The topics that have been deemed inherently concerted to date all represent discrete terms and conditions of employment. An employer’s systemic racism, including racial bias or discrimination, by contrast, implicates *all* terms and conditions of
employment—including those the Board has already identified as being inherently concerted, such as wages, work schedules, and job security.

Indeed, the specter of workplace discrimination has been a matter of concern in U.S labor law since the early days of the Act. See, e.g., Vaca v. Sipes, 386 U.S. 171, 177 (1967) (tracing the union duty of fair representation to judicial attempts to combat racial discrimination by unions) (internal citations omitted); Cf. Sewell Manufacturing Co., 138 NLRB 66, 72 (1962) (overturning election because employer’s “propaganda directed to race . . . so inflamed and tainted the atmosphere . . . that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility.”). Shortly after the Act passed, the Supreme Court recognized this reality in New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 561 (1938):

The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion, and the removal of discriminations against them by reason of their race or religious belief is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation.

The connection between traditional labor rights and protests against racial discrimination continues to be recognized by the Board and courts. After the passage of Title VII of the Civil Rights Act of 1964, the D.C. Circuit recognized “an employer’s invidious discrimination on account of race or national origin” as a significant threat to employees’ exercise of their Section 7 rights, noting that “racial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act.” United Packinghouse, Food & Allied Workers Int’l Union v. NLRB, 416 F.2d 1126, 1135 (D.C. Cir. 1969). Moreover, workplace discrimination is of significant importance to employees: “[i]t can hardly be argued, given the
history of race relations in this country, that alleviating racial discrimination is not of interest to all employees in the workplace, irrespective of race or ethnicity of the person...” Dearborn Big Boy No. 3, Inc., 328 NLRB 705, 710 and n.33 (1999); see also General Teamsters Local Union No. 528, 237 NLRB 258, 261 (1978) (adopting an ALJ decision in which the judge commented that, “the right of employees to be free from racial discrimination by an employer or union must be accorded the same primacy and protection as the right to safe working conditions.”). And virtually every collective-bargaining agreement contains an anti-discrimination provision, signifying the importance of this issue to employees.

Similarly, an employer’s tolerance of racial harassment has the potential to affect numerous terms and conditions of employment and is a matter of great significance to employees that is likely to spawn collective action. Indeed, the facts of this case illustrate that concerns about such vital workplace issues have the propensity to resonate with the workforce and lead to collective action, as confirmed by the Charging Party’s and other employees’ concerted attempts to get management to put an end to the ongoing racial harassment.

Racial harassment in the workplace can also be viewed, in essence, as an issue of workplace health and safety. See generally Kathleen M. Pospenda, et al., Is Workplace Harassment Hazardous to Your Health?, JOURNAL OF BUSINESS AND PSYCHOLOGY, Vol. 20 No. 1, 95–110 (2005) (exposure to workplace harassment increases risk for illness, injury, or assault). Workplace health and safety is undoubtedly one of the most vital terms and conditions of employment from the perspective of employees, and such concerns often serve as a precursor to organizing or other actions for mutual aid and protection. E.g., Crossing Rehabilitation Services, 347 NLRB 228, 231 (2006) (employees wanted union in order to negotiate over “concerns about safety at work, employment benefits, and job security”); Snowshoe Co., 217 NLRB 1056, 1058
(1975) (employee unionization efforts began for the purpose of “improving working conditions, particularly safety measures, and wages”), enforced mem., 530 F.2d 969 (4th Cir. 1975); see also Northwest Rural Electric Cooperative, 366 NLRB No. 132, slip op. at 15–16; see also id. at 1, n.1 (ALJ finding workplace safety inherently concerted). As the Board has observed, “health and safety matters regarding unit employees’ workplaces are of vital interest to employees.” Detroit Newspaper Agency, 317 NLRB 1071, 1071 (1995) (confirming relevancy of union’s request for information addressing health and safety issues). Indeed, “[f]ew matters can be of greater legitimate concern to individuals in the workplace . . . than exposure to conditions potentially threatening their health, well-being, or their very lives.” Minnesota Mining & Manufacturing Co., 261 NLRB 27, 29 (1982) (finding that employer was required to comply with union request for certain health and safety information), enforced sub nom., Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB, 711 F.2d 248 (D.C. Cir. 1983). Moreover, the resolution of safety and health issues is a frequent objective of organizational activity likely to lead to collective action for mutual aid or protection. E.g., Systems with Reliability, Inc., 322 NLRB 757, 757–60 (1996) (employees discussed toxic effects of methyl ethyl ketone in their workplace before confronting employer and threatening to contact OSHA).

Further, although the determination of whether a topic is inherently concerted is ultimately a policy judgment, the specific facts of this case demonstrate the necessity of this extension in the contemporary workplace. Respondent stipulated that “for purposes of this matter diversity, equity[, ] and inclusion, as well as preventing racial discrimination in the workplace[,] are important issues for employees and employers, including Respondent and its employees, that implicate terms and conditions of employment by providing a work environment free of discrimination.” (Tr. 529.) Respondent maintains a dedicated Diversity, Equity, and
Inclusion (DEI) department, which is designed to promote diversity throughout its operations. (Id. at 780.) For the year 2020, Respondent’s Environmental, Social, and Governance (ESG) Report devoted substantial resources to DEI issues, including repeated references to increasing diversity in the workplace, interviews with high-level executives regarding diversity issues, and statistics tracking the diversity of associates, managers, and executives at Home Depot. (GCX 20 at 26–33.) Respondent has also issued numerous press releases highlighting its commitments to resolving issues of racial discrimination in the workplace, including a statement from Chief Executive Officer Craig Menear. (GCX 18; GCX 19; see also GCX 42 (internal statement from DEI Executive Bottoms highlighting DEI efforts); GCX 45 (internal statement from CEO Menear highlighting diversity concerns in the workplace). These extensive efforts all highlight the centrality of race in the workplace.

The specific facts of this case also demonstrate how issues of race are intimately connected to concerns of workplace safety. Respondent’s DEI policy defines “inclusion” as “[h]ow we embrace and enable our associates to feel safe, respected, engaged, motivated and valued for who they are and their contributions to the organization.” (GCX 20 at 26 (emphasis added).) Charging Party Morales repeatedly emphasized how the persistent issues of racism in the New Brighton store made them feel unsafe and that their efforts with their co-workers were designed to make employees feel safe. For example, Morales explained that they put the letters BLM on their apron to be a symbol of safety to their co-workers of color. (Tr. 68–69.) Morales further explained that these issues of persistent racism caused them to feel unsafe in the workplace. (Tr. 224.) Another co-worker of color who put BLM on his apron, Nebiy Tesfaldet, similarly testified that he put this symbol on his apron to signify that Home Depot is a “safe place” for people of color. (Tr. 419.) Logic, as well as evidence from people of color,
demonstrates the integral connection between workplace safety and racism—which furthers bolsters the rationale for finding racial concerns in the workplace to be inherently concerted.

Finally, Counsel recognizes that, even where topics are “inherently concerted,” the Board has generally required that there be a conversation between employees about the relevant topic to find concert. See Hoodview Vending, 359 NLRB at 358 n.16 (2012) (“Inherently concerted activity involves a conversation between two or more individuals.”), incorporated by reference in 362 NLRB No. 81, slip op. at 1. While here it is clear that employees had numerous conversations amongst themselves and with management about issues of racism in the workplace, employees’ display of BLM on their aprons must independently constitute protected concerted activity. Thus, the inherently concerted doctrine should also be expanded in this case to move beyond a conversation between two people to include the wearing of a slogan or button in the workplace.

A button or slogan related to an inherently concerted topic and worn in the workplace is effectively the start of a conversation among employees that is no different from those already found to be inherently concerted in other contexts. Here, Respondent expressed repeatedly that it wanted to prevent dissension in the workplace by preventing employees from displaying BLM on their aprons. (Tr. 673, 787–89.) It was this desire to prevent potential disagreements about racial justice issues, specifically BLM, which apparently motivated Respondent to invoke its apron policy against this display even though these topics did not violate Respondent’s policy because, as the evidence overwhelmingly demonstrates, these were issues that were directly related to the working conditions at the New Brighton store. Recall, the relevant portion of the policy only prohibits “causes or political messages unrelated to workplace matters.” (JTX 1 at 1.) Here, the Charging Party’s wearing of the BLM slogan on their work apron could well have
led to more traditional discussions with coworkers regarding racism in the workplace generally.\textsuperscript{22} Thus, like the preliminary discussions about vital terms in \textit{Hoodview Vending}, finding the wearing of the BLM slogan here to be inherently concerted would prevent the Employer from rendering employees’ right to act in concert meaningless by permitting the Employer to preemptively “shut down future discussions and any other concerted actions that might follow.” \textit{Id.}, slip op. at 4; see also \textit{Parexel International, LLC}, 356 NLRB 516, 518–19 (2011).

As is evident from the above discussion, issues of racism in the workplace are essential terms and conditions of employment. As with wages, schedules, and job security, the inherently concerted doctrine should be expanded to include issues of race in the workplace. And on this basis, Respondent’s apron and dress code policies, which have been applied to prohibit symbols protesting race discrimination in the workplace, are unlawful.

\textbf{B. BLM Is a Symbol of Mutual Aid or Protection in the Workplace Because It Involves Combating Racism in All Forums, Including the Workplace}

Section 7 grants employees the right to engage in “concerted” activities for the purposes of “mutual aid or protection.” As we have demonstrated above, concerns about racial issues in the workplace necessarily satisfy the first prong of this standard. And as we will demonstrate below, the particular symbol chosen by employees in this case—BLM—satisfies the second prong of this analysis, as it is a symbol for mutual aid or protection.

In determining whether an employee’s activity is for “mutual aid or protection,” the question is “whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees.” \textit{Fresh & Easy Neighborhood Market, Inc.}, 361 NLRB 151,

\textsuperscript{22} Although not necessary to a finding of inherent concert, given the particular context in which Morales and their co-workers wore the BLM slogan, this action could also have bolstered support for future action amongst the employees regarding the alleged racially-motivated vandalism and/or encouraged others to come forward with complaints about alleged harassment or the treatment of people of color in the Respondent’s workplace.
The Board applies an objective standard to this analysis. Id. The mutual aid or protection clause is interpreted broadly and covers efforts to “improve their lot as employees through channels outside the immediate employee-employer relationship” as well as activities “in support of employees of employer’s other than their own.” Eastex, Inc. v. NLRB, 437 U.S. 556, 559–60, 564–65 (1978). Therefore, even political advocacy by employees can fall within the scope of Section 7 protections when it touches on employees’ “interests as employees,” based on a totality of circumstances. Id. at 565–67.

Thus, for example, in Nellis Cab Co., 362 NLRB 1587, 1587–89 (2015), the Board found that a group protest by taxicab drivers to object to a regulatory agency’s decision to issue more medallions was for mutual aid or protection. Although the action was not directed at any particular employer, the Board nonetheless found the protest protected because the issuance of more medallions could affect drivers pay and the employer had some influence over the regulatory agency’s decision to issue more medallions. Id. at 1588. Similarly, in Kaiser Engineers, 213 NLRB 752, 755 (1974), enforced, 538 F.2d 1379 (9th Cir. 1976), the Board found that an engineer who wrote a letter to Congress, on behalf of his fellow employees protesting resident visas for foreign engineers, was protected, as the expansion of the visa program could impact the job security of engineers in the profession.23

Here, wearing BLM apparel at work falls within the scope of the “mutual aid or protection” clause because the movement is aimed at combating racism in all its forms, including in the workplace. Simply put, displaying the BLM message at work is objectively connected to

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23 For an extended discussion of various cases addressing the mutual aid or protection clause of Section 7 of the Act in the context of political advocacy, see General Counsel Memorandum 08-10, Guideline Memorandum Concerning ULP Charges Involving Political Advocacy, at 3–7 (July 22, 2008).
improving employees’ lot as employees. Although the phrase and movement originated in response to police brutality and racial violence, they have both evolved to encompass the broader fight against systemic racial inequality and oppression of people of color, which necessarily includes racial discrimination and economic inequality in employment. And, as Respondent stipulated, these very same issues of “diversity, equity and inclusion, as well as preventing racial discrimination in the workplace[,] are important issues for employees and employers, including Respondent and its employees.” (Tr. 529.)

Indeed, the BLM movement has explicit ties to and involvement with labor organizing and workplace justice, which establishes that it extends beyond the singular original goal of defeating racial violence. Numerous posts on the Black Lives Matter website confirm that the organization focuses on labor rights for employees:


2021 (emphasizing that “[i]t’s beyond time to advance and protect the rights of Black Workers in the United States”) (GCX 105);

- *Expand Postal Banking*, Black Lives Matter, [https://blacklivesmatter.com/expand-postal-banking/](https://blacklivesmatter.com/expand-postal-banking/), dated October 20, 2021 (noting that “[p]ostal banking is critical to closing the racial wealth gap and is long overdue.”) (GCX 106);

Further, even apart from the Black Lives Matter organization’s website, other popular news outlets have recognized that the movement has long encompassed concerns of economic justice and workers’ rights. *See, e.g.*, Tanzina Vega, *The Next Battle for Black Lives Matter: Economic Justice*, CNN, [https://money.cnn.com/2016/08/02/news/economy/black-lives-matter-the-economy/index.html](https://money.cnn.com/2016/08/02/news/economy/black-lives-matter-the-economy/index.html), dated August 2, 2016 (“Black Lives Matter activists are expanding their call for justice to a new target: the economy.”) (GCX 108 at 1); Jelani Cobb, *The Matter of Black Lives*, The New Yorker, [https://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed](https://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed), dated March 6, 2016 (“[A]lthough the movement initially addressed the killing of unarmed young black men, the [founders] were equally committed to the rights of working people and to gender and sexual equality.”) (GCX 109 at 7); *see also* Justin World, *America’s Long Overdue Awakening to Systemic Racism*, Time, [https://time.com/5851855/systemic-racism-america/](https://time.com/5851855/systemic-racism-america/), dated June 11, 2020 (“[A]t the core of their movement is much more than the outrage over the latest instances of police brutality. Centuries of racist policy, both explicit and implicit, have left black Americans in the dust, physically, emotionally and economically.”) (GCX 113 at 4).

The Board, in turn, has long recognized the rights of employees to address issues of racism and diversity in their workplaces. *See Vought Corp.*, 273 NLRB 1290, 1294 (1984), *enforced*, 788 F.2d 1378 (8th Cir. 1986); *see also* Dearborn Big Boy No. 3, *Inc.*, 328 NLRB 705, 710 (1999) (efforts by employees to encourage a coworker to file a racial discrimination lawsuit was protected activity for mutual aid or protection). This protected objective is plainly
encapsulated by the BLM message, especially when displayed at work. That employees here explicitly connected their use of the BLM message to concerns of workplace safety for their co-workers and customers confirms the protected nature of BLM. (Tr. 69, 419.) And because racial economic inequality is undeniably a component of the broader societal ill of systemic racism—and an animating concern of the BLM movement—expressions of support for BLM in the workplace necessarily implicate workers’ employment interests.

A show of solidarity for a movement that strives to eliminate societal racism also implicates employees’ working conditions in more nuanced ways. For example, employees feel the effects of societal racism in their jobs when they are exposed to racist coworkers who harass employees of color, another issue raised by employees in this case and one that can be at least partially rectified through training and protocols for employees. In that vein, the display of BLM in the New Brighton workplace takes on particular meaning, given the diversity of the workforce performing “essential” jobs during the Covid-19 pandemic, risking their health to retain their livelihoods. (Tr. 663 (noting that New Brighton store is the most diverse in the district).) In short, expressions of support for the BLM movement fall within the scope of the “mutual aid or protection” clause because the message, displayed by employees while at work, is inextricably tied to the issue of systemic racism as it impacts the workplace.

In the face of this evidence, Counsel anticipates that Respondent will make three primary arguments: first, that the controversy surrounding BLM privileges the employer to prohibit its display in the workplace; second, that the political nature of BLM’s messaging removes it from the scope of protected activity; and third, that allowing BLM will require Respondent to allow employees to display other hate speech, such as swastikas. None of these arguments should succeed.
As to the first argument, the Board has routinely allowed employees to wear at times provocative messaging in support of their workplace causes. For example, in *Tenneco Automotive, Inc.*, 357 NLRB 953, *enforced in rel. part*, 716 F.3d 640 (D.C. Cir. 2013), an employee wore a shirt in the workplace that said, “Thou shall not scab,” and, after being instructed to remove it, later replaced the message with “Thou shall not steal” and “Thou shall not be a low life.” Although the Board recognized that the message would cause controversy amongst his co-workers, the Board nonetheless found this activity protected. *Id.* at 957. The Board has further held that similar concerns about controversies amongst customers are insufficient to remove a symbol from the protection of the Act. *Escanaba Paper Co.*, 314 NLRB 732, 732–33, 735 n.14 (1994); see also *Constellium Rolled Products Ravenswood, LLC*, 371 NLRB No. 16, slip op. at 3 (Aug. 25, 2021) (finding that use of the term “whore board” to refer to overtime signup sheet did not forfeit protection of the Act). Those circumstances in which the Board *has* prohibited such messaging involve situations, unlike here, where employees have engaged in disloyal conduct like attacking an employer’s product. *E.g.*, *Pathmark Stores, Inc.*, 342 NLRB 378, 379–80 (2004) (finding employer legitimately prohibited “Don’t cheat the meat” slogan worn by meat department employees as it “likely could lead . . . customers to believe that . . . the [employer] was cheating them in some way with respect to the meat offered for sale.”); *Noah’s New York Bagels, Inc.*, 324 NLRB 266, 275 (1997) (employer legitimately prohibited apparel mocking kosher nature of employer’s product). The message sent by Board precedent in this area is clear—simply because an employer disagrees with otherwise protected speech, it is not allowed to ban it on that basis.

The second argument—that BLM is a political slogan—fares equally poorly. The letters BLM undoubtedly hold different meanings for different people, and include, at least in part,
references to protests against police violence and other political topics. (See, e.g., RX 24(b)–(d).) That these letters have some connection to politics, however, does not preclude them from also falling within the scope of activity for mutual aid or protection. The test remains whether the subject matter touches upon “employees’ interests as employees,” given the totality of the circumstances. *Eastex, Inc.*, 437 U.S. at 565–67. And where, as here, a political message has a connection to workplace conditions, such messaging falls within the ambit of Section 7 of the Act. *See, e.g., Kaiser Engineers*, 213 NLRB at 755; *see also American Medical Response West*, 370 NLRB No. 58, slip op. at 7 (Dec. 10, 2020) (“It matters not that the message conveyed by such insignia, paraphernalia, or flyers might be “political” in nature, so long as the message has a reasonable and direct nexus to the advancement of mutual aid and protection in the workplace.”); *see also United States Office of Special Counsel, Black Lives Matter and the Hatch Act, Opinion Letter*, dated July 14, 2020, available at: https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/Black%20Lives%20Matter%20and%20the%20Hatch%20Act.pdf (finding that “BLM terminology is not inherently political activity”). Nor can the Respondent feign ignorance as to this connection given that the protected objectives described above are common knowledge and readily apparent from mainstream news articles. *Hawaii Tribune Herald*, 356 NLRB 661, 661, 679 (2011) (employer unlawfully prohibited employees from wearing armbands where inferred from surrounding circumstances that employer was aware that plain red armbands were worn in protest of a coworker’s suspension), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *see also Holladay Park Hospital*, 262 NLRB 278, 278–79 (1982) (union-related significance of yellow ribbons worn by employees was apparent from the surrounding circumstances). Indeed, the Respondent itself instituted close in time to employees’ BLM activity enhanced diversity programs, including an expansion of its DEI program (GCX 20
at 27 (Bottoms statement that protests in May 2020 created “fierce urgency, and that reinforced our focus on supporting diversity, equity[,] and inclusion among our associates, communities[,] and suppliers”) and messaging from the CEO highlighting the need for responsive action (GCX 18, GCX 45)—thereby recognizing that the same societal ills that sparked widespread BLM protests in May 2020 also impacted its own workforce. Indeed, Respondent’s stipulation that “diversity, equity and inclusion, as well as preventing racial discrimination in the workplace are important issues for employees and employers, including Respondent and its employees” establishes the centrality of the very issues that BLM as a symbol seeks to address. (Tr. 529.)

Third, Respondent’s argument, presented to Charging Party Morales by Respondent’s managers, that it must condone symbols of hate, such as swastikas, if it allows BLM is incorrect. As demonstrated above, BLM has an established connection to workplace concerns and employees’ interests as employees—which forms the entire basis for finding that symbol protected. Beyond being a recognized symbol of hate, a swastika also fails to possess the requisite nexus to workplace concerns to warrant falling within the scope of Section 7 protections. s such, this argument also fails.

C. Respondent’s Policy Prohibiting BLM Is Unlawful

In light of the above discussion, there are two independent bases for finding that Respondent’s application of its dress code and apron policy to prohibit employees from wearing BLM is unlawful. First, as we have demonstrated, displays of BLM in the workplace are inherently concerted and fall within the scope of employee activities protected by Section 7 of the Act. Respondent has stipulated that its policy applies to prohibit the display of BLM by employees at all its facilities in the United States. (JTX 1 at 1.) Thus, rather than enforcing its policies as written, i.e., as a ban on using the apron to promote or display “causes or political
messages unrelated to workplace matters” (emphasis added), Respondent has unlawfully interpreted and applied those policies at “its facilities in the United States” as a blanket prohibition on those messages related to the protesting of racial discrimination in the workplace, namely BLM. As such, Respondent’s policy violates Section 8(a)(1) of the Act.24

Second, even assuming that BLM is not inherently concerted, Respondent has admitted that it would apply its policy to BLM, in the specific circumstances of Morales’s usage at all of its stores. Respondent stated as much in its position statement, stating that Respondent “applies this [apron and dress code] policy uniformly . . . Morales was not the only employee asked to remove a BLM . . . slogan, [they are] simply one who refused to do so.” (GCX 23 at 11 (emphasis added).) Respondent also testified that the policy was applied correctly to Morales’s situation, and that it would be applied the same in any other store to an employee in Morales’s situation. (Tr. 581.) As we demonstrated above in Section IV, even if BLM is not inherently concerted, the symbol was a logical outgrowth of their traditional protected concerted activities and therefore Respondent has admitted that the application would be unlawful on a nationwide basis.

VI. Respondent Committed Numerous Independent 8(a)(1) Violations During Conversations with Morales

A. Respondent Violated Section 8(a)(1) of the Act by Instructing Morales to Remove BLM from Their Apron

It is a violation of Section 8(a)(1) of the Act for an employer to threaten employees to remove union and other insignia at the workplace, absent special circumstances,25 outweighing

24 As will be addressed in the remedy section below, Counsel will be arguing that the remedy for this violation should include rescission of the policy and in doing so, request that the Board overturn AT&T Mobility, LLC, 370 NLRB No. 121, slip op. at 7 (May 3, 2021) (overruling prong three of Lutheran Heritage Village-Livonia, 343 NLRB 646 (2006)).

25 See Section VII.A for an analysis of Respondent’s special circumstances defense.
employee Section 7 rights. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801–803 (1945); see also In-N-Out Burger, Inc., 365 NLRB No. 39, slip op. at 1 n.2, 6–12 (Mar. 21, 2017), enforced, 894 F.3d 707 (5th Cir. 2018) (instruction to employee to remove “Fight for Fifteen” button independently violated Act). As we discussed in detail above, Morales met on separate occasions with Jason Bergeland and, the following day, with Melissa Belford. During each of these meetings, the managers told Morales they had to remove the display of BLM from their apron. As argued above in Sections IV and V, Morales’s display of BLM was protected concerted activity. As such, and absent demonstrated special circumstances, Respondent, by both Bergeland on February 17, and Belford on February 18, violated Section 8(a)(1) of the Act by instructing Morales to remove BLM from their apron.

**B. Respondent Further Violated the Act By Threatening Morales for Sending an E-mail to Their Co-Workers**

An employer also violates Section 8(a)(1) when it threatens employees for having engaged in activity protected by Section 7 of the Act. E.g., Technology Service Solutions, 332 NLRB 1096, 1101 (2000) (employer violated Section 8(a)(1) by disciplining employees for sending messages to co-workers regarding protected activities). Morales’s e-mail to management was first reviewed and given the go-ahead by their coworker Jamesha Kimmons. The e-mail, having been sent from the flooring department e-mail address was understood to be viewable by all flooring specialists. (Tr. 375–76; GCX 7 at 1–2.) Morales testified this way: “I sent it specifically to Enrique but with an open e-mail like that, anyone who has access to that specialty e-mail can see that e-mail.” (Tr. 172.) Ward confirms this, testifying she often reviewed the sent folder for work purposes, and, in fact, read Morales’s e-mail to Ellis. (Tr. 376.) Morales’s e-mail sought a wider discussion regarding racial harassment in the workplace and was one of many of the protected concerted activities they engaged in to address working
conditions with management and, specifically, the inadequate response to persistent racial harassment and vandalism to Black History Month materials. (Tr. 171–172; GCX 7 at 1–2.) As such, by threatening Morales that they should not have written the e-mail, Respondent violated Section 8(a)(1) of the Act. California Institute of Technology, 360 NLRB 504, 504 n.1 (2014) (employer violated Section 8(a)(1) by disciplining employees for sending e-mail regarding working conditions).

C. Respondent Violated Section 8(a)(1) of the Act by Instructing Morales to Keep Respondent’s Workplace Investigation Confidential

During Belford’s meeting with Morales, Belford twice told them not to speak with others regarding the investigation, “Casey [Whitely] reminded me, too. Just obviously, this is confidential. I would ask that you please don’t speak about this, you know, to anybody else, not because I don’t care, but just out of – I would like to be able to, as we need to, speak to them and have their own personal story. And I really want this to be something that we do that shows value and respect to you as well as to everybody else involved, okay? So just keep it confidential.” (GCX 5 at 26 (emphasis added).)

As an initial matter, this admonition is likely overbroad even under extant Board law, for two reasons. First, Belford’s confidentiality instruction is not limited to individuals who are or could be involved in the investigation—rather, it is directed to anybody else, suggesting the rule is overboard. Cf: Unique Thrift, 368 NLRB No. 144, slip op. at 2, n.3 (Dec. 16, 2019) (noting that lawful confidentiality instructions should be limited to participants). Second, Belford’s instruction is broad enough to cover both the discussions in the investigation and the underlying events—suggesting that it was not appropriately tailored. Id.

Regardless, as will be explained below, the Board should overrule cases, including Unique Thrift Store which suggest that the Employer can require employees to keep workplace
investigations confidential during the term of the investigation and return to a case-by-case analysis as discussed in the section immediately below.

1. The Board Should Overrule Unique Thrift Store, Watco Transloading, LLC, and Alcoa Corp.26

   i. Background

   Section 7 protects employees’ right to engage in “concerted activities for the purpose of . . mutual aid or protection.” Employee communications with each other regarding terms and conditions of employment are vital to employees’ ability to aid one another in addressing workplace concerns. See Fresh & Easy Neighborhood Market, Inc., 361 NLRB 151, 155–56 (2014). In the context of workplace investigations, protected discussions might concern discipline or the investigation itself, but might also concern a host of workplace issues that could be the subject of the investigation, such as racial discrimination and harassment, sexual harassment, and misconduct. See Westside Community Mental Health Center, 327 NLRB 661, 666 (1999) (discipline); Independent Stations Co., 284 NLRB 394, 394, 402–04 (1987) (disciplinary practices); Caesar’s Palace, 336 NLRB 271, 272 (2001) (discipline or disciplinary investigations); Vought Corp., 273 NLRB 1290, 1294 (1984) (racial discrimination), enforced, 788 F.2d 1378 (8th Cir. 1986); Tanner Motor Livery, Ltd., 148 NLRB 1402, 1403–04 (1964) (same), remanded on other grounds, 349 F.2d 1 (9th Cir. 1965); J. W. Microelectronics Corp., 259 NLRB 327, 327 (1982) (racial harassment), enforced, 688 F.2d 823 (3d Cir. 1982); Fresh & Easy, 361 NLRB at 156–58 (sexual harassment); Phoenix Transit System, 337 NLRB 510, 510 (2002) (same), enforced mem. per curiam, 63 F. App’x 524 (D.C. Cir. 2003); cf. Hyundai

26 Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019); Watco Transloading, LLC, 369 NLRB No. 93 (May 29, 2020); Alcoa Corp., 370 NLRB No. 107 (Apr. 16, 2021).
Recognizing the importance of these rights and drawing on well-established precedent,27 the Board in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), *enforcement denied in rel. part*, 851 F.3d 35 (D.C. Cir. 2017), articulated a framework for assessing whether a confidentiality requirement surrounding a workplace investigation is unlawful. Specifically, the Board clarified that the employer has the burden to prove that confidentiality was necessary for a particular investigation, on a case-by-case basis, based on objectively reasonable grounds for believing that the integrity of an investigation would be compromised without it. *Id.* at 1109–11. Under this standard, an employer cannot “reflexively impose confidentiality requirements in all cases or in all cases of a particular type.” *Id.* at 1110. While acknowledging that an earlier case “focused on situations in which ‘witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up,’” the Board recognized the possibility that other comparably serious threats to the integrity of an investigation might warrant a confidentiality requirement. *Id.* at 1111 (quoting *Hyundai*, 357 NLRB at 874). Applying this standard, the Board concluded that the medical center had

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27 See, e.g., *Hyundai*, 357 NLRB at 873–74 (routine instruction to not talk with other employees about the substance of investigations unlawful because employer did not assess the need for confidentiality on a case-by-case basis); *Caesar’s Palace*, 336 NLRB at 272 (confidentiality rule lawful where need to protect integrity of ongoing investigation into illegal drug activity in the workplace—based on allegations of a management coverup, retaliation, and threats of violence—outweighed the infringement on employees’ rights); *Phoenix Transit*, 337 NLRB at 510 (employer failed to justify prohibition against employees discussing sexual harassment complaints with each other where investigation ended years before).
unlawfully maintained and applied a policy of requesting that employees not discuss ongoing investigations of employee misconduct.\footnote{Although \textit{Unique Thrift} stated that \textit{Banner Estrella} addressed “oral confidentiality instructions,” 368 NLRB No. 144, slip op. at 3 n.4, in fact, it was closer to a confidentiality rule given that the employer maintained an interview form with a standard script about confidentiality. \textit{Banner Estrella}, 362 NLRB at 1109.} \textit{Id.} at 1111, 1113.

In \textit{Unique Thrift}, 368 NLRB No. 144, the Board abandoned the \textit{Banner Estrella} framework\footnote{\textit{Unique Thrift} also overruled \textit{Hyundai}, 357 NLRB 860, to the extent \textit{Banner Estrella} relied upon it. \textit{Unique Thrift}, 368 NLRB No. 144, slip op. at 6 n.12.} and determined that investigatory confidentiality policies should be assessed under the Board’s general test for facially neutral workplace rules announced two years earlier in \textit{Boeing Co}, 365 NLRB No. 154 (Dec. 14, 2017).\footnote{Because \textit{Unique Thrift} utilized the \textit{Boeing} test, it bears mentioning that the General Counsel urges the Board to overrule \textit{Boeing}. In her view, the Board should reinstate the standard from \textit{Lutheran Heritage Village-Livonia}, 343 NLRB 646 (2004), with some doctrinal clarifications, namely: (1) that a “reasonable employee” should be explicitly defined as a vulnerable employee who may not be aware of their rights under the NLRA and would not grasp to find any possible reading that would render a rule noncoercive; (2) that a violation occurs whenever one reasonable interpretation of a rule is to unlawfully prohibit Section 7 activity, taking into account the surrounding circumstances, even if that is not the only reasonable interpretation; (3) that the word “could” should be substituted for the word “would”; and (4) that the word “unlawfully” should be added so that the test states as follows: a rule is unlawful if “employees [c]ould reasonably construe the language to [unlawfully] prohibit Section 7 activity.” In addition, the General Counsel urges the Board to formulate a model disclaimer and adopt a presumption of lawfulness when a disclaimer is prominently placed in a handbook—ordinarily towards the front of a hard-copy handbook or at least referenced in the facially neutral rules under review.} Under that test, the Board evaluates the nature and extent of the potential impact of the rule on rights protected by the Act and the legitimate justifications associated with the rule. \textit{Boeing}, 365 NLRB No. 154, slip op. at 3–4. Applying \textit{Boeing}, the Board concluded that confidentiality rules are always lawful to the extent they are limited to the duration of the investigation because the legitimate business justifications associated with such rules “predictably outweigh the comparatively slight potential of such rules
to interfere with the exercise of Section 7 rights.” *Unique Thrift*, 368 NLRB No. 144, slip op. at 8. On the other hand, rules that are not limited “on their face” to open investigations would require individualized scrutiny in each case. *Id.*, slip op. at 9.

In defining what an investigative confidentiality rule is, the Board did articulate some limitations on its blanket endorsement of confidentiality rules for ongoing investigations. *See id.*, slip op. at 2 n.3, 8 n.15. In this regard, the Board declared that its blanket rule would not extend to rules that applied to nonparticipants in an investigation. Likewise, it would not cover rules that prohibit employees—participants and nonparticipants alike—from discussing the events giving rise to an investigation, provided that participants do not disclose information they either learned or provided in the course of the investigation.

In *Watco*, the Board extended *Unique Thrift*’s reasoning to oral confidentiality instructions in all respects except one. 369 NLRB No. 93, slip op. at 8–9 & n.25. Rather than assuming silence as to duration meant the restriction was *not* time limited, as in *Unique Thrift*, the Board in *Watco* announced it would examine the surrounding circumstances to determine what an employee would have reasonably understood regarding the duration of confidentiality. In that case, a human resources representative told an employee who was under investigation for harassment that the employer was “conducting a confidential internal investigation” and the employee “was absolutely forbidden to discuss any of this conversation with anyone.” Because there was no indication that the instruction was *not* limited to the term of the investigation and the employer was concerned that the employee might influence others’ answers or recollection of events—a concern that was not expressly mentioned to the employee—the Board found the instruction to be durationally limited and, therefore, lawful.
Finally, in *Alcoa*, the Board likewise upheld a confidentiality instruction as lawful, this time in a unionized setting. 370 NLRB No. 107, slip op. at 1. In that case, a labor relations specialist told employee witnesses in an investigation into a coworker’s allegedly discriminatory behavior that the interview conversation was to be kept confidential, including from other employees. Again, the Board concluded that employees would have reasonably understood that the instruction was limited to the duration of the investigation based not only on the circumstances of the investigation but also on events that occurred in its aftermath, notwithstanding that most of the witnesses were apparently unaware of these later events.

2. The Board Should Overrule *Unique Thrift* Because It Failed to Give Sufficient Weight to Employees’ Section 7 Rights and Was Not Well-Reasoned

i. *Unique Thrift* wrongly concluded that the potential adverse impact of investigative confidentiality rules was “comparatively slight”

*Unique Thrift*’s greatest flaw—and its key premise—is its assertion that the “potential adverse impact” of investigative confidentiality rules on employees’ Section 7 rights is “comparatively slight,” at least when they are limited to the duration of the investigation. *Unique Thrift*, 368 NLRB No. 144, slip op. at 8. That assertion is patently wrong. It ignores the broad ambit of protection that Section 7 provides employees, whether represented by a union or not, to “help each other and to protect each other” at work. *Id.*, slip op. at 13 (Member McFerran, dissenting); cf. *Union Tank Car Co.*, 369 NLRB No. 120, slip op. at 2 (July 17, 2020) (recognizing that employee discussions involving complaints about the employer and its managers who establish and enforce their terms and conditions “lie[] at the heart of protected Section 7 activity”). Indeed, because communications between employees are often the first step toward taking action for mutual aid or protection, the Board has recognized that they “lie[] at the heart of protected Section 7 activity.” *St. Mary Margaret Mercy Healthcare Centers*, 350 NLRB
enforced, 519 F.3d 373 (7th Cir. 2008), abrogated on other grounds by General Motors LLC, 369 NLRB No. 127 (July 21, 2020); see also Brunswick Food & Drug, 284 NLRB 663, 680 (1987) (recognizing that “to stifle communication between employees about [workplace] matters is to choke off collective bargaining at its roots”), enforced sub nom. NLRB v. Kroger Co., 859 F.2d 927 (11th Cir. 1988) (table). In addition, Unique Thrift’s approach casually dismisses the statutory right to discuss workplace matters not only with coworkers but also with third parties who may help them improve their working conditions, including labor unions, government agencies, the media, civil rights organizations, and others. See Eastex, Inc. v. NLRB, 437 U.S. 556, 565–66 & nn.15, 16 (1978) (employees remain protected when they seek to improve terms and conditions of employment through channels outside the immediate employee-employer relationship, such as resort to administrative and judicial forums and appeals to legislators); Kinder-Care Learning Centers, 299 NLRB 1171, 1171 (1990) (“[T]he Board has found employees’ communications about their working conditions to be protected when directed to other employees, an employer’s customers, its advertisers, its parent company, a news reporter, and the public in general.”). Under Unique Thrift, an employer can effectively quash all these discussions, and any concerted activity that may flow from them, with one simple workplace rule: “keep investigations and investigative interviews confidential until the investigation is closed”—no matter how long that may be. See Gearhart-Owen Industries, 226 NLRB 246, 261–62 (1976) (employee engaged in protected concerted activity by speaking to a coworker about getting the union to intercede because she was dissatisfied with the employer’s investigation into her sexual harassment complaint); Mobil Oil Exploration & Producing, U.S., 325 NLRB 176, 178–79 (1997) (seeking support from fellow employees in the face of possible discipline where employee unexpectedly became the target of an investigation was protected,
notwithstanding that he was given investigative confidentiality instruction), enforced, 200 F.3d 230 (5th Cir. 1999).

By doing so, the standard established in Unique Thrift enables employers to stifle key labor-law rights at a time when employees’ investigatory interests are arguably at their apex—that is, when their actions might actually affect the outcome of an investigation. Whether their actions be coming to the defense of a coworker who has been wrongly accused, ensuring that discrimination or harassment allegations are not swept under the rug, or advocating improvements to safety measures after witnessing a coworker suffer an on-the-job accident, employees’ ability to effectively impact their working conditions hinge on being able to exercise their Section 7 rights before an investigation is closed. Indeed, an employee’s need to reach out to coworkers for help is rarely greater than when facing “the industrial equivalent of capital punishment.” Griffin v. Auto Workers, 469 F.2d 181, 183 (4th Cir. 1972).

Although Unique Thrift promised that such rules would not chill Section 7 activity because “an employer may not discipline an employee for exercising the protected right to pursue collective action,” few employees would find comfort in that assurance. Unique Thrift, 368 NLRB No. 144, slip op. at 11. It is more likely that employees faced with such a rule would feel compelled to “choose safe silence over risky speech,” even where that speech would be protected by the Act. Id., slip op. at 13 (Member McFerran, dissenting).

ii. Unique Thrift wrongly concluded that a reasonable employee would read nonexistent limitations into a broad confidentiality rule

The Board in Unique Thrift concluded that the impact of investigative confidentiality rules was “comparatively slight,” in part, because of another flaw in its reasoning: that is, the assumption that a reasonable employee would infer limitations into a rule based solely on its subject matter, untethered from any language in the rule itself.
The rules at issue in *Unique Thrift* stated that employees, generally, may be subject to discipline if they engage in “unauthorized discussion of [the] investigation or interview with other team members” and that interviewees, specifically, are “expected to maintain confidentiality regarding these investigations.” In finding these rules lawful, the majority read limitations into them based on its view that “[i]nvestigative rules, by their nature, bind [only] those who are privy to internal investigations from sharing information that might bias the investigation.” *Id.*, slip op. at 2 n.3, 8 & n.14. Thus, the majority concluded that employees not interviewed would understand that they could discuss the underlying incident being investigated without limitation. In addition, the majority found that interviewees would interpret the rules as only banning them from disclosing information “either learned or provided in the course of the investigation,” thereby allowing them to also discuss the underlying incident. *Id.*, slip op. at 8. How, exactly, an interviewee could discuss the underlying events with a coworker, or anyone else, without also revealing information they had already provided to investigators is puzzling at best and unexplained in the decision. Finally, the majority interpreted both rules to not restrict “communications with third parties such as union representatives, Board agents or other governmental agencies.” *Id.*, slip op. at 11 n.21.

As then-Member McFerran pointed out, none of these “supposed limitations . . . have a basis in the language of the rules themselves, nor would they be readily apparent to employees.” *Id.*, slip op. at 19 (Member McFerran, dissenting). The rule prohibiting “unauthorized discussion of investigation or interview with other team members” is not limited to interviewees. Rather, it would reasonably be read by all employees, whether involved in the investigation or not, to restrict their right to discuss the matter under investigation with coworkers. Similarly, by requiring interviewees to maintain confidentiality “regarding” the investigation, interviewees
would reasonably conclude that discussion of the subject of the investigation, or anything
directly related to it, such as potential discipline, was off-limits, including with third parties.

In short, the *Unique Thrift* majority was only able to downplay the chilling effect of
investigatory confidentiality policies by grafting imaginary limitations onto the rules based on
the majority’s own highly legalistic view of what an “investigative confidentiality rule” is, “by
its very nature.” *Id.*, slip op. at 2 n.3, 8 n.14. That approach cannot be squared with the general
rule, which has been acknowledged by the Board members comprising the majority in *Unique
Thrift*, that “[r]ank-and-file employees do not generally carry lawbooks to work or apply legal
analysis to company rules as do lawyers, and cannot be expected to have the expertise to
examine company rules from a legal standpoint.” *See Prime Healthcare Paradise Valley, LLC*,
368 NLRB No. 10, slip op. at 6 n.12 (June 18, 2019). Furthermore, the majority’s effective
assumption that employees will bend over backwards to interpret the rule so that it does not
infringe upon their Section 7 rights also does not properly “take into account the economic
dependence of employees on their employers” that necessarily leads employees to “pick up
intended implications” of investigative confidentiality rules that “might be more readily
dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969);
*see also Boeing*, 365 NLRB No. 154, slip op. at 38 (Member McFerran, dissenting).

**iii. *Unique Thrift* criticized *Banner Estrella* based on false premises**

In *Unique Thrift*, the majority proffered three main reasons for overruling *Banner
Estrella*: (1) that it was inconsistent with Board and Supreme Court precedent recognizing the
Board’s role in balancing employers’ legitimate business justifications and employees’ Section 7
rights, (2) that it failed to consider the importance of confidentiality assurances to both
employers and employees, and (3) that it was inconsistent with other federal guidance, namely,
guidance by the Equal Employment Opportunity Commission (EEOC) regarding sexual harassment in the workplace. See Unique Thrift, 368 NLRB No. 144, slip op. at 3–6. As explained below, each of these premises is faulty and fails to justify the majority’s categorical determination that confidentiality rules limited to open investigations are always lawful to maintain.

First, the Banner Estrella framework did not abdicate the Board’s role in balancing employers’ legitimate business justifications against employees’ Section 7 rights by shifting the burden to the employer to establish a sufficiently weighty justification. Banner Estrella merely placed the burden upon employers to prove the existence of a legitimate and substantial business reason for investigative confidentiality rules. Once an employer met that burden, the Board would then strike “the proper balance between the asserted business justifications and the invasion on employee rights in light of the Act and its policy.” Id., slip op. at 19 (Member McFerran, dissenting). This approach was already well established in Board precedent, if not clearly articulated by the Board itself prior to Banner Estrella. See, e.g., Hyundai, 357 NLRB at 874 (ALJ characterizing caselaw as imposing a burden on the employer to demonstrate a legitimate and substantial justification warranting investigative confidentiality); Praxair Distribution, Inc., 357 NLRB 1048, 1063 (2011) (same); Caesar’s Palace, 336 NLRB at 271–72; Phoenix Transit, 337 NLRB at 510. If anything, it is Unique Thrift’s new, categorical approach that shirks the Board’s role in carefully balancing the interests at stake.

Furthermore, Unique Thrift’s suggestion that a burden-based framework cannot effectuate a balancing of interests is plainly contrary to precedent. Where the statutory rights of employees are infringed upon, the Board routinely puts the onus on employers to show why particular circumstances justify that infringement. For instance, in the context of employee
discussion of wages, “[o]nce it is established that the employer’s conduct adversely affects employees’ protected rights, the burden falls on the employer to demonstrate ‘legitimate and substantial business justifications’ for his conduct.” *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976), enforcing 217 NLRB 653 (1975); cf. *International Business Machines Corp.*, 265 NLRB 638, 638 (1982) (employee’s dissemination of salary guidelines in violation of confidentiality rule was unprotected where the employer’s substantial and legitimate business justifications for the rule outweighed employees’ interests). Similarly, in union insignia cases, the Board has long placed the burden on employers to demonstrate “special circumstances” justifying a ban on such insignia. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–03 & n.7 (1945); see also, e.g., *W San Diego*, 348 NLRB 372, 373 (2006). Thus, *Banner Estrella*’s utilization of a burden-based framework is not an abrogation of any responsibility to balance employee and employer interests.

Second, the Board in *Banner Estrella* did not fail to consider the importance of maintaining confidentiality in the context of workplace investigations. Rather, the *Banner Estrella* framework gives employers the opportunity to demonstrate legitimate business justifications for why confidentiality was needed in any given investigation by providing an objectively reasonable basis for believing the investigation would be compromised otherwise. See, e.g., *Praxair*, 357 NLRB at 1048 n.2, 1063 (exceptions only taken as to credibility resolutions) (confidentiality needed to prevent named individuals, including plant manager, from being warned so as to compromise safety investigation); *Caesar’s Palace*, 336 NLRB at 272 (investigation into illegal drug activity in the workplace required confidentiality because of allegations of management coverup and threats of violence); see also *Michigan State Employees Association d/b/a American Federation of State County 5 MI LOC Michigan State Employees*
Assn., 364 NLRB No. 65, slip op. at 2, 16–18 (Aug. 4, 2016) (acknowledging employer’s interest in integrity of the investigation, but finding that it lacked evidence in the record). Further, Board decisions reveal that blanket confidentiality requirements do not always benefit employees who seek resolution of workplace complaints but “can actually prevent employees from obtaining the resolution they sought in reporting the matter.” Unique Thrift, 368 NLRB No. 144, slip op. at 20 & n.50, 21 (Member McFerran, dissenting) (citing Phoenix Transit, 337 NLRB at 510) (noting possible shift in public sentiment against the use of non-disclosure agreements due to concerns that they can enable sexual harassment to continue).

Finally, Unique Thrift vastly overstated whatever tension there might be between the Banner Estrella standard and EEOC guidance regarding sexual harassment in the workplace. Unique Thrift asserted that the EEOC “endorses blanket rules requiring confidentiality during employer investigations,” yet it cited nothing in support of this sweeping statement. Indeed, the EEOC guidance it does cite is directed at employers, urging them to honor a sexual harassment complainant’s request for confidentiality to the extent possible, noting that complete confidentiality is impossible.31 EEOC, Notice 915.002, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, § V(C)(1) (June 18, 1999), available at http://www.eeoc.gov/policy/docs/harassment.html (“An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential

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31 The General Counsel would not construe Banner Estrella as forcing employers to abandon any promise of confidentiality that a victim may have sought. If the victim’s identity comes to light in the course of interviewing other witnesses, the employer could, for example, ask the witnesses to keep the victim’s identity confidential, which would be more narrowly tailored to the privacy considerations at stake.
witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it.”). The guidance is not directed toward preserving for employers a right to impose confidentiality on victims and their allies to prevent them from speaking up about sexual harassment in the workplace. Even accepting that there might be potential tension based on the EEOC’s later recommendation that the two agencies “confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA,” Unique Thrift’s categorical approach improperly subordinates Section 7 rights based on the mere specter of a conflict. As the D.C. Circuit observed, nothing in the Banner Estrella framework prevents an employer from taking into account the nature of an investigation, including whether it concerns allegations of sexual harassment, when determining what degree of confidentiality is necessary. 

**Hyundai America Shipping Agency, Inc. v. NLRB**, 805 F.3d 309, 314 (D.C. Cir. 2015) (observing that the obligation to comply with EEOC guidelines may constitute a legitimate business justification for requiring confidentiality in the context of a particular investigation in agreeing that a rule imposing confidentiality in all investigations was overbroad).

3. **The Board Should Overrule Watco and Alcoa Because They Compound Unique Thrift’s Flaws By Effectively Eliminating the Durational Delineation**

Watco extended the same flawed analysis in Unique Thrift to one-on-one confidentiality instructions not derived from an employer policy or rule. As in Unique Thrift, the Board inappropriately deemed an employer’s “interest in silencing employees in every investigation, regardless of the circumstances,” to be self-evident. **Alcoa Corp.**, 370 NLRB No. 107, slip op. at 5 (Member McFerran, dissenting). Even worse, however, Watco effectively eliminated the
distinction between situations where confidentiality is imposed for the duration of the investigation and those where that obligation continues even after the investigation closes.

Although *Watco* nominally tasked the Board with determining what employees would have reasonably understood about the duration of the instruction based on the circumstances, in applying that standard, the Board effectively gave employers a free pass so long as they do not explicitly prohibit employees from discussing the matter after the investigation is over. In both *Watco* and *Alcoa*, the Board concluded that employees would interpret the confidentiality instructions as only applying while the employer’s investigation was open. Yet in both cases, the confidentiality instructions were broad and did not indicate, explicitly or implicitly, that they applied only while the investigation was open. Even worse, in assessing the surrounding circumstances, the Board relied on facts that were not known to employees subject to the confidentiality requirement. Thus, although *Watco* and *Alcoa* claimed to view instructions from the perspective of employees, the way in which they applied the test plainly conflicted with that principle. In both cases, the Board “favor[ed] a noncoercive interpretation” that did “not account for the tendency of economically-dependent employees to pick up on the coercive implications of employer statements that other persons would not hear.” *Id.*, slip op. at 7–8 & n.25 (Member McFerran, dissenting) (citing *Gissel*, 365 U.S. at 617). Such an unreasonable approach only compounded the flaws embedded in *Unique Thrift*. Further, in a unionized setting such as in *Alcoa*, this outcome not only quashed employees’ Section 7 right to discuss matters related to an investigation among themselves, during or even after the investigation, but also infringed on their right to consult with their union. *Id.*, slip op. at 8 (Member McFerran dissenting).
4. The Board Should Return to the Banner Estrella Framework Because It Struck the Proper Balance Between Employees’ Section 7 Rights and Employers’ Interests in the Integrity of Investigations

In Banner Estrella, the Board reaffirmed that confidentiality may be imposed only when legitimate and substantial justifications outweigh employees’ Section 7 rights in a particular investigation. 362 NLRB at 1110. This standard gives due regard to the chilling effect of confidentiality rules on employees’ Section 7 rights while also accounting for employers’ legitimate business interests in maintaining the integrity of workplace investigations.

The Banner Estrella framework “fully and fairly accommodates the competing interests at stake.” Id. at 1110. That decision correctly observed that the “potential for interference with [Section] 7 rights is obvious in the case of a disciplinary investigation,” and that other types of investigations also implicate Section 7 rights “insofar as they involve—directly or indirectly—employees’ terms and conditions of work and employees’ desire to improve them by acting together.” Id. at 1112 n.16. By requiring that employer interests outweigh these employee interests on a case-by-cases basis, the Board effectuated the purposes of the Act by “preserv[ing] the space in which employees may act together to improve their terms and conditions at work.” 32

Id. In contrast, Unique Thrift effectively abdicated this responsibility by decreeing that all investigative confidentiality rules applicable to open investigations are lawful, regardless of the circumstances.

In weighing the interests, Banner Estrella properly placed the burden on employers to demonstrate objectively reasonable grounds for believing that the integrity of the investigation

32 This case-by-case basis standard is akin to the requirement under Lutheran Heritage and its progeny that work rules must be narrowly tailored to an employer’s legitimate business interests.
will be compromised without confidentiality.\footnote{In \textit{Banner Estrella}, the Board vacillated between quoting the \textit{Hyundai} factors—that witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and/or there is a need to prevent a cover up—in the conjunctive and the disjunctive. In the General Counsel’s view, while the presence of all these factors need not be a “threshold” for finding a confidentiality request permissible, \textit{id.} at 1110 n.10, proof of a single one is not necessarily sufficient. The ultimate inquiry is whether there are objectively reasonable grounds for believing that the integrity of the investigation will be compromised, and the Board should consider the \textit{Hyundai} factors as well as any “other comparably serious threats to the integrity of an employer investigation.” \textit{Id.} at 1111.} \textit{Id.} at 1110–11. As explained above, this approach is consistent with precedent and accommodates a balancing of interests. And, as a practical matter, placing the burden with employers makes sense given that the employer is best positioned to judge whether confidentiality is necessary in a particular instance based on “its knowledge of both the shop floor and the scope of the investigation.” \textit{Id.}

For all these reasons, the General Counsel raises these issues for both the administrative law judge and the Board to overrule \textit{Unique Thrift}, \textit{Watco}, and \textit{Alcoa} and reinstate the framework set forth in \textit{Banner Estrella}.

**VII. Respondent’s Affirmative Defenses**

Respondent asserted a battery of affirmative defenses in its Answer to the most recent Complaint. (GCX 1(p) at 4–8.) The majority of these affirmative defenses are addressed in our discussions above regarding the merits of the substantive complaint allegations. There are, however, several affirmative defenses which warrant additional consideration, and they are discussed below.

\textbf{A. Respondent Fails to Satisfy the Heavy Burden of Proving that Special Circumstances Should Allow It to Prohibit Employees’ Section 7 Activities (Sixth Defense)}

As we addressed above, employees have a fundamental right under Section 7 to wear union buttons and other insignia while at work. \textit{See Republic Aviation Corp. v. NLRB}, 324 U.S.
Rules infringing on this right are presumptively invalid. See, e.g., *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 3 (Aug. 27, 2016). To overcome this presumption, the employer must prove that “special circumstances” outweigh this Section 7 right. *Id.* The Board has found special circumstances to justify restrictions on union insignia when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees. *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). Even if an employer meets this heavy burden, however, the rule must be “narrowly tailored to the special circumstances justifying [its] maintenance.” *Boch Honda*, 362 NLRB 706, 707 (2015), enforced, 826 F.3d 558 (1st Cir. 2016). While these principles are frequently applied to union buttons or insignia, they have been extended to encompass other Section 7-protected messages on clothing or adornments. See *Constellation Brands, U.S. Operations, Inc. d/b/a Woodbridge Winery*, 367 NLRB No. 79, slip op. at 1 n.3, 8–10 (Jan. 31, 2019) (applying union insignia principles to “Cellar Lives Matter” vest), enforced, 992 F.3d 642 (7th Cir. 2021); *In-N-Out Burger, Inc.*, 365 NLRB No. 39, slip op. at 1 n.2, 6–12 (Mar. 21, 2017), enforced, 894 F.3d 707 (5th Cir. 2018); see also *Boch Honda*, 362 NLRB at 707, 716 (finding unlawful a dress code that prohibited employees who have contact with the public from wearing “pins, insignias, or other message clothing”).

Here, based on the record at hearing, Counsel anticipates that Respondent will rely on two principal justifications for its ban on BLM—public image concerns and safety concerns tied to customer reactions to controversial messages.34 Respondent’s apron policy, however, clearly

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34 Counsel notes that the special circumstances analysis, and not the *Boeing* test, applies to the ban at issue here. Cf. *Wal-Mart Stores Inc.*, 368 NLRB No. 146, slip op. at 2–3 & nn.10 & 13 (Dec. 16, 2019) (applying *Boeing Co.*, 365 NLRB No. 154 (2017), to a dress code that limited
infringes on employees’ essential right to wear protected insignia and is only lawful if justified by special circumstances and narrowly tailored. Respondent has failed to carry this burden.

Starting with Respondent’s public image defense, the Board has held that this exception applies only in “narrow factual circumstances.” Boch Honda, 362 NLRB at 707, n.6. For example, in In-N-Out Burger, Inc., 365 NLRB No. 39, the employer interpreted its uniform policies to prohibit employees from wearing “Fight for Fifteen” buttons. It justified this ban by pointing to, among other items, its desire to promote a sparkling environment with consistent uniforms. Although the employer there maintained a “stringent” dress code (even to the point of dictating employee underwear) and instructed employees not to add or subtract anything from their uniforms, the Board nonetheless found the public image defense wanting. Id., slip op. at 1 n.2, 7, 10. Similarly, in Grill Concepts Services, 364 NLRB No. 36, (June 30, 2016), the Board found a restaurant’s policy prohibiting union buttons unlawful, overturning the administrative law judge’s decision. There, the employer argued that the union buttons would “unreasonably interfere with the [employer’s] public image as a ‘traditional American grill restaurant’ where customers could come to get ‘predictable, reliable’ service.” The Board disagreed, noting that the employer had presented no evidence that the buttons would interfere with these interests. Id., slip op. at 2. By contrast, the Board has found such prohibitions lawful in only those limited circumstances where the employer has both maintained strict uniform requirements and the wearing of insignia to small, non-distracting logos or graphics). Contrary to Wal-Mart, here the policies ban an entire category of Section 7-related insignia. They are not facially neutral rules that merely limit the size and/or appearance of protected buttons and insignia. See id., slip op. at 2–3; see also, e.g., USF Red Star, Inc., 339 NLRB 389, 391 (2003) (“a ban on wearing union insignia violates the Act unless it is justified by special circumstances”); United Parcel Service, 312 NLRB 596, 597 (1993) (same), enforcement denied, 41 F.3d 1068 (6th Cir. 1994); Ohio Masonic Home, 205 NLRB 357, 357 (1973) (same), enforced, 511 F.2d 527 (6th Cir. 1975); Floridan Hotel of Tampa, 137 NLRB 1484, 1486 (1962) (same), enforced, 318 F.2d 545 (5th Cir. 1963).
demonstrated a special need for the prohibition. *See, e.g., W San Diego*, 348 NLRB at 372–73 (finding lawful prohibition on union button where employer maintained strict dress code and sought to create a “‘Wonderland’ where guests can fulfill their ‘fantasies and desires’ and get ‘whatever [they] want whenever [they] want it.”); *United Parcel Service*, 195 NLRB 441, 441 & n.2 (1972) (finding prohibition on union button lawful while employees are in uniform and facing the public based on employer’s “history of presenting to the customers and the general public its image of a neatly uniformed driver”).

This precedent dictates the failure of Respondent’s public image defense, as Respondent allows extensive customization of aprons and does not otherwise maintain a consistent uniform. The record is replete with evidence of employees and managers wearing customized aprons, on the sales floor, during business hours. (GCX 13; GCX 16; *see* Tr. 299–320.) Indeed, Respondent’s managers advertise this customization on Twitter. (Tr. 320, 583–85.) The extent of customization of aprons is vast, including to the extent of completely covering the front of the apron, as demonstrated by the samples from the record below:
Employees also testified to extensive customization of aprons, both during and outside of holidays. (Tr. 58–59, 334; GCX 10.) Respondent has gone so far as to advertise this customization on its public website. (GCX 21 at 2 (noting “tradition of adding flair to aprons with pins and badges”).) Respondent’s well-established practice of customizing aprons is so notorious that it has been celebrated at the Smithsonian Museum of American History. (GCX 22.) Far from establishing a record of consistency, the evidence demonstrates an almost singular level of personalization. Further, outside of requiring staff to wear aprons, Respondent had virtually no other dress code, as employees are allowed to wear different colored clothing, shorts or pants, and hats of various types. (Tr. 53, 329–30.) In short, whatever image Respondent is trying to present, it is certainly not a carefully cultivated “Wonderland” nor a “neatly uniformed” workforce, as would be required to satisfy its public image defense. And, of course, the record use of BLM in this case, which involves merely writing the letters on the apron, pales in comparison to this extensive customization. (GCX 49; GCX 50.)

Turning to Respondent’s public safety defense, the Board typically has found that safety considerations constitute special circumstances in cases where there is a legitimate hazard related to the nature of the adornment or equipment and/or the nature of the work, e.g. in industrial or warehouse settings. See, e.g., Sam’s Club, 349 NLRB 1007, 1011–12 (2007) (prohibition against non-breakaway lanyards in retail warehouse-style store justified because the badges could get caught in merchandise or machinery); Albis Plastics, 335 NLRB 923, 923–24 (2001) (prohibition against union stickers on safety helmets justified by concern that such stickers could interfere with visibility of other stickers that served as safety measures), enforced, 67 F. App’x 253 (5th Cir. 2003). Although Respondent need not wait for actual violence to institute such a ban, it also
cannot rely on “only generalized speculation or subjective belief about potential disturbance . . . or disruption of operations.” Medco Health Solutions, 364 NLRB No. 115, slip op. at 4; see Escanaba Paper Co., 314 NLRB at 733.

Here, the Respondent advances a novel justification—essentially an expansive take on the public image justification masquerading as a safety concern—by reasoning that, because some controversial messages may spark the ire of an aggressive customer, all messaging must be banned in order to protect employees. Recognizing such a justification, however, would conflict with the principle that negative customer reactions do not generally dictate whether Section 7 insignia are protected. See Nordstrom, Inc., 264 NLRB 698, 701–02 & n.12 (1982) (“fears regarding the creation of controversy on the part of the buying public” as to union steward button insufficient to justify ban on the selling floor even where employer was aware that public sentiment about representation of its employees was mixed); Howard Johnson Motor Lodge, 261 NLRB 866, 867–68 & n.6 (1982) (the lawfulness of Section 7 activity, “including union button wearing, does not turn upon the pleasure or displeasure of an employer’s customers”), enforced, 702 F.2d 1 (1st Cir. 1983).

In light of these considerations, the record does not support Respondent’s public safety defense. Most importantly, despite numerous local and national managers testifying, there was no evidence presented of any violence or even threats of violence at any Home Depot store due to BLM on aprons. Store Manager Bergeland, in fact, testified that he never even heard any complaints from customers about the presence of BLM in the New Brighton store. (Tr. 515.) The only record evidence of any dispute at a Home Depot store was a stray conversation where an employee mentioned disagreeing with the BLM movement in a non-public breakroom—which again did not include any violence or threats of violence. (Tr. 220–22.) Such minor
disputes, however, are insufficient to justify infringing on employees’ Section 7 rights.\(^\text{35}\)

Respondent’s public safety argument is further undercut by the fact that Respondent has allowed employees and managers to wear other controversial symbols, such as gay pride flags, that might be likely to engender disagreement from customers. \(E.g.,\) GCX 48 (pride flag on aprons); Tr. 56–57, 320, 642.)

Finally, if Respondent contends that the particularized circumstances of the New Brighton store warrant a blanket ban on BLM, this argument must fail. As discussed above, any ban must be narrowly tailored to the specific circumstances warranting the ban. \textit{Boch Honda}, 362 NLRB at 707; \textit{see also W San Diego}, 348 NLRB at 374 (upholding ban on union button as to public areas, but finding ban in nonpublic areas unlawfully overbroad). To the extent that any ban may have been hypothetically justified due to violence during the George Floyd protests, Respondent’s blanket ban, at all times and at all stores, is not at all tailored to these circumstances. And even such a hypothetical ban would likely not sustain muster, given Respondent’s lack of evidence of any actual violence, or threats of violence, related to BLM at its stores during the protests.

Respondent’s ban also is not narrowly tailored to its retail locations, as it admitted that the ban also applied to non-retail facilities such as its distribution centers and corporate headquarters. (JTX 1 at 1 (noting that policy applies to “Respondent’s facilities in the United States”); Tr. 795, 799 (noting that BLM prohibited in corporate office and non-public

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\(^{35}\) Respondent was only able to present one instance where the symbol BLM led to any sort of workplace dispute. (RX 24(g).) This dispute occurred at a different retail chain, however, and even after the incident, that chain did not prohibit BLM. \textit{Id.} at 2. Such an isolated dispute, at an entirely different store, falls far short of satisfying Respondent’s burden. \textit{Cf. Escanaba Paper Co.}, 314 NLRB 732, 732–34 (1994) (ban on wearing “no scabs” button not justified in the absence of misconduct or threats of misconduct), \textit{enforced sub nom. NLRB v. Mead Corp.}, 73 F.3d 74 (6th Cir. 1996).
This further supports finding that the ban was not narrowly tailored and therefore is unlawful. *E.g., W San Diego*, 348 NLRB at 374 (upholding ban on union button as to public areas, but finding ban in nonpublic areas unlawfully overbroad).

**B. Respondent’s Trademark Defenses Also Fail (Tenth and Eleventh Defenses)**

Respondent also argues, as an affirmative defense, that allowing BLM on its apron would infringe upon and dilute its trademark for its orange aprons. While it is undisputed that Home Depot owns a trademark on its orange aprons (RX 4), the placement of BLM on aprons does not implicate any trademark concerns. Although Respondent has a proprietary interest in protecting its trademark, employee use during Section 7 activities does not implicate these concerns.

Courts have identified three interests that are protected by trademark laws: (1) the trademark holder’s interest in protecting the good reputation associated with the mark from the possibility of being tarnished by inferior merchandise sold by another entity using the trademark; (2) the trademark holder’s interest in being to enter a related commercial field at some future time and use its well-established trademark; and (3) the public’s interest in not being misled as to the source of products offered for sale using confusingly similar marks. *See Scarves by Vera, Inc. v. Todo Imports LTD.*, 544 F.2d 1167, 1172 (2d Cir. 1976). In other words, the touchstone of trademark law is protecting the commercial interests of the holder, such that consumers would not be confused that the product sold by another entity is the product of the trademark holder. These concerns are only implicated where there is a legitimate concern that the use would confuse the public regarding the source, identity, or sponsorship of the product. *See, e.g., Smith v. Chanel, Inc.*, 402 F.2d 562, 563 (9th Cir. 1968).

Here, there is no reasonable argument that employees displaying BLM affects any of
the commercial interests that Respondent maintains in its aprons. The employees were not using the apron to establish a competing product or to impugn the products of Respondent. The BLM logos in the record are small and do not otherwise remove the ability to recognize the aprons as belonging to Home Depot. And to the extent that the mere covering of a portion of the apron creates dilution or infringement concerns, the Twitter accounts of Respondent’s managers, displaying fully covered aprons, raise far greater trademark concerns than those presented by the employees’ private, non-commercial usage. Compare GCX 49 and GCX 50 with GCX 13 and GCX 16.

C. Respondent’s First Amendment Argument Flouts Decades of Board and Court Precedent (Twelfth, Thirteenth, and Fourteenth Defenses)

As an initial matter, Respondent’s First Amendment defense was the subject of its Motion for Summary Judgment to the Board. (GCX 1(o).) This Motion was opposed by Counsel for the General Counsel (GCX 1(q)), and the Board issued a summary unpublished Order denying Respondent’s Motion after the close of the administrative hearing. National Labor Relations Board, Order Denying Summary Judgment dated November 9, 2021, Case 18-CA-273796, available at https://apps.nlrb.gov/link/document.aspx/09031d45835c1224. The arguments below echo those relied on in Counsel’s Opposition to the Board and are made in anticipation of Respondent’s continued adherence to this claim.

Turning to the substance of the argument, Respondent ignores the longstanding, uninterrupted line of court and Board precedent holding that employees have a right under the Act to wear insignia or apparel related to terms and conditions of employment and that employer prohibitions on such items can violate the Act. The Supreme Court recognized those principles over 70 years ago in Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802–03 & n.7 (1945), and lower courts and the Board consistently have applied them ever since. See, e.g., In-
N-Out Burger, Inc. v. NLRB, 894 F.3d 707, 714 (5th Cir. 2018), cert. denied, 139 S. Ct. 1259 (2019); Serv-Air, Inc. v. NLRB, 395 F.2d 557, 563 (10th Cir. 1968); American Medical Response West, 370 NLRB No. 58 (Dec. 10, 2020); see also Boch Imports, Inc. v. NLRB, 826 F.3d 558, 570–71 (1st Cir. 2016); Guard Publishing Co. v. NLRB, 571 F.3d 53, 61–62 (D.C. Cir. 2009); Washington State Nurses Association v. NLRB, 526 F.3d 577, 580–81 (9th Cir. 2008); Wal-Mart Stores, Inc. v. NLRB, 400 F.3d 1093, 1097–98 (8th Cir. 2005); Mount Clemens General Hospital v. NLRB, 328 F.3d 837, 846–48 (6th Cir. 2003); NLRB v. Malta Construction Co., 806 F.2d 1009, 1011 (11th Cir. 1986). That right extends to insignia worn on employer-provided uniforms and visible to the public. See, e.g., In-N-Out, 894 F.3d at 712, 717 & n.2; Guard Publishing, 571 F.3d at 61. Respondent has pointed to no decision (or even a concurrence or dissent) in its prior arguments suggesting that those principles are inconsistent with the First Amendment. If this longstanding line of precedent posed First Amendment concerns, surely someone would have mentioned it before now.

Further, through this affirmative defense, Respondent seeks to have the administrative law judge jettison decades of court and Board precedent. Such a departure from established precedent would wholly undermine an important line of protection of employee rights under the Act—and is outside the power of the administrative law judge. E.g., Pathmark Stores, 342 NLRB 378, 378 n.1 (2004) (quoting Iowa Beef Packers, Inc., 144 NLRB 615, 616 (1963), enforced in part, 331 F.2d 176 (8th Cir. 1964)).

Relatedly, although Respondent focuses on insignia related to Black Lives Matter, its theory is not so limited. Black Lives Matter messaging is connected to terms and conditions of employment, and is protected activity under the Act, because racial equity is a matter that plays out in the workplace and that employers can affect. That connection, as we have demonstrated,
is especially apparent here, where employees have concertedly displayed the insignia in support of workplace safety concerns. Employer prohibitions on Black Lives Matter insignia thus are no different than employer prohibitions on other insignia that courts and the Board routinely have found to violate the Act. Respondent gives no explanation for why its argument would not also extend to employer bans on buttons such as “Fair Contract Now,” “Fight for $15,” “Vote Yes on Local 16,” or “Vote No on Local 16.”

The Supreme Court has noted expressly that employer unfair labor practices are “communications that are regulated without offending the First Amendment.” *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978). In *NLRB v. Gissel Packing Co.*, the Court rejected a First Amendment challenge to a Board order directing the employer to cease and desist from making certain statements to its employees. 395 U.S. 575, 616–20 (1969). Although *Gissel* and its progeny dealt with employer threats, employer restrictions on protected activity like insignia are simply another form of interference with Section 7 rights.

Respondent’s First Amendment argument also fails on its own terms. Nothing in a Board order remedying the alleged violations would compel Respondent itself to speak about Black Lives Matter. And there is no government-sponsored message imposed upon it. Many of the cases Respondent has previously cited (and will likely cite again) are thus inapplicable. *See Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2459–60 (2018) (state-imposed requirement that public employees pay fees to union representing them); *Wooley v. Maynard*, 430 U.S. 705, 706–07 (1977) (state-imposed requirement to display state motto on license plate); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 626 (1943) (state-imposed requirement to salute flag); *National Association of Manufacturers v. NLRB*, 717 F.3d 947, 949 (D.C. Cir. 2013) (Board requirement to post list of NLRA rights), *overruled in part by*
American Meat Institute v. U.S. Department of Agriculture, 760 F.3d 18 (D.C. Cir. 2014). After all, the speech at issue in an insignia case like this one is employees’ speech, not Respondent’s. In other words, Respondent claims a First Amendment right to stop its employees from speaking.

Counsel further anticipates that Respondent will try to argue that employees are always conduits for employer speech. Respondent, however, has to this point provided no case support for this broad-brush proposition. In past arguments on this subject, Respondent has cited to language that “[w]hen an employee engages in speech that is part of the employee’s job duties, the employee’s words are really the words of the employer. The employee is effectively the employer’s spokesperson.” Janus, 138 S. Ct. at 2474. This language however, was addressing the unrelated issue of when a public employer can regulate its own employees’ speech. In the public-sector context, the question of whether an employee is speaking for her employer is relevant to whether the First Amendment permits the state as employer to control her speech. Id. No such question is implicated here. Moreover, the Court was comparing public-sector employee speech and public-sector union speech, not holding that employee speech is always employer speech. Id. Contrary to Respondent’s belief, employees are not “mobile billboards” for their employer. Wooley, 430 U.S. at 715.

In addition, cases Respondent has cited in the past finding a First Amendment violation where a speaker was forced to carry a third party’s message are distinguishable in key respects. Those cases involved discrete, self-contained expressive communications from the speaker. See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 559 (1995) (parade); Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 5–7 (1986) (mailing); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 244
The Court found a compelled-speech violation because inserting a third party’s message into that communication created the impression that the inserted message likewise came from the speaker. *Hurley*, 515 U.S. at 576–77; *Pacific Gas*, 475 U.S. at 15. By contrast, the Court has found no First Amendment violation in requiring a party to host third-party speech where “there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006); see also *Turner Broadcast Systems, Inc. v. FCC*, 512 U.S. 622, 655 (1994) (finding “little risk that . . . viewers would assume that the [speech] . . . convey ideas or messages endorsed by” the host); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (speech “will not likely be identified with” property owner).

Such misattribution is unlikely here. The letters BLM handwritten on a small number of employees’ aprons do not have the appearance of an official company message. A piece of insignia is directly connected to the third party—the particular individual employee wearing it—who is actually conveying the speech. If customers harbored any belief that the message came from Respondent, they would encounter a store full of counterexamples in the form of employees in standard Home Depot aprons without the letters BLM. Customers likely would understand that a message worn only by a single employee represents that employee’s speech. Moreover, if an unadorned orange apron is as iconic as Respondent claims, customers likely would know that any additions, particularly handwritten messages, were not Respondent’s.

**D. The General Counsel Acted Within the Scope of Her Statutory Authority in the Prosecution of this Matter (Thirtieth Defense)**

Any argument that Respondent may make in its post-hearing briefing that the issuance and prosecution of the complaint were ultra vires would be without merit and should be rejected. As shown below, these proceedings were properly initiated and prosecuted by General Counsel
Abruzzo because former General Counsel Peter R. Robb was properly removed. In any event, former General Counsel Robb’s term has indisputably now expired, and General Counsel Jennifer Abruzzo has since ratified all of the actions taken in this case following his removal.

The General Counsel’s position is that the President lawfully removed former General Counsel Robb and lawfully designated former Acting General Counsel Ohr and appointed General Counsel Abruzzo. We note that in National Association of Broadcast Employees and Technicians (American Broadcasting Companies, Inc.), 370 NLRB No. 114, slip op. at 2 (Apr. 30, 2021) (“NABET”), the Board stated, in response to a similar challenge to the former Acting General Counsel’s designation, that “even assuming, arguendo, that the Board would have jurisdiction to review the actions of the President, it would not effectuate the policies of the Act to exercise this jurisdiction.” Nevertheless, the Board reasoned in NABET that the federal courts should rule upon the issue in the first instance. Id.

Subsequently, the first court to do so upheld the President’s actions. Specifically, in Goonan v. Amerinox Processing, Inc., No. 1:21-cv-11773, 2021 WL 2948052, at *4–*5 (D.N.J. July 14, 2021), the United States District Court for the District of New Jersey held that “the President may relieve the General Counsel of his or her duties without the process required for Board members.” The court reasoned that the “plain language” of the Act compelled this conclusion after comparing the express protection from removal afforded Board Members under Section 3(a) with the absence of anything similar in Section 3(d).

The ruling in Amerinox is entirely consistent with the Supreme Court’s recent decision in Collins v. Yellen, 141 S. Ct. 1761 (June 23, 2021), which effectively counters any argument that the General Counsel is not removable at the pleasure of the President. In Collins, the Supreme Court squarely held that statutory silence on the question of removability indicates Congressional
intent to follow the default rule that officers serve at the pleasure of the person or body appointing them. 141 S. Ct. at 1783 (stating presumption that “the President holds the power to remove at will executive officers and that a statute must contain ‘plain language to take [that power] away’” (quoting Shurtleff v. United States, 189 U.S. 311, 316 (1903))). And Section 3(d) of the NLRA, which creates the position of General Counsel and provides it a four-year term, is silent on the question of removability. In contrast, Section 3(a) of the Act expressly provides members of the Board protection from removal except for “neglect of duty or malfeasance in office.”

Any claim that President Biden could not remove former General Counsel Robb except for cause therefore also contradicts the long-settled presumption that “when Congress includes particular language in one section of a statute but omits it in another, Congress intended a difference in meaning.” Collins, 141 S. Ct. at 1782 (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002) (decision by Congress to include removal restrictions in one section of statute and omit them in another creates presumption that such restrictions are limited to their express terms)); accord Maine Community Health Options v. United States, 140 S. Ct. 1308, 1323 (2020).36 It is equally well settled that a statutory term limit does not imply any limitation on the President’s removal power. Parsons v. United States, 167 U.S. 324, 342 (1897).

Finally, any construction of the Act that would limit the President’s power to remove the General Counsel would raise serious questions about whether such a construction would be constitutional. Collins, 141 S. Ct. at 1787 (unconstitutional to insulate head of FHFA from

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36 The Court in Collins concluded that Congress placed no restriction on the President’s power to remove the Acting Director of the Federal Housing Finance Agency (“FHFA”) because “[i]n the Recovery Act, Congress expressly restricted the President’s power to remove a confirmed Director but said nothing of the kind with respect to an Acting Director.” Collins, 141 S. Ct. at 1782.
removal at the President’s pleasure); *Seila Law v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2199–200 (2020) (unconstitutional to insulate Director of the Consumer Financial Protection Bureau from removal at the President’s pleasure). If there were any ambiguity, the Board would have to construe the Act to avoid any such questions. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1987); see also, e.g., *Operating Engineers Local 150 (Lippert Components, Inc.)*, 371 NLRB No. 8, slip op. at 2 (July 21, 2021) (Chairman McFerran, concurring) (applying constitutional avoidance doctrine); *id.* at 5 (Members Kaplan and Ring, concurring) (same, with an extended discussion of *DeBartolo*). And given that such a construction is not only readily available here, but also the best reading of the statute, the Board should find that the statute does not provide removal protection for the General Counsel.

As shown above, the Supreme Court’s recent decision in *Collins* effectively rejects, and the district court’s subsequent decision in *Amerinox* directly rejects, any argument that the General Counsel is not removable at the pleasure of the President. Therefore, the General Counsel submits that, despite the Board’s pronouncement in *NABET*, it should now reach the issue and find that the President lawfully removed former General Counsel Robb and lawfully designated former Acting General Counsel Ohr and appointed General Counsel Abruzzo.37

37 We note that this case, unlike *NABET*, presents no issue as to the constitutionality of the President’s designation of acting principal officers—an issue that the Supreme Court did not address in *Collins*, but resolved long ago in other cases. See, e.g., *NLRB v. Southwest General*, 137 S. Ct. 929, 934 (2017) ("Congress has long accounted for th[e] reality" of vacancies in offices requiring Senate confirmation “by authorizing the President to direct certain officials to temporarily carry out the duties of a vacant [] office . . . in an acting capacity”); *United States v. Eaton*, 169 U.S. 331, 343 (1898) (non-Senate-confirmed acting officer was lawfully designated). Because Respondent accordingly raises only a statutory issue that falls squarely within the ambit of *Collins*, the Board would be justified in departing from *NABET*, even if it adheres to that decision’s rationale regarding a constitutional challenge.
Even had former General Counsel Robb not been removed, Respondent cannot dispute that his term, which began on November 17, 2017, would have expired by now. And General Counsel Abruzzo—who was originally sworn into office on July 22, 2021—was re-sworn in on November 29, 2021, in an abundance of caution. Thereafter, on December 13, 2021, she issued a notice of ratification stating that, “Following appropriate review and consultation with my staff, I have decided to ratify the issuance of the complaint and its continued prosecution in this case. Those actions were and are a proper exercise of the General Counsel’s broad and unreviewable discretion under Section 3(d) of the Act.”

Under settled law, a ratification issued by a properly appointed official “can remedy a defect arising from the decision of an improperly appointed official.” Jooce v. Food & Drug Administration, 981 F.3d 26, 28 (D.C. Cir. 2020); accord Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board, 796 F.3d 111, 117–21, 124 (D.C. Cir. 2015); Doolin Security Saving Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203, 212 (D.C. Cir. 1998). The General Counsel’s ratification is also consistent with Board and court precedent upholding ratifications by Board officials in various parts of the agency as curing their own defective actions as well as the actions of their predecessors who lacked authority to act. See, e.g., Wilkes-Barre Hospital Co. v. NLRB, 857 F.3d 364, 371 (D.C. Cir. 2017) (accepting Board and Regional Director ratifications of actions taken at times when the Board lacked a valid quorum and the Regional Director’s appointment was defective); Advanced Disposal Services East, Inc. v. NLRB, 820 F.3d 592, 604–06 (3d Cir. 2016) (accepting Regional Director’s ratification of his own actions after defect in his appointment was cured); Hendrickson Trucking Co. v. NLRB, 770 F. App’x 1, 7–8 (D.C. Cir. 2019) (accepting administrative law judge’s ratification of her own unfair-labor-practice decision, issued when she lacked a valid appointment); see also CFPB v.
Gordon, 819 F.3d 1179, 1186, 1191–92 (9th Cir. 2016) (properly-appointed Director validly ratified his own earlier action). Moreover, the Board has specifically recognized that a properly-appointed General Counsel can ratify the actions of a former Acting General Counsel who lacked authority to act at relevant times. See, e.g., 1621 Route 22 West Operating Co., LLC v. NLRB, 725 F. App’x 129, 137 (3d Cir. 2017) (accepting the General Counsel’s ratification of a complaint and prosecution undertaken by an Acting General Counsel who served in violation of the Federal Vacancies Reform Act); Midwest Terminals of Toledo International, Inc., 365 NLRB No. 157, slip op. at 1 (Dec. 15, 2017), enforced, 783 F. App’x 1 (D.C. Cir. 2019); Newark Electric Corp., 366 NLRB No. 145 (July 31, 2018), enforced, 14 F.4th 152 (2d Cir. 2021).

This settled precedent establishes that the General Counsel’s ratification in this case was proper. Accordingly, General Counsel Abruzzo’s December 13, 2021 ratification provides additional grounds to reject any argument made by Respondent that the complaint and prosecution were ultra vires.

VIII. Remedies

As a remedy for Respondent’s unlawful application of its uniform policy, it should be required to post, nationwide, the proposed Notice to Employees included in Appendix C to this brief. The Board has held that such nationwide postings are appropriate where an employer has uniformly applied an unlawful rule. E.g., Guardsmark, LLC, 344 NLRB 809, 811–12 (2005) (remedy for an unlawful handbook provision included nationwide notice postings), enforced, 475 F.3d 368, 380–81 (D.C. Cir. 2007) (“[O]nly a company-wide remedy extending as far as the company-wide violation can remedy the damage.”); Shamrock Foods Co., 369 NLRB No. 140, slip op. at 1, n.4 (July 29, 2020). By virtue of Respondent’s admitted application of its rule on a nationwide basis, such a remedy is appropriate. (JTX 1 at 1.)
Counsel also requests that this notice be posted on Respondent’s My Apron intranet site, at the location where employees access Respondent’s employment policies. The evidence developed at hearing demonstrates that Respondent communicates to its associates using the MyApron site. (Tr. 782–83.) As such, posting the notice on this website will effectuate the Act and should be included in the recommended Order. E.g., J. Picini Flooring, 356 NLRB 11, 13 (2010) (finding electronic posting appropriate if “Respondent customarily communicates with its employees by such means.”).

Additionally, Respondent should be required to rescind its unlawful rule. Admittedly, the Board recently held, in AT&T Mobility, LLC, 370 NLRB No. 121 (May 3, 2021), that employers should not be required to rescind rules that are unlawful only on an as-applied basis. Id., slip op. at 5–7. Although the rule at issue here is similarly unlawful only because of its application to BLM (and not unlawful on its face), the Board should revisit this remedial limitation and expand the remedy for an as-applied violation. As Chairman McFerran explained in her dissent:

Once a rule is unlawfully applied to Section 7 activity, employees will continue to be chilled by it, so long as the rule is maintained in its original form. By its actions, the employer has conclusively demonstrated to employees that the rule can and does apply to Section 7 activity. A Board order and notice do nothing to reassure employees who come to the workplace after the 60-day notice-posting period or who are otherwise unaware of the Board’s remedial measures.

Id., slip op. at 15 (Chairman McFerran, dissenting). A notice posting is simply not enough, especially in the context of employees engaging in protests regarding racial discrimination and harassment in their workplace.

Further, as Chairman McFerran suggests, the Board’s remedial policy for unlawfully applied rules should be expanded from how it existed prior to AT&T Mobility, LLC. If an employer is found to have unlawfully applied a rule, rescinding the rule and allowing an employer to simply reimplement the rule after a notice posting is insufficient to remedy the
chilling effect on employees. Rather, after rescission of its rule, should an employer wish to reinstate the rule, it should be required to include “an affirmative disclaimer in the rule that it will not be applied to statutorily-protected activity.” Id., slip op. at 16 (Chairman McFerran, dissenting).

Another remedial question presented is whether the new policies advocated by Counsel for the General Counsel should be applied retroactively (as raised by Respondent’s Twenty-Ninth Affirmative Defense). Although Counsel recognizes that the Administrative Law Judge is currently bound by AT&T Mobility (and thus no retroactivity analysis need be conducted on that issue), there is the remaining question of whether the proposed expansion of the inherently concerted doctrine should be applied retroactively. It should.

The Board has long held that the default practice is to apply all new policies retroactively to “all pending cases in whatever stage.” SNE Enterprises, 344 NLRB 673, 673 (2005). In determining whether this default policy applies, the Board “balance[es] any ill effects of retroactivity against ‘the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.’” Id. (quoting Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947)). The ultimate inquiry is whether applying the new policy to the parties in the case and to other pending cases would create “manifest injustice.” MV Transportation, 368 NLRB No. 66, slip op. at 12 (Sept. 10, 2019). In considering whether a manifest injustice would occur, the Board weighs “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.

The circumstances of this case demonstrate that the default rule of retroactive application should apply to the expansion of inherently concerted activity. First, and most importantly, in
every situation in which the Board has expanded the scope of inherently concerted activity, it has applied it retroactively to the parties in the case. See Hoodview Vending Co., 359 NLRB 355, 358–59 (2012), vacated, 2014 WL 2929781 (June 27, 2014), reconsidered & affirmed, 362 NLRB 690 (2015); Aroostook County Regional Ophthalmology Center, 317 NLRB 218, 220 (1995), enforcement denied, 81 F.3d 209 (D.C. Cir. 1996); Trayco of South Carolina, Inc., 297 LRB 630, 634 (1990), enforcement denied, 927 F.2d 597 (4th Cir. 1991). Second, the other factors considered in the retroactivity analysis all weigh in favor of retroactivity. There is no evidence the Respondent relied on, or even considered, the existing state of the law in determining how to apply its apron policy. Applying this policy retroactively would ensure that employees who protest race issues in the workplace receive the full protection of the Act, which furthers the statutory interests. And Respondent will be able to point to no particular injustice stemming from retroactive application—particularly given that it affects only one discharged employee and one provision in its dress code and apron policy. Cf. MV Transportation, 368 NLRB No. 66, slip op. at 12 (applying contract coverage test retroactively to all collective-bargaining relationships).  

38 Although not specifically pled, Counsel also requests an order requiring Respondent to pay for any consequential economic harm suffered by Charging Party Morales as a result of Respondent’s unlawful constructive discharge. Thryv, Inc., 371 NLRB No. 37 (Nov. 10, 2021).
IX. Conclusion

For the reasons discussed above, Counsel respectfully requests that the Administrative Law Judge find that Respondent violated the Act, as alleged in the Second Amended Complaint, award the remedies requested therein, and issue a Decision consistent with these findings.

Respectfully Submitted,

David Stolzberg, Esq.
Counsel for the General Counsel
National Labor Relations Board,
Region 18 212 Second Ave. South, Suite 200
Minneapolis, Minnesota 55401
Telephone (763) 270-7057
David.stolzberg@nlrb.gov

Tyler Wiese, Esq.
Counsel for the General Counsel
National Labor Relations Board,
Region 18 212 Second Ave. South, Suite 200
Minneapolis, Minnesota 55401
Telephone: (952) 703-2891
Tyler.wiese@nlrb.gov

Dated: December 23, 2021
APPENDIX A

Proposed Conclusions of Law

1. Home Depot USA, Inc. (Respondent) is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by:
   a. Applying its apron and dress code policies, specifically the provision disallowing “causes or political messages unrelated to workplace matters,” to prohibit employees from displaying “BLM” and/or “Black Lives Matter” on their person while working at any of Respondent’s facilities in the United States.
   b. Instructing employees to remove BLM from their workplace aprons.
   c. Threatening employees with unspecified consequences for sending emails regarding racial issues in the workplace to their co-workers.
   d. Instructing employees to keep workplace investigations confidential.
   e. Constructively discharging Charging Party Antonio Morales by conditioning his employment on forfeiting his right to wear BLM in the workplace.

3. The unfair labor practices described above affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.
APPENDIX B

Proposed Order

The Respondent, Home Depot USA, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:
   a. Applying its apron and dress code policies, specifically the provision disallowing “causes or political messages unrelated to workplace matters,” to prohibit employees from displaying “BLM” and/or “Black Lives Matter” on their person while working at any of Respondent’s facilities in the United States.
   b. Instructing employees to remove BLM from their workplace aprons
   c. Threatening employees with unspecified consequences for sending emails regarding racial issues in the workplace to their co-workers.
   d. Instructing employees to keep workplace investigations confidential.
   e. Constructively discharging employees by conditioning their continued employment on removing BLM from their workplace aprons.
   f. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:
   a. Within 14 days from the date of this Order, rescind the rule in its dress code and apron policies prohibiting employees from wearing “causes or political messages unrelated to workplace matters.”
   b. Within 14 days from the date of this Order, furnish all employees nationwide with inserts for the current dress code and apron policies that (1) advise that the unlawfully applied policies have been rescinded, or (2) provide lawfully worded policies that include an explicit disclaimer that the policy will not be applied to Section 7 rights on adhesive backing that will cover the unlawfully applied policies; or publish and distribute to employees revised apron and dress code policies that (1) do not contain the unlawfully applied policies, or (2) provide lawfully worded policies that include an explicit disclaimer that the policy will not be applied to Section 7 rights.
c. Within 14 days from the date of this Order, offer Charging Party Antonio Morales full reinstatement to their former job without prejudice to their seniority or any other privileges previously enjoyed.

d. Within 14 days from the date of this Order, make Charging Party Antonio Morales whole for any loss of earnings and other benefits, including, but not limited to, payment for consequential economic harm they suffered as a result of the discrimination against them.

e. Compensate Charging Party Antonio Morales for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Region Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

f. Within 14 days from the date of this order, remove from its files any reference to the unlawful constructive discharge of Charging Party Antonio Morales, and within 3 days thereafter, notify Morales in writing that this has been done and that the constructive discharge will not be used against them in any way.

g. Within 14 days after service by the Region, post at all its facilities in the United States copies of the attached notice marked “Appendix.” Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent’s authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
APPENDIX C

Proposed Notice to Employees

As you may know, ANTONIO MORALES, an individual, filed a charge with the National Labor Relations Board against HOME DEPOT USA, INC. (RESPONDENT) alleging that we violated the National Labor Relations Act. As a result of this charge, we have been ordered to post this notice by the National Labor Relations Board.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose a representative to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities, including for raising issues of racism and/or racial justice in the workplace.

WE WILL NOT present you with an unlawful choice of abandoning your efforts to improve your working conditions by engaging in protected concerted activity around issues of racism or retaining your employment.

WE WILL NOT apply our apron and dress code policies to prohibit the display of BLM and/or Black Lives Matter on your apron or clothing, or to otherwise prohibit you from engaging in protected concerted activity.

WE WILL NOT instruct you to remove BLM and/or Black Lives matter from your workplace aprons.

WE WILL NOT threaten you for emailing your co-workers about racial issues in the workplace.

WE WILL NOT threaten you that you must keep workplace investigations confidential.

WE WILL permit employees to wear BLM and Black Lives Matter on their aprons in the workplace.

WE WILL, within 14 days of the date of this Order, offer Charging Party Antonio Morales full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice.
**WE WILL** make Antonio Morales whole for any loss of earnings and other benefits, including, but not limited to, payment for consequential economic harm resulting from their constructive discharge, less any net interim earnings, plus interest.

**WE WILL** compensate Antonio Morales for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay aware to the appropriate calendar years.

**WE WILL**, within 14 days from the date of this Order, remove from our files any reference to the unlawful constructive discharge of Antonio Morales, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the constructive discharge will not be used against them in any way.

**WE WILL**, on a nationwide basis, rescind the provision in our apron and dress code policies prohibiting the display of “causes or political messages unrelated to workplace matters.”

**WE WILL**, on a nationwide basis, furnish you with inserts for the current dress code and apron policies that (1) advise that the unlawfully applied policies have been rescinded, or (2) provide lawfully worded policies that include an explicit disclaimer that the policy will not be applied to Section 7 rights on adhesive backing that will cover the unlawfully applied policies; or publish and distribute to employees revised apron and dress code policies that (1) do not contain the unlawfully applied policies, or (2) provide lawfully worded policies that include an explicit disclaimer that the policy will not be applied to Section 7 rights.
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOME DEPOT USA, INC.

and

Case 18-CA-273796

ANTONIO MORALES JR., an Individual

CERTIFICATION OF SERVICE OF: Brief to the Administrative Law Judge.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on December 23, 2021 I served the above-entitled document(s) by the service methods indicated, upon the following persons, addressed to them at the following addresses:

By U.S. Mail:

Taylor Fleming, Specialty ASM
The Home Depot
1520 New Brighton Blvd
Minneapolis, MN 55413

By E-mail:

Brian E. Hayes, Attorney
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W., Suite 1000
Washington, DC 20006-1134
Email: brian.hayes@ogletree.com

C. Thomas Davis, Attorney
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
401 Commerce Street, Suite 1200
Nashville, TN 37219-2491
Email: tom.davis@ogletree.com
Keith D. Frazier, Attorney
Ogletree, Deakins, Nash, Smoak & Stewart,
P.C.401 Commerce St Suite 1200
Nashville, TN 37219
Email: keith.frazier@ogletreedeakins.com

Harrison C. Kuntz, Attorney
Ogletree Deakins Nash Smoak & Stewart
PC7700 Bonhomme Avenue Suite 650
Saint Louis, MO 63105-0030
Email: harrison.kuntz@ogletree.com

Roman Martinez
Latham Watkins
555 Eleventh St. NW, Suite 1000
Washington, D.C. 20004
Email: roman.martinez@lw.com

Brent T. Murphy
Latham Watkins
555 Eleventh St. NW, Suite 1000
Washington, D.C. 20004
Email: brent.murphy@lw.com

Joseph E Sitzmann
Latham Watkins
555 Eleventh St. NW, Suite 1000
Washington, D.C. 20004
Email: joseph.sitzmann@lw.com

Antonio Morales Jr.
2614 Fillmore St. NE
Minneapolis, MN 55418
Email: mail@techtonio.com

Date: December 23, 2021

/s/ David J. Stolzberg
(Signature)