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

HOME DEPOT U.S.A., INC.,	)	
Respondent,	)	
v.	)	**NLRB Case 18-CA-273796**
ANTONIO MORALES, An Individual.	)	

HOME DEPOT U.S.A., INC.'S POST-HEARING BRIEF

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Pursuant to Section 102.42 of the National Labor Relations Board's Rules and Regulations, Home Depot U.S.A., Inc. ("Respondent," "Home Depot," or the "Company") files this Post-Hearing Brief and respectfully requests dismissal of the above-captioned charge in its entirety.

INTRODUCTION

Home Depot strives to create an open, inclusive, and welcoming environment for its diverse range of customers—regardless of race, gender, ethnicity, religion, sexual orientation, and political views. One way it advances this objective is by requiring that all customer-facing store employees (known as "associates") wear a common uniform—Home Depot's iconic orange apron. That trademarked apron reflects the Company's brand and proudly declares the Company's eight core values, including "Respect for All People," "Taking Care of Our People," and "Doing the Right Thing." (GC-18); (Tr. 785:10-12, 786:14).[1]

[1] This Brief uses the following conventions: (JX-_) refers to Joint Exhibits offered and admitted into the record; (GC-_) refers to General Counsel Exhibits offered and admitted into the record; (RX-_) refers to Respondent Exhibits offered and admitted into the Record; and (Tr. __:__) refers to the page and line numbers of the Transcript of Hearing. Additionally, any references to the "Complaint" refer to the Complaint as Second Amended and further orally amended at the hearing.

To promote a welcoming atmosphere for customers, and a safe environment for its employees, Home Depot has adopted detailed policies indicating what other messages can—and cannot—be displayed by store associates on their Home Depot-owned aprons. For example, Home Depot authorizes associates to display certain non-controversial messages, such as "[p]atriotic pins supporting the store's country of origin," "[p]ins with pictures of an associate's family members," and approved decorations celebrating certain "holidays" and "special occasions." (JX-1). By contrast, Home Depot prohibits its associates from wearing potentially divisive messages that violate Home Depot's "policies on discrimination or unlawful harassment," "promote or display religious beliefs," or display "causes or political messages unrelated to workplace matters." (*Id.*)

Home Depot strives to apply its policies neutrally, without favoring any particular group of employees or point of view. Thus, over the past year, Home Depot has enforced its policy by forbidding security guards to wear neck scarves declaring "Blue Lives Matter," prohibiting "Make America Great Again" messaging, and in this case forbidding associates from wearing on their apron BLM messaging. (Tr. 516:12-20, 675:18-22, 790:24-791:7). Of course, Home Depot's dress code policies do not restrict what political or social views Home Depot associates can espouse in other ways, or on their own time.

The General Counsel's theory of this case is that Home Depot restricted the right of the Charging Party, Antonio Morales, Jr., to engage in protected concerted activity by enforcing its dress code and apron policies to prohibit Morales from wearing the letters BLM for Black Lives

Matter on their[2] Home Depot-owned apron. That theory is flawed and should be rejected on multiple grounds.

First, the General Counsel's theory is unconstitutional because it seeks to compel Home Depot's speech in violation of the First Amendment. The stated purpose of the General Counsel's case is to force Home Depot to communicate certain specific political and social messages on Home Depot-owned aprons worn by Home Depot employees when interacting with customers on behalf of Home Depot, even though Home Depot has made a deliberate choice not to use its aprons to communicate *any* such messages unrelated to workplace activities. Compelling Home Depot's speech in this way is unconstitutional. Decades of Supreme Court precedent make clear that the government cannot tell individuals or corporations what they must say—nor can it force them to serve as a conduit for the expression of others. Whether the BLM message on Morales' apron is characterized as Home Depot's speech or as Morales' speech (which Home Depot is forced to allow) does not matter. Either way, preventing Home Depot from controlling the political or social messages displayed on its orange uniforms violates the First Amendment.

Second, the General Counsel's theory conflicts with federal trademark law. Trademarks like Home Depot's iconic orange apron serve as the identity of their owners and derive their value from the reputation and goodwill of their owners. The General Counsel's theory, however, would prevent Home Depot from exercising control over authorized uses of its trademark, at the risk of damage to Home Depot's reputation and goodwill. And there is no logical limit to the variety of political and social messages whose display on Home Depot's aprons could be justified on the

[2] After the close of the hearing, Counsel for the General Counsel informed Home Depot that Morales uses they/them pronouns. This Brief refers to Morales in accordance with that information.

General Counsel's reading of the statute. Ruling for the General Counsel would create an unavoidable risk of confusion over whether Home Depot intends to make a political statement, or whether it supports or endorses a particular political message. That result violates federal trademark law.

Third, the General Counsel's theory of the National Labor Relations Act (NLRA) fails on its own terms. The NLRA is not a freewheeling bill of rights that protects employees' right to speak on any matter they choose, at any time. Instead, it is meant to safeguard employees' right to work collectively to advance their workplace concerns. For that reason, to be protected under Section 7, Morales' conduct must both (1) be "concerted" and (2) be "for the purpose" of "mutual aid or protection." 29 U.S.C. § 157.

In this case, Morales' conduct was neither. It was not "concerted" because Morales acted alone, rather than seeking to initiate group action. And it was not "for mutual aid or protection" because the BLM message Morales displayed on their orange apron was unrelated to the purpose of employees seeking "to improve [their] terms and conditions of employment or otherwise improve their lot *as employees*." *Eastex*, 437 U.S. at 565 (emphasis added). Viewed objectively, the BLM message reflects support for a political and social movement focused primarily on criticizing police misconduct toward Black Americans. That message has no nexus to workplace concerns at Home Depot, much less the *direct* nexus required by Section 7 and relevant caselaw. Indeed, the General Counsel has previously acknowledged that pro-BLM advocacy is "unprotected" by Section 7. *See Amazon.com*, Case 19-CA-266977, Advice Memorandum dated March 12, 2021, at 8. Moreover, Morales' own testimony makes clear that their decision to wear the BLM message was motivated by a desire to protest racial injustice in society generally, and to

communicate a statement of alliance with people of color at large. That decision had nothing to do with the terms or conditions of their employment at Home Depot.

Even assuming Morales' conduct was protected by Section 7, however, Home Depot still prevails under the NLRA's "special circumstances" doctrine. That doctrine holds that "a company may lawfully ban [protected] messages on publicly visible apparel on the job when the company reasonably believes the message may harm its relationship with its customers or its public image." *S. New Engl. Tel. Co. v. NLRB*, 793 F.3d 93, 95 (D.C. Cir. 2015). Here, it plainly protects Home Depot's right to bar its employees from expressing their views on political and social topics on Home Depot's iconic orange aprons. Home Depot's effort to avoid controversy both promotes Home Depot's values and protects employees and customers alike from the threat of discord or even violence in a highly polarized environment.

Finally, the General Counsel's theory of constructive discharge is also baseless. Home Depot never took any adverse action against Morales. Instead, Home Depot merely asked Morales to consider other options for demonstrating support for people of color at large that would be consistent with Home Depot's policies. It was *Morales* who refused to engage and instead chose to leave Home Depot. And, moreover, Morales resigned without ever referencing the allegedly protected conduct that the General Counsel now argues was the cause of Morales' constructive discharge.

For each of these reasons, the General Counsel's case fails here. The complaint should be dismissed in its entirety.

FACTUAL BACKGROUND

I. <u>Home Depot's Operations and Ubiquitous Orange Apron</u>

Home Depot operates approximately 2,200 home improvement retail stores in total, including about 2,000 stores in the United States. (Tr. 788:6-7). The Company achieves a unitary

vision throughout its operations, despite its large size, in part due to well-publicized shared values. Specifically, Home Depot expresses its eight (8) "foundational values" through its Values Wheel. (GC-15) (Tr. 785:10-12, 786:14). Northern Division President Crystal Hanlon described these values at the hearing as, "what we're built on" (Tr. 294:16-19), and Vice President of Associate Relations and Chief Diversity Officer Derek Bottoms explained that across the Company, the Values Wheel guides staff on the right direction in any situation. (Tr. 786:11-787:6). As part of an effort to communicate the Company's values to the public, Home Depot prominently displays the Values Wheel on the iconic orange aprons worn by all store employees. (Tr. 787:2-6).

Home Depot emphasizes "Respect for All People" among the foundational principles included on the Values Wheel. (GC-15). Consistent with that emphasis, Home Depot strongly supports and pursues diversity, equity, and inclusion ("DE&I") initiatives. For example, one "Best Practices and Resources" communication to employees outlines DE&I goals with regard to Home Depot's associates, communities, and suppliers, describing important DE&I principles, and highlighting a wide variety of resources available to employees. (GC-43). Another similar communication from Bottoms provides employees with further DE&I information and resources, noting Home Depot's desire to "make a meaningful difference in accordance with our value of Respect for All People." (GC-42). Regarding employment issues, Home Depot implements its values through a comprehensive Harassment and Non-Discrimination Policy aimed at securing "an environment that is free of discrimination and harassment." (GC-44) (RX-1).

Home Depot further ensures consistent communication of its values through the orange aprons central to the Company's identity. (GC-14) (Tr. 787:2-6). As multiple witnesses confirmed at the hearing, Home Depot expects all in-store personnel, including associates, supervisors, and managers, to wear the apron at all times while working on the floor. (Tr. 59:20-60:2, 293:11-294:8,

461:6-12, 653:22-654:3, 709:3-12). Hanlon testified this emphasis exists because the apron is not simply an important part of the brand, but indeed the apron *is* the brand. (Tr. 294:9-11).

Bottoms described three reasons for Home Depot's heavy identification with its apron: (1) uniformity in appearance; (2) making it easy for customers to identify store personnel; and (3) "the apron plays a very integral part in who we are at Home Depot." (Tr. 785:13-786:4). District Manager Melissa Belford further elaborated:

> [T]he Home Depot apron represents the fact that when we come to work in the store, people from all walks of life, we put on our uniform and we're now a group working toward the same goals. That's what I see. That's what I see day in and day out . . . it's [also] honestly like a flag in the store to let a customer know that this particular associate works for Home Depot. They can ask anyone a question for help.

(Tr. 655:25-656:11).

Home Depot identifies so closely with the apron that its intranet site for associates, upon which it publishes all employment policies, is known as, "My Apron." (Tr. 566:3-4, 782:14-17, 783:6-10). Furthermore, long-term personnel develop close connections to the apron, associating the apron with the Company itself. For example, District Human Resource Manager Casey Whitley, when asked about the meaning of the apron to him, testified:

> It's the second job I've ever had. The orange apron is our brand. It makes us recognizable out in the marketplace. It obviously identifies us to customers that are in the store. My entire -- my two brothers, my dad have all worked for Home Depot at one time or another. I pretty much owe anything I have to Home Depot, so it means everything.

(Tr. 748:12-19).

Consistent with the overriding importance of its orange apron, Home Depot takes several measures to protect the apron's integrity. Legally, Home Depot has obtained trademark protection for the apron, most recently renewing the trademark in 2020. (RX-4) (Tr. 837:14-16). To protect its trademark, Home Depot takes steps to control use of the apron. (Tr. 835:12-24).

To this end, Home Depot trains all employees at the outset of their employment on various policies and practices regarding the apron. (Tr. 48:23-50:6, 330:25-331:5, 332:6-25, 656:14-22). Such practices include care of the apron and the requirement to leave the apron in the store at the end of the associate's shift each day. (Tr. 51:16-52:5, 228:20-229:12, 656:14-22). When an associate separates from employment, a Home Depot representative must cut the apron into pieces and dispose of it. (Tr. 230:23-231:2, 330:25-331:5, 658:5-21). Such measures not only protect the integrity of the apron overall, but also prevent outside actors from using aprons for nefarious motives, including impersonation of associates. (Tr. 658:5-21).

Home Depot additionally protects the apron through dress code and apron policies governing its use by associates. (JX-1). Bottoms explained these policies exist because:

> [w]e view the apron as an extension of who we are. We view the apron as a rep[resentation of] what we stand for, who we are. So we have defined through our policy what we think is appropriate to be on the apron and what's not appropriate to be on the apron.

(Tr. 788:17-21).

Home Depot's dress code policy states "unacceptable" displays include "causes or political messages unrelated to workplace matters." (JX-1). Likewise, Home Depot's apron policy states:

> [w]hile The Home Depot respects the personal opinions and beliefs held by associates and customers, the apron is not an appropriate place to promote or display religious beliefs, causes or political messages unrelated to workplace matters, or messages that would violate our policies on discrimination and unlawful harassment.

(*Id.*).[3]

At the hearing, Bottoms described Home Depot's rationale for prohibiting such displays as an extension of its Respect for All People value:

[3] Home Depot notes the policies, taken together, refer to this standard in multiple locations throughout. (*Id.*). All such references are consistent with the language quoted here.

> we have 400,000 associates at any given time. If you think about it we have 500,000 or 600,000 associates kind of come through our doors in any given year. We have millions of customers that come in as well. And out of those customers people have different values, people have different political parties, different race, different religion. Every time -- it runs the spectrum both for our associates and for our customers and that's our attempt to make our associate know as well as customers know that we respect who these people are. When you come into this store we're not trying to judge who you are, we're not trying to make any statement about your political views, religious views, how you dress, or anything else as a customer. But what we do is [we] want to make sure you know and our associates know we respect all of our associates and we respect all our customers.

(Tr. 787:10-788:2).

II. <u>The Black Lives Matter Social and Political Movement</u>

As Charging Party Morales acknowledged at the hearing, the Black Lives Matter movement, commonly abbreviated as BLM, exists as both a "statement" and an advocacy organization. (Tr. 214:11-14). Bottoms summarized his understanding of BLM's focus as:

> an organization or movement or group that is specifically around polic[e] violence towards African American males . . . And specifically what I believe it does – what its focus is to try to prevent or raise awareness of polic[e] violence towards African-American males and police in communities.

(Tr. 789:1-790:9). *See also* (Tr. 807:3-8) (disagreeing on cross-examination that BLM is about more than police brutality). Charging Party Morales agreed BLM opposes police brutality and, relatedly, favors the political goal of defunding the police. (Tr. 213:11-24).

For its part, the BLM organization's website explains its origin and purpose as related to police and vigilante violence against Black communities, without any reference to workplace issues:

> #BlackLivesMatter was founded in 2013 in response to the acquittal of Trayvon Martin's murderer. Black Lives Matter Global Network Foundation, Inc. is a global organization in the US, UK, and Canada whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes. By combating and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy, we are winning immediate improvements in our lives.

(RX-24(d), p. 1). *See also* (*Id*., at pp. 3-6) (describing further the movement's origins with a focus on violence against Black communities, and without reference to workplace issues). The BLM organization's website also list "BLM's 7 Demands". None of those demands relate to the workplace, and they instead focus on items such as defunding the police, enacting legislation regulating police misconduct, banning President Trump from future political office and social media, and expelling President Trump's Republican supporters from Congress. BLM Demands, Black Lives Matter, https://blacklivesmatter.com/blm-demands/ [blacklivesmatter.com] (last visited Nov. 30, 2021).

Consistent with this self-described purpose, the vast majority of public articulations and explanations of BLM-related activities focus on issues of police brutality and other violence against Black communities, without reference to workplace matters. For example, a May 11, 2021, Politico article regarding BLM's activities entitled "Black Lives Matter thought they had Washington's ear. Now they feel shut out." recounts multiple law enforcement and voting rights initiatives, such as the BREATHE Act (requiring "reallocation of funds from law enforcement to communities of color"), general police reform initiatives, opposition to the Justice in Policy Act, the For the People Act (voting rights), and the John Lewis Voting Rights Act. (RX-24(c)). Similarly, a March 19, 2021, CBS Minnesota article presents twelve (12) BLM demands in Minnesota, none of which relate in any manner to workplace issues. (RX-24(b)). Such media reports reinforce the common public understanding that BLM pertains to issues of violence against Black communities, and related political solutions to that problem, rather than to workplace issues. In Minneapolis specifically, General Counsel witness Nebiy Tesfaldet agreed BLM focuses on defunding the police and advocating against police brutality. (Tr. 444:5-13).

As with most political issues, the Black Lives Matter movement evokes widely divergent viewpoints amongst different population groups. As Bottoms explained, some individuals view BLM favorably, while others view it as a radical organization and oppose its goal of defunding the police. (Tr. 790:10-23). Charging Party Morales agreed that some individuals both within Home Depot, and also in the Minneapolis, Minnesota community at large, view BLM unfavorably. (Tr. 215:1-5). Indeed, polling research confirms that the public is sharply polarized about BLM. *See* Juliana Menasce Horowitz, *Support for Black Lives Matter Declined After George Floyd Protests, But Has Remained Unchanged Since*, Pew Rsch. Ctr. (Sept. 27, 2021), https://www.pewresearch.org/fact-tank/2021/09/27/support-for-black-lives-matter-declined-after-george-floyd-protests-but-has-remained-unchanged-since/ (noting that only 55% of respondents support BLM).

III. <u>Racial Unrest in Minneapolis, Minnesota</u>

Sadly, events beginning in May 2020 made the police brutality focus of the Black Lives Matter movement a highly visible topic of discussion within the Minneapolis community. As was widely publicized, news of the May 25, 2020, murder of George Floyd by Minneapolis police officer Derek Chauvin resulted in widespread protests across the nation, with particular intensity in Minneapolis. (RX-24(e), (h), (i)). Unfortunately, as was also widely reported, some of those protests evolved into riots that included violence and property destruction. (*Id*.).

These local circumstances unsurprisingly resulted in a volatile atmosphere within the city. General Counsel witness Sadie Ward (Tr. 365-19-366:3) and Store Manager Jason Bergeland (Tr. 515:17-516:3) both confirmed the existence of a tense atmosphere during the summer of 2020, as well as in February and March 2021, immediately prior to Chauvin's trial. District Manager Melissa Belford provided a vivid description of circumstances in the city during February 2021, as they related to Home Depot's associates:

> [i]t was a pretty hostile environment. We were about a month out from the trial for the police officer involved in George Floyd's death. There were a lot of things that were happening. While it had calmed down from different points in 2020, there was still plenty of rallies, support. We saw protests happening. We still saw angst for associates. I don't remember the exact timing but I believe in there within the next couple of weeks even the bus system got shut down again to protect people moving in and out of the city. There were a lot of situations that impacted associates. I also had associates whose family are police officers and are impacted. All of that dynamic was going on at that time related to Black Lives Matter, related to Blue Lives Matter, related to just the angst in Minneapolis over the George Floyd death.

(Tr. 674:25-675:17).

Similarly, District Human Resource Manager Whitley recounted a time immediately following the riots when, as he drove around the city, he observed multiple fires and the direct impacts of rioting. (Tr. 746:17-748:21). Amongst the immediate aftermath, Whitley witnessed the BLM acronym spray-painted on several buildings. (Tr. 747:17-18). Furthermore, the Target store in the same shopping center as the New Brighton store was "looted and product out their back door strewn about." (Tr. 747:6-9).

IV. <u>Home Depot's New Brighton Store</u>

Home Depot's New Brighton store[4] sits only 6.5 miles away from the site of George Floyd's murder. (Tr. 515:22-23). The local tensions described above forced the store to close early four (4) times between May and November 2020, and another two (2) times after November 2020. (Tr. 516:4-11, 680:8-681:1).

The New Brighton store employs approximately 236 to 300 associates at any given time. (Tr. 457:12-14, 493:8-10, 868:9-12). Reflecting the character of its surrounding neighborhood, the store enjoys both a diverse workforce and a diverse customer base. (Tr. 70:1-17, 434:5-11).

[4] At the hearing, witnesses referred to the store variously as "New Brighton", "the quarry", "2807", "Northeast Minneapolis", and "Minneapolis". (Tr. 42:7-16, 326:7-12, 455:19-24, 491:5-8, 601:20-24, 762:21-25, 864:6-10). This Brief utilizes the term "New Brighton" to refer to the store at which Charging Party Morales worked.

Indeed, District Manager Belford described New Brighton as the most diverse store in her eleven (11) store District. (Tr. 663:8-11).

Charging Party Morales' tenure lasted from August 2020 until their February 19, 2021 resignation. (Tr. 41:11-13) (GC-9). They initially worked a morning shift, but then transitioned to a midday shift that ended around 5:00 p.m. or 6:00 p.m. (Tr. 45:24-46:14).

Morales worked in the Flooring Department as a flooring sales specialist for the entirety of their employment. (Tr. 41:17-20). The Flooring Department is located in the middle of the store, and contains a flooring desk with a computer, telephones, and other such equipment. (Tr. 72:12-23). At any given time, the Flooring Department consists of approximately five or six flooring specialists, and about ten flooring associates who assist with the Department's sales. (Tr. 42:17-43:19). Additionally, flooring supervisors oversee the Department's work. (Tr. 43:23-25). During the course of Morales' employment, Michelle Theis served as flooring supervisor for their entire tenure. (Tr. 44:1-45:9). At different times, Department Manager Taylor Flemming and then Assistant Store Manager ("ASM") David Stolhanske, also held responsibility for the Flooring Department. (*Id.*).

V. Home Depot's Investigation and Termination of Co-worker Allison Gumm for Racially Insensitive Conduct

Morales' co-worker, Allison Gumm, also worked as a flooring specialist. (Tr. 387:7-8). While substantially irrelevant to the NLRA issues in dispute in this matter, at the hearing, Morales and two other General Counsel witnesses—flooring specialist Sadie Ward and flooring associate Nebiy Tesfaldet—testified extensively about multiple complaints they made about Gumm's behavior during the course of Gumm's employment. Morales specifically alleged six (6) instances of misconduct and overall concerns about Gumm's behavior. Those allegations were:

- On Morales' first day of employment, they shadowed Gumm, who told them to watch out for Somali customers because, she claimed, they are more likely to steal (Tr. 77:23-78:17);

- Gumm made a critical comment about Morales putting information into the Flooring Department computer in Spanish (Tr. 82:24-83:14);

- Gumm cleaned areas after Morales used them, but not after other associates used the same areas (Tr. 100:19-101:8, 377:25-381:7);

- Gumm once refused to assist Morales with a roll of rug (Tr. 109:16-20);

- While Morales and other associates stood at the Flooring Department desk, Gumm appeared to take a cell phone photograph of the group without their consent (Tr. 120:4-122:3); and

- Gumm once shut off Morales' computer (Tr. 127:2-3).

Ward and Tesfaldet described similar issues, specifically complaints that Gumm behaved condescendingly and rudely to customers of color. (Tr. 342:14-17, 351:5-352:3, 354:24-355:3, 386:22-387:2, 392:16-394:2).

For her part, at various times Gumm complained that Morales treated her differently than other associates (Tr. 105:25-113:14), would not greet her in the same way they greeted others (RX-19), refused to help her (RX-19, 20), left a mess in work areas then subsequently demanded she clean it up (RX-19), and would mutter "she doesn't know what she's talking about" while Gumm spoke to customers (RX-20).

Morales, Ward, and Tesfaldet reported their complaints on several occasions. Specifically, the General Counsel's witnesses described the following interactions:

- On about September 14, 2020, Ward and Morales met with flooring supervisor Theis regarding Gumm. (Tr. 93:1-96:23, 344:4-345:24). Ward then followed up a few weeks later to clarify with Theis and Key Carrier ASDS Jordan Meissner what she and Morales had reported. (Tr. 346:3-348:3).

- On about November 2, 2020, Morales again met with Theis regarding Gumm. (Tr. 98:13-104:16). At the conclusion of that meeting, Theis told Morales she and Department Manager Flemming would speak to Gumm. (Tr. 104:9-16).

- On about November 27, 2020, Theis and Flemming met with Morales in response to Gumm's complaint that Morales treated her differently than others. (Tr. 105:25-113:14). During the meeting, Morales reiterated their complaints against Gumm. (Tr. 105:25-113:14, 763:17-765:3). Flemming then told Morales he would bring Morales' concerns to Human Resources, and specifically to Meissner. (Tr. 112:25-113:10).

- On about December 18, 2020, Flemming informed Morales he had spoken to Gumm, and offered Morales the opportunity to move to a different department if they so desired. (Tr. 115:5-117:24).

- On about February 2, 2021, Morales, associate Jamesha Kimmons, and associate Blessing Roberts reported the photograph incident to ASM Enrique Ellis, and informed him of the history of issues with Gumm. (GC-33, 39) (Tr. 129:12-18, 466:14-19). Ellis then reported this information to Store Manager Bergeland. (Tr. 468:22-469:23).

- On about February 3, 2021, Morales reported their complaints about Gumm to ASM Suzette Johnson, who responded that she would forward those concerns to corporate Human Resources representatives. (Tr. 132:10-137:11, 843:3-8).[5]

Each time Home Depot representatives received complaints regarding Gumm they took them seriously, conducting a fair and objective investigation into each allegation and administering corrective action as appropriate, consistent with Home Depot's discipline policy. General Counsel witness Ward admitted as much when she testified that, although unaware of the specific details, she knew management spoke to Gumm on multiple occasions during this time, because Gumm's behavior became more reclusive at certain intervals. (Tr. 350:17-351:4). Home Depot's progressive approach to discipline includes informal coaching and more formal discipline when informal conversations are unproductive. In this case, Gumm's coaching and subsequent discipline included:

[5] General Counsel witness Tesfaldet also claimed, without details or elaboration, that at various unspecified times he complained about Gumm's interactions with customers to Theis, Flemming, Johnson, Stolhanske, and Ellis. (Tr. 389:13-391:24, 395:6-12-398:6).

- On October 22, 2020, following Morales' and Ward's initial reports to Theis added a Manager's Note in Home Depot's system, documenting a coaching conversation Flemming and Meissner held with Gumm. (GC-23, p. 27).[6]

- On December 19, 2020, following Morales' further complaints about Gumm and the meeting initiated by Gumm's complaints against Morales, Home Depot issued Gumm a Coaching disciplinary action. (GC-23, p. 28).

- On February 9, 2021, following Morales' February 2 and 3 complaints to ASMs Ellis and Johnson, Home Depot issued Gumm a Counseling disciplinary action. (GC-23, p. 29).[7]

After Morales reiterated their concerns about Gumm to District Manager Belford and District Human Resources Manager Whitley when they met on February 18, 2021, Belford instructed Whitley to conduct a full investigation of the Gumm situation. (Tr. 618:6-16). Whitley commenced that investigation the following day. (Tr. 721:11-16). Whitley's investigation included interviews and the procurement of statements from Morales (RX-14), Theis (GC-35), Flemming (GC-36), Ward (GC-40), associate Laurel Brooks (*Id.*), Kimmons (*Id.*), Roberts (*Id.*), Tesfaldet (*Id.*), and Gumm herself (GC-20, 40).

As a result of Whitley's investigation, Home Depot bypassed the Final Warning step of its progressive disciplinary process, which is allowed by policy, and moved Gumm directly from the Counseling step to termination. (Tr. 742:14-743:3, 749:19-24). Home Depot administered Gumm's discharge on February 26, 2021. (GC-23, p. 32). As District Manager Belford explained

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[6] GC-23 is Home Depot's April 8, 2021 position statement submitted to the Region at the investigation stage of this matter. The parties jointly confirmed at the hearing that the Exhibits attached to the position statement, and included in GC-23, may be independently cited as record evidence. (Tr. 527:8-528:16).

[7] In addition to these formal disciplinary actions, an internal email states that on or about February 1, 2021, department supervisor Adrianna Gonzales and ASM Eric Boxberger spoke with Gumm regarding her behavior. (GC-37) (Tr. 498:8-499:5). In response, Gumm claimed she felt bullied in the Flooring Department, and asserted other associates, including Morales, did not perform their share of work. (*Id.*).

at the hearing, Home Depot made the decision to discharge Gumm "because she did not uphold our values based around respect, specifically related to Mr. Morales." (Tr. 623:13-16).

VI. The New Brighton Store's Efforts to Honor February 2021 Black History Month

Around the beginning of February 2021, flooring associate Tesfaldet questioned various members of management regarding the store's plans to celebrate Black History Month, noting his belief that the store failed to celebrate Black History Month adequately in February 2020. (Tr. 402:18-407:19). When ASMs Ellis and Stolhanske informed him they intended to order food for associates from local Black-owned restaurants, Tesfaldet stated his view that such orders constituted insufficient recognition. (Tr. 409:6-16). In response, Ellis and Stolhanske encouraged Tesfaldet to make posters celebrating Black History Month, using store merchandise at no cost, while on the clock. (Tr. 409:8-411:19).

Tesfaldet accepted the offer to become engaged in improving the New Brighton store's recognition of Black History Month by making posters while at the Flooring Department Desk, and then posting them in the staff-only area adjacent to the break room. (Tr. 356:18-357:9, 412:3-413:3). The posters included depictions of modern African-American leaders, such as Colin Kaepernick and LeBron James (GC-24), as well as historical figures such as Claudette Colvin and Jesse Owens (GC-25). In addition, ASM Stolhanske placed flash cards depicting Black History Month information in the break room. (Tr. 142:13-144:17, 437:6-13).

Unfortunately, on or about February 9, 2021, an unidentified individual(s) removed the flash cards from the break room, and on February 12, 2021, someone defaced the poster depicting modern leaders by tearing down the image of Kaepernick. (Tr. 160:6-12, 470:15-472:3, 501:22-25). Associates Kimmons and Morales informed Stolhanske of the removal of the Kaepernick photograph, and Stolhanske then posted a replacement image of Kaepernick. (Tr. 147:1-149:20,

159:5-6, 414:10-13). Stolhanske also sent an email to all store personnel with access to email on February 13, 2021, stating:

> In our efforts to celebrate black history month, an unknown individual(s) have taken or thrown away the history information cards I placed in the break room and have torn a picture down from one of the posters that one of our associates worked hard to create and celebrate. From the information [I] have gathered, the cards look to have disappeared from Tuesday night[']s close, and the poster picture was torn off during closing shift Friday night.
>
> I will continue to replace these items through the end of BHM, and [I] would appreciate any help with keeping an eye on them.
>
> **<u>Intolerance and disrespect will not be tolerated[.]</u>**

(GC-7, pp. 4-5) (emphasis in original).

Front end supervisor Piero Protti responded to Stolhanske's email, echoing his sentiments, inviting employees to request a Home Depot-provided DE&I pin, stating, "[w]e will continue to not tolerate intolerance", and including a link to an article. (*Id.* at pp. 3-4) (the article linked by Protti is in the record at GC-107). Store Manager Bergeland replied to Protti's email confirming he had placed an order for DE&I pins. (GC-7, p. 3).

Despite these emails and warnings, on February 17, 2021 an unknown individual or individuals again removed the Kaepernick photograph. (Tr. 160:6-12, 474:3-5, 501:22-25). Consequently, ASM Ellis sent another storewide email, explaining management's efforts to identify the perpetrator(s), and asking associates to take note of the photographs when they traveled to and from the area. (GC-7, p. 2). In response, Morales sent an email from the Flooring Department's email account to Ellis (and only Ellis) (Tr. 243:1-4, 475:7-9), stating:

> Thank you for letting us know, we will keep an eye out.
>
> I would like to open the floor for a wider discussion if possible. I believe these actions are part of a very serious underlying issue that needs to be a store wide discussion. While email may be the easiest most responsive form of communication, I think it is crucial to have discussions as a whole with our fellow coworkers. Home Depot needs to acknowledge that these actions will not be

> condoned and that they are not a reflection of our policies. During this month of all months especially, our fellow coworkers of color need to feel the support from the store they work for. There are multiple incidents in the break room especially where certain people feel the need to express their intolerant beliefs which cause people like me to feel uncomfortable and disrespected. These actions and those words are blatant intolerance and example[s] of hatred that is unwelcomed. I do hope that a private investigation is underway, but 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.

(GC-7, pp. 1-2).

Ellis shared Morales' email with Store Manager Bergeland prompting Bergeland to seek a meeting with Morales to better understand their ideas for a "wider discussion" on topics of diversity and inclusion. (GC-7, p. 1) (Tr. 476:8-15, 510:11-511:4). At the hearing, Ellis recounted his pre-meeting conversation with Bergeland:

> [Bergeland] read over the e-mail as well. He wanted to talk to Antonio to get [their] ideas and input. He seemed very passionate about what was going on and we just wanted to get more ideas, get more eyes on it, more input on what else we could be doing to show more diversity and inclusion throughout the store, so that's why we talked to Antonio.

(Tr. 476:8-15).

VII. <u>Store Manager Bergeland's Encouragement of Morales During Their February 17, 2021 Meeting to Assist in Developing Solutions</u>

A. Bergeland Initiated the February 17, 2021 Meeting to Praise Morales for Their Email Earlier that Day.

As Morales confirmed in their testimony, Bergeland began the meeting with Morales and Ellis[8] by "talk[ing] about just how well written the email was and that if I had an interest, that I could help him kind of come up with ideas for Black History Month and other heritage months[.]"

[8] In their testimony, Morales initially did not recall that Bergeland was the other manager present in addition to Ellis, but then transitioned to describing Bergeland as the primary speaker. 166:1-17).

(Tr. 169:2-6). *See also* (Tr. 168:12-14, 244:6-19). Morales further confirmed Bergeland stated he "agrees with a lot of what [Morales] said." (Tr. 168:12-14). Regarding potential solutions, Bergeland asked Morales for thoughts on how to broaden the racial inclusion discussion and asked if Morales wished to participate in a DE&I committee the store could create. (Tr. 244:6-19, 517:17-518:9). As Bergeland summarized:

> **Bergeland**: Well, initially when we talked to [them] in my office about the e-mail and about the situation, it was actually to thank [them] for being involved. I thought the e-mail was really well written. We talked and discussed about trying to find, again, ways that [they] could participate in part of the solution as well as being part of a diversity inclusion committee member for the store.
>
> **Q**: What were some of the ways that [they] could participate and be [part of] the solution?
>
> **Bergeland**: Offer ideas, offer other solutions on how we can celebrate all of the other national holidays that we celebrate as a company.
>
> **Q**: Was this in any way intended to be a disciplinary meeting?
>
> **Bergeland**: Never.
>
> **Q**: Did you ever criticize Mr. Morales for sending the e-mail?
>
> **Bergeland**: Never.

(Tr. 510:11-511:4).

Morales claims Bergeland criticized them during the meeting noting the email chain they had received and responded to was "mostly just for management and certain heads of departments", and so Morales should not have sent their response to everyone. (Tr. 168:17-20). Morales further claimed Bergeland stated the issue "was something that the management was taking care of and that I should just let them handle it." (Tr. 171:18-20).

These assertions by Morales are illogical for several reasons. Most critically, the face of the email proves that Morales **did *not* send their reply email to the entire store**, but instead sent

it only to Ellis. (GC-7, p. 1) (Tr. 243:1-4, 475:7-9). The only other individuals who hypothetically could have viewed the email were Flooring Department personnel with the credentials necessary to access the Department's email account. (Tr. 375:11-21). Furthermore, even those individuals would have to access the account's "Sent" folder to view the email. (Tr. 172:1-4, 172:12-19, 243:15-20). There is no evidence any associates did so.

Furthermore, in addition to the above-quoted testimony, Bergeland confirmed Morales' email "[a]bsolutely [did] not" create a disciplinary issue (Tr. 500:19-21), and indeed Morales received no discipline for sending the email to Ellis. (Tr. 245:3-5). Additionally, Ellis confirmed Bergeland's recollection during cross-examination by Counsel for the General Counsel:

> **Q**: Mr. Bergeland told [Morales] during that meeting that [they] shouldn't have sent that e-mail, didn't he?
>
> **Ellis**: No, he did not.
>
> . . .
>
> **Q**: Mr. Bergeland didn't say anything to the effect of you shouldn't have sent that e-mail to so many people?
>
> **Ellis**: No, he did not.
>
> **Q**: He didn't raise any issues with the fact that the e-mail had been sent at all?
>
> **Ellis**: No.

(Tr. 477:6-20).

Moreover, Morales' recollection of this event is not credible based on the undisputed facts presented at the hearing. It would have made no sense for Bergeland to describe the email chain as "mostly just for management and certain heads of departments" (Tr. 168:17-20), when managers in each prior message explicitly directed their emails to all of the store's email addresses. (GC-7).

For all of these reasons, as well as the general credibility issues associated with Morales' testimony described below, the ALJ should not credit Morales' contention that Bergeland criticized them for sending their email to Ellis.

B. Bergeland Noticed the BLM Insignia on Morales' Apron for the First Time During the February 17, 2021 Meeting.

During the meeting, Bergeland noticed—for the first time—that Morales' had written the letters BLM on their apron near their name. After exploring the suggestion of a "wider discussion" raised by Morales' email, Bergeland turned to a discussion of the BLM message. (Tr. 511:15-18).

At the hearing, Counsel for the General Counsel made much of its assertion that Home Depot permitted Morales to display BLM on their apron for several months prior to this meeting. *See, e.g.*, (Tr. 32:13-33:23). The General Counsel did not, however, establish that any Home Depot representatives with responsibility for enforcing the dress code and apron policies prohibiting the display of "causes or political messages unrelated to workplace matters" (JX-1) ever noticed Morales' BLM display prior to this February 17, 2021, meeting.[9] To the contrary, the undisputed evidence demonstrates that when management became aware of BLM insignia on aprons worn by other associates, both before and after February 17, 2021 (discussed in further detail below), it consistently instructed those associates to remove the display. (Tr. 767:22-768:22) (Department Manager Flemming describing two separate occasions in the autumn of 2020 when he instructed

[9] In its rebuttal case, the General Counsel introduced a photograph of Morales' apron, including the BLM letters, time stamped with a date of September 29, 2020. (GC-50, p. 3). The mere fact that Morales had placed BLM on their apron as of that date, however, does not mean Home Depot permitted the display at that time. As noted above, the absence of evidence that any Home Depot representatives noticed or commented on the letters prior to Morales' February 17, 2021 meeting with Bergeland precludes any attempt by the General Counsel to demonstrate inconsistent enforcement.

associates to remove BLM from their aprons); (Tr. 844:5-845:13) (ASM Johnson describing two separate instances prior to February 3, 2021, in which she instructed associates to remove BLM from their aprons); (GC-27) (Tr. 420:12-426:11, 441:21-442:5, 513:22-515:13, 877:4-10) (multiple management conversations with associates Tesfaldet and Kimmons subsequent to February 17, 2021 instructing them to remove BLM from their aprons).

As Morales themself testified, approximately 236 to 300 associates work at the store, and they do not know what every other associate displays on their aprons. (Tr. 868:9-869:4). Home Depot does not conduct policy compliance inspections of associates' aprons. (Tr. 868:20-24). Furthermore, Bergeland previously had only a few brief contacts with Morales, and did not notice the BLM insignia during those interactions. (Tr. 496:5-17). Similarly, Department Manager Flemming testified he never noticed the BLM insignia on Morales' apron during his various meetings with Morales. (Tr. 765:4-7). Morales themself confirmed that no members of management ever acknowledged their BLM insignia prior to this conversation with Bergeland. (Tr. 70:18-22, 276:12-20).

C. Bergeland Explained the Dress Code Violation Created by Morales' BLM Insignia, But Morales Refused to Remove the Letters.

Morales testified that Bergeland raised the issue of the BLM insignia by stating that, if it were up to Bergeland, he would permit the display, but policy prohibited it. (Tr. 169:11-15). Bergeland confirmed at the hearing that he informed Morales the "causes or political messages" portion of the dress code policy prohibits the display of BLM. (Tr. 512:4-16). Bergeland further explained to Morales that permitting employees to display political messages such as BLM would also necessitate that Home Depot permit displays with which Morales would disagree. (Tr. 169:17-19). Morales specifically confirmed at the hearing that Bergeland told them, "BLM can mean different things to different people". (Tr. 246:22-23).

As Morales also admitted at the hearing, Bergeland told them one of the Company's values is "Respect for All People," and that they could outline that phrase on their apron's Value Wheel. (Tr. 247:11-19, 513:1-15). Bergeland further suggested Morales could express their beliefs by wearing the Home Depot DE&I pins and patches ordered for associates by the store. (Tr. 513:1-15). Morales rejected these alternatives. (Tr. 279:4-12). Ultimately, when Bergeland's attempts to work with Morales on potential accommodations failed to result in a solution, Morales flatly refused to remove the BLM insignia. (Tr. 171:2-9). Morales ended the meeting by stating, "I'm not taking this off my fucking apron" as they left Bergeland's office. (Tr. 479:8-9).

At no point during the meeting did Morales describe their purpose in wearing BLM as related to any workplace issues (Tr. 502:23-503:3), and at the hearing Morales advanced no claim that they drew any such connection between BLM and the workplace.

Following this February 17, 2021, meeting, Bergeland instructed ASM Ellis to check on Morales and see how they were doing, but Ellis discovered that Morales had left for the day. (Tr. 479:1-4). Via an Instagram message, Morales informed flooring supervisor Theis they needed to go home due to a family emergency, but in fact, no such family emergency existed. (GC-6) (Tr. 172:23-173:12).

VIII. Home Depot's Efforts Through District Manager Belford to Retain Morales and Help Them Comply With the Dress Code and Apron Policies

Following the February 17, 2021, meeting between Bergeland, Ellis, and Morales, Bergeland informed District Manager Belford (who was already scheduled to be present at the store later that day for an event) of the meeting's developments. (Tr. 664:7-14). When she arrived at the store, Belford attempted to find Morales to speak with them, but they had gone home, so she could not do so. (Tr. 664:11-15). Consequently, Belford asked Theis to convey Belford's contact information to Morales. (Tr. 664:15-22). Theis then sent an image of Belford's business card to

Morales so they could connect. (GC-6) (Tr. 178:18-179:6). The next morning, Morales sent Belford an email acknowledging her efforts to reach them. (GC-8, p. 3). Belford responded, and they subsequently set up a videoconference meeting for 1:30 p.m. that day, during Morales' working time, to include District Human Resource Manager Whitley. (*Id*. at pp. 2-3) (Tr. 665:3-666:23).

The February 18, 2021, videoconference meeting between Belford, Whitley, and Morales took place as scheduled, during which Morales secretly recorded the audio of the meeting on their iPhone. (GC-4, 5(a)) (Tr. 184:2-8, 279:22-280:4).[10] Due to Morales' secret recording, the entirety of the conversation, including both an audio file and a transcription, has been entered into the record. Noteworthy portions of the meeting include:

- Belford began the meeting by telling Morales she wanted to meet because Bergeland told her about their meeting the prior day, and Theis told her about the Allison Gumm complaints. (GC-4 5:10-6:8).
- Morales then described the Gumm issues to Belford. (GC-4 6:15-14:6, 23:12-25:2).
- Belford highlighted the Company's Respect for All People value, and explained that in light of that value, the Gumm conduct Morales alleged made Belford "sick to [her] stomach." (GC-4 16:15-17, 17:9-10).
- Belford explained, "I'm concerned that you feel number one, that you can come to Home Depot and feel great about who you are and what you bring to the table and being able to do your job well, right? Number two, I want to make sure that you feel like you are supported, and you are encouraged to be -- to be you and to be a great associate at the Home Depot." (GC-4 19:11-17).
- Belford confirmed the Company's no-retaliation policy applied to Morales' allegations regarding Gumm, and that they should report any evidence of retaliation by Gumm. (GC-4 25:7-13).

[10] This citation refers to the transcription of an audio recording Morales made of his meeting with Belford. To avoid confusion between citations to the hearing transcript and citations to the transcription of Morales' audio recording, this Brief will cite to page and line numbers of the audio recording's transcription as: (GC-4 __:__).

- Belford told Morales she keeps discipline of other employees confidential, but that steps had been taken regarding Gumm. (GC-4 16:20-25).[11]

- Belford asked Morales for a statement to assist in further investigation of the Gumm situation, which they provided after the meeting. (RX-14) (GC-4 21:15-22:11, 76:13-77:12).

- Belford complimented Morales' email to Ellis regarding Black History Month (GC-7, pp. 1-2) as being "very eloquent". (GC-4 26:22-24).

- Belford told Morales the actions of those taking down Black History Month materials "do[] not reflect what Home Depot has to offer. It does not reflect what the core values reflect." (GC-4 29:3-5). *See also* (GC-4 29:13-16).

- Morales told Belford management should have mentioned the Black History Month issue in a morning meeting, and that such a statement would have been "sufficient." (GC-4 31:15-22). Belford informed Morales that management had discussed the issue at morning meetings. (GC-4 33:2-34:10). Morales then admitted they do not attend morning meetings, and did not attend the meeting the prior day. (*Id*.).

- Morales acknowledged to Belford that one reason given by Bergeland for the need to remove their BLM insignia was a "safety concern." (GC-4 32:3-5).

- Similar to Bergeland's suggestion, Belford offered for Morales to be part of associate committees. (GC-4 35:11-36:13).

- When Belford asked why Morales drew BLM on their apron, they responded, "I put it on as a signal to show that I support black people; I support people of color. And I think that what happened over the course of the summer [of 2020], I think that needs to be addressed and how we need to continue to support black people." (GC-4 39:3-7). Morales later explained the meaning of BLM to them was, "respect for all people, especially black people." (GC-4 49:12-13).

- Belford, at length, empathized with Morales based on personal experiences. (GC-4 41:6-44:21).

- Belford explained that BLM displays violate the dress code and apron policies. (GC-4 45:2-48:19). She further explained the reason aprons need to display consistent messages in accordance with the policy:

[11] At the hearing, Belford noted that employees often do not know when disciplinary action has been taken against a co-worker since such discipline is kept confidential. Thus, it is not surprising that Morales might be unaware of Home Depot's prior steps to address the Gumm issues. (Tr. 619:5-11, 620:4-12, 620:24-621:3).

> [W]hile we certainly don't look the same, we put on the same uniform because it's a united front, okay. It's also why if you look right down over your heart, there's your eight values right there, right? If you look down, that's why it's over your heart because that's who we are and how we should lead . . . But the reason why we all wear the same uniform is to show respect to people."

(GC-4 45:15-46:1).

- As an example of the policies' application, Belford noted she wears a cross, but keeps it inside her shirt. (GC-4 46:1-47:22). Belford explained she hides her cross because it "could potentially either offend someone, frustrate someone, or definitely isolate someone[.]" (GC-4 47:18-19).

- Belford told Morales that permitting BLM displays could result in others displaying messages contrary to BLM on their aprons, and that she "just want[ed] to vomit to think about [it]." (GC-4 48:17-19). Belford further described such contrary messages as, "extremely disgusting and derogatory and horrid[.]" (GC-4 51:15-16).

- Like Bergeland, Belford encouraged Morales to highlight "Respect for All People" on their apron's Values Wheel. (GC-4 51:24-52:6). She further told Morales the Company had ordered DE&I pins, which they could place on their apron. (GC-4 52:9-16). Morales refused to accept such options or any other potential alternatives. (GC-4 52:18-21, 53:5-21). *See also* (GC-4 68:17-69:2, 73:21-24).

- After Belford explained the need for Morales to comply with the dress code and apron policies, Morales stated they were "willing to be fired over this." (GC-4 53:22-54:3). Belford responded, "I'm not going to fire you over that. That's not how that's going to work. You haven't done anything wrong, okay." (GC-4 54:4-6).

- Belford informed Morales they could clock out and come back to work after they found "a different way to express your belief and your support of Black History Month or black people in general and racial equality[.]" (GC-4 55:3-8).

- Emblematic of multiple efforts by Belford to encourage Morales to remain at Home Depot and help work on solving problems, she implored them:

> I don't want you to [leave], Antonio, just hearing your story and hearing who you are and hearing what you're passionate about, I think you have a lot that you could help Home Depot learn from. I think that you have a lot that you could help your leaders at 2807 learn from. I think you could be a part of some cool change. If you're passionate about these things, this is an amazing opportunity for you to help influence others and find a way to teach and, you know, help us celebrate the amazing things that make us who we are[.]

(GC-4 55:10-20). *See also* (GC-4 57:11-58:20, 61:16-21, 62:11-16, 65:14-68:15, 72:7-13, 76:2-12).

- Belford stated, and Morales did not disagree, that the Gumm matter was "a completely separate issue from you having the Black Lives Matter on your apron[.]" (GC-4 56:12-20).
- Belford described to Morales the chaotic and frightening scenes she witnessed at the store during the riots following George Floyd's murder. (GC-4 59:22-60:11).
- At the meeting's conclusion, Belford again encouraged Morales to think about other potential displays for their apron. (GC-4 73:14-20). Morales expressed some receptiveness to Belford obtaining ideas for such displays from other corporate leaders. (GC-4 74:22-75:9). Belford then offered Morales time to go home and consider the issue, with pay for their full shift that day. (GC-4 72:25-73:9).

Following the end of the meeting, Morales did, in fact, go home, and Belford ensured they received pay for their entire scheduled shift that day. (Tr. 199:6-20, 667:15-668:7).

That evening, Morales emailed Belford to inform her they planned to take the following day off as well, in order to "think about my future with [H]ome [D]epot." (GC-8, p. 1). Morales vaguely explained, "based on what I have seen and what I have heard I do not feel comfortable, supported, heard or understood by my management team or by the company." (*Id.*). The next morning, Belford responded expressing her disappointment that Morales felt that way and following up on three items: (1) plans for a "deep investigation" into Gumm's conduct; (2) celebrations of Black History Month at the New Brighton store; and (3) ideas from another District Manager about potential apron displays. (*Id.*). Morales did not respond and had no further contact with any Home Depot representatives prior to their resignation.

IX. <u>Morales' Voluntary Resignation</u>

Later on February 19, 2021, Morales voluntarily resigned their Home Depot employment. They conveyed this decision in a resignation letter. (GC-9). Importantly, their resignation letter did not mention BLM, "Black Lives Matter", or the apron and dress code policies, but instead referred generally to not feeling "safe". (*Id.*). At the hearing, Morales also explained their decision

as, “I determined that I didn't feel safe at Home Depot any longer[.]” (Tr. 200:22-23). As explained in further detail below, however, Morales could not explain why they felt unsafe, nor what made them feel that way. (Tr. 221:25-223:9, 224:7-225:13).

Contrary to the General Counsel’s efforts to paint Morales’ resignation as compelled by Home Depot, in fact multiple Home Depot representatives implored them to stay and work as part of the solution to problems. Emblematic of the General Counsel’s unsuccessful attempts to mischaracterize the circumstances, the following exchange occurred at the hearing during Counsel for the General Counsel’s examination of ASM Ellis, regarding the February 17, 2021 meeting between Store Manager Bergeland, Ellis, and Morales:

> **Q:** [Bergeland] instructed Mr. Morales to remove BLM from [their] apron at that meeting; is that right?
>
> **Ellis:** He explained to Antonio the dress code policy, how BLM is seen as a social cause and in violation of the dress code policy and yes, [they need] to remove it from [their] apron.
>
> **Q:** If [they want] to continue working at Home Depot, right? It was either stop wearing the apron or stop working at Home Depot; isn't that right?
>
> **Ellis:** No.
>
> **Q:** That wasn't the way it was presented?
>
> **Ellis:** No, it wasn't.

(Tr. 478:6-17).

Contrary to such an ultimatum, in reality Bergeland suggested other means through which Morales could express the same sentiments, while complying with the dress code and apron policies. Bergeland’s suggestions included outlining “Respect for All People” on their apron’s Values Wheel and wearing company-provided DE&I pins and patches. (Tr. 247:11-19, 513:1-15).

Similarly, as noted above, in District Manager Belford’s meeting with Morales she repeatedly and emphatically implored Morales not to quit, and to instead participate in finding

solutions. (GC-4 61:16-21, 62:11-16, 65:14-68:15, 72:7-13, 76:2-12). She further emphasized Home Depot's willingness to work with Morales on other dress code compliant expressions. (*Id.* at 68:17-69:2, 73:21-24). For example, Belford asked Morales:

> Do you have any other -- I just, I don't want to see you walk away. I think you have too much to offer us to walk away. Do you have any other ideas of things that could either go on aprons or that we could do to show support for our associates of color or our, you know, contractors of color or the community, without it being something that would go against dress code?

(*Id.* at 57:21-58:2). Belford also encouraged Morales to, "[m]ake it something so that people know Antonio cares[.]" (*Id.* at 69:1-2).

In response to references by Morales to the possibility of termination, Belford made abundantly clear that Home Depot was not, in any way, imposing disciplinary consequences on them:

> **Morales**: Yep, I know that, and I am willing to be fired over this.
>
> **Belford**: I'm not going to fire you over that. That's not how that's going to work. You haven't done anything wrong, okay.

(*Id.* at 54:2-6).

> **Belford:** If you leave us, we will lose the good that you could do for us. 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.

(*Id.* at 57:11-16).

Unfortunately, these repeated efforts by Bergeland and Belford to retain Morales came to no avail when they independently and voluntarily resigned, without accepting Belford's invitation to further explore potential solutions. (GC-9).[12]

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[12] On March 1, 2021, Belford sent Morales an email following up on the results of the Gumm investigation. (RX-18) (Tr. 676:7-12). Morales did not respond to this email. (*Id.*).

X. <u>The ALJ Must Resolve Relevant Credibility Disputes Against the Charging Party.</u>

The vast majority of the dispositive factual issues in this case stand undisputed, but if and when the ALJ must make credibility resolutions involving the testimony of Charging Party Morales, the record demonstrates he should resolve such disputes against Morales. Morales testified evasively on several subjects, and the evidence includes multiple instances of dishonest behavior by Morales.

Morales was evasive throughout their testimony, even on basic topics. (Tr. 221:17-21, 229:13-230:5, 231:8-232:9, 238:10-23, 248:24-250:5, 272:5-273:13). Central issues in the case also received such treatment. For example, Home Depot's counsel asked Morales, "What does the movement Black Lives Matter stand for?" Their response: "Black lives matter." (Tr. 210:20-22). Similarly, at one juncture Morales even denied, contrary to all common sense and societal understandings, that the Black Lives Matter organization uses the acronym "BLM." (Tr. 214:15-21). *Compare with* (RX-24(d)) (excerpts from the Black Lives Matter organization's website repeatedly using the acronym BLM, including solicitations to "FOLLOW BLM" and "SHOP BLM").

Two exchanges demonstrating the unpersuasive nature of Morales' testimony occurred in response to inquiries about their claim—both in this resignation letter (GC-9) and prior testimony (Tr. 200:22-23), that they resigned because they did not feel safe at Home Depot:

Q: I mean, you use the term unsafe several times. What do you mean by unsafe?

Morales: Exactly what it means.

Q: I mean, did you think someone was going to physically hit you? I don't know what your definition is of what unsafe is.

Morales: What is your definition of unsafe?

Q: I'm sorry?

Morales: What is your definition of unsafe?

Q: I am not going to give you mine. I am asking for yours.

Morales: We might have mutual definitions.

Q: Well, then tell me yours and maybe we do.

Morales: When I don't feel safe.

Q: Okay. And is that not feeling safe in a physical manner that you think someone is going to physically hurt you or not feeling safe that you think people are in the room who disagree with you or some other option?

Morales: It depends on the situation.

Q: So at times is it feeling unsafe because you are in an area where you disagree with other people in that area?

Morales: Not necessarily.

Q: Well, you said it depends on the situation so I understood that to mean that at times the description I just gave could be applicable. So let's see if we can start over try to determine what you mean by unsafe because you use that several times during your testimony. What do you mean by unsafe?

Morales: It depends on the person. If I don't know the person, it could mean physical harm.

(Tr. 221:25-223:9).

Q: What did you mean in your resignation letter when you said I have not felt safe?

Morales: I meant that from what I recalled of my experience, I did not feel like I was in a position where I could feel I could work safely.

Q: Okay. Well, and again, I am just trying to understand does that mean physical harm or does that mean being in an environment that makes you feel uncomfortable or something else?

Morales: It can mean physical harm. It can mean anything else.

Q: Well, what did it mean to you when you wrote it?

Morales: When I wrote it, I was feeling physically unsafe.

Q: And who did you think was going to physically harm you?

Morales: I didn't know at the time.

Q: Do you know now?

Morales: I still don't know now, no.

Q: Has anyone tried to harm you from Home Depot?

Morales: From Home Depot specifically, no.

Q: How about Allison Gumm? Has she tried to harm you?

Morales: I would say yes.

Q: So let's go back to the document -- oh. How has she tried to harm you? How did Ms. Gumm try to harm you?

Morales: There was a few times where she intentionally bumped into me.

(Tr. 224:7-225:13). Of note, Morales did not include complaints of Gumm "bump[ing] into" them amongst any of the many complaints they raised regarding her conduct to supervisors, to District Manager Belford, in their statement (RX-14), or in their prior testimony.

Also in relation to their resignation letter (GC-14), Morales incredibly claimed they did not include the BLM issue amongst the reasons for their resignation because they feared others would lose their jobs as a result. (Tr. 201:16-202:1, 258:16-19, 270:23-271:3). After failing to explain *how* their inclusion of the issue in their resignation letter could conceivably have resulted in other associates losing their jobs, Morales transitioned to answering simply that they did not "owe Home Depot a full explanation as to why I am resigning." (Tr. 262:12-17). *See also* (Tr. 271:10-19).

Further compounding the credibility deficiencies in Morales' testimony, their claims on other specific matters call their reliability into question. For example, when questioned regarding

a February 23, 2021, (post-discharge) statement they wrote (provided with *Jenck's* material but not entered into the record) Morales initially could not recall writing the statement, nor whether anyone suggested they write it, and then wavered on whether they spoke truthfully at the time. (Tr. 216:15-21). Similarly, Morales claimed they could not recall whether they used the word "fucking" when refusing to remove BLM from their apron to ASM Ellis and Store Manager Bergeland (Tr. 251:15-20), as Ellis subsequently confirmed. (Tr. 479:8-9). Such claims of gaps in recollection call into question the accuracy of Morales' testimony regarding events occurring contemporaneously with, and prior to, these February 2021 instances. In this regard, Home Depot notes that unlike other witnesses, Morales did not testify entirely based on independent recollections. Instead, the General Counsel and Morales relied upon hearsay Facebook Messenger text messages between Morales and their then-significant other. (GC-3(a)-(h)) (Tr. 75:16-139:20).

Moreover, undisputed evidence demonstrates Morales behaved dishonestly *during* the events in question. For example, after their February 17, 2021 meeting with Bergeland and Ellis, Morales misled Theis about going home due to a family emergency, when in fact no such emergency existed. (GC-6) (Tr. 172:23-173:12).

As a result of the above examples, the ALJ should not credit Morales' testimony where any material credibility disputes arise but must instead resolve such disputes against them due to their evasive testimony and demonstrated history of dishonesty.[13]

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[13] To the extent any material factual findings depend upon credibility resolutions involving General Counsel witness Tesfaldet, the ALJ should also discredit that witness. Tesfaldet offered testimony (irrelevant to the issues of this case) that he reported co-workers using racial slurs against him to ASM Suzette Johnson. (Tr. 398:13-402:17, Tr. 403:8-18, 434:21-435:10). Johnson credibly denied Tesfaldet made any such reports. (Tr. 845:14-846:1).

Tesfaldet also claimed, contrary to the overwhelming weight of evidence regarding the universal requirement for associates and supervisors to wear aprons, that Kimmons worked without an

ARGUMENT

The General Counsel's theory of this case is that Home Depot should be held liable for violating the NLRA by telling Morales to comply with its apron dress code policy and remove the BLM messaging from his orange apron. That theory fails for four reasons. *First*, the General Counsel's effort to force Home Depot to display Morales' chosen BLM message violates the First Amendment. As a wealth of Supreme Court and Eighth Circuit authority make clear, the government is not allowed to compel Home Depot's speech or force Home Depot to serve as the conduit for Morales' speech in this fashion. *Second*, forcing Home Depot to display the message at issue would dilute Home Depot's trademark, in violation of federal trademark law. *Third*, Home Depot's enforcement of its apron policy against Morales does not violate Section 7, because (1) Morales was not engaged in protected, concerted activity, and (2) special circumstances weigh strongly against applying Section 7 to Home Depot's conduct in any event. And *fourth*, the General Counsel's constructive discharge claim fails because Home Depot never disciplined Morales for his conduct and Morales chose to quit his job at Home Depot for other reasons.

Beyond the General Counsel's Section 7 theory, the General Counsel is also wrong to allege that Home Depot violated the NLRA by asking Morales to keep confidential the details of its investigatory interview relating to misconduct by a different employee. NLRB precedent directly supports such a request for confidentiality. And the General Counsel's request for a nationwide remedy in this case is similarly baseless.

For any or all of these reasons, this case should be dismissed in its entirety.

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apron. *Compare* (Tr. 438:18-25) *with* (Tr. 59:20-60:2, 293:11-294:8, 461:6-12, 653:22-654:3, 709:3-12).

I. <u>The General Counsel's Theory of This Case Violates the First Amendment.</u>

Punishing Home Depot for enforcing its dress code and apron policies against Morales would contravene the Company's First Amendment rights. Under the First Amendment, Home Depot has the right to choose what messages (if any) to communicate on the Home Depot-owned aprons worn by Home Depot employees when interacting with customers on behalf of Home Depot. Here, Home Depot has made a deliberate choice not to use its aprons to communicate *any* political or social messages unrelated to workplace activities, including the BLM speech at issue here. The General Counsel's effort to compel Home Depot to allow that speech is unconstitutional and must be rejected.

A. The First Amendment Protects Employers from Being Forced to Communicate Political Speech Against Their Will.

The First Amendment flatly prohibits any law "abridging the freedom of speech." U.S. Const. amend. I. Inherent in that freedom is "the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988). The First Amendment thus does not merely limit the government's power to restrain speech, but also "prohibits the government from telling people what they must say." *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.* ("*FAIR*"), 547 U.S. 47, 61 (2006).

In application, that principle means two things. *First*, and most directly, the government cannot compel a speaker to alter the content of its own speech in favor of conveying the government's desired speech. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Indeed, "the fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995). As the Court held in *West Virginia State Board of Education v. Barnette*, at the core of the First Amendment is the guarantee that government may not "force

citizens to confess by word or act" a message consistent with the government's viewpoint. 319 U.S. at 642. And although the Court has often rejected speech compulsions when the speaker found the government's required message "morally objectionable," *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), whether a speech compulsion is constitutional does not turn on whether the speaker is offended by or disagrees with the message the government seeks to compel. Instead, it is enough that the government seeks to mandate speech at a time when the speaker would simply prefer to remain silent, or speech that the speaker would prefer to convey in a different place or manner. *See Riley*, 487 U.S. at 796-99.

Second, as a corollary, the government cannot force a speaker to serve as an unwilling conduit of a third party's message, especially in circumstances where the message would likely be perceived as coming from the speaker (and not just the third party). Thus, for example, in *Wooley v. Maynard*, the Supreme Court held that New Hampshire could not force each of its motorists to be a "mobile billboard" for the state's message by mandating that drivers display a license plate bearing the state motto—"Live Free or Die"—if that was a sentiment the driver did not wish to communicate. *See* 430 U.S. at 717. Likewise, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court held that state law could not compel parade organizers to include a group in the parade bearing a message that the organizers did not wish to endorse. 515 U.S. at 566, 575-76. The *Hurley* Court acknowledged that, because "the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole," there was a serious "likelihood of misattribution" of third-party speech to the parade organizers while at the same time leaving the organizers without an effective way to "disavow 'any identity of viewpoint' between" the organizers and the group whose

unwanted message they would be compelled to include. *Id.* at 576-77 (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980)).

These core free-speech principles apply with the same force to corporate speakers as they do to individuals and expressive groups: "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion); *accord Riley*, 487 U.S. at 801; *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751-52 (8th Cir. 2019). *See also Citizens United v. FEC*, 558 U.S. 310, 342 (2010) (collecting cases).

The Supreme Court has recognized corporate speakers' right to be free from compelled speech on many occasions. For example, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, California's public utility regulator ordered PG&E to distribute a newsletter published by a consumer interest group using the "extra space" in PG&E's monthly mailings. 475 U.S. at 5-7 (plurality opinion). PG&E challenged the Commission's order, arguing that it had "a First Amendment right not to help spread a message with which it disagrees" under precedents like *Maynard*. *Id.* at 7. The Court agreed. It held that the Commission's requirement offended the First Amendment for two reasons relevant here. First, it required the company to use its facilities as a forum for third-party speech and to disseminate in that forum a message that it did not wish to speak on behalf of a third party. *Id.* at 14-15. And second, it necessarily required the company to alter the content of its own speech, either (1) by speaking less, to make room to accommodate the third party's message, or (2) by speaking out, both to combat the third party's speech and to distinguish the third party's speech from its own, when it would prefer to be silent. *Id.* at 15-17.

Similarly, in *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a state statute that required newspapers to publish the replies of any political candidates that the newspaper may have criticized. 418 U.S. 241, 258 (1974). That requirement, too, offended the First Amendment because it compelled the newspaper to accommodate the speech of a third party and serve as a forum for speech with which it disagreed, or simply did not wish to convey. *Id.* at 254-58.

The First Amendment's prohibitions on government-compelled speech fully apply in the labor context. The Supreme Court's recent decision in *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018), applied this exact line of compelled speech cases to invalidate a state law requiring non-member public employees to pay agency fees to public-sector unions. *Id.* at 2463-65 (citing *Maynard*, *Riley*, *Tornillo*, *Pacific Gas*, and *Barnette*). Other courts have likewise applied the Court's compelled-speech cases to invalidate Board decisions compelling employer speech under the guise of the NLRA. *Nat'l Ass'n of Mfrs. v. NLRB* ("*NAM*"), 717 F.3d 947, 956-60 & n.13 (D.C. Cir. 2013), *overruled on other grounds by Am. Meat Inst. v. U.S. Dep't of Ag.*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc) (invalidating Board rule); *Sysco Grand Rapids, LLC v. NLRB*, 825 F. App'x. 348, 359-60 (6th Cir. 2020) (overturning Board's compelled-speech remedy under NLRA). Indeed, the Board itself has regularly applied the First Amendment's compelled-speech doctrine in its own decisions. *See, e.g.*, *Purple Communications*, 361 NLRB 1050 at 1065 (2014), *overruled on other grounds by Caesars Entertainment*, 368 NLRB No. 143; *Amalgamated Transit Union, Local Union No. 1433*, Case No. 28-CB-78377, 2012 WL 5954680 (2012), *aff'd*, 360 NLRB 261, 265 (2014).

The First Amendment therefore prohibits the government from both (1) "telling people what they must say," and (2) "forc[ing] one speaker to host or accommodate another speaker's

message." *FAIR*, 547 U.S. at 61, 63. And these protections belong to individuals and corporations alike, including in the labor context.[14]

B. The General Counsel's Theory of This Case Is Squarely at Odds With the First Amendment.

The General Counsel's theory of this case is that the NLRA requires Home Depot to authorize its associates to display the markings "Black Lives Matter" or BLM on its orange aprons, despite Home Depot's considered choice not to communicate "causes or political messages unrelated to workplace matters." *See* Complaint at Para. 4. That theory violates Home Depot's First Amendment rights for two core reasons. First, the aprons are Home Depot's speech and convey Home Depot's desired message, and so requiring Home Depot to include a specific message on those aprons unconstitutionally compels Home Depot to speak against its will. *See Barnette*, 319 U.S. at 642. Second, even assuming that the BLM messages at issue are its employees' speech (and not Home Depot's speech), requiring Home Depot to serve as an unwilling conduit of its employees' messages on the aprons itself is unconstitutional. *See Maynard*, 430 U.S. at 717; *Hurley*, 515 U.S. at 576-77. Under either approach, the General Counsel must lose this case.

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[14] The General Counsel has previously dismissed the Supreme Court's compelled-speech cases as irrelevant to the labor context, waving aside decades of authority as "First Amendment caselaw from various other, non-labor contexts" and deeming it irrelevant because it "does not address the 'context of the labor relations setting.'" Gen. Counsel's Opp. Pet. Revoke Subpoena at 4, ("Petition Opp.") (citation omitted). *See also* Gen. Counsel's Opp. to Mot. Summ. J. (GC-1(q) at 8, ("Summary Judgment Opp.") (asserting that "[m]any of the cases Respondent cites are thus inapplicable"). That contention is not only inconsistent with all of the case law cited here, it also contradicts the Board's own litigating positions in other cases. *See, e.g.*, NLRB Br. 43-48, *Commc'ns Workers of Am. v. NLRB*, Nos. 17-70948, 17-71062 & 17-71276 (9th Cir. Dec. 19, 2017) (accepting that First Amendment compelled-speech cases apply, but distinguishing them); NLRB Br. *66, *Nat'l Ass'n of Mfrs. v. NLRB*, Nos. 12-5068 & 12-5138, 2012 WL 3152145 (D.C. Cir. Aug. 3, 2012) (acknowledging that First Amendment prohibits compelled "ideological" speech). These sources leave no doubt the First Amendment's compelled-speech doctrine fully applies in the context of labor relations.

1. The General Counsel Seeks to Compel Home Depot's Speech.

The General Counsel's action violates the First Amendment because it directly seeks to compel Home Depot to convey the government's desired message. Front and center on each apron, Home Depot broadcasts its logo, "The Home Depot." (GC-14). As Home Depot executives explained at the hearing, Home Depot uses its aprons to convey the Company's core message to the public—much like businesses regularly use billboards, advertising, and other signage. *See, e.g.*, (Tr. 785:23-24) (Bottoms: "the apron plays a very integral part in who we are at Home Depot."); (Tr. 786:20-24) (Bottoms: "Several of us will call [the Values Wheel] our North Star so to speak because it directionally tell you here's the things . . . that are important to us."); (Tr. 788:17-18 (Bottoms: "We view the apron as an extension of who we are."). Home Depot wants the aprons to project the Company's core values, while avoiding messages that may be polarizing to customers or associates in Home Depot's stores. (GC-4, 47:18-19, 48:8-10) (District Manager Melissa Belford explaining that the apron policy seeks to avoid "creat[ing] a barrier" or "potentially either offend[ing] someone, frustrat[ing] someone, or definitely isolat[ing] someone"). Bottoms put it well:

> [P]art of what we're trying to do with the aprons is represent the company, and our reputation is you're here to buy a project, you're here to mow your lawn, add a room, put a floor in your house. You're not here to understand or care about what somebody else's concerns, their concern[] is. That's not a message that as a company we would present on our apron.

(Tr. 791:11-17).

The General Counsel's theory of this case would interfere with Home Depot's carefully curated message by telling Home Depot "what [it] must say" on its aprons. *FAIR*, 547 U.S. at 61. That violates the First Amendment. As the Court explained in *Maynard*, the government may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed

and read by the public." 430 U.S. at 713. So too here. Just like the plaintiffs in *Maynard*—who were forced to "use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty"—the General Counsel seeks to force Home Depot to use its most recognizable symbol, worn by its most public-facing employees, to display a BLM message under threat of legal sanction. 430 U.S. at 715.

Maynard's billboard analogy is particularly apt. As testimony from Bottoms made clear, the apron is "a billboard to advertise for Home Depot." (Tr. 819:13-14). Home Depot aprons are not merely colorful uniforms designed to identify Home Depot associates to customers. Instead, the aprons actively convey a host of messages on Home Depot's behalf. Most significantly, on every apron, Home Depot emblazons its eight core values on the Values Wheel. (GC-14) (Home Depot's apron); (GC-15) (Home Depot's Values Wheel); (Tr. 294:12-22). Home Depot intentionally places the Values Wheels over employees' hearts because—as Home Depot District Manager Melissa Belford explained to Morales—"that's who [Home Depot] is and how [Home Depot] should lead." GC-4 45:18-20). As Home Depot Northern Division President Crystal Hanlon testified at trial, "[Home Depot] showcases [its] values as many times as [it] can because it keeps us all aligned." (Tr. 295:17-19).

Beyond the Values Wheel, Home Depot has decided to use its aprons to convey other messages that highlight employees' individuality and promote Home Depot's products, all while presenting Home Depot personnel as a unified team. Those messages range from professional expertise that associates can offer to customers (like knowledge of a particular department or product line), to Company-sponsored promotional materials that advertise goods or services (like the Company's extended warranty program), to an employee's personal interests that build connections with customers (like pictures of family members or pets). (Tr. 56:2-22) (Morales

describing various messages conveyed on aprons) (Tr. 461:13-463:25) (ASM Enrique Ellis describing same). More generally, as described by Belford, the apron also serves as an internal reminder that while Home Depot employees come "from all walks of life," they also "come together every day" as "a group working toward the same goals." (Tr. 654:4-656:20).

The fact that Home Depot authorizes employees to personalize some of the messages on their aprons—within the carefully crafted restrictions of the apron policy—does not change the fact that the speech on the aprons is Home Depot's. Anyone who walks into a Home Depot store and encounters an associate wearing a Home Depot apron recognizes that the uniform has been purposefully designed by Home Depot to convey specific values and thereby cultivate a particular environment in Home Depot stores. That is especially true because the apron itself prominently features not only "The Home Depot" logo, but also the Company's message to its customers in the form of the core values reflected on the Values Wheel. Because the apron reflects Home Depot's chosen message, a customer who sees an associate wearing a BLM message on his apron—or any other kind of political or social slogan, for that matter—will naturally conclude that the message is being conveyed on Home Depot's behalf.

Key testimony at the hearing leaves no doubt that the aprons are Home Depot's way of broadcasting to the world *Home Depot's* views and values. As Bottoms explained, "people identify us and our associates by the apron and we use it to make that connection between our company, our associates and communities in which we serve." (Tr. 786:1-4); *see also* (Tr. 294:11) (Crystal Hanlon: "[the apron is] our brand.").

The General Counsel's own witnesses confirmed that people view messages on the aprons as reflecting *Home Depot's* speech. Most notably, during Morales' cross-examination, counsel for Home Depot presented Morales with the following hypothetical question:

> If you walked into a Home Depot and you saw an associate wearing a—be[ing] allowed to wear a swastika on their apron, would that suggest to you that Home Depot endorses it?

(Tr. 230:6-14). Without hesitation or qualification, Morales immediately responded, "Yes." (*Id.*). Presented with the same hypothetical display of a swastika on a Home Depot apron, another General Counsel witness—Nebiy Tesfaldet, a former associate and colleague of Morales at the New Brighton store—likewise agreed that if a store associate displayed a swastika on his apron, that would mean that "Home Depot was condoning that swastika." (Tr. 442:11-15).

Supreme Court precedent confirms that the speech the General Counsel seeks to compel here is *Home Depot's* speech. As the Court explained in *Janus*, its most recent decision applying compelled-speech principles in the labor context: "When 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*." 138 S. Ct. at 2474 (emphasis added). In that circumstance, "[t]he employee is effectively *the employer's spokesperson*." *Id.* (emphasis added).

In short, any message that Home Depot is compelled to display on the aprons worn by its public-facing employees during business hours is plainly Home Depot's speech, regardless of whether it also counts as speech by its employees. And even when employees are allowed to personalize their aprons, curating those messages as a way of communicating Home Depot's values and presenting an image that connects with customers and employees is undoubtedly Home Depot's speech, too. It follows that forcing Home Depot to *alter* its speech—by requiring the company to communicate messages on its aprons that it does not wish to communicate—is a straightforward violation of the First Amendment.

2. <u>Alternatively, the General Counsel Impermissibly Seeks to Force Home Depot to Serve as the Conduit for the Speech of Its Employees.</u>

Even if employee-chosen ideological messages appearing on Home Depot aprons are only the employee's speech—and not Home Depot's speech—the General Counsel's theory remains unconstitutional. The First Amendment does not allow the government to force Home Depot to serve as the conduit for employee speech by allowing its employees to disseminate their personal views about the Black Lives Matter movement on Home Depot-owned aprons, to Home Depot customers, in Home Depot Stores.

As explained above, the First Amendment does not merely prohibit the government from forcing an individual to "personally speak the government's message"; it also "limit[s] the government's ability to force one speaker to host or accommodate another speaker's message." *FAIR*, 547 U.S. at 63. *See also Telescope Media Grp.*, 936 F.3d at 751-52 ("The Supreme Court has recognized that the government still compels speech when it passes a law that has the effect of foisting a third party's message on a speaker.").

Here, the General Counsel flouts this principle by seeking an order that would require Home Depot to serve as conduit for the political and social speech of its employees. As noted above, the Supreme Court rejected this form of compelled third-party speech in *Pacific Gas*, holding that a state violated the First Amendment by requiring a private utility to include a third party's newsletter criticizing the company in the company's billing envelope because that would impermissibly force the company to host speech it disfavored. *See* 475 U.S. at 14-15 (plurality opinion). Much like that unconstitutional newsletter policy, the General Counsel's theory here fails because it "identifies a favored speaker 'based on the identity of the interests that [the favored speaker] may represent' and forces [another] to assist in disseminating the speaker's message." *Id.* (citation omitted). Here, consistent with its First Amendment rights, Home Depot has chosen

to refrain entirely from the display of political or social issue speech unrelated to the workplace on its aprons.

The General Counsel's theory is similarly at odds with *Hurley*. There, the Court recognized that forcing parade organizers to include in the parade a group conveying an inconsistent message "would likely be perceived" as resulting from the organizers' endorsement of that message. The same is true here: Forcing Home Depot to authorize associates to display BLM messages on Home Depot's aprons would inevitably lead its customers to assume that they are speaking with Home Depot's approval, and on Home Depot's behalf. 515 U.S. at 775-76. Indeed, as noted above, the General Counsel's own witnesses *confirm* that ordinary customers viewing an ideological message worn by a Home Depot associate on his Home Depot apron would conclude that Home Depot "endorses" and "condon[es]" that message. (Tr. 230:6-14, 442:11-15). Just as in *Hurley*, the "likelihood of misattribution" is high. 515 U.S. at 576-77.

The General Counsel's theory thus violates the Constitution *regardless* of whether a BLM message appearing on a Home Depot apron is viewed as speech by Home Depot or by the employee.

3. <u>The General Counsel's Expansive Theory of Compelled Speech Would Inflict Severe Practical Harm on Home Depot and Other Employers.</u>

Enforcing the First Amendment in the context at issue here is especially important given the numerous practical problems that the General Counsel's theory would create for employers. The General Counsel's theory would apparently require Home Depot—and presumably all other employers—to allow employees to display virtually all political or social messages on company-owned uniforms. If accepted, that theory would inevitably lead to polarization by politicizing workplaces, thus harming the in-store experience for customers and employees alike.

In this case, Home Depot would be required to communicate support for BLM. As noted above, Home Depot fully supports principles of racial justice and DE&I. But, as explained in more detail elsewhere, the most common understanding of the movement corresponds to the purely political issues of police brutality and police reform and, more generally, signals a social statement of solidarity. *See infra* Factual Background Section II (describing social and political motivations of Black Lives Matter movement); *supra* Argument Section III.A.1.ii (explaining how the Black Lives Matter movement relates to issue of police brutality and police reform, not terms and conditions of employment); *supra* Argument Section III.A.1.iii (describing Morales' testimony that BLM, to him, was a "symbol of solidarity").[15] Home Depot has chosen not to use its apron as a forum for debate of these non-workplace matters.

The political and social meanings attached to BLM underscore the potential for confusion and controversy if Home Depot were forced to communicate that phrase on its aprons. Indeed, as explained in more detail in the discussion of the Board's special circumstances doctrine below, display of BLM messaging has created serious threats to the safety of Home Depot's employees and customers. *See supra* at Argument Section III.A.2.i. Home Depot has every right to refrain from engaging in speech likely to confuse the public—and spark controversy—in this way.

Moreover, the General Counsel's theory of the NLRA has sweeping implications that go far beyond the particular BLM message directly at issue here. That theory would apparently give employees the right to display, on their aprons, any political or social message even absent any direct nexus to their terms and conditions of employment. To take just a few examples, such messages would presumably include those that: (1) support particular presidential candidates

[15] *See also* Adina Campbell, *What Is Black Lives Matter and What Are the Aims?*, BBC News (June 13, 2021), https://www.bbc.com/news/explainers-53337780.

("MAGA," "Build Back Better," "Yes We Can," etc.); (2) endorse particular social or economic policies or causes ("Occupy Wall Street," "Build The Wall," "Abortion Is Healthcare," etc.); and (3) deploy BLM-style rhetoric to advance different political or social causes ("White Lives Matter," "All Lives Matter," "Blue Lives Matter," etc.). Under the General Counsel's theory, the possibilities are endless.

Forcing Home Depot to allow employees to display messages like these would create obvious real-world problems. The proliferation of such messages would challenge the inclusive and apolitical atmosphere that Home Depot strives to cultivate in its stores. Given the hundreds of thousands of associates Home Depot employs and millions of customers Home Depot welcomes—all of whom have "different values, . . . different political parties, different race[s], [and] different religion[s]," (Tr. 787:15-17)—customers and employees encountering displays of strong political or ideological views might feel unwelcome, attacked, or excluded, depending on the message.

Morales' own testimony offers direct evidence of this. When presented with a number of theoretical messages that employees might display on their apron—including Blue Lives Matter, MAGA/Make America Great Again, Thin Blue Line, and All Lives Matter—Morales expressed that they would "personally be bothered" by the display of such messages. (Tr. 233:22-235:14). Yet, as highlighted in the special circumstances discussion, not all of Home Depot's customers and employees share Morales' views. The display of such controversial messages, then, can stir discord among customers and employees. Worse, the discord can even lead to violence, as Home Depot itself and other employers have witnessed. *See supra* Argument Section III.A.2.i (discussing threats against, harassment of, and violence toward employees as a result of their display of political messages in the workplace). And Home Depot would bear the brunt of any resulting

anger. After all, customers would reasonably hold the Company responsible for any messages that appear on its employees' aprons, bearing the Home Depot logo, worn on premises and during business hours. *See supra* Argument Section III.A.2.iii (discussing public-image risks associated with requiring Home Depot permit political messages on its aprons).

In addition to the harmful impact on safety, employees, and the Company's public image, forcing Home Depot to allow employees to trumpet their personal political and social views on such topics would inflict severe First Amendment harm on Home Depot, and other employers. Because of the obvious risk of misattribution of individual employees' messages to Home Depot, the Company would "be forced either to appear to agree with [the employee's message] or to respond." *Pacific Gas*, 475 U.S. at 15 (plurality opinion). As a practical matter, Home Depot would repeatedly be forced to take a stand on controversial political and social issues—or clarify that it is *not* taking a stand, despite what appears on its aprons—when Home Depot would simply prefer to remain silent. *See FAIR*, 547 U.S. at 63.

Even when Home Depot might be affirmatively willing to speak, it would nonetheless be forced to try to find creative ways to distance itself from compelled messages. How, when the aprons already contain so many messages that *are* Home Depot's speech, would Home Depot be able to delineate the messages it was forced to convey or with which it disagrees? *See Hurley*, 515 U.S. at 576-77 ("Practice follows practicability here, for such disclaimers would be quite curious in a moving parade."). In the real world, Home Depot would, as a practical matter, likely be unable to adequately convey to its customers which of the hundreds or even thousands of messages picked by employees could be attributed to Home Depot. And even assuming Home Depot could find a way to draw that line, it would inevitably risk alienating a significant portion of its customers and

employees in doing so. The First Amendment does not countenance the General Counsel's effort to control Home Depot's speech.

C. None of the General Counsel's Counter-Arguments to Home Depot's First Amendment Arguments Has Merit.

Home Depot raised a version of these First Amendment arguments when petitioning to revoke the General Counsel's subpoena in this case.[16] At the hearing, the ALJ addressed Home Depot's First Amendment argument by stating that "for over 40 years the Board has always considered statements on uniforms to be the statements of the employee, not the statements of the employer for First Amendment reasons" and explaining his unwillingness to go out "on [his] own, . . . to reverse 40 years . . . or more . . . of Board precedent on that." (Tr. 17:1-10). Respectfully, the ALJ's skepticism of Home Depot's First Amendment argument rests on two significant misunderstandings.

First, there simply is not a single case holding that statements on employees' uniforms are considered employee speech, rather than employer speech, for purposes of the First Amendment. And despite two opportunities in these proceedings so far—in its oppositions to both Home Depot's Petition and Motion for Summary Judgment—the General Counsel has failed to cite *any* case law, from the Board or elsewhere, suggesting otherwise.

In fact, the Board has itself previously acknowledged—to the Supreme Court, no less—that *no* court or Board decision has *ever* adjudicated whether and how the First Amendment compelled-speech doctrine applies to uniform insignia. The Board was explicit on this point in its recent opposition to the petition for certiorari in *In-N-Out Burger, Inc. v. NLRB*, No. 18-340 (U.S. Jan. 24, 2019), *cert. denied*, 139 S. Ct. 1259 (2019). In that case, the NLRB brought an

[16] *See generally* Home Depot U.S.A., Inc.'s Pet. to Revoke Subpoena Duces Tecum, No. 18-CA-273796 (NLRB Sept. 9, 2021) ("Petition").

enforcement action against In-N-Out's dress code policy that prohibited "Fight for 15" buttons on employee uniforms. When In-N-Out petitioned the Supreme Court for certiorari, it argued—for the first time in the case—that the NLRB's action implicated its First Amendment rights. In response, the Board urged the Supreme Court not to grant review because (among other reasons) that issue had never been resolved before—either in that case, or in *any* case—such that the Court should allow for further percolation of the issue. *See* NLRB Br. 9, *In-N-Out Burger, Inc. v. NLRB*, No. 18-340 (U.S. Jan. 24, 2019), *cert. denied*, 139 S. Ct. 1259 (2019). As the Board told the Supreme Court:

> [T]his Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it should not address [In-N-Out's] novel constitutional arguments in the first instance. Not only was [In-N-Out's] compelled-speech claim not considered by the Board or the court of appeals in this case, *such a claim has not been considered by the Board or a court in the context of workplace insignia in* ***any*** *case*. Indeed, lower courts have had just over six months to consider the scope of *Janus*, and few decisions have yet applied it outside the agency-fee context in which it arose. Further percolation on this issue is plainly warranted.

Id. (emphasis added). There is simply no Board precedent—or judicial case law—addressing the First Amendment argument presented here.

Second, the ALJ was mistaken in believing that the Board's position that "statements on uniforms [are] the statements of the employee, not the statements of the employer," (Tr. 17:5-6), disposes of Home Depot's First Amendment challenge. The Board's views on that issue cannot survive the Supreme Court's decision in *Janus*, which expressly states 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*." 138 S. Ct. at 2474 (emphasis added). And, in any event, the First Amendment protects Home Depot from being forced to serve as the conduit for the speech of third parties. As a result, the General Counsel's theory violates the Constitution even if the BLM

statements at issue here reflect employee speech. The ALJ's stated reason for rejecting Home Depot's First Amendment argument lacks merit.

So far, the General Counsel's only real legal defense of its effort to compel speech on Home Depot's apron has rested on the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The General Counsel has argued that "the Supreme Court has noted expressly that employer unfair labor practices are 'communications that are regulated without offending the First Amendment.'" (GC-1(q)) Summary Judgment Opp. 8 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978)). In particular, the General Counsel characterizes *Gissel* as addressing—and conclusively settling—the "proper interplay" between "the Board's ability to regulate speech and the strictures of the First Amendment," with the former generally trumping the latter. Petition Opp. at 2-3; *see also* (GC-1(q)) Summary Judgment Opp. at 8-9. That reading of *Gissel*—which is not even a compelled-speech case—is flatly wrong.

Gissel has nothing to do with the compelled speech at issue here. There, the Board brought an NLRA action against an employer that had responded to a union-organizing drive by making threatening statements to employees about its "precarious financial position" and the "great difficulty" they would face "finding employment elsewhere" once a "probable . . . plant shutdown" resulted from union strikes. 395 U.S. at 619. The Court acknowledged that employer speech is generally protected by the First Amendment. *Id.* at 617. Nonetheless, it rejected the employer's First Amendment challenge in the circumstances at issue, holding that the employer's statements were "a threat of retaliation based on misrepresentation and coercion" meant to dissuade the organizing effort, "and as such without the protection of the First Amendment." *Id.* at 618.

The General Counsel appears to believe that *Gissel* generally subordinates an employer's First Amendment rights to the NLRA. *See* (GC-1(q)) Summary Judgment Opp. at 8; Petition Opp.

at 2-3. That is mistaken: *Gissel* stands for the far more limited proposition that the NLRA does not violate the First Amendment simply because it prohibits employers from making affirmative coercive threats against their employees. *See, e.g.*, *Ohralik*, 436 U.S. at 456 (citing *Gissel* for the proposition that "employers' threats of retaliation for the labor activities of employees" can be "regulated without offending the First Amendment"); *Nike, Inc. v. Kasky*, 539 U.S. 654, 680-81 (2003) (Breyer, J., dissenting) (reading *Gissel* as "upholding [a] prohibition of employer comments on unionism containing threats or promises," while acknowledging that "substantial government regulation can coexist with First Amendment protections designed to provide room for public debate").

Gissel does not speak to whether the Board is justified in *compelling* an employer either to voice a specific message or to accommodate the speech of third parties, and it certainly does not imply that the First Amendment gives way to the NLRA if the two conflict. And although *Gissel* notes that courts must take account of the "labor relations setting" when assessing the scope of an employer's First Amendment rights, 395 U.S. at 617, that is fully consistent with Home Depot's position here. Nothing about the "labor relations setting" makes it constitutional for the Board to force Home Depot to display ideological messages on its aprons.

Beyond *Gissel*, the General Counsel has also cited a handful of cases in which the NLRA was interpreted to allow employees to display messages in the workplace, even over their employers' objections.[17] But none of these cases even *mentions* the First Amendment, let alone

[17] *See* (GC-1(q)) Summary Judgment Opp. at 7-8 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802-03 (1945); *Boch Imports, Inc. v. NLRB*, 826 F.3d 558 (1st Cir. 2016); *Guard Pub'g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *Wash. State Nurses Ass'n v. NLRB*, 526 F.3d 577 (9th Cir. 2008); *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093 (8th Cir. 2005); *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837 (6th Cir. 2003); *NLRB v. Malta Constr. Co.*, 806 F.2d 1009 (11th Cir. 1986)); Petition Opp. at 3 (citing *Am. Med. Response W.*, 370 NLRB No. 58 (Dec. 10, 2020); *In-*

rejects a First Amendment challenge analogous to the one Home Depot is bringing here. Moreover, each of those cases is factually distinguishable, as each involved messages that (unlike the BLM statement here) focused narrowly and directly on workplace matters.[18] And not one of them resolved a First Amendment challenge that raised the question whether the NLRB's action unconstitutionally compelled employer speech.

Notably—and despite multiple opportunities—the General Counsel has *not* argued that compelling Home Depot's speech here is constitutional because it can satisfy strict scrutiny. Under that standard, the government may justify a compulsion of speech by establishing both (1) a "compelling" government interest supporting the compulsion, and (2) that compelling the speech in question is the least restrictive means of advancing that interest. *Hurley*, 515 U.S. at 577-78; *Riley*, 487 U.S. at 798. The General Counsel's unwillingness to argue that it can satisfy strict scrutiny is entirely understandable—because it cannot. The government has no compelling interest in forcing Home Depot to disseminate pro-BLM messages against Home Depot's will. And even if it had such an interest, there would surely be many other, less restrictive alternative mechanisms by which employees can communicate a BLM message—or any other political message or cause—*other than* on their Home Depot apron. Indeed, Home Depot itself offered Morales a host of alternative policy-compliant ways to express themselves in the workplace. (GC-4 52:9-16, 68:17-69:2, 73:21-24) (Tr. 247:2-250:8).

N-Out Burger, Inc., 365 NLRB No. 39 (Mar. 21, 2017); *W San Diego*, 348 NLRB 372, 375-76 (2006); *Pathmark Stores*, 342 NLRB 378, 379 (2004)).

[18] Home Depot's as-applied challenge does not require the Board to issue comprehensive guidance on how the First Amendment applies to speech that has a nexus to labor organizing and/or workplace activity, or that is more readily identified as reflecting the employee's speech (and not Home Depot's).

The bottom line is that the General Counsel has offered no good explanation of how its theory of this case squares with the First Amendment. It doesn't. Home Depot is entitled to judgment as a result.

II. <u>The General Counsel's Theory Conflicts With Federal Trademark Law.</u>

In addition to the important constitutional considerations implicated, the General Counsel's position that Respondent must permit employees to alter their aprons with BLM insignia also impermissibly conflicts with federal trademark law. "Trademarks serve as the identity of their owners and in them resides the reputation and goodwill of their owners." *CytoSport, Inc. v. Vital Pharm., Inc.*, 617 F. Supp. 2d 1051, 1080 (E.D. Cal.), *aff'd*, 348 F. App'x 288 (9th Cir. 2009). Using a trademark without permission prevents a trademark owner from exercising control over authorized uses of its trademark and thus "creates the potential for damage to its reputation." *Id*. (citing *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 195 (3d. Cir. 1990)). Such is the case here, where Morales' alteration of their apron undermines Home Depot's right to exercise control over its trademarks and the reputation associated with its trademarks.

Home Depot owns numerous federal trademark registrations associated with its stores and retail services, including a registration for its orange aprons (Reg. No. 2,361,754), which it has used continuously since 1979. (RX-4) (Tr. 834:1-834:9). The orange aprons have become a distinctive identifier of Home Depot, and the goodwill associated with the aprons was not lost on Charging Party Morales. As Morales admitted, they chose their orange apron as a medium for their political message to make an "impact"—one, no doubt, heightened *because* of the recognition and goodwill cultivated by Home Depot in its apron trademark. *See* (GC-4 63:3-8). Courts have likened similar uses to "piggybacking" on the commercial efforts of a trademark holder to advance a political message at the cost of that trademark owner's ability to control its reputation and mark.

See MGM-Pathe Communications Co. v. Pink Panther Patrol, 774 F. Supp. 869, 876 (S.D.N.Y. 1991). So is the case here.

The placement of political messaging on Home Depot's apron trademark causes the potential for confusion about whether Home Depot intends to make a political statement or whether it officially supports, endorses, or is affiliated with the message. Such confusion has been found to violate federal trademark law. For example, in *Hershey Co. v. Friends of Steve Hershey*, the court granted a preliminary injunction against political candidate Steve Hershey's use of signs featuring elements of the HERSHEY chocolate bar trademark in promotion of his campaign. 33 F. Supp. 3d 588 (D. Md. 2014). There, the court found that the public was likely to be confused about whether "Hershey is affiliated with, or sponsoring, Senator Hershey based on his campaign signage" and that the Hershey company had demonstrated the likelihood of suffering irreparable harm because its reputation was "no longer within its control." *Id.* at 595. Similarly, in *MGM-Pathe Communications Co.*, the court granted a preliminary injunction against a gay rights activist organization called The Pink Panther Patrol, finding that, "Members of the public could easily draw the inference that the sponsor of the famous Pink Panther has loaned its name to the defendants' cause expressing ideological support" and that confusion about sponsorship could "seriously impair the value and continued usefulness of [the PINK PANTHER trade]mark." 774 F. Supp. at 875, 877.

Home Depot's trademark registration affords the Company the authority to control the ways in which its orange apron trademark is used, and the right to manage its brand's reputation. Morales' actions have the potential to cause confusion about whether Home Depot intends to make or support a particular political message. If allowed to continue—for example, by other employees with other political messages—Home Depot could be exposed to continued confusion about its

intent or support for those political movements. As a result, a decision that infringes on Home Depot's ability to control its trademarks would violate Home Depot's intellectual property rights, and could potentially cause substantial harm.

Consequently, the General Counsel's position implicates the Board's responsibility to harmonize the Act with other laws. The Supreme Court has explained:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another.

Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942).

The orange apron's trademarked status renders the General Counsel's position here incompatible with the equally important Congressional objective of ensuring trademark protection integrity. As a result, the Board's responsibility to harmonize the Act with other laws provides another basis for rejection of the General Counsel's approach to BLM insignia on Respondent's trademark-protected orange aprons.

III. <u>Home Depot Did Not Violate The NLRA.</u>

Section 7 of the NLRA grants employees the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. The General Counsel's principal theory of this case is that Home Depot violated that right by prohibiting Morales from displaying BLM messaging on their apron. That theory fails for three independently sufficient reasons. *First*, Morales' display of BLM was not "concerted," because it was undertaken independently and not for the purpose of initiating group action. *Second*, Morales' display of BLM was not "for mutual aid or protection," because it was unrelated to their terms and conditions of employment and instead sought merely to communicate Morales' view on matters of political and social concern. And *third*, the special circumstances doctrine allows Home Depot to enforce its apron

policy prohibiting political and social displays, in order to promote Home Depot's apolitical image and eliminate potential discord and violence in its stores.[19]

In addition, the General Counsel may also try to argue that, even if Morales' decision to display BLM was *not* protected by Section 7, Home Depot nonetheless violated the NLRA by constructively discharging them for other reasons that *are* protected—namely, Morales' complaints about misconduct by Allison Gumm and the New Brighton store's treatment of Black History Month. That theory also fails: Home Depot was fully supportive of Morales' complaints about Gumm and Black History Month, and it was entirely appropriate for Home Depot to enforce its valid apron policy against Morales in any event. Because the General Counsel cannot prevail on either of its NLRA theories, the complaint should be dismissed in full.

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[19] In light of the serious constitutional concerns that would result from applying the NLRA to reach Morales' conduct here, the Board should read the NLRA narrowly to avoid the possibility of infringing Home Depot's rights. The Supreme Court has long held the view that when "an otherwise acceptable construction of a statute would raise serious constitutional problems," one should "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress," because a court should "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Blg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490 (1979)). What's more, Section 8(c) of the NLRA itself affirmatively protects the free speech rights of employers. *See* 29 U.S.C. § 158(c) ("The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."). Thus, as at least one court has put it: "Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment." *NLRB v. Ford Motor Co.*, 114 F.2d 905, 914 (6th Cir. 1940). Indeed, just the opposite—Section 8(c) "implements the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The constitutional problems identified above support reading the NLRA narrowly, to protect Home Depot's right to prohibit political and social messages on its aprons.

A. Section 7 Does Not Protect Morales' Display of BLM on a Home Depot Apron.

1. Morales' Display of BLM Is Not Concerted or Protected Activity.

Section 7 protects the employee right to engage in activities that are "for the purpose of collective bargaining *or other mutual aid or protection*." 29 U.S.C. § 157. In turn, the "mutual aid or protection" clause protects a very specific category of employee conduct: employees' efforts "to improve [their] terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Importantly, to be protected under the NLRA, the conduct must be both "concerted" and "for mutual aid or protection." Proof of one element without the other renders the conduct unprotected. Although that clause protects conduct that is "somewhat broader" than Section 7's enumerated protections for "'self-organization' and 'collective bargaining,'" an activity must bear a sufficiently "immediate," rather than "attenuated," "relationship to employees' interests as employees." *Id.* In other words, the activity in which an employee engaged must be related to the workplace—it "require[s] the showing of a 'nexus' between the activity and 'employees' interests as employees.'" *Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d 601, 606 (D.C. Cir. 2007) (quoting *Tradesmen Int'l*, 275 F.3d at 1141); *cf. Five Star Transp., Inc.*, 349 NLRB 42, 44 (2007) (noting that raising "general" concerns rather than specific workplace concerns is not activity with the goal of mutual aid or protection).

In particular, the Board has long held that political speech or activity does not qualify as activity with the goal of mutual aid or protection unless the political activity is "'directly related' to working conditions." Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, Memorandum No. GC 08-10, 2008 WL 6708138, at *3 (N.L.R.B.G.C. July 22, 2008) ("2008 Opinion") (quoting *Motorola, Inc.*, 305 NLRB 580, 580 n.1 (1991)); *see also Union Carbide Corp.-Nuclear Division*, 259 NLRB 974, 977 (1981); *GHR*

Energy Corp., 294 NLRB 1011, 1014 (1989). In other words, political speech requires an especially close nexus with the workplace—"the Board looks to whether there is a *direct nexus* between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees." 2008 Opinion at *3 (emphasis added) (citing *Five Star Transp., Inc.*, 349 NLRB 42 (2007)).

The question whether an employee's activity was "concerted" or for "mutual aid or protection" is an objective inquiry. *See Fresh & Easy*, 361 NLRB 151, at *4. Thus, the analysis turns on how a reasonable person would understand the character of the employee's activity, and the relationship between that activity and employees' interests as employees.

The General Counsel possesses the burden of proof to show the existence of protected activity, and it has failed to do so here. *See Michigan State Employees Association*, 364 NLRB No. 65, slip op. at *5, n. 17 (2016). As an initial matter, Home Depot emphasizes that in this case the General Counsel challenges the application of a ***concededly lawful*** policy. As noted above, Home Depot's dress code and apron policies state in part:

> [w]hile The Home Depot respects the personal opinions and beliefs held by associates and customers, the apron is not an appropriate place to promote or display religious beliefs, causes or political messages unrelated to workplace matters, or messages that would violate our policies on discrimination and unlawful harassment.

(JX-1).

At the hearing, Counsel for the General Counsel described this policy approvingly: "Obviously armed with good labor counsel, Respondent itself specifically carves out such display of messages if they are related to workplace matters, as they should." (Tr. 34:18-21). The concededly lawful nature of the dress code and apron policies on their face accords with the Board's longstanding approach of finding purely political speech unprotected by Section 7. *R. H. Macy, & Co.*, 191 NLRB 58, 61 (1971) (stating employers may "of course" prohibit political

campaign buttons because they "do not enjoy the protection of Section 7 of the Act as do union insignia"); *American Medical Response West,* 370 NLRB No. 58, slip op. at *7, n.17 (2020) (adopting ALJ decision explaining political materials are protected only if the message has a "reasonable and direct nexus to the advance of mutual aid and protection in the workplace" and must "have a close nexus to and would impact terms and conditions of employment"); *Firestone Steel Products Co.*, 244 NLRB 826 (1979), *affirmed* 645 F.2d 1151 (DC Cir. 1981) (finding lawful employer's prohibition on "purely political tracts" related to federal and state political candidates). Indeed, in *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1978), Justice White expressed concern that political speech in the workplace, "might concern goals and ends about which [the employer's] workforce, considered as a whole, as well as the public, may be deeply divided, with which [the employer] may have no sympathy whatsoever, or in connection with which [the employer] would not care to have it inferred that [it] supports one side or the other." *Id.* at 579 (White, J., concurring).

The necessary implication flowing from the General Counsel's concession of the dress code and apron policies' lawfulness, coupled with its allegations here, is that the General Counsel asks the ALJ to interpret Home Depot's own policies in a manner contrary to Home Depot's interpretation, and contrary to the plain language of the policies themselves. Specifically, the General Counsel attempts to place the display of BLM insignia within the purview of "workplace matters", despite society's widespread understanding of the Black Lives Matter movement's purpose, the meanings expressed by employees here, and the commonsense applications used by all Home Depot representatives.

i. Morales' Display of BLM Was Not "Concerted" Activity.

"[W]hether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers." *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 152 (2014). For employee speech to qualify as concerted, "it must appear

at the very least" that the employee "was engaged in [speech] with the object of initiating or inducing or preparing for group action or that [the speech] had some relation to group action in the interest of employees." *Quicken Loans, Inc.*, 367 NLRB No. 112, at *3 (Apr. 10, 2019) (citation omitted). Here, however, Morales' display of the BLM message on their apron was a unilateral act undertaken without any objective (or subjective) purpose of preparing for group action in the interest of fellow employees. Rather, the self-evident purpose of Morales' display was to communicate their general support for the anti-racist goals of the BLM movement. Indeed, that is precisely how Morales described their reasons for wearing the BLM message, both to Home Depot and at the hearing. *See* (Tr. 68:17-22) (Morales explaining that they wore the BLM message "as a symbol of solidarity" with victims of "prejudice and racism in our world today"); (GC-4 39:3-7) (Morales telling Belford that he displayed the BLM message "as a signal to show that I support black people; I support people of color"). There is no evidence that Morales displayed BLM as any sort of precursor to group activity in the Home Depot workplace.

As noted above, the General Counsel made clear, both at the hearing and in the Complaint (Para. 4(b), (c)), that it views application of the Board's "inherently concerted" doctrine as an important element of its theory of a violation. That approach fails to comport with the facts here.

As an initial matter, it is well-settled that ALJs possess a "duty to apply established Board precedent which the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved." *Pathmark Stores, Inc.*, 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)). As the General Counsel acknowledged at the hearing, the protesting of racial discrimination is not among the limited number of topics the Board has found inherently concerted.

(Tr. 35:12-15). Specifically, the Board has only found the doctrine applies to: wages;[20] work schedules;[21] and job security.[22] Because the Board has never found issues of racial discrimination (nor BLM displays) inherently concerted, and existing Board law binds the ALJ, the ALJ must reject application of the inherently concerted doctrine on that basis.[23]

Moreover, even putting aside the ALJ's duty to apply existing Board precedent, the "inherently concerted" doctrine does not apply here. The "inherently concerted" doctrine does nothing to solve the General Counsel's failure to establish "**protection**" (i.e., that Morales placed "BLM" on their apron for "mutual aid and protection" within the meaning of Section 7).

The Board's decisions on the "inherently concerted" doctrine have consistently emphasized its role as substitution for explicit evidence of concert amongst employees. For example, in *Aroostook County*, the Board found work schedules inherently concerted because the topic is a "vital term and condition of employment" and "the grist upon which *concerted* activity feeds." 317 NLRB at 220 (emphasis added). The Board decided an explicit finding of "an object of initiating group action" unnecessary there because discussion of such terms and conditions of employment are "likely to spawn collective action." *Id*. This finding, however, ***depended entirely***

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[20] *Trayco of South Carolina, Inc.*, 297 NLRB 630 (1990), *enforcement denied*, 927 F.2d 597 (4th Cir. 1991).

[21] *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995), *enforcement denied in part on other grounds*, 81 F.3d 209 (D.C. Cir. 1996).

[22] *Hoodview Vending Co.*, 362 NLRB 690 (2015).

[23] While acknowledging the Board's stance that the "inherently concerted" doctrine applies to some topics, for purposes of preserving potential appellate issues, Home Depot notes the "inherently concerted" doctrine must be invalidated as inconsistent with both the Act and the Board's well-established *Meyers* line of cases. *Meyers Industries ("Meyers I")*, 268 NLRB 493 (1984); *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986) *affirmed sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988)).

upon the assumed premise that the topic at issue is a (vital) term and condition of employment. The inherently concerted doctrine says nothing about conversion of topics unrelated to the workplace (such as racial injustice in society at large) into subjects covered by Section 7. *See also Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 n.10 (2014) (rejecting argument that wage-related complaints "were individual, rather than concerted activities, because they were not undertaken in contemplation of group action" due to application of "inherently concerted" doctrine "regardless of whether they are engaged in with the express object of inducing group action.").

As the Supreme Court has acknowledged, "it is of course true that Section 7 does not protect all concerted activities[.]" *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). Subsequently, the Supreme Court further elaborated:

> It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause (of Section 7 of the Act).

Eastex, Inc., 437 U.S. at 567–68 (quoting *Ford Motor Co.*, 221 NLRB 663, 666 (1975), *enforced*, 546 F.2d 418 (3d Cir. 1976)) (citing with approval the Board's finding in *Ford* that distribution on employer's premises of a "purely political tract" was unprotected even though "the election of any political candidate may have an ultimate effect on employment conditions")). The *Eastex* Court further held application of the "mutual aid and protection" clause of Section 7 requires demonstration of an effort "to improve terms and conditions of employment or otherwise improve their lot as employees[.]" *Id*. at 565.

The Board later explained in *Meyers I*:

> [t]he Act does not protect all concerted activity. It is not a violation of the Act to restrain or coerce an employee because he engages in concerted activity that is not protected—either, for example, because such activity contravenes another section

> of the Act or another statute, or because it was not engaged in 'for the purpose of collective bargaining or other mutual aid or protection.'

268 NLRB at 499 n. 6 (quoting Section 7 and citing *Eastex*, 437 U.S. at 568 n.18). *See also Universal Syndications*, 347 NLRB at 630 (stating, "'[t]here is no question that [two employees] engaged in concerted action [but t]he crucial inquiry is whether such activity was protected under the Act. In order for concerted activity to obtain the protection of Section 7, employees must show they were engaged in activities for their 'mutual aid and protection.'" (citing *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984)); *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at *9 (2019) (dismissing allegation because the General Counsel failed to show employee "was seeking 'to improve terms and conditions of employment.'" (quoting *Eastex*, 437 U.S. at 565)).

The topics to which the Board has applied the "inherently concerted" doctrine—wages, work schedules, and job security—are all clearly terms and conditions of employment. Home Depot has stipulated that DE&I and prevention of racial discrimination in the workplace are also terms and conditions of employment. (Tr. 529:10-17). But, application of the "inherently concerted" doctrine would not solve the fundamental flaw in the General Counsel's theory here. That doctrine, pertaining only to the issue of concert, cannot convert a general social and political movement such as Black Lives Matter into a term and condition of employment, nor the display of that movement's insignia into an act undertaken for mutual aid and protection.[24]

[24] The parties' stipulation that DE&I, as well as the prevention of racial discrimination in the workplace, are important terms and conditions of employment does not support the General Counsel's argument in this regard. (Tr. 529:10-17). The stipulation noted that Home Depot does not concede Morales engaged in protected concerted activity, nor that the inherently concerted doctrine applies here. (Tr. 529:20-24). Moreover, DE&I and the prevention of racial discrimination in the workplace do not, for the many reasons discussed throughout this Brief, equate to support for the Black Lives Matter political movement.

Indeed, as the above Supreme Court and Board standards reflect, a group of workers could concertedly voice support for their favorite sports team or music group (or political candidate), but such actions would not enjoy the Act's protection. Theoretically, applying the rationale of the "inherently concerted" doctrine to this hypothetical scenario, one could further posit that a single employee's support for that sports team or music group is "inherently concerted," but such a theory would in no way implicate Section 7 protection. Likewise, application of the "inherently concerted" doctrine here could not establish Morales acted with regard to terms and conditions of employment by displaying BLM on their apron, nor that such actions constitute efforts made "for mutual aid and protection" within the meaning of Section 7.[25]

ii. Black Lives Matter Pertains to Police Brutality/Police Reform and Other Non-Workplace Issues, Not Terms and Conditions of Employment.

Squarely implicating the prohibition contained in Home Depot's dress code and apron policies, it cannot be disputed that the majority of the general public considers the Black Lives Matter movement a "cause[] or political message[] unrelated to workplace matters" (JX-1). The General Counsel here presented no evidence contradicting this common understanding. To the contrary, Charging Party Morales, admitted that the movement exists as both a "statement" and a political advocacy organization (Tr. 214:11-14), agreed the movement in general opposes police brutality against African Americans (Tr. 213:21-24), and the political organization favors defunding the police (Tr. 213:11-20). *See also* (Tr. 371:15-24) (General Counsel witness Ward

[25] At the hearing, Counsel for the General Counsel suggested a desire to prove, in support of its "inherently concerted" theory, that Home Depot has inserted racial issues into the workplace. The "inherently concerted" doctrine has no application here, and, more importantly, it is not relevant since Home Depot stipulated that DE&I and racial non-discrimination in the workplace are terms and conditions of employment. (Tr. 529:10-24).

agreeing that two topics associated with the Black Lives Matter movement are protesting police brutality against African Americans, and the summer 2020 protests).

Under the facts in this case, there is an insufficient nexus between the BLM message placed on Morales' apron and Home Depot "employees' interests *as employees*." *Eastex*, 437 U.S. at 568 (emphasis added). Any arguable connection between BLM and matters of workplace concern—if any—is too attenuated to bring it within the ambit of Section 7. For that reason, Home Depot's apron policy and dress code do not restrict or impair any protected activity, and therefore did not violate the NLRA.

As noted above, the test for assessing the character of an employee's activity is an objective one on which the General Counsel bears the burden of proof: "Employee motive is not relevant" to determining whether an activity was "engaged in for mutual aid or protection." *Kingman Hosp., Inc.*, 363 NLRB No. 145 (Mar. 17, 2016); *see Bates Paving & Sealing, Inc.*, 364 NLRB No. 46 (July 14, 2016). Here, a reasonable person would perceive the BLM message on Morales' apron as conveying a more general social or political message, rather than a message about workplace conditions or improving the terms and conditions of employment. BLM was founded in 2013 in response to the acquittal of George Zimmerman for fatally shooting Trayvon Martin, an unarmed Black teenager. *See* Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 Nev. L. Rev. 1091, 1092 (2018); *About*, Black Lives Matter, https://blacklivesmatter.com/about/ (last visited Oct. 21, 2021). Since its founding, the movement has been described as holding a wide range of goals, including "draw[ing] attention to the many ways in which Black people are treated unfairly in society," engaging in "political action," "combat[ting] police brutality, the over-policing of minority neighborhoods, and the abuses committed by for-profit jails," "'defunding' the police," "work[ing] on voter registration and get-

out-the-vote campaigns in Black communities," and "celebrat[ing] Black artists and writers." *Black Lives Matter*, Encyclopedia Britannica, https://www.britannica.com/topic/Black-Lives-Matter (last visited Oct. 21, 2021). Others have emphasized BLM's "intersectional" aspects, including "its support for other groups struggling in the current system" like "the Boycott, Divestment, and Sanctions (BDS) movement to protest the treatment of Palestinians by the state of Israel" and "the protestors at Standing Rock in North Dakota against construction of the Dakota Access Pipeline." Amanda D. Clark et al., *Black Lives Matter: (Re)framing the Next Wave of Black Liberation*, 42 Rsch. Soc. Movements, Conflicts & Change 145, 146-47 (2018).

But above all, BLM is most closely associated with the goal of "fighting racism and anti-Black violence, especially in the form of police brutality." Encyclopedia Britannica, *supra*. *See also* Deen Freelon et al., *Beyond the Hashtags*, Ctr. for Media & Soc. Impact 7 (2016) (describing BLM as "a loosely-coordinated, nationwide movement dedicated to ending police brutality"); *The Black Lives Matter Movement Explained*, World Econ. F., https://www.weforum.org/agenda/2016/08/black-lives-matter-movement-explained/ (last visited Oct. 21, 2021) (describing the goal of BLM as "highlighting the disproportionate number of incidences in which a police officer killed a member of the black community"); Matt Pearce, *Why the Term 'Black Lives Matter' Can Be So Confusing*, L.A. Times (Oct. 20, 2015), https://www.latimes.com/nation/la-na-black-lives-matter-explainer-20151020-story.html (describing BLM as "mostly focused on the deaths of black people after encounters with the police"); Harry Cockburn, *Black Lives Matter: Who Are the Group and What Are Their Aims?; How Did the Movement Spring Up, and Who Is Behind It?*, Indep. (July 8, 2016) ("[T]he movement has successfully drawn global attention to the deaths of black people, most notably at the hands of white police officers in the US.").

While it is unnecessary to ascribe any one or several of these goals in particular to BLM to resolve this case, the wide range of goals that are attributed to BLM is enough to demonstrate that a reasonable person would be unlikely to consider BLM to have a message "directly" or closely associated with the terms and conditions of employment. Whatever may be said about the goals of BLM as a movement, it is not characterized by employees "improv[ing] their lot *as employees*." *Eastex*, 437 U.S. at 565 (emphasis added). And that conclusion is only underscored when viewed in light of the cases in which courts have found that a sufficient nexus *does* exist between employees' activities and their workplace concerns.

For example, in *Eastex*, the Court found that employees engaged in protected activity when distributing union newsletters on the employer's property in advance of upcoming contract negotiations because "the distribution was closely tied to vital concerns of the Act," including "continuing [the union's] organizational efforts" and potentially recruiting new members. 437 U.S. at 559, 575 & n.24. Similarly, in *Venetian Casino Resort*, the D.C. Circuit upheld as protected activity unionized employees' demonstration on the employer-owned sidewalk outside the casino where they were employed. 484 F.3d at 607-08. "Because the demonstration was an effort to communicate its 'labor dispute' to the public and an attempt to enlist the support of prospective employees in accomplishing its goal of getting the Venetian to 'operate[] on a union basis,'" the court reasoned, "the nexus was clear and distinct" between the activity and the employees' interests as employees. *Id.* (citation omitted). In each case, the connection to the employees' lot *as employees* was immediate rather than attenuated because the objective goal of the employees' actions was to alter directly the conduct of their employers or to promote specific improvements in the terms and conditions of their employment.

By comparison, the BLM message here is much more analogous to the kind of purely social or political message that the Board has long considered too attenuated to merit protection under the mutual aid or protection clause. *See e.g. Firestone Steel Prods. Co.*, 244 NLRB 826, 826-27 (1979) (determining leaflets discussing candidates for statewide elections were unprotected under Section 7 because they were political and did not "relate to employee problems and concerns as employees"); *Kay Mfg. Co., Inc.*, No. E 13-CA-34493, 1998 WL 1984995 (Apr. 17, 1998) (determining an employees' books and tapes concerning "purely political issues" did not enjoy Section 7 protection under the applicable "objective standard," even though the employee might have "truly believed that her co-workers were at risk of actual physical harm by reason of the existence of various conspiracies"); *accord Kelly v. U.S. Postal Serv.*, 492 F. Supp. 121, 1233, 126 (S.D. Ohio 1980) (determining that employer complied with Section 7 when it prohibited buttons saying "Death to the Shah U. S. Imperialism get your Bloody Hands Off of Iran" because they "easily [fell] into the category of 'purely political'" and did "not relate to plaintiffs' jobs or to their status or condition as employees").

Take, for example, the message at issue in *Ford Motor Company*, 221 NLRB 663 (1975). There, the message encouraged employees not to support traditional political parties' candidates in congressional elections, and instead "to seek an independent workers' party." *Id.* at 666. The Board concluded that such a purely political message did not "relate to employees' problems and concerns" as employees, even if it had a tangential connection to improving workers' lot. *Id.* Likewise, even if BLM has some attributes that could be connected to improving workers' conditions, like eliminating racial discrimination, that message is too attenuated and general to relate to Home Depot's "employees' problems and concerns *qua* employees." *Id.* True enough, protected concerted activity under the "mutual aid or protection" clause need not always come in

the form of explicit union organizing; "employees may seek to improve their lot through channels other than the employer-employee relationship." *Off. of Pro. Emps. Int'l Union, AFL-CIO, CLC v. NLRB*, 981 F.2d 76, 82 (2d Cir. 1992). But when an employee's activities involve a political program or message, "their political efforts" must "ha[ve] a *direct bearing* on the terms of their employment." *Id.* (emphasis added). Otherwise, if described at a high enough level of generality, any political agenda or activity could be characterized as having *some* connection to the terms and conditions of employment, however attenuated. *See, e.g.*, *The Mead Corp.*, No. E 9-CA-38055, 2001 WL 1598682 (NLRB June 20, 2001) (determining the "dominant theme" of handbills urging employees not to vote for George W. Bush was "a political one" and thus outside the "purview of Section 7 protection," even though those handbills stressed that Bush "Wants to Take Away Your Union"). And as the Supreme Court has explained, such a broad reading of the mutual aid or protection clause as the General counsel advocates for here would stretch Section 7 past its breaking point. *See Eastex*, 437 U.S. at 568. Morales' speech, which they identified as addressing racial injustice in society generally and a statement of alliance with people of color, at large had—at most—an attenuated connection to their workplace conditions. That is a far cry from the direct nexus that the Board's precedents require. Their conduct, therefore, is not protected activity under Section 7's mutual aid or protection clause.

Online materials entered into the record via stipulation (regarding which the parties did not waive relevance arguments (Tr. 530:4-7)), represents the only evidence purporting to support the General Counsel's burden of proof on this issue. None of those materials establish the required connection between the Black Lives Matter movement and terms and conditions of employment. Approximately half of the General Counsel's Exhibits in this regard reflect cursory, isolated, and one-off expressions of general support by the Black Lives Matter organization for employees of

organizations other than Home Depot. For example, screenshots of pages buried deep within the BLM organization's website reflect:

- General support for unionization efforts by Amazon workers (GC-102, 104);
- Advocacy efforts related to the functions of the United States Postal Service which, at most, tangentially touch on working conditions for Postal Service workers (GC-101, 106);
- A post supporting Black Women's Equal Pay Day (GC-103) which, as Home Depot noted at the hearing (Tr. 539:5-16), is an initiative created by other organizations and individuals long prior to the Black Lives Matter movement's own creation; [26] and
- A post containing a theoretical discussion of the topic, "Police Associations Are Not Unions", a premise which, if accepted, would only further distance the Black Lives Matter Movement from the concerns of the Act (GC-105).

Of particular note, (GC-101), a November 26, 2020 Black Lives Matter website post describing a campaign billed as "#BlackLoveLetters", states "#BlackLoveLetters is BLM's first economic justice campaign**.** So when we say fund the postal service and defund the police, we mean it." (*Id*. at p. 1) (emphasis in original). The General Counsel cannot credibly claim (and indeed no witness asserted) that displays of BLM on aprons reflect employee advocacy efforts, when the Black Lives Matter organization's "first economic justice campaign" began on November 26, 2020, and related to "fund[ing] the postal service and defund[ing] the police".

The General Counsel's other online materials provide no further basis to draw a connection between the Black Lives Matter movement and terms and conditions of employment. It presented:

- A 2016 CNN article describing economic issues as a potential future focus for the BLM movement, noting only general economic concerns rather than any potential advocacy regarding terms and conditions of employment (GC-108);

[26] Equal Pay Day, National Committee on Pay Equity, https://www.pay-equity.org/day.html [pay-equity.org] (last visited November 30, 2021) (explaining, "Equal Pay Day was originated by the National Committee on Pay Equity (NCPE) in 1996).

- A 2016 New Yorker article which likewise does not attempt to connect the Black Lives Matter movement to workplace issues in any manner, but rather repeatedly further confirms its focus on issues of law enforcement violence against African Americans (GC-109);

- A 2015 LA Times article entitled, "Why the term 'Black Lives Matter' can be so confusing," which again ties the movement closely to police brutality issues, and makes no mention of terms and conditions of employment (GC-110);

- A 2015 article by the American Medical Association Journal of Ethics entitled, "#BlackLivesMatter: Physicians Must Stand for Racial Justice", focusing on racial disparities in healthcare, and not on terms and conditions of employment (GC-111);

- A June 2020 New York Times article detailing another employer's (Starbucks) decision to permit employees to wear BLM insignia, a decision that, as a matter of course, has no bearing on the question of whether Section 7 protects such displays as a general matter (GC-112); and

- A June 2020 TIME Magazine article, which, like the LA Times and New Yorker articles discussed above, also describes BLM's focus on police brutality issues and protests, as well as systemic racism generally, rather than any advocacy related to terms and conditions of employment (GC-113).

Online materials entered into the record by Home Depot pursuant to the same stipulation also reflect the clear separation between the Black Lives Matter movement and terms and conditions of employment. Of particular note, the "ABOUT" and "HISTORY" portions of the Black Lives Matter organization's website, which describe its fundamental purpose, focus on violence against African Americans regarding both the organization's origin story and current goals. (RX-24(d)). Elsewhere, the organization's "7 Demands" pertain again to policing issues, and also to campaigns against Republican Party politicians. BLM Demands, Black Lives Matter, https://blacklivesmatter.com/blm-demands/ [blacklivesmatter.com] (last visited Nov. 30, 2021). They are:

1. Convict and ban [former President Donald] Trump from future political office[;]

2. Expel Republican members of Congress who attempted to overturn the election and incited a white supremacist attack[;]

3. Launch a full investigation into the ties between white supremacy and the Capitol Police, law enforcement, and the military[;]

4. Permanently ban Trump from all digital media platforms[;]

5. Defund the police[;]

6. Don't let the coup be used as an excuse to crack down on our movement[; and]

7. Pass the BREATHE Act[.]

(*Id*.). At no point do those pages mention terms and conditions of employment. (*Id*.).

Moreover, other online sources focus on Black Lives Matter political advocacy efforts which, like the "purely political tracts" the Supreme Court described as unprotected in *Eastex*, 437 U.S. at 567–68, bear no relationship to terms and conditions of employment. *See also Firestone Steel Products Co.*, 244 NLRB at 826; *Ford Motor Co.*, 221 NLRB at 666. For example, in Minnesota, a March 2021 CBS Minnesota article describes "Black Lives Matter Minnesota" as presenting a list of twelve (12) public policy demands at the Minnesota State Capitol, all of which pertain directly to law enforcement issues, and none of which relate to terms and conditions of employment. (RX-24(b)). On the national scale, a May 2021 Politico article recounts political efforts by the Black Lives Matter supporters in Washington, DC, advocating for issues of law enforcement and voting rights, such as qualified immunity, defunding the police, the transfer of military equipment to law enforcement, the BREATHE Act, the Justice in Policing Act, the For the People Act, and the John Lewis Voting Rights Act. (RX-24(c)). None of the lobbying efforts described pertain to anyone's terms and conditions of employment. (*Id.*). Such reports accord with the public's understanding of the Black Lives Matter movement (and the Black Lives Matter

organization's own branding (RX-24(d)), as reflected in many online sources describing the movement as pursuing objections unrelated to the workplace.[27]

The General Counsel's Division of Advice made clear in March 2021, that it shares the public's common belief that the Black Lives Matter movement does not relate to terms and conditions of employment—and thus that expressing support for BLM is "unprotected" by Section 7. *Amazon.com* Advice Memorandum dated March 12, 2021, at 8. In a case involving Amazon.com technology industry workers' expressions of support for unionization efforts by warehouse employees, the Division of Advice rejected that employer's solicitation policy-based defense due, in part, to evidence of disparate treatment. In that regard, the Division of Advice (a component of the Office of the General Counsel) specifically noted that showing support for BLM, in that instance by solicitation, was not a protected activity:

> On top of the Employer's admission that there are no comparators, there is evidence that the Employer has tolerated other employees' climate-related external communications and **other unprotected employee solicitations for, e.g.,** girl scout cookies and **Black Lives Matter**.

Amazon.com, Case 19-CA-266977, Advice Memorandum dated March 12, 2021, at 8 (emphasis added).

In short, based on the widespread and common understanding throughout society that Black Lives Matter is a movement and organization unrelated to workplace matters, an employee's

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[27] *See, e.g.*, Adina Campbell, *What Is Black Lives Matter and What Are the Aims?*, BBC News (June 13, 2021), https://www.bbc.com/news/explainers-53337780 [bbc.com]; NBC News: A movement, a slogan, a rallying cry: How Black Lives Matter changed America's view on race, https://www.nbcnews.com/news/nbcblk/movement-slogan-rallying-cry-how-black-lives-matter-changed-america-n1252434;

Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS News (June 4, 2021), https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/ [cbsnews.com].

display of BLM lacks the required direct nexus to matters of workplace concern amongst any audience. Instead, customers, co-workers, and others observing such insignia would associate the display with concerns wholly unrelated to terms and conditions of employment. As a result, consistent with the Supreme Court's rationale in *Eastex* and subsequent Board precedent, BLM displays lack Section 7 protection.

iii. Neither the Charging Party nor Any of Their Co-Workers, Connected BLM Insignia to Terms and Conditions of Employment Here.

Consistent with the absence of a relationship between the Black Lives Matters movement and workplace issues generally, **no employees, most notably and importantly including Charging Party Morales, claimed any relationship between their displays of BLM and workplace issues here**, either during the underlying events or at the hearing. Morales identified two purposes for their BLM insignia: (1) protesting racial injustices in society at large and; (2) demonstrating that they are an ally to people of color. Neither of these purposes reflects Section 7 activity in any respect, and certainly do not approach the "reasonable and direct" and "close" nexus to terms and conditions of employment required for the Act's protection to apply. *American Medical Response West,* 370 NLRB No. 58, slip op. at *7, n.17.

Store Manager Bergeland confirmed that, when he asked Morales about their BLM insignia, Morales made no mention of racial issues in the store itself. (Tr. 502:23-503:3, 511:21-512:3). He testified:

> **Bergeland**: I asked [them] -- I don't recall word for word but I asked [them] what BLM meant to [them], why that was important to have that on [their] apron.
>
> **Q**: Did [they] answer you?
>
> **Bergeland**: I really didn't get an answer specifically around that. From what I could gather from our conversation was more around external events that were going on outside the store.

(Tr. 511:21-512:3). Similarly, during their meeting with District Manager Belford and District Human Resources Manager Whitley, Morales offered that the meaning of "Black Lives Matter" to them is: "respect for all people, especially black people." (GC-4 49:12-13). When asked by Belford why they displayed BLM on their apron, Morales again referred to issues in society at large, rather than in the store:

> I put it on as a signal to show that I support black people; I support people of color. And I think that what happened over the course of the summer [of 2020], I think that needs to be addressed and how we need to continue to support black people.

(GC-4 39:3-7).

Morales' testimony at the hearing drew no closer connection to workplace matters. On direct examination, they testified with regard to racial issues in society:

> **Q**: Okay. And why did you feel the need to [put BLM on your apron]?
>
> **Morales**: I believe that there is a lot of prejudice and racism in our world today and especially in our state so I want to show that as a symbol of solidarity.

(Tr. 68:17-22).[28]

Regarding Morales' belief that their display of BLM announced them as an ally to people of color, they stated in response to a direct examination question about the meaning of the insignia:

> It means Black Lives Matter. It's a symbol of alliance. I have never seen it as something political myself. It's something that I put on so that people know 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.

(Tr. 68:4-10). *See also* (Tr. 69:9-12, 209:11-15, 237:22-238:9).

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[28] Apparently recognizing the insufficiency of Morales' answer for purposes of its legal theory, Counsel for the General Counsel then followed up with a leading question on whether Morales felt racism existed within the store. (Tr. 68:23-24). Morales, so led, dutifully responded in the affirmative. (Tr. 68:25).

Morales' co-workers likewise made no reference to terms and conditions of employment when asked, both during the underlying events and at the hearing, about the Black Lives Matter movement. Bergeland testified that when he spoke to associate Tesfaldet about Tesfaldet's display of BLM on his apron:

> I really didn't get a lot of concise or direct information on what exactly it meant. He expressed some similar concerns [to Morales'] of things that were going on in the City of Minneapolis outside of the store where at times it was visible with the rioting right outside the front entrance of our store.

(Tr. 515:7-13). Similarly, Whitley recalled that when he noticed BLM on Tesfaldet's apron, Tesfaldet cited the concept of serving as an ally for people of color. (Tr. 744:4-6). Tesfaldet himself, when asked at the hearing what BLM means to him, stated:

> [I]t says Black Lives Matter but it's towards the people of color wanting to be treated with pretty much equality and equity that any other person has."

(Tr. 415:11-14). Regarding his reason for placing BLM on his apron, Tesfaldet testified:

> Because around that time there was a lot of stress and high emotions for customers, including myself. When I took my apron off, I was dealing with another type of stress including the protests . . . it was a hot time for everybody especially with the protests and the fresh murder of Floyd. I wanted to put it on my apron just because, one, as someone outside -- just being a worker at Home Depot but I also shop there so I was trying to relate to the customers to let them know that, like, I sympathize with them and I understand and I let them know that it's still a safe place and I'm still here willing to work for them, to help them buy whatever they need, just so they don't understand that they don't have to deal with anything while coming into the store.

(Tr. 419:12-24).

The General Counsel's other employee witness, Sadie Ward, did not display BLM herself, but did describe at the hearing the nature of conversations about Black Lives Matter in the store. She stated:

> As I mentioned, I worked at Home Depot during the week of civil unrest. Black Lives Matter was a common topic that week that we talked about. It's hard to quantify any specific conversation from that week but I know it was discussed very frequently among many associates. I also remember a conversation between

> [Tesfaldet] and Cody [last name unknown] in flooring. The three of us had a conversation -- Cody was a Caucasian male -- discussing how we, as white individuals, would never understand some of the life experiences that [Tesfaldet] has gone through. We had that conversation one evening at the Flooring Desk.

(Tr. 339:8-20).

As reflected in both public and "all associate" communications issued by Home Depot CEO Craig Menear following George Floyd's murder, Home Depot, like Morales, Tesfaldet, Ward, and many other Home Depot associates, opposes racial injustice in society. (GC-18, 45). Such injustice, however, does not convert the display of BLM into a message connected to terms and conditions of employment. To the contrary, both as a general matter and based on the statements of the General Counsel's witnesses, the Black Lives Matter movement is a "cause[] or political message[] unrelated to workplace matters". (JX-1). As a result, the plain meaning of Home Depot's concededly lawful dress code and apron policies squarely prohibits BLM insignia, and application of those policies here did not violate the Act.

2. Special Circumstances Permit Home Depot to Restrict Employees from Displaying BLM Insignia on Their Aprons.

The presence of special circumstances related to BLM insignia further precludes a violation here, even if Section 7 did protect such a display. The Board has long held that an employer may prohibit otherwise-protected insignia, where it establishes a "special circumstance", through demonstration that the insignia would: (1) jeopardize employee safety; (2) damage machinery or products; (3) exacerbate employee dissension; or (4) unreasonably interfere with the public image that the employer has established, as part of its business plan, through appearance rules for its employees. *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 35 (2007); *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), *enforced* 99 Fed. Appx. 233 (D.C. Cir. 2004); *American Medical Response West*, 370 NLRB No. 58, slip op. at *7. Here, though it need only establish one such

special circumstance, Home Depot has shown that three (3) of the four (4) special circumstances apply.

i. Due to Society's Highly Polarized Political Environment, Safety Risks Would Result from Displays of BLM Insignia, Particularly at the New Brighton Store.

The Board has noted, "when an employer demonstrates, based on the conditions of the workplace, that curtailing the employees' right to display [otherwise protected] insignia is necessary to its safety objectives, the Board will dismiss allegations that the ban is unlawful." *Albis Plastics*, 335 NLRB 923, 924 (2001). Here, Home Depot possesses a special circumstance prohibiting the display of the highly politicized terms BLM or "Black Lives Matter" due to the external circumstances created by our deeply divided society.

Sadly, the proposition that we live in a highly polarized environment, and that this reality can and has spurred some to behave violently, requires no citation. As popular media reports informing the public's understanding of the world make clear, topics including COVID-19 measures,[29] racial issues,[30] and general political candidacies[31] have resulted in recent violence

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[29] *See* Ashley Wong et al., *Tourists Attack N.Y.C. Restaurant Hostess Over Vaccine Proof, Police Say*, N.Y. Times (Sept. 17, 2021), https://www.nytimes.com/2021/09/17/nyregion/carmines-nyc-hostess-attacked.html [nytimes.com]; Josh Morgan et al., *Police Identify Cashier Killed in Shooting Over Mask Dispute at DeKalb Grocery Store*, CBS46 (June 15, 2021), https://www.cbs46.com/news/police-identify-cashier-killed-in-shooting-over-mask-dispute-at-dekalb-grocery-store/article_61080d00-cd38-11eb-a5ee-d7c995e42747.html [cbs46.com]

[30] Ewan Palmer, *California Teacher Receives Death Threats Over 'I Can't Breathe' T-Shirt*, Newsweek (Aug. 25, 2020), https://www.newsweek.com/teacher-death-threats-blm-shirt-1527472 [newsweek.com];

[31] Michael Bartiromo, *Trump Supporter Attacked at Cheesecake Factory Over MAGA Hat: Report*, Fox News (May 15, 2018), https://www.foxnews.com/food-drink/trump-supporter-attacked-at-cheesecake-factory-over-maga-hat-report [foxnews.com].

against workers. Unsurprisingly, such reports include incidents of aggressive and violent behavior in relation to BLM and "Black Lives Matter". For example, a June 30, 2020, U.S. News report recounts a Target shopper's statement that an employee wearing a "Black Lives Matter" mask "needed to take it the f--- off [her] face", amongst other aggressive comments, prior to the customer's ejection from the store. (RX-24(g)). Similarly, an October 25, 2020, Insider report details a Starbucks customer yelling "F--- Black Lives Matter", and other highly politicized statements, in response to a request regarding mask usage. (RX-24(j)).

Unfortunately, as Bottoms described at the hearing, Home Depot has experienced such circumstances as well. He recounted a May 2016 incident in Staten Island, New York, in which a customer took a photo of an associate's "America Was Never Great" hat which quickly drew significant internet attention. (Tr. 791:23-7). Home Depot then began receiving complaints, including threats from customers that they would no longer shop at the store. (Tr. 792:7-8). Worse, the employee received death threats, and individuals began appearing at the store, searching for her in an evident attempt to do harm. (Tr. 792:9-13). The incident ultimately forced the Company to transfer the associate to another store for her own safety. (Tr. 792:13-15). As with the other incidents described above, this situation received significant media coverage. (RX-24(f)).

These safety concerns are especially salient at the New Brighton store, where a very tense and sometimes violent atmosphere prevailed throughout Morales' tenure due to George Floyd's May 2020 murder and the subsequent March 2021 trial of Derek Chauvin. (RX-24(e), (h), (i)) (Tr. 365-19-366:3, 515:17-516:3, 674:25-675:17, 746:17-748:21). As District Human Resource Manager Whitley testified, BLM represented a prevalent image in affected areas throughout Minneapolis, including as spray-painted on damaged buildings. (Tr. 747:17-18). The store's location—only 6.5 miles from the site of Floyd's murder, and within a shopping center where

looting occurred—served only to heighten the need for safety considerations. (Tr. 515:22-23, 747:6-9).

District Manager Belford testified that such safety concerns weighed heavily on her mind while addressing Morales' BLM insignia:

> One of the things that is important in my role is that the decisions that I make obviously don't just impact one individual. They could potentially impact my District or more. Sometimes that involves safety. One of the things that was very concerning to me especially with the environment that we have been in in the Minneapolis market is there were incidents that happened at another retailer where they allowed BLM on masks and on dress code and there were associates that were involved in situations that were less than favorable, unsafe, very volatile. And in my mind one of the things that influenced me is I did not want Mr. Morales to be put in a situation where [they] might receive some unwanted whatever, scrutiny, verbiage, whatever it would be from a customer or from anywhere else, so it was honestly, kind of, a safety call.

(Tr. 672:25-673:18). Similarly, when Whitley addressed other employees regarding BLM insignia, he took into account the fact that events in Minneapolis made subjects such as Black Lives Matter "hot topics in the area." (Tr. 705:4-9). *See also* (Tr. 215:1-5) (Morales agreeing that many individuals in the Minneapolis area view the Black Lives Matter movement unfavorably); (GC-4 32:3-5) (Morales acknowledging that Store Manager Bergeland cited safety concerns when explaining reasons for the prohibition on BLM insignia).

As the apron policy states, Home Depot respects its associates' personal opinions and beliefs, but display of highly politicized messages such as BLM in stores—and particularly in the circumstances of the New Brighton store—creates unacceptable safety risks due to the polarized nature of the current social moment. The potential consequences of violent adverse reactions, as demonstrated by Home Depot's experience with an associate in Staten Island, would render irresponsible any finding that Section 7 protects BLM displays on aprons. As a result, the safety prong of the Board's special circumstances doctrine applies directly to BLM insignia.

ii. Displays of BLM Insignia Would Exacerbate Employee Dissension.

In *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972), the Board adopted, without modification, the Trial Examiner's finding that sweatshirts worn by employees bearing the slogan, "Ma Bell is a Cheap Mother" did not enjoy Section 7 protection due to their deleterious impact on harmonious workplace relations. Acknowledging the parties' stipulation that the phrase "was capable of more than a single interpretation to some people, including some union members, other employees, management, and the public", the Trial Examiner relied upon its potential reference to the profane term, "motherfucker". *Id*. at 670. He further relied upon the fact that, due to its display on sweatshirts, if permitted others would be forced to observe the display "continuously" and "during the entire 7 or 8-hour workday." *Id*. at 671. The Trial Examiner further observed:

> Nor is it of any consequence that Respondent's instructions to remove or cover the inflammatory phrase came before actual disruption of discipline. Respondent "was under no compulsion to wait until resentment piled up and the storm broke before it could suppress the threat of disruption by exercising its right to enforce employee discipline".

Id. *See also Honda of America Mfg.*, 334 NLRB 746, 747 (2001) (finding unprotected similar impliedly profane references).

Here, the insignia in question implicates far more potential dissension than that over a theoretical reference to the word, "motherfucker." Instead, given nationwide events, and particularly those on the doorstep of the New Brighton store, other employees could, and have, viewed the display of BLM as a direct challenge to their core political beliefs about law enforcement personnel. Indeed, in some instances, that perception pertains to other employees' own family members. The adverse reactions such a display could provoke far eclipse those the Board found supportive of special circumstances—arising from a potential reference to a curse word—in *Southwestern Bell*.

This conclusion rests not on speculation, but rather on experience throughout the nation made known to Home Depot and the public at large through media reports regarding both BLM specifically, and the costs of political or social movement arguments in the workplace generally. *See, e.g.*, (RX-24(a)) (October 3, 2020 Seattle Times article entitled, "Black Lives Matter logos in the workplace divide employers, workers and customers"); Kevin B. Smith et al., *Friends, Relatives, Sanity, and Health: The Costs of Politics*, PLOS One, Sept. 25, 2019; John Eligon & Tim Arango, *Ten Months After George Floyd's Death, Minneapolis Residents Are At War Over Policing* (Mar. 28, 2021), https://www.nytimes.com/2021/03/28/us/minneapolis-george-floyd.html [nytimes.com]; Yuki Noguchi, *I Can't Work With You! How Political Fights Leave Workplaces Divided*, NPR (Jan. 28, 2020), https://www.npr.org/2020/01/28/798593323/i-cant-work-with-you-how-political-fights-leave-workplaces-divided [npr.org].

The record here contains ample evidence that such concerns are present and especially pertinent at the New Brighton store. Similar to the stipulation in *Southwestern Bell*, the Charging Party here agreed at the hearing that some of their co-workers view BLM unfavorably. (Tr. 215:1-5). This knowledge arose from specific comments they heard co-workers make disapproving of BLM insignia and the Black Lives Matter movement at large, specifically citing two different co-workers named "Jim." (Tr. 220:12-19, 228:4-13). General Counsel witness Ward likewise testified she overheard such negative comments regarding the Black Lives Matter movement. (Tr. 372:17-373:8). Morales further testified that when they overheard those statements from co-workers, it made them feel "uneasy" and "unsafe". (Tr. 221:6-24, 227:4-13).

Furthermore, other associates have directly complained to management about their co-workers wearing BLM insignia in the New Brighton store. ASM Johnson testified that one (1) of the two (2) instances in which she asked an associate to remove BLM from an apron occurred due

to a complaint from another employee. (Tr. 845:1-13). Likewise, Department Manager Flemming stated he received complaints from multiple associates about a cashier's BLM apron display before instructing its removal. (Tr. 767:22-769:2, 770:18-771:6). Flemming testified:

> **Q**: What were the [associates'] concerns?
>
> **Flemming**: That there was -- you know, because of that controversy around the nature of that particular issue that there was possible safety issues involved potentially with customers or other associates.
>
> **Q**: When you say "that particular issue," what are you referring to?
>
> **A**: The Black Lives Matter movement.

(Tr. 770:23-771:6).

Similarly, District Manager Belford described associates expressing a variety of views to her during the 2020 riots, including support for Black Lives Matter and participation in protests on one hand, and both support and concern on behalf of police officers on the other. (Tr. 681:21-683:17). One of those associates had two sons on the police force, including one responsible for guarding Derek Chauvin's home during the riots. (Tr. 683:1-7, 683:22-684:2, 684:16-685:6). That associate wanted to display a "Thin Blue Line" pin in support of his son, but Belford did not permit him to do so, thus enforcing the dress code and apron policies. (Tr. 685:1-6). Like the safety concerns she relied upon in addressing Morales' circumstances, Belford also considered the exacerbation of employee dissension such displays would cause, noting, "while you have associates that are very supportive of BLM per se as an organization, you also have associates that supported the Thin Blue Line or the Blue Lives Matter organization as well." (Tr. 673:20-24).

As both the national conversation and the specific circumstances of the New Brighton store show, a display of BLM evokes deep-seated and highly personal emotions amongst both Black Lives Matter supporters and defenders of law enforcement personnel. The dissension that can result from introduction of that conflict into the workplace far exceeds any sensibilities that could

have been offended by an implicit reference to a curse word, which the Board found established a special circumstance in *Southwestern Bell*. Thus, even if BLM refers to terms and conditions of employment (like the far more Section 7 related collective bargaining negotiations referenced in *Southwestern Bell*), the resulting exacerbation of employee dissension associated with its display justifies Home Depot's prohibition here.

iii. A Statutory Requirement to Permit the Display of BLM Insignia on Home Depot Aprons Would Unreasonably Interfere with the Company's Established Public Image.

The Board has long held that employers in a retail setting may be entitled to shield the public from certain kinds of slogans and images in order to protect the employer's public image. In making such determinations, the Board considers whether wearing a particular insignia would likely affect the employer's marketing of its product or service to the public, which includes a consideration of whether the words/images are provocative or offensive to members of the public. *See, e.g.*, *United Parcel Service*, 195 NLRB 441, 441 (1972) (upholding ban on button supporting candidate in intra-union elections because it interfered with projected public image of drivers' brown uniforms); *Starwood Hotels & Resorts Worldwide, Inc.*, 348 NLRB 372, 373 (2006) (upholding employer ban on buttons where they interfered with all-black server uniform); *Noah's New York Bagels*, 324 NLRB 266, 275 (1997) (holding employer could prohibit tee-shirt stating, "[i]f its not Union, its not Kosher" (sic) because it unduly interfered with employer's public image as a purveyor of kosher products); *Pathmark Stores*, 342 NLRB at 379-80 (2004) (finding employer had reasonable belief that ambiguous tee-shirt slogan "Don't Cheat About the Meat" would have an inappropriate negative impact on customers); *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1087 (2003) (deferring to arbitral finding that employer had reasonable belief that "road kill" tee shirt, depicting employees as a squashed carcass lying in a pool of blood, was provocative and would adversely affect legitimate business interests). Furthermore, in establishing

this special circumstance an employer need not demonstrate an actual effect on customers (though, as discussed below, such evidence exists here), but rather must only show the insignia "reasonably threatened to create concern among the Respondent's customers". *Pathmark Stores*, 342 NLRB at 379.

Here, the centrality of the orange apron to Home Depot's brand and image is beyond legitimate challenge. As explained in detail above, not only does the Home Depot hold the apron out as *the* symbol of the Company to customers (Tr. 59:20-60:2, 293:11-294:11, 461:6-12, 653:22-656:11, 709:3-12, 785:13-786:4), but it also serves as the unifying symbol for personnel internally. (Tr. 655:25-656:11, 748:12-19, 788:17-21). Even Home Depot's internal intranet page is named, "My Apron." (Tr. 566:3-4, 782:14-17, 783:6-10). Consequently, the Company takes numerous proactive steps to protect the apron's integrity in all respects, ranging from legal trademark protection (RX-4) (Tr. 835:12-837:16) to practical steps such as keeping aprons inside the stores at all times (Tr. 51:16-52:5, 228:20-229:12, 656:14-22), and destroying individual aprons upon their associates' separations. (Tr. 230:23-231:2, 330:25-331:5, 658:5-21).

Home Depot's desire to keep individuals' political views separate from the apron accords with these investments in its branding. Bottoms testified, with regard to the Respect for All People value displayed on the apron, the reasons why Home Depot seeks to avoid serving as a forum for political debate:

> [W]e have 400,000 associates at any given time. If you think about it we have 500,000 or 600,000 associates kind of come through our doors in any given year. We have millions of customers that come in as well. And out of those customers people have different values, people have different political parties, different race, different religion. Every time -- it runs the spectrum both for our associates and for our customers and that's our attempt to make our associate know as well as customers know that we respect who these people are. When you come into this store we're not trying to judge who you are, we're not trying to make any statement about your political views, religious views, how you dress, or anything else as a

> customer. But what we do is want to make sure you know and our associates know we respect all of our associates and we respect all our customers.

(Tr. 787:10-788:2).

As a matter of course, these principles extend to the highly politicized topic of "Black Lives Matter." Bottoms further explained BLM insignia violate the dress code and apron policies because:

> BLM is a political message, a political statement, a political movement. It's -- whether you agree with it or not, I think you have to from my perspective view it as divisive. I'm not saying it's divisive good or bad. There [are] people at either end of the spectrum about it. And from my perspective, our apron policy, dress code policy is designed to make sure we are not offensive or offending any of our customer base.

(Tr. 803:14-804:1). Furthermore, Home Depot's experience at the New Brighton store accords with these principles. For example, ASM Johnson's request to associate Anthony Anderson to remove BLM from his apron stemmed from a customer complaint about the insignia. (Tr. 844:15-25, 848:4-24).

Like the brown uniforms in *United Parcel Service* and the black uniforms in *Starwood Hotels*, Home Depot holds the orange apron out as *the* fundamental symbol of the Company itself. A government-imposed requirement that the Company permit associates to use that same apron to display political beliefs such as BLM, even if such a display refers to terms and conditions of employment, which it does not, would undermine the unifying and branding purpose of the apron. Consequently, the "public image" special circumstance allows Home Depot to prohibit the display of BLM insignia on its orange aprons.

3. <u>The General Counsel Presented No Evidence Demonstrating Home Depot Inconsistently Applies Its Dress Code and Apron Policies.</u>

The Complaint in this matter alleges at Paragraph 4(d) that Home Depot enforced its dress code and apron policies "selectively and disparately, by applying them against employees who

displayed the slogan 'BLM' on their aprons[.]" Additionally, at the hearing Counsel for the General Counsel devoted extensive time and effort to attempting to show that Home Depot permits certain non-BLM displays. (GC-10, 13, 16, 21, 22, 48) (Tr. 56:3-58:13, 58:14-59:18, 299:21-300:7, 305:13-306:2, 315:10-25, 319:11-320:6, 320:12-19, 334:8-16, 336:7-337:1, 462:6-463:14, 587:21-591:1, 596:10-16, 642:10-651:18, 659:21-662:20, 709:14-713:25, 811:3-821:5). Such evidence focused primarily on displays of LGBTQ+ Pride, and celebratory/decorative aprons. (*Id*.). The General Counsel, however, comes no closer to establishing a violation through these contentions because: (1) they have no relevance to the proper analysis here; (2) all examples pointed to by the General Counsel accord with the dress code and apron policies; and (3) Home Depot consistently prohibits items that violate the policies.

i. The General Counsel's Attempts to Establish Inconsistencies in Enforcement Lack Relevance to the Merits of Its Allegations.

As an initial matter, the General Counsel's contentions in this regard have ***no bearing whatsoever*** on the merits of its allegations. Even if the General Counsel had demonstrated inconsistency in the types of messages allowed on the apron, that evidence would be irrelevant absent a gateway showing that Section 7 protects BLM displays, which it does not. As the Board stated in *Register Guard*, "in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." 351 NLRB 1110, 1118 (2007), *enforced in part and remanded sub nom., Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). *See also T-Mobile USA, Inc.*, 369 NLRB No. 50, slip op. at *3 (2020).[32] Furthermore, any purported inconsistencies are irrelevant to Home Depot's special

[32] Home Depot notes the *Register Guard* case is best known for its holding that employees do not possess a Section 7 right to use their employer's email system for protected activities, and that the

circumstances arguments, which turn solely on the specific issues created by BLM displays, and not on speculative contentions about how other displays could theoretically affect safety, employee dissension, and public image concerns.

Consequently, if the display of BLM insignia is unprotected (as it is) because it does not relate to workplace matters, and if Home Depot has established special circumstances related to BLM displays (as it has), then other displays of any type are completely irrelevant.[33] Under *Register Guard*, Home Depot may draw any line it wishes, so long as it does not draw a line along Section 7 grounds. As noted above, the General Counsel concedes the facial lawfulness of the dress code and apron policies. Thus, the central issue in this case remains solely whether a BLM display, standing alone, constitutes an act for mutual aid and protection regarding terms and conditions of employment. As shown above, it does not, and special circumstances apply in any event.

Board later overturned the email-related holding in *Purple Communications*, 361 NLRB 1050 (2014) (itself subsequently overturned in *Caesars Entertainment*, 368 NLRB No. 143 (2019)). Regarding the proposition cited here, however, the *Purple Communications* Board explicitly stated, "[w]e do not reach *Register Guard*'s definition of discrimination[.]" 361 NLRB at 1054, n.13. The Board's approving citation of *Register Guard*'s definition of discrimination in *T-Mobile*, 369 NLRB No. 50, slip op. at *3, demonstrates the continued validity of that definition.

[33] Counsel for the General Counsel implicitly acknowledged the irrelevance of its inconsistency arguments when the parties entered various online materials into the record via a stipulation that permitted the parties to make relevance objections on the record. Each of the relevance objections the General Counsel raised to materials offered by Home Depot was on the basis that items did not "mention BLM or Black Lives Matter". (Tr. 547:5-9, 548:15-18, 549:20-23, 550:18-22). If the General Counsel considers such online materials irrelevant because they do not specifically mention BLM or Black Lives Matter, then it cannot explain how the non-BLM examples of apron displays it offered at the hearing hold relevance.

ii. The General Counsel Failed to Establish Any Inconsistencies in Dress Code and Apron Policy Enforcement.

Moreover, even if one assumes for the sake of argument that inconsistent treatment of BLM displays could hold any relevance here, the General Counsel failed to establish any such inconsistencies for two reasons: (1) all of the displays the General Counsel points to accord with the dress code and apron policies insofar as they are not "causes or political messages unrelated to workplace matters" or are otherwise permitted by the policies; and/or (2) the images relied upon reflect celebratory/decorative aprons not intended for general use on the sales floor.

Counsel for the General Counsel primarily attacked displays of LGBTQ+ and Pride insignia, such as rainbow-colored flags, in its effort to demonstrate inconsistent treatment. *See, e.g.*, (GC-16, 48) (Tr. 315:10-25, 319:11-320:6, 642:10-651:18, 709:14-713:25, 811:3-821:5). For example, much of Counsel for the General Counsel's focus in this regard centered on a Company-issued celebratory/decorative apron depicted in a photograph from the Twitter feed of Northern Division President Hanlon. (GC-16, p. 18); (GC-48). These efforts, however, show no inconsistency with Home Depot's dress code and apron policies. Hanlon and the other individuals wore identical celebratory aprons containing a Pride flag during June, also known as Pride Month. (Tr. 853:19-24). The Company celebrates and recognizes Pride Month, just as it does for many other cultural months such as Black History Month, Native American Heritage Month, and Veterans Month. (Tr. 653:11-17). Celebration of a cultural month is not the same as advocacy for "causes or political messages unrelated to workplace matters." (JX-1).

The General Counsel's reliance on Company-issued materials such as the aprons depicted on Hanlon's Twitter feed also fails to show inconsistency, because the dress code and apron policies explicitly permit display of such materials. The dress code policy, as cross-referenced by the apron policy, lists as "Acceptable": "[v]endor pins authorized by The Home Depot";

"[d]ecorated aprons celebrating holidays, special occasions and events as approved by the [District Manager/Store Manager/District Human Resources Manager]; and "patches or pins that promote events, activities, organizations, slogans, or messages sponsored by Home Depot." (JX-1, pp. 4-5). Consequently, items falling under those categories cannot demonstrate inconsistency with the dress code and apron policies.

For similar reasons, the celebratory/decorative aprons relied upon by the General Counsel also fail to demonstrate inconsistencies. Such aprons fall directly under the category of "[d]ecorated aprons celebrating . . . special occasions" permitted by the policies. (*Id.* at p. 4). Hanlon, for example, explained in her testimony that she receives such celebratory/decorative aprons when she visits stores, and that these aprons are not meant for general use on the sales floor. (GC-16) (Tr. 305:13-306:2, 320:12-19).[34] District Manager Belford provided the same explanation in her testimony, when presented by the General Counsel with aprons shown on her Twitter feed. (GC-13) (Tr. 587:21-588:8, 590:12-591:1, 596:10-16, 659:21-662:20). The General Counsel further points to decorative aprons displayed on the Company's website, without any evidence whatsoever that any individual ever wore them in a store. (GC-21, 22).

The General Counsel also elicited evidence of apron displays that do not remotely resemble "causes or political messages unrelated to workplace matters". (JX-1). Such references include university emblems (GC-13, p. 10) (GC-16, p. 2) (Tr. 299:21-300:7, 598:20-600:13), sports teams

[34] Home Depot notes that, in pre-hearing conversations with the ALJ regarding Home Depot's Petition to Revoke the subpoena *ad testificandum* issued to Hanlon, Counsel for the General Counsel represented it required Hanlon's testimony because she possessed unique and pertinent information to which only she could testify. In fact, the questions the General Counsel posed to Hanlon focused almost exclusively on her publicly available Twitter feed, and specifically the irrelevant celebratory/decorative aprons. When Counsel for Home Depot raised at the hearing the General Counsel's inaccurate pre-hearing representations, the ALJ correctly observed the evidence elicited from Hanlon was "not particularly helpful[.]" (Tr. 314:19-20).

(Tr. 58:14-59:18, 464:10-23), general artwork (Tr. 56:3-22, 58:14-59:18, 462:6-463:14), and even Halloween costumes (GC-10) (Tr. 334:8-16, 336:7-337:1). Similarly, Counsel for the General Counsel questioned Bottoms regarding displays in offices at Home Depot's corporate headquarters (Tr. 794:3-796:25), which are inaccessible to the general public (Tr. 794:11-17), and where personnel do not wear uniforms (830:10-12). The General Counsel's evidence accords with the dress code and apron policies and does not advance the General Counsel's legal theories in any manner.

iii. Home Depot Consistently Enforces Its Prohibition Against All Political Messages.

Far from inconsistent enforcement, Home Depot demonstrated at the hearing that it uniformly adheres to its dress code and apron policies regarding political messages. As both Store Manager Bergeland and District Manager Belford explained during their meetings with Morales, Home Depot does not target BLM or "Black Lives Matter", but rather consistently applies the same prohibition to similar polarizing political and social messages. (Tr. 516:12-20, 675:18-22). Such messages include "Police Lives Matter", "Blue Lives Matter", "Thin Blue Line", and "MAGA". (Tr. 516:12-20, 675:18-22, 790:24-791:7).

Home Depot has enforced these prohibitions in the New Brighton store, even under difficult circumstances. During the height of the summer 2020 riots, one associate wore a "Thin Blue Line" pin in support of his police officer son, whom the associate felt could be in danger, and Belford instructed him to remove the pin. (Tr. 685:1-6). Also around that time, District Human Resources Manager Whitley learned of customer complaints regarding security guards who wore "Blue Lives Matter" neck gaiters, and immediately directed the guards to remove them. (Tr. 745:7-746:16, 752:11-753). Indeed, Whitley testified that he and Belford considered these prior

applications of the policies, and the need for overall consistency, in their handling of Morales' BLM insignia. (Tr. 753:10-754:1).

As a result, the record evidence leaves no doubt Home Depot has consistently enforced its concededly lawful dress code and apron policies to prohibit "causes or political messages unrelated to workplace matters" (JX-1), and that such enforcement cannot violate the Act.

B. Home Depot's Treatment of Morales' Complaints About Gumm and Black History Month Were Entirely Appropriate and Did Not Violate Section 7.

For the reasons explained above, the General Counsel's principal theory of this case—that Morales was constructively discharged for engaging in the protected activity of displaying BLM on his apron—fails, because the BLM display is not protected concerted activity. Nonetheless, the General Counsel might also argue that, even if the BLM activity is itself unprotected, Home Depot also constructively discharged Morales for a different reason—his various efforts to oppose the misconduct of Allison Gumm and the defacement of Black History Month posters at the New Brighton facility. The GC might argue under a dual motives analysis: (1) that these Gumm and BHM-related complaints were themselves protected by Section 7; (2) that Home Depot's retaliation against Morales for making the complaints itself independently violates Section 7; and (3) that Home Depot is liable even if it was also motivated in part by its legitimate desire to enforce the apron policy. Such an approach must fail both because a dual motives analysis cannot apply here, and, even if they did, the facts do not support a violation.

1. *Wright Line* Does Not Apply Because the General Counsel's Constructive Discharge Allegation Precludes a Dual Motives Analysis.

As an initial matter, the appropriate overall analytical framework applied to Morales' separation from employment is the standard of *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964) ("*Burnup & Sims*"), rather than the dual motives framework of *Wright Line*, 251 NLRB 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 445 U.S. 989 (1982) ("*Wright Line*").

The Board applies a *Wright Line* analysis when it examines allegations of pretext—i.e., claims that an employer's asserted legitimate reason for its decision to impose an adverse action merely disguises its true motive to retaliate for protected activities. *Burnup & Sims*, conversely, applies where the employer's motive is not at issue, and the Board must instead decide only whether the employee conduct directly cited by the employer enjoyed the Act's protection. The facts of this case do not support any examination of Home Depot's motives, or allegations of pretext, and thus only the *Burnup & Sims* framework (and not *Wright Line*) can apply.

As explained below, the need to apply only *Burnup and Sims* arises from the nature of the General Counsel's constructive discharge allegation, which obviates the need for any examination of motives. Instead, the central issue in this case distills down to whether Morales' display of BLM on their apron constituted protected activity. Furthermore, the correct application of *Burnup & Sims* renders all of the General Counsel's evidence and arguments regarding associate Allison Gumm's conduct,[35] as well as Morales' email to ASM Ellis about Black History Month (GC-7, pp. 1-2), wholly irrelevant to the pertinent analysis under *Burnup and Sims*.

[35] As described above, much of the complained-of conduct by Gumm related to treatment of customers, rather than other employees. Counsel for the General Counsel acknowledged at the hearing that Board law on whether complaints about treatment of retail customers can form the basis for protected activity is "unsettled." (Tr. 352:9-353:1). Home Depot agrees the Board has not directly addressed this issue. Home Depot further notes that in *Brighton Retail, Inc.*, 354 NLRB 441, 443-45 (2009), an ALJ's Decision, as adopted by the Board, appears to recognize treatment of other employees and treatment of customers as different concepts. Furthermore, as an analytical matter, treatment of customers objectively falls outside the "mutual aid and protection" clause of Section 7. 29 U.S.C. § 157. *See Waters of Orchard Park*, 341 NLRB 642, 644 (2004) (noting long history of Board cases finding complaints regarding the quality of patient care unprotected in the healthcare context); *Universal Syndications, Inc.*, 347 NLRB 624 (2006) (finding unprotected complaints regarding misallocation of tips given by employees for a pizza delivery driver). In any event, for the reasons discussed herein, the question of whether complaints about Gumm's treatment of customers enjoyed the Act's protection lacks relevance to the appropriate analysis.

As the Board has explained, the existence or absence of unlawful animus relevant under a *Wright Line* analysis, is not material where the "very conduct for which employees are disciplined is itself [claimed to be] protected concerted activity." *CGLM, Inc.*, 350 NLRB 974, 974 n.2 (2007) (internal quotations omitted) (quoting *Burnup & Sims* at 976), *enforced mem. per curiam*, 280 F. App'x 366 (5th Cir. 2008). *See also Readyjet, Inc.*, 365 NLRB No.120, slip op. at 1 n.4 (2017); *Shamrock Foods Co.* 337 NLRB 915, 915 (2002), *enforced* 346 F.3d 1130, *rehearing denied* (D.C. Cir. 2003); *Phoenix Transit System*, 337 NLRB 510, 510 (2002), *enforced mem.* 63 F.Appx. 524 (D.C. Cir. 2003). Consequently, the Board will find error if an ALJ conducts analysis under the *Wright Line* dual motives framework, rather than the *Burnup & Sims* single motive framework, where motive is not at issue. *Atlantic Scaffolding Co.*, 356 NLRB 835, 838 (2011).

The very nature of the "Hobson's Choice" constructive discharge theory advanced by the General Counsel here (discussed in further detail below) renders a dual motives analysis inapplicable. Specifically, unlike a typical dual motives case challenging an employer's adverse action against an employee, ***Home Depot did not take any adverse action against Morales.*** Morales themself, not Home Depot, chose to end their employment. Consequently, Home Depot's motives are not at issue. Even applying the General Counsel's incorrect analysis, the pertinent question does not relate to *why* Home Depot would have presented Morales with a choice between continued employment and the display of BLM insignia.[36] Instead, the ALJ must evaluate only

[36] Home Depot does not assert that *Wright Line* never applies in constructive discharge cases. Indeed, under the theory of constructive discharge in which an employer creates intolerable working conditions, the Board may well examine *why* the employer chose to create such conditions. Under the "Hobson's Choice" theory advanced by the General Counsel here, however, the reason for the purported presentation of a choice is immaterial. The General Counsel can only establish a violation if the activity in question enjoys the Act's protection, and fails to establish a violation if it does not enjoy protection.

whether such a choice (if presented, which as explained below, it was not), forced Morales to abandon a Section 7 activity, as opposed to an unprotected activity.

Due to the absence of a "dual motives" analysis, Morales' complaints regarding Allison Gumm, and their email to ASM Ellis about Black History Month, have no bearing on the merits of the General Counsel's allegation. Even if one assumes *arguendo* that Morales engaged in any protected activities of which Home Depot was aware regarding Gumm and Black History Month, such an assumption would not alter the fundamental *Burnup & Sims* assessment of whether the display of BLM insignia enjoys the Act's protection. Likewise, even assuming Morales engaged in no protected activities whatsoever regarding Gumm or Black History Month, the ALJ must still independently assess whether the Act protected their BLM display, and if so whether Home Depot presented a "Hobson's Choice" on that basis. The existence or non-existence of protected activities regarding Gumm or Black History Month makes no difference in that assessment.

Consequently, the General Counsel's extensive treatment of the Gumm complaints at the hearing demonstrate a misguided approach. Indeed, Counsel for the General Counsel stated it presented such evidence to demonstrate the complaints about Gumm's behavior arose from "real and true concerns." (Tr. 352:20-353:1). It cannot explain, however, whether the existence of such complaints, much less their validity, has any bearing on the pertinent analysis here. As a result, the ALJ must disregard as irrelevant the General Counsel's evidence and arguments regarding Morales' Allison Gumm complaints and their Black History Month email.

2. The General Counsel Cannot Satisfy *Wright Line*.

To the extent the GC incorrectly advances a dual-motives argument, it would be governed by the framework established by *Wright Line*, 251 NLRB 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 445 U.S. 989 (1982) ("*Wright Line*"). That framework applies when "an

employer articulates a facially legitimate reason for its [adverse action], but that motive is disputed." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013). Under *Wright Line*, the General Counsel must initially establish a prima facie case by showing that: (1) Morales engaged in Section 7-protected activity by complaining about the Gumm and BHM incidents; (2) Home Depot knew of that activity; and (3) Morales' protected activity was a substantial or motivating factor in an adverse employment action against Morales. *Id.* If the GC makes this initial showing, Home Depot can nonetheless avoid liability by demonstrating that it would have taken the same action even in the absence of the Section 7-protected activity. *Id.*

Here, the GC cannot establish the third requirement for its prima facie case—that Home Depot took adverse action against Morales based in substantial part on Morales' Gumm and BHM-related complaints. And, moreover, even if Home Depot's conduct toward Morales was motivated in part by its disapproval of Morales' complaints (which it was not), Home Depot had an independently-sufficient basis for taking adverse action against Morales—namely, Morales' failure to comply with the apron policy. In these circumstances, there was no violation of the NLRA.

i. Home Depot Held No Animus Against Morales' Gumm Complaints and Black History Month Email to ASM Ellis.

First, the General Counsel failed to demonstrate that Home Depot held any animus against Morales' Gumm complaints or their Black History Month email to Ellis. Regarding Gumm, the record reflects no evidence that, at any time before, during, or after Morales' several conversations with supervisors and managers regarding Gumm, any of those individuals evinced any animus regarding Morales' complaints. To the contrary, Home Depot repeatedly expressed concern over the conduct they reported and informed them Home Depot would take action. As demonstrated by the record this was not a hollow promise of action. To the contrary, Home Depot imposed

progressive discipline against Gumm, ultimately resulting in her discharge. (GC-23, pp. 27-29, 32). District Manager Belford, the same individual ultimately responsible for handling Morales' apron situation, described Gumm's alleged conduct as making her "sick to [her] stomach," (GC-4 16:15-17), and expressed great empathy with Morales regarding their reports. (GC-4 16:15-17, 17:9-10, 19:11-17, 41:6-44:21). Belford further confirmed to Morales, without objection from them, that the Gumm situation was "a completely separate issue from you having the Black Lives Matter on your apron[.]" (GC-4 56:12-20).

Regarding Morales' Black History Month email to ASM Ellis, the record reflects only one claim of animus (by an individual other than Belford), and that assertion lacks credibility. As explained above, Morales testified that Store Manager Bergeland told them in the February 17, 2021 meeting between Bergeland, Ellis, and Morales, that Morales should not have sent the email to everyone. (Tr. 168:17-20, 171:18-20). But, Morales did not, in fact, send the email to everyone in the store (to the contrary, they intentionally responded only to Ellis), and the prior emails in the chain were in fact storewide emails. (GC-7) (Tr. 243:1-4, 475:7-9). Additionally, both Bergeland and Ellis independently and emphatically denied that any such criticism occurred. (Tr. 477:6-20, 510:11-511:4). Moreover, far from expressing animus against the email, Bergeland (as confirmed by Morales) praised them for its well-written nature, and for raising their concerns. (Tr. 168:12-14, 169:2-6, 244:6-19). For her part, Belford (again, the same individual ultimately responsible for handling Morales' apron situation), complimented Morales for his email. (GC-4 26:22-24).

Consequently, the General Counsel failed to establish that Home Depot held any animus against Morales' Gumm complaints or Black History Month email. Purportedly protected activities could not have motivated Home Depot's handling of Morales' BLM insignia if Home Depot did not hold animus toward those activities. *PPG Industries, Inc.*, 337 NLRB 1247, 1252-

53 (2002). Additionally, the Board requires a demonstration of specific and causal animus showing a direct nexus between unlawful animus and the adverse action, rather than evidence of generalized animus. *Tschiggfrie Properties, LTD*, 368 NLRB No. 120 (2019). The absence of any animus whatsoever falls far short of that standard and precludes the establishment of a *prima facie* case under *Wright Line*.

ii. The Dress Code and Apron Policies Independently Motivated Home Depot's Handling of Morales' BLM Insignia.

Any attempt by the General Counsel to establish a *prima facie* case under *Wright Line* must confront the significant obstacle that it has stipulated that Home Depot's handling of Morales' BLM insignia accords with nationwide application of the dress code and apron policies. Specifically, the General Counsel and Morales stipulated:

> At all material times, Respondent interpreted the above-described 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 Respondent's facilities in the United States.

(JX-1).

In other words, the General Counsel has conceded the existence of consistent treatment in like circumstances. Indeed, the General Counsel also introduced evidence demonstrating that before (GC-28) (June 12, 2020), simultaneous with (GC-30) (February 17, 2021), and after (GC-29) (April 12, 2021) its handling of Morales' BLM display, Home Depot required other employees elsewhere to remove BLM insignia. As discussed above, such consistent application also occurred within the New Brighton store, including two examples prior to Morales' situation described by ASM Johnson (Tr. 844:5-845:13, 848:4-24), and two others also prior to Morales' situation described by Department Manager Flemming. (767:22-769:2, 770:18-771:6). Likewise, after Morales' resignation, Home Depot required New Brighton associates Tesfaldet and Kimmons to

remove BLM from their aprons as well. (GC-27) (Tr. 420:12-426:11, 441:21-442:5, 513:22-515:13, 877:4-10).

Such significant evidence of consistent treatment at the New Brighton store and elsewhere, during all time periods, renders implausible any contention that Home Depot enforced its dress code and apron policies against Morales due to animus against their Gumm complaints or Black History Month email. To the contrary, Home Depot's uniform application of its policies show it held only one legitimate motive in asking Morales to remove BLM from their apron: compliance with the concededly lawful dress code and apron policies. Indeed, in explaining the reason for their requests to Morales, both Store Manager Bergeland and District Manager Belford undisputedly cited policy compliance. (GC-4 45:2-48:19) (Tr. 169:11-18, 512:4-16).

Consequently, the General Counsel cannot credibly argue Home Depot instructed Morales to remove BLM from their apron due to animus arising from their Gumm complaints or Black History Month email to Ellis, rather than a motive of policy compliance. This conclusion provides another independently sufficient basis to find the General Counsel lacks a *prima facie* case.

iii. Home Depot's Neutral Application of Its Concededly Lawful Policies Demonstrate It Would Have Undertaken the Same Actions Absent Any Purported Unlawful Animus.

Where, as here, Home Depot can show it would have taken the same action regardless of protected activities, it rebuts any purported *prima facie* case. *Oakes Machine Corp.*, 288 NLRB 456, 458 (1988) (noting that where both lawful and unlawful grounds motivated a charged party, it can prevail if it shows that the lawful reason alone would have prompted the action); *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 29 fn. 4 (D.C. Cir. 1998) (explaining *Wright Line* allows a charged party to prove, "despite any unlawful motive, the same action would have occurred pursuant to some additional, lawful motive"); *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d

1307, 1314 (7th Cir. 1998) (finding a charged party can "avoid a finding of an unfair labor practice if it can show that it would have taken the action regardless; that is, for legitimate reasons").

Many of the same considerations discussed above also show Home Depot would have handled Morales' BLM insignia in the same manner even if it held animus against their Gumm complaints or Black History Month email. Most notably, the General Counsel presented no evidence suggesting that Home Depot would have prohibited others in the store and elsewhere from displaying BLM, while still permitting Morales to do so. Instead, the General Counsel stipulated Home Depot interprets its dress code and apron policies to prohibit BLM insignia (JX-1), and Morales' situation reflects a direct application of such an interpretation. Thus, as a matter of course, Home Depot would have applied its policy interpretation to Morales with or without any purported unlawful animus against their Gumm complaints or Black History Month email. The consistent application of those policies within the New Brighton store involving other employees—at least four times before and two times after the incident with Morales ((GC-27) (Tr. 420:12-426:11, 441:21-442:5, 513:22-515:13, 767:22-768:22, 844:5-845:13, 877:4-10))—confirms the validity of Home Depot's rebuttal to any purported *prima facie* case under *Wright Line*.

As a result, the General Counsel's alternative theory of this case fails. Home Depot's treatment of Morales' complaints about Gumm and Black History Month were entirely appropriate and do not amount to a violation of the NLRA.

IV. <u>Home Depot Did Not Constructively Discharge the Charging Party.</u>

Even if Section 7 protection applied to Morales' display of BLM insignia, and it does not, the record does not support the General Counsel's attempt to convert Morales' voluntary

resignation into a constructive discharge. The Board recognizes two theories of constructive discharge, neither of which the General Counsel can establish here.

Under one theory, an employee must show both that: (1) the burdens imposed on the employee caused, or were intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign; and (2) the employer imposed those burdens because of the employee's protected activities. *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1170 (2004)). No evidence in the record here supports either prong of this first constructive discharge theory. The only conduct to which the General Counsel could point to as imposing a burden on Morales—that of Allison Gumm—was conduct not undertaken on behalf of Home Depot. Indeed, Home Depot ultimately discharged Gumm for those actions. (GC-23, p. 32) (Tr. 623:13-16). Moreover, the conduct Morales found offensive began, according to them, on their first day of employment (Tr. 77:23-78:17), well before they commenced any purportedly protected activities. As a result, only a "Hobson's Choice" constructive discharge analysis could apply here.

Under that theory, a constructive discharge occurs where the evidence shows the employer forced the employee to choose between continued employment and abandoning statutory rights. *Sara Lee Bakery Group, Inc. v. NLRB*, 296 F.3d 292, 300 (4th Cir. 2002). The General Counsel can only establish such a constructive discharge by demonstrating: (1) the employer conditioned continued employment on the abandonment of Section 7 rights; and (2) a quit resulted from the imposition of that condition. *Mercy Hospital*, 366 NLRB No. 165 (2018).

As the Board has acknowledged, "[n]ot every case where an employee quits in reaction to an unfair labor practice constitutes a constructive discharge." *Intercon I*, 333 NLRB 223, 224 (2001). To the contrary, such a finding requires the General Counsel to objectively demonstrate that a "prudent person in [Morales'] position" would "reasonably believe that the Respondent

would fire [them] if [they] did not forego [their purportedly protected] activity." *Id*. The General Counsel must also show the presentation of such a choice to the employee was "clear and unequivocal, and the employee's predicament not one which is left to inference or guesswork on their part." *ComGeneral Corp.*, 251 NLRB 653, 657-58 (1980) (citing *Masdon Industries, Inc.*, 212 NLRB 505 (1974); *Marquis Elevator Company. Inc.*, 217 NLRB 461 (1975); *Superior Sprinkler, Inc.*, 227 NLRB 204 (1976)).

The circumstances here directly conflict with the Board's "Hobson's Choice" constructive discharge framework. When Morales resigned, without identifying BLM as a basis for that resignation, District Manager Belford was still in discussions with them, encouraging them to consider other options to express their views in support of racial justice in the community at large. Far from creating a reasonable belief that Respondent was discharging them if they did not abandon their display of BLM at that time, District Manager Belford made abundantly clear, though multiple statements, that Home Depot was not firing them over the issue. *See, e.g.*, (GC-4 54:4-6) ("I'm not going to fire you over [the BLM display]. That's not how that's going to work. You haven't done anything wrong, okay."); (GC-4 57:15-16) ("I'm not going to fire you. That's not going to happen.").[37] To the contrary, Belford repeatedly and emphatically implored Morales not to resign, and to instead remain with Home Depot as a driver of solutions to problems. (GC-4 55:10-20) ("I don't want you to [leave], Antonio, just hearing your story and hearing who you are and hearing what you're passionate about, I think you have a lot that you could help Home Depot learn from." *See also* (GC-4 35:11-36:13, 57:11-58:20, 61:16-21, 62:11-16, 65:14-68:15, 72:7-13, 76:2-12). Moreover, rather than presenting Morales with an ultimatum that they abandon their

[37] The record does not show what would have happened if Morales had not resigned, and instead had continued to insist on displaying BLM on his apron in violation of Home Depot's policies.

activities, Belford encouraged them to explore other displays of messages about which Morales cared, including through highlighting "Respect for All People" on their Values Wheel, and wearing DE&I pins. (GC-4 51:24-52:6, 52:9-21, 53:5-21, 55:3-8, 68:17-69:2, 73:14-24).

Similarly, during Morales' meeting with Store Manager Bergeland and ASM Ellis the prior day, Bergeland also encouraged Morales to use alternative dress code compliant forms of expression, to no avail. (Tr. 247:11-19, 279:4-12, 513:1-15). Moreover, during cross-examination, Ellis directly confirmed Bergeland did not present his instruction to remove the BLM insignia as a choice between compliance and discharge. (Tr. 478:6-17).

In short, the record shows that Belford was abundantly clear and unequivocal that Home Depot was ***not*** discharging them over the issue. Nonetheless, and despite open invitations and encouragement from Belford to continue working with Home Depot on the matter, Morales abruptly resigned the day after their meeting. (GC-4 72:25-73:20) (GC-8, p. 1) (GC-9).

Importantly, **Morales themself never claimed—neither at the time of their resignation nor at the hearing—that they resigned because Home Depot demanded they remove BLM from their apron.** To the contrary, Morales' resignation letter makes no mention whatsoever of the BLM insignia nor aprons, and instead refers to vague concerns regarding "safe[ty]." (GC-9). Similarly, their email to Belford immediately preceding their resignation did not cite the BLM display nor aprons, but instead complains, without further elaboration, about not feeling "comfortable, supported, heard or understood[.]" (GC-8, p. 1). At the hearing, when asked why they resigned, Morales stated only, "I determined that I didn't feel safe at Home Depot any longer[.]" (Tr. 200:22-23).

Consequently, the General Counsel's "Hobson's Choice" constructive discharge exists purely as its own invention. Home Depot made repeated overt pleas to Morales both to express

their beliefs in a manner compliant with the dress code and apron policies, and to remain employed. These circumstances do not support a finding of constructive discharge.

As a result, the General Counsel has not shown Home Depot took any adverse action against Morales. The General Counsel cannot establish a Section 8(a)(1) violation of the nature alleged here absent such an adverse action. *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403-04 (1993) (explaining the absence of an adverse action precludes a violation based on a claim of retaliation for protected activities). Consequently, the absence of a constructive discharge, and by extension any adverse action against Morales, provides yet another independently sufficient basis for dismissal of the General Counsel's allegation related to Morales' separation from employment.

V. Home Depot Did Not Violate the Act by Protecting the Integrity of Its Investigation of Another Employee Through a Witness Interview Confidentiality Request.

At the hearing, Counsel for the General Counsel orally amended the Complaint to add an allegation that Home Depot, through District Manager Belford, violated Section 8(a)(1) of the Act by asking Morales to keep confidential the details of an investigatory interview. (Tr. 8:5-13). Counsel for the General Counsel further clarified (at Tr. 556:17-21) that the allegation arises from the following statement by Belford to Morales, regarding Home Depot's investigation into associate Allison Gumm's conduct:

> So, okay, oh, yes, I'm sorry. Casey 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. I mean, obviously, [ASM] David [Stolhanske] knows that you're there, but that sort of thing, okay?

(GC-4 26:3-13).

In her testimony, Belford explained she requested confidentiality "so we could get a good, clean understanding by our investigation." (Tr. 669:11-13).

As the General Counsel must acknowledge, this allegation contradicts current Board law under *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019) (overruling *Banner Estrella Medical Ctr.*, 362 NLRB 1108 (2015)). As noted above, the ALJ must apply current Board precedent. *Pathmark Stores*, 342 NLRB at 378 n. 1. Thus, the ALJ is required to dismiss the General Counsel's Section 8(a)(1) confidentiality statement allegation.

In *Apogee Retail*, the Board explained that an employer "guaranteeing the integrity of its investigations, to protect both itself and its employees" was a "compelling interest" for the benefit of both employers and employees. *Apogee Retail LLC*., 368 NLRB No. 144, slip op. at *9 (2019). The *Apogee* Board further explained the benefits and justification of confidentiality directives outweigh the comparatively slight impact on employees' Section 7 rights because assuring employee safety and confidentiality during an ongoing investigation is of "utmost importance." *Id*. Additionally, the Board explained another compelling justification exists, "to protect employee privacy and ensure that there will be no retaliation by managers or other employees." *Id.* at *8. *See also Watco Transloading*, LLC, 369 NLRB No. 93 slip op. at 8, n. 24 (2020); *Alcoa Corp.*, 370 NLRB No. 107 (2021) (extending the holding of Apogee to oral confidentiality instructions given to employees). *Apogee* further notes the clear lawfulness of confidentiality instructions limited in duration to the investigation in question, as opposed to generalized rules unlimited in duration, which may require further scrutiny under *Boeing* Category II. *Apogee*, 368 NLRB No. 144, slip op. at *12 (citing *Boeing*, 365 NLRB No. 154, slip op. at *16 (2017)).

Here, Belford's statement to Morales tracks precisely the legitimate concerns relied upon by the Board in *Apogee* and its progeny. She specifically cited the need to obtain independent

information from other employees, both in her statement to Morales and in her testimony at the hearing. (GC-4 26:7-9) (Tr. 669:11-13). Belford further explicitly confirmed to Morales the applicability of Home Depot's "no-retaliation policy" (GC-4 25:7-13). This legitimate need for independent recollections from other witnesses, coupled with the interests and assurances of non-retaliation, demonstrate precisely why the Board has correctly found such confidentiality requests lawful. Moreover, in the context of this portion of the conversation's direct and limited focus on Gumm's conduct, Belford's statement was clearly limited in duration to the Gumm investigation.

As a result, the ALJ must apply existing Board precedent under *Apogee* and its progeny, and dismiss the General Counsel's Section 8(a)(1) confidentiality statement allegation.

VI. <u>Existing Board Law Does Not Support a Nationwide Remedy.</u>

Contrary to existing Board law under *AT&T Mobility, LLC*, 370 NLRB No. 121 (2021), the General Counsel seeks a nationwide remedy based on the purportedly unlawful application of its facially lawful dress code and apron policies to a single employee—Morales—in a single location—the New Brighton store. Specifically, despite the absence of any allegation that Home Depot unlawfully applied its policies elsewhere, or that its dress code and apron policies violate the Act in any manner (facially or as applied), the General Counsel relies upon Home Depot's stipulation that it interprets its dress code and apron policies to prohibit BLM insignia on aprons nationwide. (JX-1) (Tr. 34:5-11).

As an initial matter, Home Depot notes the Complaint here contains no explicit allegation that its handling of Morales' use of BLM insignia on their apron created an "applied to restrict" violation regarding its dress code and apron policies, nor that those policies violate the Act in any manner. To the contrary, the Complaint only alleges at Paragraph 4(e), "[a]t all material times, Respondent, at all of its facilities in the United States, has interpreted the policy described above

in subparagraph 4(a) to prohibit employees from displaying 'BLM' and/or 'Black Lives Matter' slogans." Nowhere does the Complaint specifically allege, on an "applied to restrict" basis or otherwise, that such an interpretation creates an unlawful rule violation. Instead, the Complaint only asserts, in its general catch-all allegation at Paragraph 7, "[b]y the conduct described above in paragraphs 4, 5, and 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act." The ALJ cannot find a violation absent a specific Complaint allegation supporting such a finding when the charged party receives no clear notice that an alleged unlawful rule violation was alleged. *Dilling Mechanical Contractors, Inc.*, 348 NLRB 98, 105 (2006). Thus, as a threshold matter, the Complaint does not allege an unlawful rule violation that could support any claim to a rule-based remedy, including a nationwide remedy.

Moreover, even if the General Counsel has posited allegations that could support a rule-based remedy, *AT&T Mobility* precludes imposition of a nationwide remedy based upon a single purportedly unlawful application of a facially lawful rule. As noted above, the ALJ must apply current Board standards. *Pathmark Stores*, 342 NLRB at 379.

In *AT&T*, the Board addressed the question of whether "applied to restrict" rule violations, previously recognized under the third prong of the test for unlawful rule allegations under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), remained viable following issuance of *Boeing Co.*, 365 NLRB No. 154 (2017). Specifically, the *AT&T* Board found Respondent's no-recording policy facially lawful under *Boeing*, but also found its application to the charging party there to violate Section 8(a)(1). *AT&T Mobility*, 370 NLRB No. 121, slip op. at **2, 4. Thus, the Board continued to recognize the viability of "applied to restrict" violations based on unlawful applications of facially lawful rules. *Id.*

The *AT&T* Board then turned to the remedial implications of such "as-applied" allegations. It specifically examined circumstances where, as both in *AT&T* and here, the allegedly unlawfully-applied policy exists in facially lawful form at multiple locations. *Id*. at **5-7. This inquiry resulted in a determination that such circumstances do *not* support multi-location rescission or revision of the facially lawful rule. *Id*. The Board provided four (4) reasons for this conclusion:

(1) an employer's legitimate business considerations supporting facially lawful rules (*Id*. at **5-6);

(2) the existence of Board precedent confirming that continued maintenance of a facially lawful rule following an "applied to restrict" violation does not violate the Act (*Id*. at *6 (citing *Wynn Las Vegas, LLC*, 369 NLRB No. 91 (2020); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Marina Del Rey Hospital*, 363 NLRB 231 (2015); *T-Mobile USA, Inc.*, 369 NLRB No. 50 (2020), *supplemented* 369 NLRB No. 90 (2020));

(3) the absence of any practical meaningfulness of rescission or revision of a facially lawful rule (*Id.* at **6-7); and

(4) the fact that rescissions and revisions of unlawful rules based on single "applied to restrict" violations would undermine the "certainty and predictability of Board policy" that the Board seeks to foster (*Id*. at *7).

Of particular note, the Board explained with regard to its third reason:

> For a rule that has been found unlawful solely on "applied to restrict" grounds, revising the rule is not a meaningful option. The rule is *already* lawful on its face, so it cannot very well be revised to *make* it lawful. Under the [requested] affirmative remedy, the employer will still be required to rescind the rule. But because the rule is lawful on its face, there is no good reason why the employer cannot reinstate it once the notice-posting period – typically 60 days – has expired. The result, if the employer so chooses, is merely a temporary suspension of the rule.

Id. at *7 (emphasis in original).

The same considerations relied upon by the *AT&T* Board apply here. The General Counsel cannot demonstrate any practical statutory purpose that nationwide rescission or revision of its dress code and apron policies, which do not specifically mention BLM or "Black Lives Matter", could serve. Moreover, the General Counsel presented no evidence of nationwide dissemination of Charging Party Morales' circumstances. To the contrary, there is no logical reason to believe

associates in, for example, Fresno, California, would have any reason to think the dress code and apron policies prohibit Section 7 activities. Such associates elsewhere know only that the policies prohibit insignia promoting "religious beliefs, causes or political messages unrelated to workplace matters", a clearly and concededly lawful prohibition. (JX-1). Consequently, to such employees, a Board Notice referencing rescission or revision of these policies would be nonsensical and confusing from a Section 7 perspective.

As a result, in addition to the meritless nature of the underlying allegations, continued application of current and correct Board law under *AT&T* requires the ALJ to reject the General Counsel's request for a nationwide rule-based remedy.

CONCLUSION

The First Amendment protects Home Depot's decision to prohibit displays of BLM on its aprons. Additionally, any requirement that Home Depot permit its employees to alter their aprons with the BLM insignia would impermissibly conflict with federal trademark law. Moreover, Home Depot did not violate the Act through application of its concededly lawful dress code and apron policies to prohibit the Charging Party's BLM display on their apron, and did not constructively discharge the Charging Party. Furthermore, Home Depot's request that the Charging Party keep the contents of an interview confidential comports with current Board law. For all of these reasons, as well as the inappropriateness of a nationwide remedy, the General Counsel cannot obtain the relief it seeks here. As a result, Home Depot respectfully requests dismissal of the Charge in its entirety.

Respectfully submitted this 23rd day of December, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December 2021, this **HOME DEPOT U.S.A., INC.'S POST-HEARING BRIEF** was filed electronically via NLRB E-Filing, and service copies sent via electronic mail to:

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