CASE NOS. 24-1406 & 24-1513

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HOME DEPOT U.S.A., INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement
Of a Final Order of the National Labor Relations Board
Case No. 18-CA-273796

BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER/CROSS-RESPONDENT

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In accordance with Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1 and Eighth Circuit Rule 26.1.A, the Retail Litigation Center, Inc. states that it has no parent corporation, and no publicly held company owns 10 percent more of its stock.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is the voice of the retail industry to the judiciary. Its membership is comprised of many of the country's largest and most innovative retailers and, collectively, the RLC's members employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC provides courts with retail-industry perspectives on important legal issues impacting its members and highlights the potential industry-wide consequences of significant pending cases.

The RLC and its members have a strong interest in this case because the agency order under review compels a retailer to display an unwanted and potentially controversial message in its customer-facing retail locations, based on an erroneous interpretation of the National Labor Relations Act ("NLRA") and in violation of the First Amendment. Just as Petitioner Home Depot maintains a policy that prohibits its in-store employees from displaying political slogans on their work aprons, many other retailers similarly implement company appearance standards that are designed to create a welcoming environment, convey a consistent and recognizable brand, and

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4)(E).

communicate company messages. Such policies often restrict customer-facing employees from using their company uniform or other attire to express a message while on the job, especially through display of insignia or slogans that some customers would find controversial or offensive. Because the National Labor Relations Board ("NLRB") misread the NLRA to prohibit such a policy and misread the First Amendment to allow the prohibition, this Court should grant the petition for review and deny the cross-application for enforcement.

ARGUMENT

I. RETAILERS CAREFULLY DESIGN THE IN-STORE EXPERIENCE TO FOSTER A WELCOMING ENVIRONMENT FOR ALL CUSTOMERS, BUILD BRAND LOYALTY, AND MANAGE CONSUMER MESSAGING.

Retailers strive to make their store locations friendly and inclusive environments for all customers. For their brick-and-mortar sites, retailers intentionally design every aspect of the in-person, in-store customer experience to communicate to consumers that they are valued and appreciated by the retailer and that their patronage is desired and welcomed.

It is no surprise that retailers are intentional about the messages they communicate to their customers. As a recent Forbes article noted, "every element within a store is a potential influencer of how much time and money consumers spend and what they ultimately take away—both in their shopping bags and their

perception of the brand." E. Katz, *In-Store Branding And The Psychology Of Shopping*, Forbes (Mar. 4, 2024), https://tinyurl.com/3yzhaj6m. Everything a consumer sees in a retail outlet is carefully planned. That includes a store's "identifying sign," "the shape and general appearance of the exterior," "the interior floor plan," "the decor," "the equipment" in the store, and, yes, even "the [employees'] uniforms." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n.1 (1992) (holding trade dress of Mexican restaurant chain "inherently distinctive"); *see also Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 215 (2000) (acknowledging retailers employ distinctive trade dress). All of these contribute to the total image of a retailer. And all are used by the retailer to communicate its message to its customers.

For retailers that choose to implement dress codes or other appearance standards, uniforms often play a particularly important role in the overall communications strategy. "Most business establishments" strive "to project a certain type of image to the public." *NLRB v. Harrah's Club*, 337 F.2d 177, 180 (9th Cir. 1964). "[A] good corporate image is a genuine asset; it translates into dollars at the counter and higher stock valuation." *Corporate Image*, Inc. Magazine (Jan. 5, 2021), https://tinyurl.com/247nm958. Because employee appearance is "[o]ne of the most essential elements in that image," *Harrah's Club*, 337 F.2d at 180, many corporate (and government) organizations require their public-facing

employees to "wear uniforms," D. O'Leary, *Employee Uniforms: What to Know Before You Buy*, CO–by the U.S. Chamber of Commerce (Sep. 14, 2021), https://tinyurl.com/34bw7w8z. In many retailers' experience, uniforms "make a group of employees look like a true team, build brand consistency and convey trust and reliability to customers." *Ibid.*; *see also Tesla, Inc. v. NLRB*, 86 F.4th 640, 653 (5th Cir. 2023) ("a 'uniform requirement fosters discipline, promotes uniformity, encourages *esprit de corps*, and increases readiness'"); *UPS v. NLRB*, 41 F.3d 1068, 1069, 1073 (6th Cir. 1994) ("UPS maintains and enforces uniform and personal appearance standards . . . to project to the public an image of cleanliness, uniformity and efficiency").

Of course, not every retailer that employs a uniform policy or other appearance standard does so in the same way. For some, the desired company message can be achieved merely by requiring that employees be "formally dressed." C. Barney et al., *What Retail Workers' Attire Communicates to Customers*, Harvard Bus. Rev. (May 3, 2021), https://tinyurl.com/ynmwcnrb. Others may prefer to issue specific articles of clothing that convey a consistent look and feel—such as a shirt, hat, apron, or vest. *See, e.g.*, *The Green Apron*, Starbucks Archive, https://tinyurl.com/4j6u238f (last visited May 29, 2024) (discussing "green apron" "recognizable the world over"). Some retailers opt for a completely standardized look, with no variation permitted among their employees. Others allow for some

employee discretion, often within guidelines or restrictions set by the retailer. *See, e.g.*, *Medco Health Sols. of Las Vegas, Inc. v. NLRB*, 701 F.3d 710, 718 (D.C. Cir. 2012) (no "insulting," "provocative," or "confrontational" slogans); *Wal-Mart Stores*, 368 NLRB No. 146, slip op. at 22 (Dec. 16, 2019) (no "offensive or distracting" logos); *Harrah's Club*, 337 F.2d at 180 (no "jewelry of any kind"); *NLRB v. Starbucks Corp.*, 679 F.3d 70, 73 (2d Cir. 2012) ("one pro-union pin"). The agency record here is similar, as it shows that Petitioner permitted its retail store employees to "personalize" their work aprons in some ways but prohibited them from using the apron as a means to promote "religious beliefs, causes or political messages unrelated to workplace matters." App.853; R.2186.

It is not surprising that retailers electing to communicate with customers through uniforms would guide or limit their employees' displays on those uniforms. Retailers invest substantial time and monetary resources in building their brands, and none wants those efforts squandered. *Cf. Jack Daniel's Properties, Inc. v. VIP Prod. LLC*, 599 U.S. 140, 144 (2023) (agreeing maker of dog toys had potentially "diluted" a distiller's trademarks "by associating the famed whiskey with, well, dog excrement"). Similarly, no retailer wants to harm its brand or lose its customers because one of its employees selected a potentially controversial message and chose to display it on the company's uniform in the company's store.

A retailer's choice not to display a particular message in its store may not reflect any normative judgment. A sporting-goods chain with a store in Pittsburgh might allow its employees to wear sporting apparel but, in that location, not a Kansas City Chiefs cap. A toy store might encourage its employees to wear pins or buttons with cartoon characters but forbid them from selecting R-rated cartoons. Or, as in this case, a retailer might decide that employee uniforms are not an appropriate place to promote "religious beliefs" or "political messages," App. 853; R.2186; *see also Starbucks Corp.*, 679 F.3d at 73 ("Partners are not permitted to wear buttons or pins that advocate a political, religious or personal issue"), even though some in management may share the same views. Rather than reflecting a judgment about the content of any prohibited messages, such policies may simply reflect the retailer's view that some issues are best not raised at the point of customer interaction in the retail store.

Deciding what messages to promote and what messages to restrict is not always an easy task, even for retailers. Different consumers want different things. *See, e.g.*, *Emotional Connections in Retailing* at 5, 7–9, University of Pennsylvania, Wharton School (2013), https://tinyurl.com/yssdk93p. And messaging that works for one retail brand may be not helpful (and may even be harmful) to another. *See, e.g.*, Max Zahn, *Companies increasingly using politics in marketing, but there are risks: Experts*, ABC News (Aug. 23, 2022), https://tinyurl.com/y9h5vk99. On top

of that, the perceived meaning of all communication depends, at least to some degree, on matters of taste and style. At the end of the day, every retailer must balance a host of considerations in deciding what messages will be most effective in creating positive customer experiences in pursuit of their overall business objectives. *See Experience is everything: Here's how to get it right* at 7, PWC (2018), https://tinyurl.com/568hx2mw.

The NLRB order below forces retailers to promote messages that could result in divisive interactions with customers even if a business wants to promote a politically neutral shopping environment. The NLRB wrongly held that the NLRA requires that result and that the First Amendment allows it. If upheld, the order would impermissibly interfere with retailers' ability to cultivate their chosen in-store experience for customers.

II. FORCING RETAILERS TO DISPLAY UNWANTED MESSAGES IN THEIR STORES VIOLATES THE FIRST AMENDMENT.

In this case, the NLRB erroneously determined that the NLRA compels a retailer to allow displays of political slogans that the retailer does not wish to adopt, promote, or endorse in its store. The NLRB's directive thus forces the retailer to speak to its customers on a political issue when that retailer would prefer to remain silent. That compulsion violates the First Amendment.

A. The First Amendment Guarantees Retailers' Free Speech.

The First Amendment forbids the federal government from abridging the freedom of speech. The Supreme Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). The right to refrain from speaking means it "offends the First Amendment" when "the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586–87 (2023); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 753 (8th Cir. 2019). And that is as true for retailers as anyone else, because the First Amendment prohibits the government from making speech regulations "based on a speaker's corporate identity." *Citizens United v. FEC*, 558 U.S. 310, 347 (2010) (citing *Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–85 (1978)).

The NLRB abandoned these fundamental free-speech principles when it required Home Depot to utter a political message by permitting a store employee to write and display a political slogan on the employee's work apron. To justify its position, the NLRB contended "that employees' personalized additions to" a retail uniform are "the employees' own speech," not a retailers' speech. App.832; R.2165.

But the NLRB's position contradicts the Supreme Court's and this Court's binding First Amendment jurisprudence.

B. Retailers Often Speak Through Store-Employee Uniforms.

Retailers often speak through store-employee uniforms, as Home Depot did here. The Supreme Court has recognized 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." *Janus*, 585 U.S. at 910; *see Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("private employers . . . need a significant degree of control over their employees' words and actions"). Thus, when an employee is on the job, "[t]he employee is effectively the employer's spokesperson," and "their speech may be controlled by their employer." *Janus*, 585 U.S. at 910.

Here, all agree that messages displayed on the Home Depot work apron are constitutionally protected speech. App.832–34; R.2165–67; *see also Cohen v. California*, 403 U.S. 15 (1971) (words on jacket were speech); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (black armband was speech). All likewise agree that the store employee was required to wear the apron when interacting with customers in connection with official job duties. App.834; R.2167. The NLRB nevertheless mistook the employee for the relevant speaker, overlooking the Supreme Court's teaching that when an employee speaks as part of the

employee's job duties, the employee's words "are really the words of the employer" and thus "may be controlled by the[ ] employer." *See Janus*, 585 U.S. at 910.

The administrative record confirms that any words on the apron are Home Depot's speech. Like many other retailers, Home Depot requires its in-store, customer-facing employees to adhere to a consistent employee appearance standard that facilitates helpful, welcoming interactions between the store and its customers. That standard includes wearing a distinctive orange work apron that bears pre-printed company messages such as "I put customers first." App.853; R.2186. Although the company encourages its employees to personalize their aprons by adding their names and certain other elements, it maintains editorial control through a written policy that prohibits employees from using the apron "to promote or display religious beliefs, causes or political messages unrelated to workplace matters." App.853; R.2186. The administrative record thus confirms that messages displayed on the employee's work apron are really the words of Home Depot and thus may be controlled by the company.

C. Retailers Cannot Be Compelled To Host Unwanted Messages On Store-Employee Uniforms.

Even if the NLRB were correct that the specific words added to the work apron were the employee's speech and not the company's speech, that would not change the result under the First Amendment. The right to refrain from speaking

protects against government-scripted compulsions as well as attempts "to force an individual to include other ideas with his own speech that he would prefer not to include." *303 Creative*, 600 U.S. at 586–87; *see Lucero*, 936 F.3d at 753 ("the government still compels speech when it passes a law that has the effect of foisting a third party's message on a speaker").[2]

The Supreme Court and this Court have affirmed the principle many times. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), the Supreme Court affirmed the right of a private entity to remove from its parade a third-party group of marchers with "a message it did not like." *Id.* at 574. Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), the Supreme Court held that a California agency could not constitutionally require a utility company to distribute another speaker's message in its billing envelopes. *Id.* at 14–17 (plurality opinion). And in *Telescope Media Group v. Lucero*, this Court held that a Minnesota agency could not compel a videography business to make films containing third-party messages "different" from those that the business wanted to convey. 936 F.3d at 753. These decisions

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[2] The NRLB's contention that there is no First Amendment issue here because "it is the employee's desired message that is being displayed, not the government's," App.833; R.2166, thus misses the mark. It is the NLRB's order that compels Home Depot to permit that display. "The lesson from [the Supreme Court's cases] is that the First Amendment is relevant whenever the government compels speech, regardless of who writes the script." *Lucero*, 936 F.3d at 753.

(and more) reflect the judicial teaching that all speakers "ha[ve] a First Amendment right to present their message undiluted by views they d[o] not share," *303 Creative*, 600 U.S. at 585–86, or "to remain silent" about topics or issues that they would prefer not to address, *Pacific Gas*, 475 U.S. at 18.

That includes retailers. As explained, retailers use every aspect of the in-store customer experience to communicate with consumers. *See* section I, *supra*. This sometimes requires retailers to remove third-party messages that could offend or distract some customers, including unwanted messages selected by employees. *See, e.g., Goodyear OKs attire supporting police, but no political wear*, CBS News (Aug. 21, 2020), https://tinyurl.com/2r8wvwza; *Stores drop barbecue sauce over maker's words*, Tampa Bay Times (Sep. 27, 2005), https://tinyurl.com/22cpp2a3. A decision to keep a certain message out of a store may not reflect the retailer's own views on the issue but simply its judgment that raising a controversial or politicized topic will detract from the messages the retailer is trying to convey through the design and content of its stores.

The NLRB is thus mistaken when it asserts that a retailer's "own message" will not be "affected by the speech it [is] forced to accommodate" under the agency's ruling. App.833; R.2166 (quotations omitted). "Mandating speech that a speaker would not otherwise make," the Supreme Court has explained, "necessarily alters

the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988). And that is true in the retail context just like any other.

Finally, to the extent the NLRB suggests that the First Amendment and NLRA Section 7 are somehow in conflict (*see* App.832–33; R.2165–66), it is axiomatic that it is the statute and not the Constitution that must yield. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575–78 (1988) (construing NLRA to avoid First Amendment issue); *NLRB v. Fruit & Vegetable Packers & Warehousemen, Loc. 760*, 377 U.S. 58, 63 (1964) (similar); *Janus*, 585 U.S. at 930 (holding state labor law violates First Amendment). But there is no conflict, as the NLRA's special circumstances doctrine makes clear. *See infra*. The First Amendment protects against compelled speech in the labor context as everywhere else.

III. FORCING RETAILERS TO DISPLAY CONTROVERSIAL MESSAGES IN THEIR STORES VIOLATES THE NATIONAL LABOR RELATIONS ACT.

In addition to constitutional protections, the NLRA independently shields retailers from controversial messages their employees might try to present to their customers. The NLRB's order exceeds its authority and thereby violates the statute because the political slogan the employee displayed is not a type the NLRA protects, and because the agency fails to credit the retailer's reasonable belief that the slogan would harm its customer relationships and public image.

A. Political Slogans Are Not Union Insignia Protected By The Statute.

Section 7 of the NLRA authorizes employees "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8 makes it "an unfair labor practice for an employer to interfere with" Section 7 rights. *Id.* § 158(a)(1). Although Section 7 does not purport to address employee clothing, the NLRB has interpreted the statute as allowing employees "to wear union insignia at work." *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.7 (1945).

In this case, Home Depot rightly argues (at 25–34) that the political slogan selected by its employee was not concerted activity taken for the purpose of collective bargaining or mutual aid or protection, and thus is not authorized by Section 7. As the administrative law judge and the dissenting Board member explained, a reasonable person would perceive the employee's "BLM" marking as communicating "a broad political or social justice message" that "is not directly relevant to the terms, conditions, or lot of Home Depot's employees as employees." App.860; R.2193. In other words, the administrative record showed that "BLM" is unconnected to any protected activity.

That is not surprising because "BLM" does not qualify as union insignia. The reason employees may ordinarily "wear union insignia while on their employer's premises," *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1097 (8th Cir. 2005), is

that courts have "accepted the Board's view" that the right to self-organize "necessarily encompasses the right effectively to communicate with one another regarding self-organization," *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). And though the rule permitting employees to wear "union insignia" has "been extended to allow" some other pro-union items, *Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577, 584 (8th Cir. 1965) (noting NLRB approval for union-sponsored bowling shirts); *see also Wal-Mart Stores*, 400 F.3d at 1097 (agreeing union "t-shirt should be treated as union insignia"); *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 711 (5th Cir. 2018) (explaining "Fight for $15" button expressed support "for a $15 per hour minimum wage" and "the right to form a union without intimidation"), neither this Court nor the Supreme Court has ever endorsed the view that Section 7 authorizes employees to display political slogans on their clothing. Customers and employees alike would not understand a "BLM" notation as a form of communication regarding self-organization. *See* App.840; R.2173 ("a reasonable person with knowledge of the relevant facts would have linked Morales's display of 'BLM' with the Black Lives Matter movement . . . not with improving terms and conditions of employment"). Because a "BLM" marking is not a union insignia and does not otherwise represent concerted activity, the marking was not protected activity.

B. The Statute Protects Retailers From Employee Displays That Could Harm Customer Relationships.

Even if the "BLM" marking were protected activity, the retailer would still have the right to moderate it under "a limitation on Section 7 long recognized by the Supreme Court." *S. New England Tel. Co. v. NLRB*, 793 F.3d 93, 95 (D.C. Cir. 2015) (per Kavanaugh, J.) (citing *Republic Aviation*, 324 U.S. at 801–03). "Under the 'special circumstances' doctrine," the Supreme Court has taught, "a company may lawfully ban union 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." *Ibid.*; *accord Fabri-Tek, Inc.*, 352 F.2d at 583 ("banning the wearing of unusual union insignia or usual union insignia in an unusual way is not in violation of the employees' rights . . . because of special considerations and circumstances present in this case").

The special-circumstances doctrine should allow Home Depot, just like any other retailer, to prohibit its employee from displaying to customers a message that the company reasonably believes is "political, controversial, or offensive." *E. Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 425 (4th Cir. 1999) (citation omitted); *see also, e.g.*, *S. New England Tel. Co.*, 793 F.3d at 94–95, 97 ("the Board should have held that 'special circumstances' applied" where AT&T prohibited union T-shirt that

said "Inmate" on the front and "Prisoner of AT$T" on the back).[3] In such circumstances, the Supreme Court has explained, "the business justification for the employer's action" "outweighs" "the interference with [its employees'] s[ection] 7 rights." *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 268–69 (1965).

In holding otherwise, the NLRB failed to follow the well-established principle that it should determine only whether an employer's belief about a particular message is "reasonable." Instead of crediting the administrative law judge's finding that the retailer-prohibited slogan raised "squarely political subjects" that "created controversy" for the retailer and had nothing to do with the workplace, App.860, 863; R.2193, 2196; *see* App.854, 858–59, 862–63; R.2187, 2191–92, 2195–96, the NLRB blithely asserted that there could be no harm to the retailer because "[t]he potential for controversy that Respondent invokes would also be present for other

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[3] *Starbucks Corp.*, 679 F.3d at 78 ("the Board has gone too far in invalidating Starbucks's one [union] button limitation"; "the company is . . . entitled to avoid the distraction from its messages"); *Burger King Corp. v. NLRB*, 725 F.2d 1053, 1055 (6th Cir. 1984) ("Burger King has attempted to project a clean, professional image to the public . . . a 'special circumstance' exists as a matter of law"); *Midstate Tel. Corp. v. NLRB*, 706 F.2d 401, 402–04 (2d Cir. 1983) ("the employer had a legitimate interest in prohibiting" "T-shirts emblazoned with [the company] trademark, which was depicted as cracked in three places"); *Harrah's Club*, 337 F.2d at 180 (finding "special circumstances" where "[t]he prohibition against all special adornments only applied to employees coming in contact with the public" and "did not purport to prevent the wearing of buttons in nonworking time or in places not open to the public").

messages that Respondent permits," App.831; R.2164. But that was not the NLRB's judgment to make.

As the D.C. Circuit has explained, the NLRB's "expertise is surely *not* at its peak in the realm of employer-*customer* relations." *Medco Health Sols.*, 701 F.3d at 717 (first emphasis added) (reversing NLRB where company believed "the message on [a] T-shirt was insulting to the company and would have undermined its efforts to attract and retain customers"); *accord Midstate Tel. Corp.*, 706 F.2d at 404 ("We recognize that this is not the only conceivable interpretation of the cracked logo, but . . . this public utility, which constantly dealt with the public, had a legitimate concern"). Managing the customer relationship requires an "exercise of business judgment." *Harrah's Club*, 337 F.2d at 180. Thus, under the special circumstances doctrine, "it is not the province of the Board . . . to substitute its judgment for that of management so long as the exercise is reasonable." *Ibid.* Courts recognize that retailers, not the NLRB, are best positioned to determine how their customers are likely to react to particular messages.

Retailers have developed this skill because they "are required to anticipate" consumer reaction "if they wish to remain in business." *Macy & Co. v. NLRB*, 462 F.2d 364, 371 (5th Cir. 1972) (citation omitted); *see also Starbucks Corp.*, 679 F.3d at 80 ("an employer has the undoubted right to remove from a store any person, including an employee, who causes a disturbance likely to risk loss of customers").

For retailers, understanding consumers is existential. And consumers are not all the same. Different retailers have different target markets—that is, groups of people with shared characteristics that the retailer identifies when it markets its products or services. And just as a particular marketing pitch might be effective for one demographic but not another, *see, e.g.*, K. Heller, *Liquid Death is a mind-set. And also just canned water*, The Wash. Post (June 17, 2023) (describing brand's use of humor to reach "millennials and Gen Z"), https://tinyurl.com/2z5h95rz, a given sociopolitical message might inspire loyalty among some consumers while offending others. Retailers, not the NLRB, are best positioned to make these sensitive business judgments.

C. The NLRB's Categorical Rejection Of "Special Circumstances" Conflicts With Precedent.

The NLRB was also wrong to hold that a special circumstances argument "necessarily fails" when a retailer "encourages employees to personalize their [uniforms] by adding written messages, images, and other elements." App.830; R.2163. When an employer enforces a completely standardized uniform during all working hours, "a 'special circumstance' exists as a matter of law." *Burger King*, 725 F.2d at 1055; *accord Tesla*, 86 F.4th at 651 (finding no need to analyze special circumstances "when all [uniform] components" were required). But the inverse is

not true. That is, special circumstances may also exist where an employer permits some employee customization.

Numerous judicial and agency decisions confirm the point. In *Starbucks Corp.*, 679 F.3d at 77–78, the Second Circuit held that the coffee giant showed special circumstances justifying its policy limiting baristas to one union pin on their work aprons, notwithstanding that the company otherwise "encouraged employees to wear multiple buttons." Similarly, in *Macy & Co.*, 462 F.2d at 368–72 & n.11, the Fifth Circuit affirmed the retailer's right to prohibit a bright yellow union button when its dress code called for employees to exercise "good taste and judgment" in choosing "fashionable attire." Likewise, in *Pathmark Stores, Inc.*, 342 NLRB No. 31 (2004), the NLRB held a grocery store could prohibit employees from wearing union T-shirts that would undermine its "customer relationship" even though the store "had no policy on uniforms" and employees could generally wear whatever they liked. *Id.* at 379–80.

Contrary to the NLRB's position, the Fifth Circuit's decision in *In-N-Out Burger*, 894 F.3d 707 (5th Cir. 2018), is fully consistent with these other cases. There, a fast-food chain defended its decision to make its employees remove their union buttons by alleging that "consistent, unadorned employee uniforms [were] part of its public image." *Id.* at 716; *see ibid.* ("In-N-Out claims that its . . . employee uniforms consist[ ] of a 'limited number of specific identified elements,' to which

nothing can be added."). To be sure, the court held that the company had "undercut its claim that 'special circumstances' required employee uniforms to be button-free" by requiring "its employees wear [other, larger] buttons." *Id.* at 717. But "the facts of a particular case should not be mistaken for its rule," *United States ex rel. Owsley v. Fazzi Assocs., Inc.*, 16 F.4th 192, 197 (6th Cir. 2021) (brackets omitted), and the Fifth Circuit said nothing that supports the NLRB's categorical assertion that there can be no special circumstance where an employer allows its employees some limited discretion to personalize their uniforms.

The bottom line is simple: "A company may lawfully prohibit its employees from displaying messages on the job that the company reasonably believes may harm its relationship with its customers or its public image." *S. New England Tel. Co.*, 793 F.3d at 94. At a minimum, the special circumstances doctrine permits a retailer to stop its in-store, customer-facing employees from writing on their work uniforms political slogans that the retailer believes are potentially controversial or otherwise not brand-enhancing.

CONCLUSION

For all these reasons, the Court should grant the petition for review and deny the cross-application for enforcement.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations imposed by Federal Rule of Appellate Procedure 29(a)(5). It contains 4,945 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

This brief complies with the electronic-filing requirements of Local Rule 28A(h)(2) because it has been scanned for viruses and is virus-free.

May 29, 2024

/s/ Jeremy J. Broggi
Jeremy J. Broggi

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I certify that on May 29, 2024, I electronically filed the foregoing brief with the Clerk of the Court by using the CM/ECF system, and that the CM/ECF system will accomplish service on all parties represented by counsel who are registered CM/ECF users.

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Jeremy J. Broggi