UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD

STARBUCKS CORPORATION

and **Case 12-CA-358230**

WORKERS UNITED, SOUTHERN REGIONAL JOINT BOARD a/w SERVICE EMPLOYEES INTERNATIONAL UNION

COUNSEL FOR THE GENERAL COUNSEL'S POST HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Submitted by:

Darma A. Wilson, Counsel for the General Counsel
National Labor Relations Board, Region 12
Miami Resident Office
51 S.W. First Avenue, Room 1320
Miami, FL 33130
Office (305) 536-5391
Direct (786) 482-7106
Fax (305) 536-5320
Email: Darma.Wilson@NLRB.GOV

I. STATEMENT OF THE CASE

Section 7 of the National Labor Relations Act (the Act) guarantees employees the right to, *inter alia,* join or assist labor organizations, bargain collectively, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(5) of the Act makes it unlawful for an employer to fail or refuse to bargain collectively with the collective-bargaining representative of its employees. Starbucks Corporation (Respondent) operates retail coffee shops at locations throughout the United States, including a shop located at 1703 West Tennessee Street, Tallahassee, Florida (Store 8804). Since September 27, 2022, Workers United, Southern Regional Joint Board a/w Service Employees International Union (the Union) has been the exclusive bargaining representative of the baristas and shift supervisors, also referred to as partners, employed at Store 8804.

The in-person hearing in this case was conducted in Tallahassee, Florida on July 28, 2026, before the Honorable Administrative Law Judge Michael Silverstein (the ALJ). The evidence shows that Respondent has maintained a Dress Code and Personal Appearance rule which prohibits partners from wearing more than one facial piercing, and requires that the facial piercing worn must be no larger than a dime. Although the policy was published in the Partner Guide issued in April 2020, the record evidence revealed that Respondent never enforced the facial piercing rule at Store 8804 until July 2024, almost two years after the Union became the certified bargaining representative of the employees at Store 8804. Notwithstanding the rule concerning facial piercings, certain unit employees at Store 8804 wore multiple facial piercings to work without incident until July and August 2024, when Respondent began to enforce the facial piercing policy without prior notice to the Union, and without affording the Union with an opportunity to bargain with respect to this conduct or the effects of this conduct, and without reaching a first collective-

bargaining agreement, or bargaining with the Union to an overall good-faith impasse in negotiations for a collective-bargaining agreement.

This brief sets forth the relevant facts of the case and addresses the credibility of the witnesses. Next, the argument discusses the relevant case law and explains why Respondent's sudden unilateral decision to begin enforcing the facial piercing policy at Store 8804, violates Section 8(a)(1) and (5) of the Act. Finally, the brief addresses the appropriate remedy for this unlawful conduct.

II. STATEMENT OF THE FACTS

A. Procedural History

The Complaint and Notice of Hearing (Complaint) in this case issued on April 10, 2026. [GCX 1(c)].[1] On July 8, 2026, an Amendment to Complaint issued, and on July 23, 2026, a Second Amendment to Complaint issued. [GCX 1(h) and 1(m)]. At the hearing, Respondent stipulated, as alleged in paragraph 3 of the Complaint, that from February 16, 2022, through the present, the Union has been a labor organization within the meaning of §2(5) of the Act. [Tr. 97]. Respondent also amended its Answer to the Complaint to admit that all full-time and regular part-time baristas and shift supervisors employed at Store 8804 constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act and that the Union has been the exclusive collective-bargaining representative of the Unit at all times since September 27, 2022, as alleged in paragraphs 5(a) and 5(c) of the Complaint. [Tr. 97; GCX 1(c)].

B. Respondent's Operations

Respondent is a well-known national coffee retailer headquartered in Seattle, Washington, and is registered as a Washington corporation. [GCX 1(c), ¶ 2(a)]. Respondent operates stores

[1] General Counsel's Exhibits are referenced herein as "GCX [number];" Respondent's Exhibits are referenced as "RX [number]." The hearing transcript is referenced as "Tr. [page number]."

throughout the United States, including Store 8804 located in Tallahassee, Florida. Respondent refers to its employees as baristas, shift supervisors (SSV), or partners. [Tr. 130: 115-118]. On September 27, 2022, the Union was certified as the exclusive collective-bargaining representative of all full-time and regular part-time baristas and shift supervisors employed by Respondent at Store 8804, located at 1703 West Tennessee Street, Tallahassee, Florida, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act (the Unit). [Tr. 97, 131; GCX 1(c), ¶ 5(a) and 5(b)].

Baristas prepare food and beverage orders, handle sales transactions, restock inventory, and clean the store. SSVs perform these same tasks plus additional duties, including relaying messages and instructions from store managers to the other partners. [Tr. 103]. Shift supervisors enforce Respondent's policies or standards, delegate tasks to baristas, manage baristas' breaks, provide verbal coaching, and can send someone home if they are out of dress code. Shift supervisors also receive instructions from managers during shift huddles or through verbal or written text communications if there is information that needs to be relayed to baristas. [Tr. 51-52].

Baristas and SSVs report to store managers (SM) and assistant store managers (ASM), who are also sometime referred to as partners. SMs are also known as coffee house leaders. Occasionally, SMs will serve as the SM for their assigned store and temporarily serve as the SM for a second store. Coffee houses are grouped into districts and the SMs of the stores in the district report to a district manager (DM), who oversees the stores in that district. Store 8804 is part of Respondent's District 921. DMs report to the area manager (AM), who oversees multiple districts and DMs. [Tr. 130-131].

Jennifer Benoit served as a temporary SM, which is commonly known as a "proxy manager" at Store 8804, from on or about mid-May 2022 to around early July 2022, from July 2024 through September 2024, and again for part of March 2025 to April 2025. [Tr. 101]. Benoit has reported to DM Eridania "Eri" Gonzalez, the District Manager of District 921 since 2022. [Tr. 124, 133].

C. Respondent had no Past Practice of Enforcing its Facial Piercings Rule at Store 8804

Respondent's facial piercing rule under the Dress Code and Personal Appearance policy in the Partner Guide dated April 2020 states the following:

> **Jewelry and Body Piercings**
>
> [Rings and bracelets]
>
> Other jewelry must not be distracting. One small facial piercing no larger than a dime is allowed. [Earrings and ear gauges; necklaces]. No other visible pierced jewelry or body adjournments are allowed, including tongue studs and subdermal implants.
>
> Allowable jewelry must be simple in design and not be a health or safety hazard.

[RX 8; see also RX 9].[2] It is undisputed that violation of the facial piercings rule may lead to discipline. [Tr. 125].

On July 15, 2021, Emma Sainsbury ("Sainsbury") began working as a barista at Store 8804. Sainsbury is a member of the Union and has attended some contract negotiation meetings. Sainsbury testified that during her onboarding, which pre-dated the certification of the Union at Store 8804, she and another newly hired barista named Hannah Westbrooke met with the then SM

[2] This dress code in evidence as RX 9 has a footnote which states: Certain dress code changes announced on August 29, 2022 (enhanced color palette and allowing jeggings, crewneck sweatshirts and white shoes) do not apply to partners in certified union stores or stores undergoing organizing activity on or before May 3, 2022, except if the store subsequently is certified as not being represented by a union after an election, or a union withdraws a petition to represent partners at the store. Starbucks will negotiate over any changes to the terms and conditions of employment in good faith with any union representing partners at such stores and will implement changes subject to such bargaining.

Gabriella Ferrel ("Ferrel"). [Tr. 23]. Ferrel told the baristas that they were not allowed to wear bracelets, rings, nail polish, or acrylics. Ferrel also shared with them the permissible shirt and pants colors that could be worn to work and told them that earrings could not be bigger than a quarter. [Tr. 24, 25]. Ferrel never informed the newly hired baristas of the facial piercings policy. Ferrel left the store about a month after Sainsbury's start date. [Tr. 23-24]. At the commencement of Sainsbury's employment, she wore one pierced nose ring in her left nostril. [Tr. 25]. In November 2021, Sainsbury got her second nose piercing in her right nostril and wore a stud. Shortly thereafter, Sainsbury replaced the stud with a hoop nose ring. [Tr. 25]. Sainsbury wore visible multiple facial piercings at work from November 2021 until July 2024. [Tr. 25]. Sainsbury explained that from her hire in 2021 through the end of 2022 (during the Covid 19 pandemic), she was required to wear a mask while working, however, she removed the mask while eating or drinking and during her 30-minute lunch break. [Tr. 92]. After 2022, Sainsbury was not required to wear a mask and only did so if she was recovering from a cold. [Tr. 66] Sainsbury credibly testified that following Ferrel's departure, other store managers observed Sainsbury's visible multiple facial piercings, including Lauren Freeman who replaced Ferrel as SM [Tr. 26], Monique Stanley who replaced Freeman [Tr. 26-27, 134 as to last name of Monique], and Noah Parsons who replaced Monique Stanley [Tr. 27]. ASMs TG and Lauren Wood also observed Sainsbury's multiple facial piercings. Sainsbury testified that the named store managers individually managed Store 8804 for about a year and Freeman was the SM when the Union was certified in 2022. [Tr. 27]. Sainsbury testified that these store managers were often present working in the back room of the store, when Sainsbury took her lunch break there and her multiple piercings were visible, even during times that she wore a face mask during the Covid 19 pandemic in 2021 and 2022 and some later occasions when she was recovering from a cold, because she removed her face mask to eat

on those occasions. Yet she was never directed to remove any of her facial piercings. [Tr. 26-27, 65-66, 92].

Sainsbury's testimony combined with recorded documentary evidence, consisting of photos and corresponding metadata about the photos, establishes that she and other partners frequently wore multiple facial piercings at work with impunity. Thus, on various dates from December 12, 2021, through June 27, 2024, Sainsbury took photographs of herself and other partners wearing facial piercings in Store 8804, including some photos taken while on the clock. [Tr. 64-65]. GCX 4(a) and 4(b) consist of metadata and a photo image of Sainsbury taken on December 12, 2021, at 9:19 p.m. Sainsbury is the only subject in the photograph, which shows her in the front of Store 8804 wearing multiple facial piercings--a nose stud in one nostril and a nose ring in the other. [Tr. 28-29].

GCX 5(a) and 5(b) are the metadata and a photo taken on January 22, 2022. The photo shows Sainsbury standing at the back of Store 8804 wearing multiple facial piercings--a nose stud in one nostril and a nose ring in the other. [Tr. 29]. GCX 6(a) and 6(b) are the metadata and a photo taken on May 27, 2022, at the back of Store 8804, showing Sainsbury and shift supervisor Charlie Thompson, both of whom are wearing two nose hoops. [Tr.33, 34].

GCX 7(a) and 7(b) are metadata and a photo of Sainsbury and barista Dylan Owen near the drive through register at Store 8804 on June 11, 2022. Sainsbury is wearing nose rings in each nostril, and Owens is wearing two snake bite (under bottom lip) piercings, a nose hoop, and an eyebrow piercing. [Tr. 34].

GCX 8(a) and 8(b) are the metadata and a photo taken on August 25, 2022, showing barista Justus Evans, Sainsbury, and barista Dylan Owens, from left to right, in the back of Store 8804.

Sainsbury is wearing two nose piercings, and Owens is wearing two snake bite piercings on his bottom lip, a nose piercing in his left nostril, and a piercing on his eyebrow. [Tr. 36- 37].

GCX 9(a) and 9(b) are the metadata and a photo taken on November 24, 2022, showing Sainsbury in the front of Store 8804 wearing two nose piercings, and SSV Natalya Lewis wearing a bottom lip piercing and a left nostril piercing. In the background of the photo is ASM Lauren Wood. [Tr. 38].

GCX 10(a) and 10(b) are the metadata and a photo taken on June 17, 2023, of Sainsbury in the back at Store 8804. The subjects in the photograph are Sainsbury, who is wearing two nostril piercings, and SSV Luke Nasworthy. [Tr. 39-40].

GCX 11(a) and 11(b) are the metadata and a photo taken on December 23, 2023. The photo taken in the front area of Store 8804 shows Sainsbury wearing two nostril piercings, shift supervisor Alaysia Knight to the left wearing a bottom lip piercing as well as a septum piercing, and barista Dylan Owens standing behind Sainsbury on the right wearing piercings in his left nostril and eyebrow. [Tr. 40, 41].

GCX 12 (a) and 12 (b) are the metadata and a photo of Sainsbury taken on April 8, 2024, at the drive through registers in Store 8804. Sainsbury is wearing two nostril piercings. [Tr. 42].

GCX 13(a) and 13(b) is the metadata and a photo taken on June 27, 2024, showing Sainsbury wearing two nostril piercings at the back of Store 8804, with baristas Cat Ostrowski, and Anielya Wells-Miller standing behind her. [Tr. 43-44].

The photographic evidence establishes that during Sainsbury's employment from 2021 through at least June 27, 2024, she and other employees openly wore multiple facial piercings while working at Store 8804, and Sainsbury's testimony demonstrates that Respondent's SMs and ASMs knew this and never attempted to enforce the facial piercing rule until late July 2024.

Respondent will likely argue, based on insufficient evidence, as discussed infra, that the unit employees were aware of its facial piercings policy. However, even assuming for the sake of argument that employees were aware of the policy, that awareness does not establish that Respondent ever sought to enforce the policy at Store 8804 before mid-to-late July 2024. The evidence shows that approximately 6 store employees openly wore multiple facial piercings, so even if they knew the policy existed, they must have known that Respondent was not enforcing it.

RX 4, 5, and 6 tend to support the conclusion that the policy had never been enforced. RX 4 is a copy of My Daily dated July 22, 2024, which was allegedly posted from July 22 through July 28, 2024. The document contains a dress code reminder about the allowance of one facial piercing. RX 5 lists the first names of employees covering the weeks from June 24 through August 26, 2024, but shows that employees only wrote their initials next to their names on July 15, when Benoit became the Proxy Store Manager, July 22 and July 29. The fact that no employees initialed the form before July 15, 2024, is consistent with testimony that Respondent made no effort to inform unit employees about the facial piercings rule until about July 15. RX 6 is a Dress Code policy dated both July 2 and July 15, 2024. There is no evidence that any unit employee saw RX 6, even in mid-July. Moreover, these documents are only accessible on an iPad at the store that requires an app for access. Although Proxy Store Manager Jennifer Benoit claimed that baristas are supposed to review My Daily for posting announcements, she subsequently admitted that baristas do not receive an alert when announcements are posted on the app, that not all baristas review My Daily, and that they must use an app to access an iPad at the store to view My Daily. [Tr. 145].

D. Respondent's Began to Enforce the Facial Piercing Rule with respect to the Unit employees at Store 8804 in July 2024

In June 2024, Store Manager Noah Parsons left Store 8804, and in about mid July 2024, Jennifer Benoit began temporarily managing Store 8804 as the proxy manager. [Tr. 101]. As a proxy manager, Benoit split her work time between the store she regularly managed and Store 8804, working 10 to 20 hours per week at Store 8804. [Tr. 158].

Barista Emma Sainsbury was unaware of the facial piercing policy prior to July 2024, however at that time she was made aware that only one facial piercing no bigger than a dime was permitted. [Tr. 55]. She has never been disciplined for wearing multiple facial piercings. [Tr. 68]. Although Respondent asserts that all employees were aware of the facial piercing policy because it is in Respondent's Partner Guide and has been referenced in weekly updates, Sainsbury explained that she does not have a copy of the Partner Guide and has been unable to access Respondent's Partner Guide, because it is only available to partners on an iPad at Store 8804. [Tr. 59]. Sainsbury further testified that Respondent's weekly updates are distributed on iPads and employees are not automatically notified when a weekly update is posted. Sainsbury reviews the weekly updates when she remembers to do so, but she does not always see the weekly updates. [Tr. 60]. Sainsbury was not required to review the iPad daily. [Tr. 92]. She did not see a weekly update that was assertedly posted from August 29, 2022, through September 4, 2022, regarding challenges with allowing more piercings and monitoring the number of face piercings and types of piercings. [RX-1, Tr. 63]. Respondent's sole witness, Proxy Store Manager Benoit, admits that she did not know whether any other store managers of Store 8804 disseminated any information to employees that would make them aware of the existence of a facial piercings rule before July 2024. [Tr. 128-130].

In late July 2024, Barista Sainsbury had a conversation with Lex Rainey, one of the shift supervisors at Store 8804, after Proxy Store Manager Benoit held a shift meeting (a/k/a "shift huddle") with the Store 8804 shift supervisors. [Tr. 45-46]. Rainey told Sainsbury that because Sainsbury had two nose piercings, she was going to have to take one of them out because Jennifer Benoit was going to be enforcing the one piercing policy. [Tr. 46]. Sainsbury responded that since the policy had never been enforced at the store it would be a unilateral change in policy, and Rainey replied that Sainsbury's response would be communicated to Benoit. [Tr. 46-47]. Sainsbury continued to wear multiple facial piercings. [Tr. 54].

Proxy Store Manager Jennifer Benoit was Respondent's only witness. None of the other store managers of Store 8804 testified, nor did District Manager Eridania "Eri" Gonzalez. Benoit admitted that she relied on shift supervisors to communicate information to partners about Respondent's policies and specifically that she left it to the shift supervisors at Store 8804 to communicate to employees at that store about the dress code (specifically the facial piercings policy) in July 2024. [Tr. 102, 105, 108, 162]. According to Benoit, during the week of July 15, 2024, after taking over management of Store 8804, she was sitting at the desk in the back room of the store and saw Sainsbury there eating and saw that Sainsbury was wearing multiple piercings. Benoit claims that she verbally coached Sainsbury that she could not wear multiple facial piercings. Benoit testified that Sainsbury could be sent home or face other discipline if she wore multiple facial piercings at work. [Tr. 121]. However, Sainsbury does not recall being coached by Benoit. [Tr. 67].

According to Sainsbury, after hearing about the facial piercing policy from Rainey in late July 2024, she heard nothing further from management about the piercing policy until August 4, 2024. On August 4, 2024, Rainey pulled Sainsbury aside in the back of Store 8804, told Sainsbury

that Jen, a reference to SM Jennifer Benoit, sent a text message to them (Rainey), and showed Sainsbury the text message on their (Rainey's) phone. [Tr. 49-55; GCX 14]. Sainsbury saw that the text message said it was from Store Manager Benoit. Then Rainey highlighted the message on her phone so that Benoit's name was no longer visible. Sainsbury then took a photo of the text message on Rainey's phone, as Rainey held their phone. [Tr. 47 and 50-51; GCX 14 (photo) and GCX 15 (metadata)]. Benoit's text to Rainey states:

> Eri nor partner relations are answering. Please relay to Emma that while it is unfortunate prior management didn't adhere to the standards, it's always been a policy and one I've enforced vigilantly for years in all stores I've managed and if she wears the piercings on her next shift, she is putting herself at risk to be sent home for being out of dress code just how we would send home a partner that showed up in sandals or a crop top etc.

[GCX 14 and GCX 15]. Benoit admitted that she sent and received multiple text messages to and from SSV Lex Rainey, and the aforementioned message in particular, concerning barista Emma Sainsbury's reaction to the enforcement of the facial piercings policy at Store 8804 on August 4, 2024. [Tr. 106; GCX 14; RX 7]. Benoit also states that Rainey informed her at that time that Sainsbury claimed that the limitation to one facial piercing at Store 8804 was a unilateral change and that Sainsbury was not complying with the facial piercing rule, despite Benoit's coaching. [Tr. 124-126; RX 7].

Sainsbury testified that until her conversations with Rainey in late July and on August 4, 2024, the facial piercing policy was never enforced at Store 8804. [Tr. 52]. Sainsbury further testified that until that point about six partners (including Sainsbury) wore multiple facial piercings while working, but after Rainey showed her Benoit's August 4, 2024, text message, and pursuant to advice Sainsbury received from her Union representative, Sainsbury and the other employees began wearing only one piercing at work. [Tr. 88, 90]. Similarly, Benoit testified that she saw four Store 8804 employees wearing multiple facial piercings a week after she became

the Proxy Store Manager on about July 15, 2024, and that she coached those four employees at Store 8804 "in the moment" within the week after July 15, 2026. [Tr. 158-159].

The evidence shows that Respondent did not apply the facial piercings rule at Store 8804 before July 2024. Respondent provided no probative evidence of enforcement before that date. Benoit admitted that she did not know whether the previous Store Manager, Noah Parsons, enforced the facial piercing policy at Store 8804. [Tr. 115]. She admits that SSV Rainey texted her on August 4, 2024, that Parsons did not enforce the policy, as follows:

> Rainey: also I wanted to ask you about the piercing rule. Emma says that because it's a unilateral change that they are allowed to wear it per her union rep. i just want to verify that that's true with you?
>
> Benoit: That is not true and they are not allowed to wear it… I've been enforcing it for years and so have other stores. I've even sat in on corrective actions from managers to partners in John Knox for it
>
> Rainey: i think shes just talking about this store because Noah never said anything. i asked her to take it out yesterday and she told me the union lady told her she could keep rhem [sic]….or is a unilateral change considered per district not store?

[Tr. 149; RX 7]. Although Benoit replied in her text to Rainey that it was not truly a unilateral change as Sainsbury was told by Union representative Carter, her text shows no indication of prior enforcement of the facial piercings rule at Store 8804 by herself or others. In addition, a text from SSV Branden Finn a/k/a Beastie Branden to Benoit on July 27, 2024, states that former managers at Store 8804 never enforced the facial piercings policy. [Tr 166, 168, 174; GCX 17(a) and 17(b)]. Specifically, in relevant part, Finn texted to Benoit:

> Our lack of a manager and lack of a manager who cares to enforce policy is why it hasn't been enforced at our store. ….. And tbh [to be honest] it wasn't just Noah [Parsons]. No one has ever enforced it since I've been there. Even Gabriella [Ferrel] who was pretty by the book. But we all had masks then.

[GCX 17(a) and 17(b)].

Respondent stated in its position statement that it gave Store 8804 employees approximately 10 weeks, until September 2024, to comply with the facial piercings rule [RX 16, p.3, 4th paragraph] and Proxy Store Manager Benoit testified that she provided a "window of leeway" 8 to 10 weeks long for employees to comply with the rule, apparently ending in September 2024. [Tr. 107; RX 16, p.3, 4th paragraph]. Benoit then testified that she remembered having having individual conversations with the few employees who were having a hard time adjusting (i.e. to the facial piercings rule), perhaps referring to the four employees she claims to have coached "in the moment," and testified that if they continued to violate the rule, Respondent would have to hold them accountable to the facial piercings rule. Tr. [107-108]. Then Benoit quickly contradicted her prior testimony by denying that she spoke to any employees about a grace period for compliance with the facial piercing policy, asserting that everyone was complying with the policy "by that time" – even though the question to which she replied had not specified any time frame. [Tr. 108]. She then clarified that she communicated through shift supervisors and did not personally speak to any partners (i.e. shift supervisors or baristas) about leeway or a grace period by which to comply and instead communicated about it in an email to Respondent's counsel. [Tr. 108-109, 112, 160]. However, as mentioned above, Benoit then testified that she personally coached at least four employees at Store 8804 "in the moment" within the week after July 15, 2026, again appearing to contradict her testimony that she communicated with baristas through the shift supervisors. [Tr. 158-159].

There is no evidence that Respondent communicated with the Union about its intent to enforce the facial piercings rule with respect to its employees in the Store 8804 bargaining unit. Proxy Store Manager Benoit concedes that Respondent did not even consider contacting the Union regarding enforcement of the facial piercing policy at Store 8804, and that it made no effort to do

so. [Tr. 123-124]. Union field organizer Maggie Carter, the Union organizer "on the ground" at Store 8804, testified Respondent never spoke with her about the piercing policy. [Tr. 183, 188].

III. ARGUMENT

A. The Testimony of Barista Emma Sainsbury Should be Credited over the Testimony of Proxy Store Manager Jennifer Benoit.

The Board gives significant weight to the credibility of determinations of administrative law judges because they see and hear witnesses when testifying. *See Medeco Security Locks,* 322 NLRB 664, 664 (1996) ("[C]redibility is a function not only of what a witness says but of how a witness says it.") (citation omitted). The ALJ may consider "[a]ll aspects of the witness's] demeanor" in evaluating truthfulness, "including the expression of [the witness's] countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication." *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996) quoting *Penasquitos Village v. NLRB,* 565 F.2d 1074, 1078-79 (9th Cir. 1977). The Board's established policy is not to overrule an ALJ's credibility resolution unless the clear preponderance of all the relevant evidence convincingly demonstrates that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950) *enfd.* 188 F.2d 362 (3rd Cir. 1951). As the Board has observed, "[w]here demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *Daikichi Sushi,* 335 NLRB 622, 623 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003) (internal quotation marks and citations omitted). See also, *Hills & Dales General Hospital,* 360 NLRB 611, 617 (2014) and cases cited therein.

Furthermore, an employee's continuing employment by a respondent may be properly weighed and considered in resolving credibility, based on the reliability of such witnesses. In *Gold Standard Enterprises, Inc.,* 234 NLRB 618, 619 (1978), the Board held that:

> [E]very reason exists for finding the testimony of these employees particularly Credible since both were still in Respondent's employ at the time of the hearing… The Board has long recognized that the testimony of a witness in such circumstances is apt to be particularly reliable, inasmuch as the witness is testifying adversely to His or her pecuniary interest, a risk not lightly undertaken.

Similarly, in *Shop-Rite Supermarket,* 231 NLRB 500, 505 fn. 22 (1977, an ALJ, with Board approval, observed that the testimony of current employees which was adverse to their employer is "given at considerable risk of economic reprisal, including loss of employment… and for this reason not likely to be false." As the Board stated in *Portola Packing,* 361 NLRB No. 147, *slip op.* at 1, fn.2 (2014) (*citing Gold Standard Enterprises, Inc.,* 234 NLRB 618, 619 (1978), *enf. denied* on other grounds 607 F.2d 1208 (7th Cir. 1979), it is "[w]ell-established Board precedent holding that the testimony of current employees in direct contradiction to certain statements of their present supervisors … is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken." *See also Flexsteel Industry,* 316 NLRB 745 (1995).

The ALJ should credit Emma Sainsbury, who is still employed by Respondent. Sainsbury's detailed and forthright testimony is bolstered by the photographs she took over a period of years and as recently as June 27, 2024, just a month before Respondent started enforcing its corporate facial piercing rule, showing herself and other employees in Store 8804 wearing multiple facial piercings. In addition, text messages in evidence support Sainsbury's testimony that Store 8804 store managers did not enforce the facial piercing policy until Benoit started doing so in July 2024. It is inconceivable that Store 8804 store managers failed to see the employees

wearing multiple facial piercings for years, including when they ate lunch in the back room of the store where the store manager regularly performs administrative duties, and there is no evidence disputing Emma Sainsbury's testimony that the store managers and assistant store managers saw her wearing multiple facial piercings. Benoit admits that when she arrived at Store 8804 in July 2024, there were four employees upset about Respondent's start of enforcement of the facial piercings rule, presumably because they were being required to remove facial piercings as a condition of keeping their jobs.

It is undisputed that there is no evidence of coaching or discipline of Store 8804 employees for violating the facial piercing rule before late July 2024, when Benoit instructed shift supervisors to tell baristas that they could not have more than one facial piercing. In addition, Respondent's admission that it allowed a 10-week grace period for Store 8804 employees to comply with the facial piercings rule strongly suggests that it had not been enforced at the store before and that the unit employees had never even been made aware of the policy.

In contrast to Sainsbury's testimony, much of Benoit's testimony consisted of vague and generalized assertions that the facial piercing policy has always been enforced at Store 8804, though admittedly not consistently. Benoit was evasive and self-contradictory on this point. She was hesitant to acknowledge adverse facts, and she provided lengthy, self-serving responses to questions that require yes or no answers. For example, when asked whether employees were afforded eight to ten weeks grace period for compliance with the facial piercing policy, Benoit repeatedly changed her response and denied referencing eight to ten weeks leeway. [Tr. 107-108, 119-120].

Benoit's assertion that she has always enforced the facial piercing policy also lacks any foundational testimony showing that she visited Store 8804 between her stints working there in

2022 and 2024, and does not include any specific evidence about enforcement efforts at Store 8804 before July 2024. Benoit parsed words and was vague, inconsistent, and self-contradictory in her responses to questions about her communications with employees in furtherance of her efforts to enforce the facial piercings rule, most of which were in response to straightforward questions asked by the ALJ.

Moreover, in *Starbucks Corporation*, Cases 12-CA-308848 and 12-CA-308905, reported at JD-12-24 (February 29, 2024), ALJ Arthur Amchan cited Benoit's violations of the facial piercing rule both personally and as a manager of other employees. ALJ Amchan found that despite having been told by District Manager Eridania Gonzalez in July 2022, that she was not in compliance with Respondent's facial piercings policy, Benoit, Store Manager of Respondent's Magnolia store in Tallahassee, continued to wear multiple facial piercings at work until at least September 27, 2022, the day the Union was certified as the bargaining agent for the shift supervisors and baristas employed at Store 8804 (the West Tennessee store). [ALJD page. 5, Lines 10-15]. ALJ Amchan also found that Benoit interviewed and hired an employee wearing multiple facial piercings to work at the Magnolia store, and allowed that employee to wear multiple facial piercings for a year thereafter, until the employee transferred from the Magnolia store to another Starbucks store. [ALJD page 6, footnote12]. Accordingly, ALJ Amchan's findings of fact directly contradict Benoit's testimony that she has always enforced the facial piercing policy. This adds to the above-cited evidence that Benoit lacks credibility.

For the above reasons, Sainsbury should be credited and Benoit should be discredited where their testimony conflicts.

B. Respondent Unilaterally Enforced the Facial Piercing Policy Against Employees in the Store 8804 Unit in late July and early August 2024, in Violation of § 8(a)(5) and (1) of the Act.

Section 8(a)(5) of the Act prohibits employers from making unilateral changes in their employees' terms and conditions of employment without first affording the employees' bargaining representative notice and opportunity to bargain over the proposed changes. *NLRB v. Katz,* 369 U.S. 736, 743 (1962). The initiation of enforcement of a dormant rule following a successful union organizing campaign generally constitutes an unlawful unilateral change in terms and conditions of employment. *Flambeau Airmold Corp.,* 334 NLRB 165 (2001) at 165-66 (finding unlawful employer's unilateral postelection change effectively requiring employees to decide an hour in advance whether to report to work or use sick leave, where they previously could wait until the time they normally departed for work before making that choice); *see also Hyatt Regency Memphis,* 296 NLRB 259, 263-64 (1989) (unilateral move to more stringent enforcement of sign-in and sign-out policy post-election deemed unlawful), *enforced in relevant part sub nom. Hyatt Corp., v. NLRB,* 939 F.2d 361, 372-73 (6th Cir. 1991); *Celotex Corp.,* 259 NLRB 1186, 1194 (1982) (highly increased frequency of warnings post election); *Electri-Flex Co.*, 228 NLRB 847 (1977) (tightening up of lax enforcement of some plant rules amounted to a new system of rules), *enfd.* in pertinent part 570 F.2d 1327, 1332-1333 (7th Cir. 1978).

Here, the Union was certified to represent Respondent's baristas and SSVs in Case 12-RC-290700 on September 27, 2022, following its election victory on May 25, 2022. To date, contract negotiations are still underway, and no collective-bargaining agreement has been reached.

As noted above, there is ample evidence that from at least July 2021, through July 2024, employees routinely wore multiple facial piercings while working, and the evidence proves that Respondent's store managers and assistant store managers knew that employees were routinely

wearing multiple facial piercings, yet there is no evidence that any of those managers sought to enforce that policy until Benoit did so in July 2024. In July 2024, Jennifer Benoit directed SSV Rainey and other Store 8804 SSVs to enforce the facial piercing policy for the first time. It is undisputed that Respondent failed to notify the Union before beginning these enforcement efforts, and the Union had no opportunity to bargain with Respondent about the implementation of enforcement of facial piercings rule with respect to the Store 8804 unit.

As Benoit admits, she did not even notify the Union of Respondent's decision to start enforcing the facial piercings policy at Store 8804, let alone give the Union an opportunity to bargain about the decision or its effects, and she did this while the parties are still bargaining for an initial collective bargaining agreement. Accordingly, the evidence establishes that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally deciding to enforce its facial piercing policy at Store 8804 without first providing the Union with notice and an opportunity to bargain about the decision and its effects, and before reaching a good faith impasse in negotiations for an initial collective-bargaining agreement.[3]

C. In an Appropriate Case, the Board Should Overturn *Wendt* in Favor of the Balanced Approach Taken in *Raytheon* and *Mike-Sell's*

Counsel for the General Counsel (CGC) takes the position that the analysis of the instant case does not require overturning *Wendt Corp.*, 372 NLRB No. 135 (2023), in favor of the balanced approach taken in *Raytheon Network Centric Systems*, 365 NLRB 1722 (2017) and *Mike-Sell's Potato Chip Co*., 368 NLRB No. 145 (2019), because in the instant case there is **no** credible evidence of a past practice of Respondent enforcing its facial piercing policy with respect to the unit of employees working at Store 8804 for which the Union is the certified bargaining

[3] Respondent made no assertion that an impasse exists and submitted no evidence about the status of contract negotiations.

representative. However, if a determination is made that this is an appropriate case to consider overturning *Wendt*, CGC urges that the Board should overturn *Wendt Corp.*, 372 NLRB No. 135 (2023), and return to: (1) the framework in *Raytheon Network Centric Systems*, 365 NLRB 1722 (2017), for assessing whether a unilateral action is in keeping with past practice or is a "change" requiring notice and bargaining; and (2) the test in *Mike-Sell's Potato Chip Co*., 368 NLRB No. 145 (2019), for determining whether unilateral actions are sufficiently frequent and regular to constitute a past practice. In *Wendt*, the Board majority wrongly overruled *Raytheon* and *Mike-Sell's* when it departed from the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), and decades of Board precedent, by effectively holding that an employer's action involving *any* discretion, even if it is consistent with past practice, is a "change" requiring bargaining.

The *Wendt* standard significantly destabilizes labor relations and creates unworkable operational uncertainty for employers. Forcing parties to bargain over every employer's decision involving even a modicum of discretion, even those the employer has made for years, disrupts continuation of the *status quo* established by the parties' own past practice, thereby upending industrial stability. Returning to the correctly decided standards in *Raytheon* and *Mike-Sell's* is faithful to *Katz* and would restore a more balanced, commonsense approach that effectuates congressional intent and promotes industrial peace and order.

1. *Katz* and its progeny permit unilateral action that maintains the status quo, including discretionary actions.

In *Katz*, 369 U.S. at 746-47, the Supreme Court held that an employer violates Section 8(a)(5) if it makes a change to a mandatory subject of bargaining without first giving the union

notice and an opportunity to bargain about the change.[4] As the Court subsequently observed, "it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton*, 501 U.S. at 198. However, an employer's action that is consistent with a past practice is lawful because it is, "in effect, . . . a mere continuation of the status quo." *Katz*, 369 U.S. at 746.[5] Indeed, the purpose of prohibiting unilateral changes is "not advanced by freezing in place the terms of employment when doing so disrupts the established practice for making changes." *E.I. Du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012). *See also Queen Mary Rests. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977) ("The longstanding-practice exception is based on the recognition that certain unilateral changes in terms and conditions of employment do not interfere with the collective-bargaining process because they represent the status quo.").

The Court in *Katz* did not hold that a unilateral action consistent with past practice is unlawful merely because it involves some degree of discretion. Although the merit raises in *Katz* were found to be unlawful, the violation turned on the fact that they "were in *no sense* automatic, but were informed by a *large measure* of discretion," leaving "*no way* . . . for a union to know whether or not there had been a substantial departure from past practice." *Katz*, 369 U.S. at 746 (emphasis added). *Katz* did not articulate a categorical rule that every action taken by an employer involving *any* discretion requires advance notice and the opportunity for bargaining. Rather, the Court's observation was expressly bounded by the non-automatic merit raises before it, in contrast with other "*automatic increases* to which the employer [had] already committed himself." *Id.*

[4] Although the *Katz* decision involved an employer's unilateral changes during bargaining for a first contract with a newly certified union, the Supreme Court subsequently held that the doctrine "has been extended as well to cases in which an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

[5] This concept is commonly referred to as the "dynamic status quo." *See Raytheon*, 365 NLRB No. 161, slip op. at 1726.

(emphasis added). *See also E.I. Du Pont*, 682 F.3d at 67-68 (finding the "large measure of discretion" reference in *Katz* did not eliminate past-practice defense when discretion was bounded). Thus, the issue in *Katz* was not that the merit raises were discretionary, but rather that they differed from the types of increases the employer had previously granted.

For decades, the Board followed this commonsense application of the *Katz* unilateral-change doctrine. For example, in *Shell Oil Co.*, 149 NLRB 283, 287-88 (1964), decided two years after *Katz*, the Board held that the employer's unilateral subcontracting of bargaining-unit work was lawful where it did not "materially var[y] in kind and degree from what had been customary in the past." Likewise, in *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, 1577 (1965), an employer's unilateral subcontracting was lawful where it "comported with the traditional methods" by which the employer had conducted its business operations and "did not vary significantly in kind or degree from what had been customary under past established practice." *See also, e.g.*, *A-V Corp.*, 209 NLRB 451, 452 (1974) (employer lawfully continued past practice of unilaterally allocating cost of insurance premiums on a pro rata share basis, despite no fixed percentage); *Post-Tribune Co.*, 337 NLRB 1279, 1280-81 (2002) (employer lawfully increased amount deducted from employees' paychecks for health benefits but maintained same deduction percentage rate as before); *Courier-Journal*, 342 NLRB 1093, 1094 (2004) (no violation where unilateral changes to health care premiums implemented pursuant to longstanding practice and employer's "discretion was limited"); *Capitol Ford*, 343 NLRB 1058, 1058-59 (2004) (no violation where *Burns* successor unilaterally implemented productivity-bonus program and two paid holidays given predecessor's similarly discretionary practice).[6]

[6] The Board only deviated from *Katz* for brief periods—*see E.I. Du Pont de Nemours*, 364 NLRB 1648, 1648 (2016) (finding discretionary unilateral changes made pursuant to past practice developed under expired CBA unlawful); *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001) (finding employer's changes unlawful based on expired management-rights clause, but noting employer has burden of establishing unilateral post-expiration

Indeed, the Board has even applied these principles to find employers violated the Act by *failing* to act unilaterally if this altered the status quo.[7] Specifically, the Board has required unilateral wage increases by employers where such unilateral action was consistent with past practice "even though the past wage increases involved substantial employer discretion." *See Raytheon*, 365 NLRB at 1729 (citing *Arc Bridges, Inc.*, 355 NLRB 1222 (2010), *enforcement denied*, 662 F.3d 1235 (D.C. Cir. 2011); *Mission Foods*, 350 NLRB 336, 337 (2007); *Central Maine Morning Sentinel*, 295 NLRB 376 (1989)).

Critically, in *E.I. Du Pont de Nemours v. NLRB*, the U.S. Court of Appeals for the District of Columbia Circuit held that *Katz* permits unilateral action consistent with a past practice if the action involves an "acceptable level" of employer discretion. 682 F.3d at 68. Moreover, the court treated *Katz*'s "large measure of discretion" limit as a defined exception, 682 F.3d at 67, not as a rule effectively swallowing the past-practice defense. In applying these principles, the court found that an employer's unilateral modifications to its employee-benefits package were consistent with the "status quo expressed in the [c]ompany's past practice" of making annual changes of "similar scope" to employee premiums and benefits. 682 F.3d at 68. The court found the company's discretion in making those changes was sufficiently "limited" by the terms of the plan documents, which permitted changes only during the annual enrollment period, and by the company's past practice, which required it to grant union-represented employees the same benefits as non-union employees. *Id.*

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changes are consistent with past practice), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003); *Register Guard*, 339 NLRB 353, 356 (2003) (finding expired contractual provisions did not establish past practice)—before regrettably losing its way again in *Wendt*.

[7] The General Counsel agrees that the Board "must exercise considerable care" when interpreting *Katz* to mean that Section 8(a)(5) "imposes an obligation on employers to *make*" unilateral changes, since Section 8(d) of the Act explicitly states that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession," and she likewise expresses no opinion on the validity of this "reverse version of the *Katz* exception." *Raytheon*, 365 NLRB at 1729 n.36 (citing *H.K. Porter Co. v. NLRB,* 397 U.S. 99, 102 (1970)).

2. *Raytheon* and *Mike-Sell's* correctly applied the *Katz* unilateral-change/past-Practice standard.

In *Raytheon*, the Board correctly applied *Katz* in holding that the employer's unilateral actions regarding health benefits were lawful because they did not "materially vary in kind or degree" from the employer's past practice, which involved the same kinds of changes, occurred at the same time of year, and affected the same groups of employees. 365 NLRB at 1737-38. Given the common understanding of what a "change" is, "[n]early everyone would evaluate whether a 'change' has occurred by comparing the challenged action to the employer's past actions," not "matters *other than* the challenged action in comparison to past actions." *Id*. at 1734. The Board further held, consistent with *Katz*, that such a unilateral action is lawful even if it may entail discretion. *Id*. The relevant inquiry is simply whether the challenged action is similar in kind and degree with what the employer did in the past. *Id*. at 1737. In this regard, the Board observed that in *Westinghouse* the employer lawfully used its discretion in unilaterally subcontracting out thousands of contracts because its actions had not "materially varied in kind or degree from what had been customary in the past." *Id*. (quoting *Westinghouse*, 150 NLRB at 1576).

In *Mike-Sell's*, the Board applied *Raytheon* and found that the employer's sale of sales routes in 2016 was consistent with its seventeen-year past practice of unilaterally selling sales routes to independent distributors, which had occurred fifty-one times during that period. 368 NLRB No. 145, slip op. at 3-4. In so doing, the Board applied the well-established principle that the party asserting the existence of a past practice must demonstrate that the practice "occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis." *Id.*, slip op. at 3. Significantly, the Board clarified that the concepts of "regularity" and "frequency" for proving a past practice "do not require that the challenged actions

must have taken place at set intervals and in the same number on each and every occasion of change." *Id.*

3. The *Wendt* majority misread *Katz*

Regrettably, the *Wendt* Board departed from decades of Supreme Court and Board precedent by drastically redefining what constitutes a "change."[8] Under *Wendt*, unilateral conduct is consistent with a past practice only where it is automatic, i.e., "fixed by an established formula containing variables beyond the employer's immediate influence . . . [and] result[s] from nondiscretionary standards and guidelines." 372 NLRB No. 135, slip op. at 5-6 (internal quotation marks omitted). Thus, *Wendt* effectively held that an employer's action involving *any* discretion, even if it is consistent with past practice, is a "change" requiring bargaining. *Wendt*'s formulation of the unilateral-change doctrine to include a near-absolute bar on employer discretion is fundamentally inconsistent with *Katz*, which did not foreclose a past-practice defense merely because the unilateral action involves some discretion.

The *Wendt* majority further departed from well-established precedent by holding that a unilateral-change defense cannot be based on a past practice that existed before the union became its employees' exclusive bargaining representative. 372 NLRB No. 135, slip op. at 17-20. In *Katz* itself, the employer was engaged in bargaining for an initial contract, and the Supreme Court held that the employer's unilateral actions would have been lawful had they been in line with its "long-standing practice" prior to union certification. *Katz*, 369 U.S. at 746. And the Board has long found lawful changes to employees' terms and conditions that were consistent with past practice before the union's arrival or certification. *See, e.g., KDEN Broadcasting Co*., 225 NLRB 25, 26, 35 (1976)

[8] Additionally, in overturning *Raytheon* and *Mike-Sell's*—issues that were not properly before the Board for consideration—the *Wendt* majority improperly exceeded the scope of the court's express remand in *Wendt Corp. v. NLRB*, 26 F.4th 1002, 1014 (D.C. Cir. 2022). *See Wendt Corp.*, 372 NLRB No. 135, slip op. at 24-27 (Member Kaplan, concurring).

(lawful changes to employees' schedules and hours based on past practice before union's arrival); *House of the Good Samaritan*, 268 NLRB 236, 237 (1983) (passing on a premium increase to employees consistent with past practice before union's certification); *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984) (paying one-third of an insurance premium and requiring employees to pay the remaining two-thirds, consistent with its practice prior to union certification); and *Kal-Die Casting Corp*., 221 NLRB 1068, 1070 (1975) (permitting production and scheduling adjustments based on a practice developed prior to unionization).

The *Wendt* majority also erred by overruling *Mike-Sell's*. The *Wendt* Board found that *Mike-Sell's* was wrongly decided because the employer there had unilaterally sold sales routes in only seven years of the seventeen-year period at issue—notwithstanding that it had sold fifty-one routes during the relevant timeframe—which in the *Wendt* Board's view was not sufficiently regular or consistent to constitute a past practice. *Wendt*, 372 NLRB No. 135, slip op. at 9 n.31. However, as *Mike-Sell's* correctly held, even if there were no sales in several of those years, "the overall frequency and number of those sales that continued without exception over a prolonged period" were sufficiently regular and frequent that the 2016 route sales were not a "departure from the norm." *Mike-Sell's*, 368 NLRB No. 145, slip op. at 3 (citing *Westinghouse*, 150 NLRB at 1576).

By contravening *Katz* and other well-established precedents, the *Wendt* majority clearly missed the mark. But, as described below, *Wendt* also introduced other far-reaching, negative effects on the collective-bargaining process and employers' ability to effectively manage their businesses.

4. The *Wendt* standard destabilizes labor relations and creates unworkable operational uncertainty for employers.

Wendt's extreme narrowing of the past-practice exception undermines the Board's core obligation to foster labor-relations stability. *See Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949) (achieving stability of labor relations "was the primary objective of Congress" in enacting the NLRA). When an employer continues an established practice, even if the action entails some degree of discretion, the employer is maintaining workplace continuity. As the D.C. Circuit astutely noted, the "purpose of prohibiting unilateral changes is not advanced by freezing in place the terms of employment when doing so disrupts the established practice for making changes." *E.I. Du Pont*, 682 F.3d at 67. Contract negotiations between unions and employers are fraught with challenges, including "prioritizing issues, reconciling divergent positions, preparing and responding to information requests, and managing the bargaining process." *Raytheon*, 365 NLRB at 1732. *Wendt* further burdens the parties and frustrates bargaining by "illogically imposing a duty on employers to negotiate, potentially to good-faith impasse, over each and every decision involving any modicum of discretion before it [can act]—even if those decisions are precisely the same ones that the employer has taken innumerable times before." *Wendt*, 372 NLRB No. 135, slip op. at 30 (Member Kaplan, concurring). The *Wendt* standard thus encourages piecemeal bargaining, prolongs negotiations, and hinders agreement on labor contracts. *Id.* The Act's policy of stabilizing labor relations is best served by letting parties continue settled arrangements. *Wendt* does the opposite.

The *Wendt* majority's contrary assertion that *Raytheon* and its progeny undermined the collective-bargaining process, 372 NLRB No. 135, slip op. at 11-13, was devoid of evidence. When *Wendt* overruled *Raytheon* and *Mike-Sell's*, there had been "no indication whatsoever" that those decisions—in effect for six years and four years, respectively—had "corroded the collective-

bargaining process," and the majority "fail[ed] to cite any evidence" of such harm. *Tecnocap LLC*, 372 NLRB No. 136, slip op. at 27 (2023) (Member Kaplan, dissenting) (internal quotation marks omitted).

Wendt's unsound departure from longstanding precedent also creates severe operational uncertainty, stripping away employers' practical flexibility consistent with how their businesses have operated for years. Predictability and order are operational imperatives for business. To make effective operational decisions, employers must know "the scope of their respective rights and obligations." *Raytheon*, 365 NLRB at 1737. As the Supreme Court has long recognized, employers must have some degree of "certainty beforehand" regarding when they may safely continue to act as they have in the past. *Id.* (citing *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981)). If an employer is "prevented from operating in its normal routine fashion once a union is certified, it could bring the business to a grinding halt." *Wendt*, 372 NLRB No. 135, slip op. at 32 (Member Kaplan, concurring).

The *Wendt* majority's misguided retroactive application of its new standard only compounded its destabilization of labor relations and business operations. Retroactive application of a new rule must be balanced "against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles" and is improper if the "ill effect of the retroactive application" is greater. *SEC v. Chenery Corp*., 332 U.S. 194, 203 (1947). In *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2011), the court held that when there is a "substitution of new law for old law that was reasonably clear," the new rule should be given "prospectively-only effect" to "protect the settled expectations of those who had relied on the preexisting rule." The court refused to enforce the Board's retroactive application because the prior law "was absolutely clear" and the employer had "acted in conformity with the prevailing

law." *Id.* Similarly here, employers had relied on *Raytheon* and *Mike-Sell's* for several years, and those decisions represented clear, governing law that was consistent with *Katz* and its progeny. *See Wendt*, 372 NLRB No. 135, slip op. at 28 (Member Kaplan, concurring).

5. Returning to the *Raytheon* and *Mike-Sell's* standards will effectuate Congressional intent and promote industrial peace and order.

Because *Wendt* is inconsistent with Supreme Court precedent and frustrates the Act's fundamental purpose of protecting the free flow of commerce through stable collective bargaining, the Board should overturn *Wendt* and its progeny[9] and return to the well-settled *Katz* doctrine espoused in *Raytheon* and as further clarified in *Mike-Sell's*.

Returning to the *Raytheon* standard, under which an employer may lawfully take unilateral action that does not alter the status quo, including actions that have become part of a past practice irrespective of the level of discretion involved, will foster stability in labor relations by allowing for greater continuity and flexibility during contract negotiations, helping to streamline the bargaining process, and promoting agreement on contract terms. This standard will also encourage the free flow of commerce by giving employers enhanced operational certainty. For the same reasons, the policies of the Act will be effectuated by returning to the clarifying guidance in *Mike-Sell's*, under which a past-practice defense does not require that the challenged unilateral actions must have "taken place at set intervals and in the same number on each and every occasion of change." 368 NLRB No. 145, slip op. at 3. Assuredly, under these frameworks, employers may not evade their duties to bargain under the Act and must bargain when their contemplated action

[9] In *Tecnocap LLC*, 372 NLRB No. 136, the Board also improperly overruled *Raytheon*'s holding (which *Wendt* did not address, *see* 372 NLRB No. 135, slip op. at 13) that a past practice developed under or pursuant to a collectively bargained management-rights clause authorizing discretionary unilateral employer action constitutes a term and condition of employment that permits such continued unilateral conduct following expiration of the agreement containing the clause. The General Counsel will be urging the Board to overrule *Tecnocap* in a future appropriate case.

is not in keeping with past practice. And although employers may continue the dynamic status quo, they "still have an obligation to bargain *upon request* with respect to all mandatory bargaining subjects—including actions the employer has the right to take unilaterally—whenever the union *requests* such bargaining." *Raytheon*, 365 NLRB at 1732. The proper safeguards and balance are maintained, as an employer is still required to bargain over a mandatory issue if the union requests such bargaining, *regardless* of any past practice. *Id*. at 1733. *See also Mike-Sell's*, 368 NLRB No. 145, slip op. at 4 (although an employer has "no statutory obligation . . . to bargain about a decision to take unilateral action that is consistent with a past practice," the employer must still bargain upon request "about changing that status quo for the future").

IV. CONCLUSION

Counsel for the General Counsel respectfully submits that the Administrative Law Judge should find and conclude that Respondent violated Section 8(a)(5) and (1) of the Act in all respects alleged in the Complaint, as amended, and recommend the issuance of a Board Order requiring Respondent to cease and desist from enforcing the facial piercings rule with respect to the unit employees working at Store 8804, or making other changes to the wages, hours, or other terms and conditions of employment of employees in the unit without first giving the Union notice and an opportunity to bargain about the decision and the effects of the decision, and without first reaching an agreement or a bona fide good faith overall impasse in negotiations for an initial collective-bargaining agreement with the Union. Respondent should further be ordered to, upon request by the Union, cease the enforcement of the facial piercings rule at Store 8804 and restore the working conditions regarding the facial piercings of unit employees that existed before Respondent began enforcing the facial piercings in July 24, 2024. Counsel for the General Counsel also requests that Respondent be directed to physically and electronically post a Notice to employees in English and

other languages if the Regional Director determines it is appropriate to do so by text message, e-mail, or other electronic means. Counsel for the General Counsel also requests that the ALJ recommend any other relief deemed just and proper to effectuate the purposes of the Act.

If this case is found to be an appropriate one for the Board to consider overturning *Wendt*, CGC respectfully urges the Board to overturn *Wendt* and its progeny and return to the framework in *Raytheon* and *Mike-Sell's* for assessing whether a unilateral action is in keeping with past practice or is a "change" requiring bargaining. The Board is urged to reaffirm that the continuation of the dynamic status quo based on established past practice does not trigger the duty to notify and bargain even where the regularity and frequency of discretionary practices are not fixed.

Dated: October 1, 2026.

Respectfully submitted,

/s/ *Darma A. Wilson*

Darma A. Wilson
Counsel for the General
National Labor Relations Board, Region 12
Miami Resident Office
51 SW First Avenue, Room 1320
Miami, FL 33130-162
Office (305) 536-5391
Direct (786) 482-7106
Email: Darma.Wilson@NLRB.GOV

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT enforce the facial piercings rule in our Dress Code and Personal Appearance policy against our employees in the below bargaining unit represented by Workers United, Southern Regional Joint Board a/w Service Employees International Union (the Union) or make other changes to wages, hours, or other terms and conditions of employment of our employees in the below bargaining unit without first giving the Union notice and an opportunity to bargain about the decision to make such changes and the effects of the decision, and without first reaching an agreement or a bona fide good faith overall impasse in negotiations for an initial collective-bargaining agreement with the Union.

All full-time and regular part-time baristas and shift supervisors employed by the Employer at its Store 8804, located at 1703 W. Tennessee Street, Tallahassee, Florida; excluding all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the National Labor Relations Board's Order, restore the working conditions concerning the wearing of facial piercings by our employees in the above-described unit that existed before we began applying our facial piercings rule to those employees in July 2024.

STARBUCKS CORPORATION
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation, and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's

toll-free number 1-844-762-NLRB (1-844-762-6572). Callers who are deaf or hard of hearing who wish to speak to an NLRB representative should send an email to relay.service@nlrb.gov. An NLRB representative will email the requestor with instructions on how to schedule a relay service call.

201 E Kennedy Blvd Ste 530
Tampa, FL 33602-5824

Telephone: (813)228-2641
Hours of Operation: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2026, copies of the Counsel for the General Counsel's Brief to the Administrative Law Judge in the matter of Starbucks Corporation, Case 12-CA-358230 was duly served electronically upon the following:

By electronic filing to:
Hon. Michael Silverstein
National Labor Relations Board
Division of Judges
1015 Half Street SE
Washington, DC 20570-0001

By electronic mail to:
Charles Powell, Esq.
Littler Mendelson, P.C
420 20th Street North, Suite 2300
Birmingham, AL 35203

By electronic mail to:
Richard Rouco, Esq.
Quinn, Connor, Weaver, Davies,
& Rouco, LLP
2-20th Street North, Suite 930
Birmingham, AL 35203
rrouco@qcwdr.com

By electronic mail to:
Drury Selden, Esq.
Littler Mendelson, P.C
321 North Clark Street, Suite 1100
Chicago, IL 60654
dselden@littler.com

By electronic mail to:
George Davies, Esq.
Quinn, Connor, Weaver, Davies,
& Rouco, LLP
2-20th Street North, Suite 930
Birmingham, AL 35203
gdavies@qcwdr.com

/s/ Darma A. Wilson
Darma A. Wilson
Counsel for the General
National Labor Relations Board, Region 12
Miami Resident Office
51 SW First Avenue, Room 1320
Miami, FL 33130-1623
Office (305) 536-5391
Direct (786) 482-7106
Email: Darma.Wilson@NLRB.gov