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Fred Meyer Stores, Inc. a subsidiary of The Kroger Company and United Food and Commercial Workers Local No. 21, affiliated with United Food and Commercial Workers International Union and Quality Food Centers, Inc. a subsidiary of The Kroger Company and United Food and Commercial Workers Local No. 21, affiliated with United Food and Commercial Workers International Union. Cases 19–CA–272795 and 19–CA–272796

September 30, 2026

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY
AND MAYER

On May 3, 2023, Administrative Law Judge Maralouise Anzalone issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed an exception with supporting argument, and the Respondents filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

¹ The Respondents have excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We have amended the judge’s conclusions of law and recommended remedy consistent with our findings herein. We shall modify the judge’s recommended Order to conform to our findings and to the Board’s standard remedial language, and we shall substitute new notices to conform to the Order as modified.

As fully explained in *Leo Marine Services, Inc.*, 375 NLRB No. 35, slip op. at 5 fn. 17 (2026), Chairman Murphy and Member Mayer agree to apply *Thryv* in this case for institutional reasons. Member Prouty continues to believe that *Thryv* was correctly decided, is well within the Board’s remedial authority, and is necessary to satisfy the Board’s statutory obligation to provide meaningful make-whole relief. See *id.*

³ Hereafter, we use “BLM” to encompass both the phrase “Black Lives Matter” and the initialism “BLM.”

⁴ For the reasons stated by the judge, we reject the Respondents’ argument that the charges and complaint were untimely under Sec. 10(b) of the Act.

Member Mayer would find that 10(b) limitation period here began to run after the Union had “clear and unequivocal notice” of the 8(a)(5) and (1) violations. That, in Member Mayer’s view, occurred as of the definitive emails banning BLM insignia issued by the Respondents on August 14 and 15, 2020.

In affirming the judge’s findings that the Respondents violated Sec. 8(a)(5) and (1), we do not rely on her citation to *Albertson’s, Inc.*, 319

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

Specifically, we find, in agreement with the judge, that the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally changing their unit employees’ terms and conditions of employment without providing the Union notice and opportunity to bargain by instructing and/or warning employees that they may not wear “Black Lives Matter” and “BLM”³ insignia while working, by directing them to remove such insignia from their clothing and persons, by prohibiting employees from wearing “Black Lives Matter/UFCW Local 21” insignia, and by sending and constructively sending them home for refusing to remove BLM and/or “Black Lives Matter/UFCW Local 21” insignia from their uniforms. We further find, in agreement with the judge, that Respondent Quality Food Centers (QFC) violated Section 8(a)(5) and (1) by implementing a new dress code policy regarding Covid-19 masks without providing the Union notice and an opportunity to bargain.⁴

In light of our findings that the Respondents’ unlawful conduct violated Section 8(a)(5) and (1), we find it unnecessary to pass on the judge’s additional findings that the Respondents independently violated Section 8(a)(1) by

NLRB 93 (1995), because in that case no exceptions were filed to the judge’s pertinent findings. Nevertheless, the Board has long held that employers are required to bargain when they more strictly enforce uniform policies. See, e.g., *United Rentals*, 350 NLRB 951, 952 (2007) (finding respondent unilaterally changed “to more stringent enforcement” of its dress code policy in violation of Sec. 8(a)(5) and (1) when it discontinued its practice of permitting employees to wear jeans and company sweatshirts at work). Here, the judge found that the Respondents departed from their historical practices of allowing employees to customize their uniforms with a diverse array of insignia, including support for political causes and union buttons, and it is undisputed that the Respondents did not provide the Union an opportunity to bargain over these changes. Additionally, we reject the Respondents’ claim that their prohibition of BLM insignia was not “material, substantial, and significant.” The Respondents sent employees home unpaid for failing to remove BLM insignia. Cf. *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001) (finding threat of discipline for failure to follow new sick leave policy sufficient to show that the policy change was significant).

Member Prouty agrees that the Respondents violated Sec. 8(a)(5) and (1) for the reasons stated by the judge and as clarified above. In finding the violation, Member Prouty emphasizes that the Respondents’ unilateral change restrained certain employees from wearing BLM/UFCW Local 21 buttons to protest the Respondents’ ban on other BLM insignia. As noted above, this change was contrary to the Respondents’ practices of allowing employees to wear Union-related buttons, including buttons criticizing their working conditions, and it unlawfully undermined union activity.

In the absence of exceptions, we also affirm the judge’s dismissal of the allegation that Respondent QFC unlawfully enforced its dress code against BLM insignia as early as June 2020.

the same conduct, as the additional findings would not materially affect the remedy.⁵

AMENDED CONCLUSIONS OF LAW

1. Respondent Fred Meyer, Inc., a subsidiary of The Kroger Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent QFC, a subsidiary of The Kroger Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Charging Party United Food and Commercial Workers Local No. 21 (the Union) is a labor organization within the meaning of Section 2(5) of the Act that is, and at all material times was, the exclusive collective-bargaining representative of the following appropriate units of the Respondents' employees:⁶

Fred Meyer Units: As more specifically defined in the parties' various county-specific (or, in some cases, store-specific) collective bargaining agreements, certain grocery employees of Respondent Fred Meyer (the "Fred Meyer Grocery Unit"); certain meat department employees of Respondent Fred Meyer (the "Fred Meyer Meat Unit"); certain general merchandising employees of Respondent Fred Meyer (the "Fred Meyer GM Unit"); and certain front-end central checkstand ("CCK-") employees of Respondent Fred Meyer (the "Fred Meyer CCK Unit").

QFC Units: As more specifically defined in the parties' various county-specific (or, in some cases, store-specific) collective bargaining agreements, certain grocery employees of Respondent QFC (the "QFC Grocery Unit") and certain meat department employees of Respondent QFC (the "QFC Meat Unit").

4. Since on or about June 22, 2020, Respondent Fred Meyer has violated Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of its unit employees by instructing and/or warning employees that they may not wear BLM insignia while working and by directing them to remove such insignia from their clothing and persons while working without providing the Union notice or opportunity to bargain.

5. Since July 2020, Respondent QFC has violated Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of its unit employees by implementing a new dress code policy regarding Covid-19

masks without providing the Union notice or opportunity to bargain.

6. Since on or about August 14, 2020, Respondent QFC violated Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of its unit employees by instructing and/or warning employees that they may not wear BLM insignia while working and by directing them to remove such insignia from their clothing and persons while working without providing the Union notice or opportunity to bargain.

7. Since on or about August 14, 2020, Respondents Fred Meyer and QFC have violated Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of their unit employees by prohibiting them from displaying "Black Lives Matter/UFCW Local 21" insignia while working and by sending and constructively sending employees home for refusing to remove BLM and "Black Lives Matter/UFCW Local 21" insignia while working without providing the Union notice or opportunity to bargain.⁷

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

AMENDED REMEDY

Having found that the Respondents engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of their unit employees' employment, we shall order the Respondents to cease and desist from changing the terms and conditions of employment of their unit employees without first notifying the Union and giving it an opportunity to bargain; to rescind the unlawful changes; and to make unit employees whole for any loss of earnings and other benefits suffered as a result of being sent home or constructively sent home for refusing to remove the above-described insignia in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, in accordance with *Thryv, Inc.*, 372 NLRB No. 22 (2022), vacated in part on other grounds 102 F.4th 727 (5th Cir. 2024), we shall order the Respond-

⁵ For this reason, we also find it unnecessary to pass on the judge's findings that the Respondents' employees engaged in protected concerted activity when they donned BLM buttons and related insignia while working.

⁶ In the absence of a unit description in the judge's decision, we have used the unit description set forth in the General Counsel's complaint to conform the judge's recommended Order and notice to our findings.

⁷ Member Mayer notes that the Respondents do not contend that any "exigent circumstances" or similar urgent conditions justified their BLM-related changes without first giving notice to, and offering to bargain with, the Union.

ents to compensate employees for any other direct or foreseeable pecuniary harms incurred as a result of their unlawful unilateral changes. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondents shall be required to compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In accordance with our decision in *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), the Respondents shall also be required to file with the Regional Director for Region 19 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award. We shall order Respondent Fred Meyer to expunge from its files any reference to unlawful instructions given to employees Herbert Reynolds, Felicia Oliver, Forrest O'Reilly, Charles Waller, Melissa Goslin, and Zoe Mason requiring them to remove BLM and/or "Black Lives Matter/UFCW Local 21" insignia, and to expunge any reference in its files to its sending O'Reilly home and constructively sending Reynolds home for refusing to remove the insignia. We shall also order Respondent QFC to expunge from its files any reference to the unlawful instructions given to employees Kristen Wilder and Cobina Stryker requiring them to remove BLM and/or "Black Lives Matter/UFCW Local 21" insignia, and to expunge any reference in its files to its sending Wilder home for refusing to do so.

ORDER

The National Labor Relations Board orders that

A. Respondent, Fred Meyer Stores, Inc., a subsidiary of The Kroger Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its unit employees by instructing and/or warning employees that they may not wear "Black Lives Matter" and "BLM" insignia while working and by directing them to remove such insignia from their clothing and persons while working without first notifying United Food and Commercial Workers Local No. 21 (the Union) and giving it an opportunity to bargain.

(b) Unilaterally changing the terms and conditions of employment of its unit employees by prohibiting employees from wearing "Black Lives Matter/UFCW Local 21"

insignia while working and by sending and constructively sending them home for refusing to remove "Black Lives Matter," "BLM," and/or "Black Lives Matter/UFCW Local 21" insignia from their uniforms while working without first notifying the Union and giving it an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit(s):

As more specifically defined in the parties' various county-specific (or, in some cases, store-specific) collective bargaining agreements, certain grocery employees of Respondent Fred Meyer (the "Fred Meyer Grocery Unit"); certain meat department employees of Respondent Fred Meyer (the "Fred Meyer Meat Unit"); certain general merchandising employees of Respondent Fred Meyer (the "Fred Meyer GM Unit"); and certain front-end central checkstand ("CCK") employees of Respondent Fred Meyer (the "Fred Meyer CCK Unit").

(b) Rescind the changes to its unit employees' terms and conditions of employment that were unilaterally implemented on or about June 22, 2020, and August 14, 2020.

(c) Make employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the Respondent's unilateral changes in the manner set forth in the amended remedy section in this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(e) File with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful instruction given to employees Herbert Reynolds, Felicia Oliver, Forrest O'Reilly, Charles Waller, Melissa Goslin, and Zoe

Mason, as well as any reference to sending O'Reilly and Reynolds home for refusing to follow the unlawful instruction and/or warning, and within 3 days thereafter, notify the employees in writing that this has been done and that the above actions will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its bargaining unit facilities throughout Washington State copies of the attached notice marked "Appendix A."⁸ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 22, 2020.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondent, Quality Food Centers, Inc., a subsidiary of The Kroger Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its unit employees by instructing and/or warning employees that they may not wear "Black Lives Matter" and "BLM" insignia while working and by direct-

ing them to remove such insignia from their clothing and persons while working without first notifying United Food and Commercial Workers Local No. 21 (the Union) and giving it an opportunity to bargain.

(b) Unilaterally changing the terms and conditions of employment of its unit employees by prohibiting them from displaying "Black Lives Matter/UFCW Local 21" insignia while working and by sending them home for refusing to remove "Black Lives Matter," "BLM," and/or "Black Lives Matter/UFCW Local 21" insignia while working without first notifying the Union and giving it an opportunity to bargain.

(c) Unilaterally changing the terms and conditions of employment of its unit employees by implementing a new dress code policy regarding Covid-19 masks without first notifying the Union and giving it an opportunity to bargain.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of its employees in the following bargaining unit(s):

As more specifically defined in the parties' various county-specific (or, in some cases, store-specific) collective bargaining agreements, certain grocery employees of Respondent QFC (the "QFC Grocery Unit") and certain meat department employees of Respondent QFC (the "QFC Meat Unit").

(b) Rescind the changes in terms and conditions of employment of its unit employees that were unilaterally implemented on or about July 2020 and August 14, 2020.

(c) Make employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the Respondent's unilateral changes in the manner set forth in the amended remedy section in this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) File with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful instruction and/or warning given to employees Kristen Wilder and Cobina Stryker, as well as any reference to sending home Wilder for refusing to follow the unlawful instruction and/or warning, and within 3 days thereafter, notify affected employees in writing that this has been done and that the above actions will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its bargaining unit facilities throughout Washington State copies of the attached notice marked "Appendix B."⁹ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2020.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 30, 2026

James R. Murphy, Chairman

David M. Prouty, Member

Scott A. Mayer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 representatives 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 change your terms and conditions of employment by instructing and/or warning you that you may not wear "Black Lives Matter" and "BLM" insignia while working and by directing you to remove such insignia from your clothing and persons while working without first notifying United Food and Commercial Workers Local No. 21 (the Union) and giving it an opportunity to bargain.

WE WILL NOT change your terms and conditions of employment by prohibiting you from wearing "Black Lives

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

Matter/UFCW Local 21” insignia while working and by sending and constructively sending you home for refusing to remove “Black Lives Matter,” “BLM,” and/or “Black Lives Matter/UFCW Local 21” insignia from your uniforms while working without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit(s):

As more specifically defined in the parties’ various county-specific (or, in some cases, store-specific) collective bargaining agreements, certain grocery employees of Respondent Fred Meyer (the “Fred Meyer Grocery Unit”); certain meat department employees of Respondent Fred Meyer (the “Fred Meyer Meat Unit”); certain general merchandising employees of Respondent Fred Meyer (the “Fred Meyer GM Unit”); and certain front-end central checkstand (“CCK”) employees of Respondent Fred Meyer (the “Fred Meyer CCK Unit”).

WE WILL rescind the changes in terms and conditions of employment of our unit employees that were unilaterally implemented on or about June 22, 2020, and August 14, 2020.

WE WILL make the affected employees whole for any loss of earnings and other benefits resulting from the unlawful unilateral changes, plus interest, and WE WILL also make such employees whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful unilateral changes, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient’s corresponding W-2 forms reflecting the backpay award.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful instruction given to employees Herbert Reynolds, Felicia Oliver, Forrest O’Reilly, Charles Waller, Melissa Goslin, and Zoe Mason, as well as any reference to sending

O’Reilly and Reynolds home for refusing to follow the unlawful instruction and/or warning, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the above actions will not be used against them in any way.

FRED MEYER STORES, INC., A SUBSIDIARY OF
THE KROGER COMPANY

The Board’s decision can be found at <https://www.nlrb.gov/case/19-CA-272795> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940



APPENDIX B

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 representatives 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 change your terms and conditions of employment by instructing and/or warning you that you may not wear “Black Lives Matter” and “BLM” insignia while working and by directing you to remove such insignia from your clothing and persons while working without first notifying United Food and Commercial Workers Local No. 21 (the Union) and giving it an opportunity to bargain.

WE WILL NOT change your terms and conditions of employment by prohibiting you from displaying “Black Lives Matter/UFCW Local 21” insignia while working

and by sending you home for refusing to remove “Black Lives Matter,” “BLM,” and/or “Black Lives Matter-/UFCW Local 21” insignia while working without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT change your terms and conditions of employment by implementing a new dress code policy regarding Covid-19 masks without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit(s):

As more specifically defined in the parties’ various county-specific (or, in some cases, store-specific) collective bargaining agreements, certain grocery employees of Respondent QFC (the “QFC Grocery Unit”) and certain meat department employees of Respondent QFC (the “QFC Meat Unit”).

WE WILL rescind the dress code policy changes for our unit employees that were unilaterally implemented on or about July 2020 and August 14, 2020.

WE WILL make the affected employees whole for any loss of earnings and other benefits resulting from the unlawful unilateral changes, plus interest, and WE WILL also make such employees whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful unilateral changes, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient’s corresponding W-2 forms reflecting the backpay award.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful instruction given to employees Kristen Wilder and Cobina Stryker, as well as any reference to sending Wilder home

for refusing to follow the unlawful instruction and/or warning, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the above actions will not be used against them in any way.

QUALITY FOOD CENTERS, INC., A SUBSIDIARY OF
THE KROGER COMPANY

The Board’s decision can be found at <https://www.nlrb.gov/case/19-CA-272795> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington D.C. 20570 or by calling (202) 273-1940.



Elizabeth DeVleming, Esq., for the General Counsel.
Dennis Westlund and Jessica Osborne, Esqs. (Bullard Law, PC),
for the Respondents
Fred Meyer Stores, Inc. and James G. McGuinness, Esq.
(Streepy Law, PLLC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case between March 1 and 16, 2022, via videoconferencing technology. This case was tried following the issuance of an Order consolidating cases, consolidated complaint, and notice of hearing (the complaint) by the Regional Director for Region 19 of the National Labor Relations Board (oncomplaint) by the Regional Director for Region 19 of the National Labor Relations Board on November 19, 2021. The complaint was based charges (captioned above) filed by Charging Party United Food and Commercial Workers Local No. 21, affiliated with United Food and Commercial Workers International Union (Charging Party, Local 21 or the Union). The General Counsel alleges that Respondent Fred Meyer Stores, Inc. (Fred Meyer) and Quality Food Centers, Inc. (QFC) (together, Respondents) violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act). Respondents filed a timely joint answer to the complaint denying the commission of the alleged unfair labor practices.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs.¹ Posthearing briefs were filed by the

¹ Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh. ___” for General Counsel’s Exhibit; “R. Exh. ___” for

Respondents’ Exhibit; “U. Exh. ___” for Local 21’s Exhibit; “Jt. Exh. ___” for Joint Exhibit; “GC Br. at ___” for the General Counsel’s post-hearing

General Counsel, Respondents and Local 21, and each of these briefs has been carefully considered. Accordingly, based upon the entire record herein, including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Each Respondent is a corporation with offices and places of business throughout the State of Washington and is engaged in the retail grocery business at various locations throughout that state (Fred Meyer locations and QFC locations, respectively). In conducting their business operations, Fred Meyer and QFC each annually derives gross revenues in excess of \$500,000 and has purchased and received goods valued in excess of \$50,000 at the Fred Meyer locations and QFC locations, respectively, directly from points located outside the State of Washington. Respondents admit, and I find, that Fred Meyer and QFC are each an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I additionally find that Local 21 is a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

This case involves actions taken by Respondents during the summer of 2020, after their on-duty employees wore buttons and COVID masks expressing support for the Black Lives Matter movement. The General Counsel alleges that, in violation of Section 8(a)(1) of the Act, Respondents: (a) discriminatorily applied their existing dress code policies; (b) promulgated and enforced new dress code policies; (c) instructed employees to remove buttons, face masks and other attire; and (d) sent employees home early without pay for refusing to comply with directives regarding their dress. In each case, it is contended that the actions in question were taken to prevent employees from wearing items displaying the “Black Lives Matter” or “BLM” insignia while working.

The General Counsel further alleges that Respondents’ implementation and enforcement of their Respondents’ dress code policies was undertaken without affording Local 21 notice and opportunity to bargain, in violation of Section 8(a)(5) of the Act.

Respondents deny all allegations of unlawful conduct.

III. FACTUAL BACKGROUND²

Respondents are each wholly owned by The Kroger Co. (K-

roger), which operates approximately 2,700 supermarkets under a variety of local banner names, including “Fred Meyer” and “QFC,” in 35 states and the District of Columbia.³ Local 21 represents numerous bargaining units of employees at Respondents’ stores in Washington State. While certain of the actions at issue in this case were taken at a corporate level (either by Fred Meyer, QFC, or Kroger management), they were implemented at the store level against the backdrop of Respondents’ prior dress code policies and practices.

Generally, Fred Meyer stores sell home goods and apparel, in addition to groceries, and are larger in size and employee complement than QFC stores, which almost exclusively sell only groceries. (Tr. 1135.) The five stores at issue in this case include three Fred Meyers locations in Washington State, which are identified by their store numbers: FM 667 (located in Bellingham), FM 122 (located in Seattle), and FM 28 (located in Burien). The two QFC locations at issue are identified as: QFC 881 and QFC 807, which are each located in Seattle.

A. *The Historical Context of Respondents’ Alleged Unlawful Conduct*

The conduct at the heart of this case occurred in May and June of 2020—a remarkable and challenging year in modern history aptly described by one witness as “the year we all try to forget.” (Tr. 1557.) Two events converged during the summer: a national state of emergency due to COVID-19, and historic social unrest following the murder of George Floyd. Racial and public health tensions permeated many settings, including Respondents’ stores.

1. The pandemic in Washington State, 2020

The first confirmed U.S. case of COVID-19 occurred in Washington State in early January. Until mid-March, Washington had both the highest absolute number of confirmed cases and the highest number per capita of any state in the country. In March, Washington State Governor Jay Inslee issued a statewide stay-at-home order remained in effect through May 4; this order did not, however, cover workers deemed “essential,” such as the employees in this case. Effective May 18, King County (in which several of Respondents’ stores are located) began requiring face coverings in indoor public spaces. Beginning June 8, Washington State followed suit, requiring all public-facing workers to wear masks; later that month, the State issued a mask requirement that covered customers shopping in Respondents’ stores.⁴

Although very little was known about the contagiousness or lethality of the virus, Respondents’ associates (and store management teams) were expected to carry out their everyday work

brief; “R. Br. at ___” for Respondents’ post-hearing brief; and “U. Br. at ___” for Local 21’s post-hearing brief.

² The record is hereby corrected as follows at: p. 25, l. 9, “wouldn’t” is replaced by “would”; at p. 48, l. 20, “unemployed” is replaced by “employed”; p. 394, l. 2, “riders” is replaced by “rioters”; p. 447, l. 23, “school” is replaced by “store”; p. 477, l. 11, “QSB” is replaced by “QFC”; p. 482, l. 20, “sail” is replaced by “sell”; p. 578, l. 3, “personal” is replaced by “person”; p. 721, l. 19, “80,7” is replaced by “807”; p. 757, l. 20, “left field” is replaced by “afield”; p. 862, l. 25, “hosted” is replaced by “posted”; p. 891, l. 17, “Toko Fitzinagi” is replaced by “Motoko Kusanagi”; p. 1072, l. 22, “door” is replaced by “store”; p. 1075, l. 4,

“females” is replaced by “emails”; p. 1107, l. 7, “hear” is replaced by “heart”; p. 1308, ll. 24–25, “Muslim” is replaced by “homeless”; p. 1371, l. 23, “dancing” is replaced by “Dan saying”; p. 1448, l. 16, “67” is replaced by “667”; p. 1550, l. 9, “Louisa” is replaced by “Louise”; p. 1566, l. 3, “risk pans” is replaced by “wristbands”; p. 1631, ll. 22–23, “at higher messaging” is replaced by “Attire Messaging”; ad passim, “211” is replaced by “2(11)”; ad passim, “Savon” is replaced by “Siohban”.

³ See Securities and Exchange Commission (2022), The Kroger Co. Form 10-K for Fiscal Year Ended January 29, 2022. www.sec.gov.

⁴ Washington State Gubernatorial Proclamation 20-25.1, *Extending Stay Home – Stay Healthy to May 4, 2020*; Seattle & King County Local

duties for the public good. Multiple witnesses testified that the pandemic and accompanying public health restrictions presented extreme logistical challenges to Respondents' retail business and significantly worsened the working conditions for their hourly employees, known as "associates." For customers, the simple act of grocery shopping became rife with anxiety; unlike shoppers, Respondents' associates did not have the luxury of dashing through the store for necessary items—they worked, masked, through their regular shifts amid shortages of both products and coworkers. Once mask mandates were in place, both management and associates regularly contended with belligerent and confrontational customers opposed to the mandates, as well as those demanding they be more strictly enforced. (Tr. 1143–1148, 1557–1558.)

2. The George Floyd protests and Black Lives Matter

On May 25, 2020,⁵ George Floyd (Floyd), a Black man accused of passing a fake \$20 bill, was killed in the custody of the Minneapolis Police. A teenaged girl's bystander video showed a handcuffed Floyd pinned to the ground and calling for his mother. After 9 minutes and 29 seconds, he died. The video went viral. Demonstrations broke out both nationwide and globally, prompting comparisons to the 1968 riots following the assassination of Martin Luther King, Jr. During late May and June of 2020, the protests drew an estimated 15 to 26 million participants in the United States alone. The level of participation in Seattle area protests was high, relative to its population. Multiple protests were held city-wide, culminating in a portion of the city being occupied by protestors. The demonstrations drew counter-protesters, who tended to be in support of the police.⁶

Health Officer Directive dated May 11, 2020; *New face mask requirement for workers begins Monday in Washington state*, king5.com (Jun. 8, 2020), <https://www.king5.com/article/news/health/coronavirus/washington-face-mask-requirement-employees/281-9ca45304-14d8-4572-8177-3f764a865650>; Joseph O'Sullivan, Evan Bush, Elise Takahama, Katherine Khashimova Long, *Gov. Inslee orders masks to be worn in public to help stem spread of coronavirus*, Seattle Times (Jun. 23, 2020), <https://www.seattletimes.com/seattle-news/politics/inslee-orders-face-coverings-to-be-worn-in-public-to-help-stem-spread-of-coronavirus/>.

⁵ Unless otherwise noted, all dates herein refer to the year 2020.

⁶ Mark Z. Barabak, *News Analysis: Racism, Unrest, Police Brutality. Is America Living 1968 All Over Again? Yes, and No*, L.A. TIMES (Jun. 4, 2020), <https://www.latimes.com/politics/story/2020-06-04/george-floyd-protests-1968-parallels-2020-election>; Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (Jul. 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>; A. Benjamin Spencer, *The Largest Social Movement: Legal Lessons from the Black Lives Matter Movement*, 28 Wm. & Mary J. Race, Gender & Soc. Just. 1 (2021); Evan Bush, *Welcome to the Capitol Hill Autonomous Zone, Where Seattle Protesters Gather Without Police*, Seattle Times (Aug. 12, 2020), <https://www.seattletimes.com/seattle-news/welcome-to-the-capitol-hill-autonomous-zone-where-seattle-protesters-gather-without-police>.

⁷ The history of the origin of Black Lives Matter and its early evolution from social media hashtag to real-world social movement, is the subject of several scholarly articles. See, e.g., Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 Nev. L.J. 1091 (Spr. 2018).

During the protests, Respondents closed down and, in some cases, evacuated certain of their Seattle stores, including QFC 807, at which certain events in this case occurred. (Tr. 988, 990–991, 1141–1143, 1146.)

A common rallying cry seen during the protests was the slogan, "Black Lives Matter," a phrase coined in 2013 by civil rights activist Alicia Garza to convey her dismay and frustration over the acquittal of the killer of Trayvon Martin, a Black teenager.⁷ In response to continued fatal police encounters with civilians, which disproportionately impact Black Americans, "Black Lives Matter" or "BLM" had become by the summer of 2020, a regular feature of both online and real-world discussions, demonstrations and protests.⁸

3. Organized labor and corporate support for BLM

According to United States Census data, Black workers are more likely to be unionized than any other racial group. Organized labor supported the BLM protests, as evidenced by a July 20 nationwide "Strike for Black Lives" in which (as detailed, *infra*) certain of Respondents' associates participated. This event involved approximately 60 groups, including unions, calling on workers to walkout on July 20.⁹

In 2020, four Black CEOs led Fortune 500 companies, and fewer than 10 percent of the most senior leaders in those companies were Black.¹⁰ Following the Floyd murder, however, corporate America broke with its historic tradition of neutrality on social-justice issues; many major companies, including Respondents' parent company, Kroger, publicly embraced the Black Lives Matter movement.¹¹ These companies, which in-

⁸ *Fatal police violence by race and state in the USA, 1980–2019: a network meta-regression*, The Lancet 398:10307, pp. 1239–1255 (Oct. 2021); *History of the hashtag #BlackLivesMatter: Social activism on Twitter*, Pew Research Center, <https://www.pewresearch.org/internet/2016/08/15/the-hashtag-blacklivesmatter-emerges-social-activism-on-twitter/>.

⁹ Cherrie Bucknor, *Black Workers, Unions, and Inequality*, Ctr. for Econ. & Policy Research (Aug. 2016), <https://cepr.net/images/stories/reports/black-workers-unions-2016-08.pdf?v=2>; Chauncey Alcorn, *Workers Demanding Union Rights Plan to Walk Off the Job in Nationwide Strike for Black Lives*, CNN (Jul. 12, 2020), <https://www.cnn.com/2020/07/12/business/strike-for-black-lives-union-wages/index.html>; Jacob Bogage, *Thousands of U.S. Workers Walk Out in "Strike for Black Lives"*, Wash. Post (Jul. 20, 2020), <https://www.washingtonpost.com/business/2020/07/20/strike-for-black-lives/>.

¹⁰ Mike Hyter and Audra Bohannon, *Less than 1 Percent of Fortune 500 CEOs are Black: Corporate America Must Change*, Corporate Board Member, <https://boardmember.com/less-than-1-percent-of-fortune-500-ceos-are-black-corporate-america-must-change/>.

¹¹ In 2020, the Harvard Business Review reported that 60 percent of Americans polled stated that "how a brand responds to racial justice protests will influence whether they buy or boycott the brand" and also agreed that "brands should take steps to address the root causes of racial inequity." Geeta Menon and Tina Kiesler, *When a Brand Stands up for Racial Justice, Do People Buy It?*, hbr.org (Jul. 31, 2020), <https://hbr.org/2020/07/when-a-brand-stands-up-for-racial-justice-do-people-buy-it>.

cluded Walmart, Amazon, Apple, CVS Health, Berkshire Hathaway, McKesson and AT&T, issued public statements condemning racial injustice and, in many cases, outright professing that Black Lives Matter. These statements typically contained two components: announcing philanthropic initiatives and professing the company's commitment as an employer to combat racism, foster diversity, and hire and promote Black workers.¹²

B. Respondents' Dress Code Policies and Practices

The uniform worn by Respondents' hourly associates features an apron or a vest along with a nametag. Embroidered into the apron or vest is a prominent, multicolored, heart-shaped symbol commonly referred to as the "Kroger rainbow heart," which represents the Company's "core values": integrity, honesty, diversity, inclusion, safety and respect. (GC Exhs. 20, 49 at 6; R. Exh. 42; Tr. 1046–1047; see also <https://www.thekrogerco.com/careers/life-at-kroger/>.)

At hearing, the parties stipulated as to Respondents' written dress code policies in effect during the summer and fall of 2020. (See Jt. Exhs. 1–4.) Although newly hired associates were provided with copies of the policies, there is scant evidence that they actually read them or were familiar with their wording. Witness testimony, as well as photographic evidence of workers' on-duty attire, made it apparent that the written dress codes were often the rule.

1. Fred Meyer's written dress code policy

Fred Meyer's dress code policy, entitled, "Dress and Appearance," was last updated June 2019, and states that its purpose "is to convey a professional, fun business image for all we serve in our stores." The policy sets forth a number of requirements and prohibitions regarding work attire. With certain exceptions, hourly associates are required to wear either store-issued aprons or vests, depending on their position. Pursuant to its "general" standards for store hourly associates, "[u]nauthorized buttons, badges, or patches are not allowed." (Jt. Exh. 2.) The policy also contains an "exceptions" section, which states that "[o]ccasionally, stores will have approved specific themes (usually due to special promotions, holidays, etc.) and Associates may be encouraged to dress in accordance with the theme." *Id.*

Management witnesses testified that, pursuant its "approved themes" exception, Fred Meyer allows and even promotes dress code exceptions for: holidays; sports gear during football season on game days; sponsored events (such as the American Cancer Society's "Relay for Life"); and morale-boosting promotions (such as "fun dress-up days" and "pajama day"). During the month of June, which is recognized in Washington State as "PRIDE Month" in celebration of LGBTQ+ rights, Fred Meyer has for years sponsored a booth at a Seattle-based "PRIDE" event. During June, it also offers Fred Meyer-endorsed PRIDE buttons to wear at work, which feature a rainbow with the words "Fred Meyer" underneath, as well as the word, "pride." According to management witnesses, exceptions for "approved themes" cover discrete time periods, and store-issued PRIDE buttons

were only permitted during the month of June. (Tr. 119, 145, 1037–1038, 1361–1362, 1425, 1482.)

According to FM 667's Human Resources Assistant Store Leader (ASL) Angela Senatore (Senatore), associates out of dress code are, if necessary, typically sent home to change and expected to clock out before doing so. She also testified that associates who refuse to remove an item deemed out of dress code are sent home. FM 667's Assistant Store Manager Paul Shephard (Shephard) confirmed that, generally, associates who sent home to correct dress code violations are not paid for the time involved. (Tr. 1381–1382, 1438.)

2. Fred Meyer's dress code in practice

Fred Meyer associates do not appear historically to have followed—nor been held to follow—the above-written dress code requirements. Testimony by the General Counsel's employee-witnesses establishes that the prohibition on "unauthorized buttons," in particular, was widely and consistently ignored.

Local 21 buttons, even if not technically "authorized," were commonly worn and, during contract negotiations, such buttons included messages tailored to support specific Local 21 bargaining positions. In addition, despite the regular presence of managers on the retail sales floor, associates wore buttons that either critiqued their working conditions (such as an "I Hate Mornings" button worn to protest working an early morning shift) or contained more cryptic commentary (such as buttons stating, "I TRIED" and "HELP" in a semi-scribbled font). (Tr. 565–566, 574, 808–809; GC Exhs. 16, 18.) There is no evidence that associates were ever asked to remove any of these unauthorized buttons.

Associates have also decorated their aprons with a variety of other unapproved buttons, including cartoon images, pictures of animals, pins reflecting the "Star Wars," "Marvel" and "Star Trek" franchises, whimsical sayings (such as "ADULT-ISH," "Happy Hump Day" and "I Love Dogs") and, as one witness put it, other "random stuff." There is also evidence that associates shared buttons; for example, one FM 28 associate was known for regularly bringing in assortments of "random, silly buttons" and giving them out to her colleagues, who then wore them on their aprons. (Tr. 118, 392, 552, 565–566, 574, 610–611, 632, 808–809, 811–812, 1111–1113.)

Finally, it was not uncommon for associates—year-round—to wear buttons with symbols or writing expressing support for the PRIDE movement, as well as to "gift" them to each other. These buttons typically featured the movement's "rainbow" symbol accompanied by the word "PRIDE." There is no indication that any associate was ordered to remove such a pin after the official June PRIDE month had ended. Associates also wore "pronoun" buttons, which stated the pronouns by which they identified; for example, "She-Her-Hers" or "She-They." (Tr. 119–120, 392, 552, 612, 617–619, 622–624, 632–633; 653, 817, 1115–1116; GC Exhs. 20, 21, 23.) There is no evidence that Fred Meyer ever authorized associates to wear "pronoun" pins or that any associate was ever asked to remove one of them.

Once associates were required to wear COVID mask at work,

¹² See Blair Johnson, *How the Black Lives Matter Movement Enhanced Corporate Governance in 2020*, 8 Emory Corp. Governance & Accountability Rev. 99 (2021) (detailing corporate statements); see also

Natalie Sherman, *George Floyd: Why are companies speaking up this time?*, BBC News online (Jun. 7, 2020), <https://www.bbc.com/news/business-52896265>.

personalized masks, such as those endorsing an associates' favorite sports team, began to appear at Fred Meyer stores, despite the fact that they arguably violated the dress code prohibition on sports gear outside of game days. (Tr. 79–80, 752–653.)

3. QFC's written dress code policy

QFC's dress code policy in effect between May 2019 and July 2020 states that its purpose is that associates "appear fresh and clean, professional and approachable." QFC also maintained a "Personal Appearance & Grooming Standards" policy, which provides that "Company approved buttons and pins may be worn on aprons and uniforms." (Jt. Exhs. 3, 4; R. Exh. 49.)¹³

Although not specifically laid out in its written policy, QFC also considered certain apparel and accessories to be "approved" on a temporary basis during special store-recognized holidays, events and promotions, such as costumes for Halloween, rollouts of new video games and sports team gear for game days, "Hawaiian shirt days," and uniform-free days for Thanksgiving and Christmas. Like Fred Meyer, QFC sponsors local PRIDE parades and, during the month of June, allows associates to wear PRIDE buttons sold by the store at such events. QFC management witnesses, like their Fred Meyer counterparts, insisted that, after a designated event was over, it was expected that the dress code would return to normal. (Tr. 1315, 1323, 1525–1527, 1555–1157.)

In about July 2020, QFC revised its dress code to comply with Washington State's mask mandate. The revision was a "Face Mask/Covering Addendum" that specified that masks worn must:

- Appear fresh and clean, professional and approachable as a trusted grocer and food provider.
- Masks issued by the company, or others that are solid colors, floral, stripes, and plaid prints.
- Only have a small manufacturer's brand logo but must not have other logos, writings or graphics. They should also not contain the logo or brand of competing grocers or retailers.

(Jt. Exh. 4; Tr. 1249–1250.) Despite, according to its witnesses, QFC was admittedly "having conversations" with the Union "about COVID and everything that went along with that," it is undisputed that this revision was made without providing notice to Local 21. (Tr. 934–935, 1144–1145, 1193–1194, 1274.)

4. QFC's dress code in practice

Like their Fred Meyer counterparts, QFC associates appear for years to have ignored relevant aspects their employer's official dress code dictates without consequence. The witnesses called by the General Counsel—all current employees—to testify about dress code practices at their QFC stores described a work environment in which they and their coworkers freely expressed themselves via their attire, including wearing Local 21 and other nonapproved buttons.

Witnesses recalled seeing associates wearing buttons featuring video games, television shows, political jokes and hobbies,

as well as aspirational quotes, such as "Unity" and "Stand Up, Resist Hate." As they had at Fred Meyer stores, associates gifted these buttons to each other; one witness recounted gifting a "Love Will Drive Out Hate"¹⁴ button that referenced MLK Day and Local 21 to a coworker for whom that message "really resonated." (Tr. 271–272, 290, 444–445, 743–734, 737–738; GC Exhs. 24, 26, 27.) There is no evidence that associates were ever asked to remove any of these buttons.

Like Fred Meyer, QFC distributed PRIDE buttons to associates to be worn during June, but many associates continued to wear them after the month had ended and additionally wore their own, non-company approved PRIDE pins year-round. Also popular were pronoun buttons, which associates also shared at work. (Tr. 290, 365–366, 379–380, 441, 447, 507, 721–723, 736, 1159–1160, 1285; GC Exh. 25.) There is no evidence that associates were ever asked to remove PRIDE or pronoun buttons.

At least one QFC employee, cashier Cobina Stryker (Stryker) (they/them) received a complaint from a customer for wearing a pronoun button. Stryker testified that, in 2019, a customer asked in a judgmental tone what their button meant, to which they responded, "those are my pronouns and that is how I identify." Stryker was later called into the manager's office to speak with Assistant Store Manager Jim Frazzini, who told them to be careful not to make transactions with customers "about [their] pronouns." He did not, however, ask Stryker to remove their pronoun pin. (Tr. 718, 725–727.)

Despite QFC's COVID-mask "addendum" to its dress code, QFC associates wore noncompliant face masks without consequence, including masks bearing graphics, animal prints and logos from other companies. Especially popular were masks bearing the "rainbow flag" associated with the PRIDE movement. (Tr. 283–287, 441, 514.)

C. Summer 2020: Respondents and Their Associates Take a Stand on "Black Lives Matter."

As discussed, the Floyd video disgusted and outraged many Americans, who joined rallies, protests and engaged in online activism. Respondents' parent company, Kroger, like dozens of other employers, took a public-facing position on the issue of police violence against Black citizens. Using its online platforms, Kroger held itself out, as a company and an employer, as resolutely aligned with the Black Lives Matter movement.

1. Kroger publicly embraces "Black Lives Matter."

a. Kroger's CEO decries police killings and encourages Respondents' Black associates to "share their feelings" about discrimination.

On a June 4 video linked to its public website, Kroger CEO Rodney McMullen (McMullen) spoke before a backdrop of its various subsidiary brand logos (including Respondents'). In the video, McMullen lamented the "senseless killing of George Floyd, Breonna Taylor and Ahmaud Arbery, and so many more,

¹³ Based on the credible evidence, I do not agree, as urged by Local 21, that this preapproval requirement for buttons and pins was promulgated in July 2020; rather, it appears to have been in place at least as of May 2019. See Jt. Exh. 1 at ¶ 4; Tr. 1153–1154.

¹⁴ The button paraphrases King's quote, "Darkness cannot drive out darkness, only light can do that. Hate cannot drive out hate, only love can do that." Martin Luther King, Jr., *Strength to Love*, (Harper & Row, 1963). See <https://www.nps.gov/mlkm/learn/quotations.htm>.

too many more across our country.” As he spoke, the video faded to show those names, in order, on a protest rally sign calling for “JUSTICE” alongside the well-known hashtag “#BLM”:



See GC Exh. 42 (citing <https://vimeo.com/426038783>).

After further shots of protest rallies featuring more Black Lives Matter signs and, in one case, a group of protesters holding up raised fists before a line of police in riot gear, McMullen stated that “so many of our associates, families, friends, customers and communities” were “hurting, frustrated and angry.” Declaring that the Company was “against racism and injustice against the Black community,” he then pledged Kroger’s “help and support” and announced that it would offer “more opportunities for our associates to openly share their thoughts, feelings and experiences with discrimination.” As the video cut to a montage featuring people of color with “Kroger” nametags dressed as both grocery workers and managers, McMullen announced that Kroger’s “African American Associate Resource Group” had developed an “allyship resource guide,” for which a Kroger website link was displayed on screen.

After repeating that the Company was “listening” to its associates, McMullen pledged to “take action” and then announced: “To our Black associates, customers and allies: We see you. We hear you. We support you, and I stand with you.” During this portion, the video returned to the shot of BLM protesters raising their fists before the riot police, followed by a wide shot of BLM protesters marching with multiple signs stating, “Black Lives Matter,” “BLM,” “No Justice/No Peace,” “White Silence is Violence” and “The Police are Domestic Terrorists.” McMullen closed his remarks with an inspirational quote from Nelson Mandela.

A version of McMullen’s statement was distributed, in written form, to all of Respondents’ associates, via internal company

website postings, around June 5. (See R. Exh. 8; Tr. 1000.)

b. Kroger, in collaboration with a Group of its Associates, further endorses the Black Lives Matter movement.

Shortly before McMullen recorded his video statement, Kroger management turned to an employee resource group¹⁵ it had established for the purpose of, in the words of one management witness, “listening to Black associates” with a focus on diversity, work environment and promotional opportunities. While the record is scant on the origin and precise makeup of the group, it is undisputed that it consisted of members of management as well as individual workers who, shortly following the Floyd murder, produced the allyship guide promoted in McMullen’s June 4 video. (Tr. 1001, 1005–1006.)

The 13-page Allyship Guide opens with the assertion that “Injustice, bigotry and racism are deeply entrenched in the country we all love, and have been since its origination” and contains the same “Justice/BLM” image (above) that accompanied McMullen’s presentation. (R. Exh. 9.) The resource guide is both unflinching in its support of the BLM protests (counseling the reader that, in the words of Martin Luther King, Jr., “a riot is the voice of the unheard”) and unsparing in its critique of the “All Lives Matter” social movement (considered opposed to the BLM movement) as “dismissive and unsupportive of Black Lives Matter movement.”¹⁶

Describing the BLM demonstrations as “a concerted effort to be seen and heard and elicit positive change, reform and community,” the guide exhorts the reader to “find your expression and role,” even if that role is one of a “disruptor” and to do so, “despite being afraid or not knowing the first step to take.” Like McMullen’s presentation, the guide features multiple images of Black grocery workers, urging readers to become civically involved and support politicians and legislation that “support and uplift marginalized communities.” Id.

c/ Kroger publicly declares “Black Lives Matter” and Respondents Hold “listening sessions” with associates.

On June 12, Kroger posted to its official Facebook and Twitter accounts the following post:

As a company, it’s our responsibility to better support our Black associates, customers and allies. We know there is more work to do and will keep you updated on our progress, this is only the beginning. Black Lives Matter.¹⁷

Next, Respondents made good on McMullen’s promise to give associates an opportunity to speak out by holding “listening sessions”; it is undisputed that these sessions were held at both

¹⁵ An “employee resource group” (sometimes labeled an “affinity group”) is a nontraditional worker-management association established within a workplace to advance the interests of a specific demographic, such as minority employees. See Anne-Marie Vercruysse Welch; Emory D. Moore, Jr.; Jennifer Kroll & Heidi Sharp, *Legal Traps Associated with Affinity Groups*, 33 ABA Journal Lab. & Emp. Law 267 (citing *Moranski v. Gen. Motors Corp.*, 433 F.3d 537, 538 (7th Cir. 2005)). The General Counsel does not allege that the establishment or operation of any of Respondents’ employee resource groups violated the Act.

¹⁶ While the phrase “All Lives Matter” initially appeared as an inclusive alternative to the Black Lives Matter movement, by 2020, it had become associated with opposition to the Black Lives Matter movement. West, K.; Greenland, K.; Laar, C., *Implicit racism, colour blindness, and narrow definitions of discrimination: Why some White people prefer “All Lives Matter” to “Black Lives Matter.”* British Journal of Social Psychology 60 (4), 1136–1153 (2021).

¹⁷ GC Exh. 48; see also <https://twitter.com/kroger/status/1271516803756425218>; <https://www.facebook.com/Kroger/posts/10157798125078218>.

companies.

At Fred Meyer sessions, associate-members of the Company's own African American Associate Resource Group met with top executives, including then-President Dennis Gibson, then Vice President of Merchandising Todd Kammeyer and Human Resources Director Sara Parker. As Fred Meyer's Senior Manager for Labor and Associates Relations, Sharon Carroll (Carroll) explained, "it was really an opportunity for leadership to listen to associates" about their "views, feelings, thoughts, ideas, concerns about what was happening out in the world, out in society, and then how—how that translates to Fred Meyer, or insights into their experience at Fred Meyer." Associate Relations Specialist Ashley Boal (Boal), who oversaw 133 Fred Meyer stores in the Northwest (including those at issue in this case) testified that, during the session, associates were asked what the company could do to support its Black associates and specifically what it could "do differently." (Tr. 982–983, 1001–1003, 1021, 1565, 1568–1569.)

Although it appears that QFC historically held "sharing sessions" in which Black associates related their experiences with workplace discrimination, the record does not reflect whether any of these sessions were held during the summer of 2020. (Tr. 1216–1217.)

2. Respondents' associates "openly share" their views by donning Black Lives Matter buttons and masks at work.

Like many American workers, within a day or two of the Floyd killing, Respondents' associates began discussing the event, as well as the repeated instances of police killing Black citizens. They also began to display, on their work uniforms, the slogan "Black Lives Matter" or "BLM." This ranged from attaching buttons¹⁸ to their work aprons to hand customizing Respondent-issued face masks by writing the slogan on them. These actions occurred at all five stores at issue in this case. As they had with their PRIDE pins, associates exchanged and "gifted" each other BLM buttons. (Tr. 68–70, 88–89, 139–140, 573, 576, 631, 649, 651–652, 809, 1014, 1435–1436.)

The earliest occurrence of multiple associates donning BLM gear was at FM 667. Shortly after the Floyd murder, coworkers discussed the incident, the years-long pattern of police killings and their sense of relief that the issue was finally making "big headlines." Approximately 7 associates of various races began wearing buttons Black Lives Matter buttons and/or face masks on which they had handwritten either "Black Lives Matter" or "BLM." Non-Black associates considered their messaging a show of support to their Black coworkers; as white associate Charles Waller explained, this was especially significant in his store (FM 667) considering that he only had 5-6 Black coworkers (representing approximately .03 percent of the store's complement of associates). (Tr. 69, 631, 651.)

Indeed, at the stores at issue in this case, Black workers represented a markedly small portion of the work force. Black individuals were also notably absent in the management ranks of both Respondents. Respondents' witness Boal admitted that "in many Fred Meyer stores there are few, if not any, Black man-

agers" and "there is a lack of racial diversity in leadership at Fred Meyer"; at FM 667, for example, there were no Black managers during the summer of 2020. Black associates working in Respondents' stores were to racial harassment by customers, coworkers and supervisors; these incidents ranged from daily microaggressions to incidents that bordered on violence. In one such incident, Herbert Reynolds (Reynolds) (who identifies as Black, Native American and Puerto Rican) was harassed by an angry customer who "offered" Reynolds his gun and suggested that he "rob the store." (Tr. 57–59, 315–316, 325, 333, 651, 761, 1079, 1099–1101, 1215, 1427, 1448–1449.)

Associates discussed these incidents at work, as well as the lack of non-white representation in management and their belief that they had been denied promotion and training opportunities based on their race. They also reported incidents of racial discrimination and harassment to their supervisors. According to Zackery Englander, associate labor and relations manager for all QFC stores, even before 2020, Black associates used the "training and sharing sessions" with management to report being "racially discriminated against by QFC." The record makes clear that associates' BLM messaging was not unrelated to these concerns; as QFC associate Motoko Kusanagi (Kusanagi) (she/they), who identifies as mixed-race, testified, the BLM buttons were conversation starters. Workers wearing the buttons, she explained, began more openly to divulge their shared experience with racism at work, including discussions about the failure to promote Black associates to management positions. (Tr. 63–65, 316, 318, 328–333, 331–334, 570–572, 775–776, 1216–1217.)

Associates also testified that their BLM messaging identified Respondents' stores to the public as pro-racial justice, "safe spaces" during a time of social unrest. As one Fred Meyer worker testified, the buttons signaled to Black customers that his store was a safe place where they would not be racially profiled or given poor service based on their skin color, especially, as he put it, "during all of the, you know, MAGA stuff." Likewise, a QFC employee-witness explained that the buttons signaled to customers (and especially those of color) that their store was an environment in which they were protected from racist judgements. Respondents' customers generally accepted, and even appreciated, the associates' BLM gear. As QFC associate Stryker testified, "almost every other customer" responded extremely positively to the BLM button on their apron. (Tr. 651, 707, 761, 801.)

According to Respondents' management witnesses, dress code violations were not limited to the BLM message, but also included certain associates wearing apparel with messaging such as, "Blue Lives Matter" and "MAGA 2020." While this appears to have been the case, I do not credit the testimony, which was almost exclusively uncorroborated hearsay, about reported dissension between these associates and those who wore BLM gear. Indeed, even where it purported to be first-hand, this testimony was far too vague in time, place and identifying details to be reliable. For example, FM 667's Shephard broadly claimed, "[w]e saw friends who had worked together for years yelling at each other on the sales floor about their political beliefs." (See,

¹⁸ Unless otherwise noted, the buttons worn were of a standard 2-1/4" size. (See, e.g., GC Exh. 11.)

e.g., Tr. 1058, 1427, 1558–1564.) With no corroboration for such vague accounts, I simply cannot credit them.¹⁹

D. Respondents' Initial Response to Associates' Public Facing BLM Support

Kroger's public endorsement of Black Lives Matter was held out as unequivocal and unwavering, and Respondents assured their workforces that Black associates' voices (and those of their allied coworkers) "mattered." It also appears, however, that Respondents expected to retain control over the manner and tone in which those voices spoke.

1. Kroger issues "talking points" pledging financial support for racial equity and justice and rolls out wristbands as an alternative to BLM gear.

A few weeks after the Floyd protests began in late May, members of Kroger's human resources and communication teams, in conjunction with their Fred Meyer and QFC counterparts, distributed "talking points" to store leaders, which were "cascaded"²⁰ to associates and disseminated to all via internal company websites. (Tr. 1614–1618.)

According to the talking points, Kroger had conducted its "first executive listening session," and had established a \$5 million fund to "support the advancement of racial equity and justice." The talking points, which emphasized that Kroger was "committed to change," then explained that:

one of the things we've heard is that many associates have expressed a desire to stand together with the Black community and show their support through their clothing, facial coverings and accessories. While we will not be adjusting our existing dress code, rules or policies, we acknowledge their feedback and want them to feel supported and heard.

The Company then announced that it would make "wristbands" available to associates; these, according to Respondents' witness Boal, were intended to "support associate voices" and show the Company's support for the BLM movement. As she explained, the wristbands were "put . . . out there as an alternative to wearing the Black Lives Matter button." (Tr. 1038, 1065, 1625–1626, 1652; R. Exh. 42.)

The approximately 1/4-inch wide silicon wristbands came in two styles: black with white letters reading, "Standing Together"; and blue with the Kroger Values: "Integrity, Honesty, Diversity, Inclusion, Integrity, Safety and Respect," each separated by a small heart (reminiscent of the Kroger-values heart symbol). The wristbands were distributed to store leaders, who were expected to "cascade" them to associates. As Carroll explained, the wristbands were a compromise intended to offer a message "that we were hoping everyone could get around" in a way that would not be "polarizing." Store management began offering

associates the wristbands, but there is no evidence of any associate actually wearing one. As Reynolds explained, "they never said anything about Black Lives Matter." (Tr. 82–83, 1270, 1294, 1395–1397, 1572, 1565–1566, 1626–1627, 1653.)

2. Based on a customer complaint, FM 667 bans associates' BLM gear.

In mid-June,²¹ FM 667 associate Reynolds was screamed at by a customer for wearing a handwritten BLM mask. As noted, Reynolds was one of approximately seven FM 667 associates who wore similar masks. On June 22, Reynolds was called into a meeting with Store Manager Dan Miller (Miller).²² Miller informed him that, per a directive from "corporate," his mask was in violation of Fred Meyer's dress code. Reynolds objected that others were allowed to wear PRIDE pins and that therefore he did not see how his BLM could be out of code. Miller informed him that the Black Lives Matter message was considered "political" and that pins either had to be "corporate-approved or Union-approved." Miller then stated that customers had complained, and then asked, "what can we do to make things better?" Reynolds responded by requesting that Fred Meyer issue approved BLM pins. Miller, taking notes, stated that he would talk to "corporate" about it. After his meeting, Reynolds shared with his coworkers what had happened and the possibility that Fred Meyer might issue them official BLM pins. It is undisputed that Fred Meyer did not provide notice to Local 21 that it planned to ban associates BLM messaging, or that it was considering issuing company-approved BLM buttons. (Tr. 69, 76–78, 82, 85, 139, 141, 144–145, 1460–1461.)

3. FM 667 associates resist management's directive and question Kroger's commitment to the BLM movement.

Between June 22 and 24, Miller and Senatore pulled several other associates into individual meetings, instructed them that BLM gear was no longer permitted and offered them Kroger wristbands as an alternative. At least two of them, like Reynolds, openly questioned why associates were being asked to remove BLM buttons while PRIDE buttons were still allowed despite the latter also being considered, by some, to be objectionable and controversial. Associates also objected that prohibiting BLM insignia was inconsistent with Kroger's public image of supporting the Black Lives Matter movement. They roundly rejected the Kroger wristbands, and associates even questioned why the "Kroger Values" wristband was issued in blue (i.e., the color associated with "All Lives Matter" and "Blue Lives Matter" movements).

One of the most forceful and passionate responses came from Felicia Oliver (Oliver), a long-term and well-regarded associate who is African American. During her meeting, Miller informed Oliver that, in order to teach an upcoming training class for her coworkers, she might have to take off her BLM button. Oliver

¹⁹ Likewise, to the extent Respondents' upper-management witnesses gave vague testimony about unnamed store managers and store leads relaying that associates were frustrated and angry about interactions with customers over BLM gear (see, e.g., Tr. 1058), this testimony was so vague as to be nonreliable.

²⁰ "Cascading" is Respondents' lingo for imparting information down the corporate hierarchy. (Tr. 1565–1566, 1583, 1615–1616.)

²¹ Although Reynolds testified that this incident occurred later (in July or August), the bulk of the evidence indicates that his recollection was mistaken.

²² Although he still served as store manager as of the hearing, Miller did not testify.

immediately protested that her button was small and not like the larger BLM buttons that “everyone was wearing.” When Miller informed her that associates would no longer be allowed to wear the Black Lives Matter buttons, she retorted that had worked for Fred Meyer for 22 years and felt that she had been “suppressed as a Black woman” during that time. (Tr. 1709–1711, 1720; GC Exh. 54.)

Next, Oliver accused Kroger of sending a “double message,” noting that she had seen that CEO McMullen “was for Black Lives” and “now he was taking this away, he is not sticking to his word.” If FM 667 disallowed the buttons, she threatened, “it would make Kroger look bad” and customers would boycott their stores. She then stated that she would consider quitting if management refused to support her as a person of color by allowing her and her coworkers to wear the buttons. In response, Senatore offered Oliver the opportunity to take a “leave of absence,” and Miller gave her permission to wear her button for the rest of the day. Id.

Senatore documented the objections associates made during these meetings; her notes indicate that their “feedback” included comments such as:

- Not allowing our freedom of speech defeats the Feed The Human Spirit heart²³ on our apron.
- Rodney [McMullen] states that he supports Black Lives but does not allow the associates to do so.
- Not allowed to [wear] Black Lives but Kroger donating, why don't they back what they say[?]

(R. Exh. 10, GC Exh. 54; Tr. 656, 658–660, 673.)

Following the meetings, associates who had been made to remove their BLM gear (including Reynolds, Olivier and Waller) immediately began discussing their dissatisfaction with Fred Meyer's handling of the matter. The consensus was that management's actions were “BS.” (Tr. 83, 662–663, 672, 679.)

4. Fred Meyer “floats” the idea of a small, company-issued BLM button.

Following the June 22–24 meetings with associates, Senatore drafted an email to Carroll relaying, in detail, the associates' concerns that banning the BLM message was be inconsistent with Kroger's professed support of the Black Lives Matter movement. She reported that the majority of the associates supported the idea of wearing a small button of their choice. She also highlighted Oliver's threat to quit over the issue, as well as her proposal for a small-sized, company-approved BLM button, noting:

[a]fter meeting with these associates and getting feedback from a few others, our soon to be Senior Ambassador for the New Rewards roll out (and #1 Customer Comment getter for

friendly & caring) came up with an idea for a button the size of a quarter they could wear for what they support.

(R. Exh. 10; GC Exh. 54.)

In response, Carroll instructed Senatore to “engage” with Oliver and let her know that her suggestions had been “bubbled up.”²⁴ She also told Senatore to take a picture of Oliver's button (with her permission) and “[t]ell her that you cannot promise anything but we are continuing the conversation based on associate feedback.” Senatore relayed the message to Oliver and, with her permission, sent Carroll a picture of Oliver's BLM button. (GC Exhs. 54, 55; Tr. 1603, 1607–1608, 1661–1663.)

E. Local 21 Issues “Union/BLM” Buttons and Respondents Respond with Company-Wide Bans

There is no evidence that Fred Meyer took any further to develop an “approved” BLM button, but, shortly after FM 667 associates were barred from wearing the BLM message, Local 21 began issuing its members BLM buttons that also featured the Union's own insignia.²⁵ Kroger's public support of the Black Lives Matter movement had, at this point, generated a degree of negative media attention, culminating in a viral video, later debunked, claiming to show a Kroger customer receipt with an added “BLM tax.”²⁶ While Respondents appear to have initially tolerated the Local 21/BLM buttons, in August, they began enforcing their dress codes against all associate BLM displays, including the union-issued buttons. According to the General Counsel, this involved sending home (without pay) certain associates who refused to remove their buttons.

1. Associates wear “Local 21/BLM” buttons on their uniforms.

During the last week of June, Local 21's then-campaign director for Grocery Sector, Mark Auerbach (Auerbach), learned that FM 667 management had directed associates to remove their BLM buttons and masks, as well as the possibility that Kroger was considering issuing employer-sanctioned BLM buttons to associates. Local 21 moved quickly and instead produced BLM-themed buttons with the Union's logo, providing the first batch of them to FM 667 associates around July 10. The Union posted an announcement on its website about what had happened at FM 667, and a phone number for members to text if they wanted buttons at their store. (Tr. 850, 854–857, 862–863, 867; GC Exh. 30.)

The Local 21 buttons caught on quickly at FM 667; several associates, including Reynolds and Waller, distributed them. They were popular with the store's associates, and, at one point, over 50 percent wore them. Additional requests for the Local 21/BLM buttons came in and they were provided to at least 15 of Respondents' stores. At the stores involved in this case, they were distributed by stewards and other associates, left in piles in

²³ As noted, the “heart” featured on Fred Meyer and QFC associates' aprons represents the Kroger “core values.” (Tr. 374, 619, 679.)

²⁴ “Bubbling up” (i.e., the apparent inverse of “cascading down”), referred to relaying Oliver's comments up the chain of management.

²⁵ The Local 21 buttons were black with white lettering and, like most of the employees' individual BLM buttons, a typical 2-1/4” in size. (Tr. 862; GC Exh. 23.)

²⁶ See Len La Rocca, Fact check: Kroger is not charging customers a Black Lives Matter tax, USA Today.com (Jul. 27, 2020), <https://www.usatoday.com/story/news/factcheck/2020/07/27/fact-check-kroger-not-charging-customers-blm-charge/5505638002/>.

breakrooms and worn by associates. The buttons themselves were at ‘hot topic’ at work. As QFC associate Stryker testified, “[e]veryone was talking about the pins,” and they advised at least five coworkers that collectively wearing the buttons would allow associates to “create a space” for discussing topics of racial equity and justice at work. Associates also shared their hope that, because Local 21 had provided the buttons, management would not be able to take them away. (Tr. 326–336, 396, 399, 457, 508, 578–580, 666–668, 776–777, 863, 867.)

2. Local 21 publicizes the new button campaign online.

On July 20 (approximately 2 weeks after FM 667 associates received their new buttons), Local 21 members participated in the National Strike for Black Lives (discussed earlier) at various locations, including FM 667.²⁷ The action was advertised on Local 21’s Instagram page with postings that included statements such as “Justice for Black communities is a necessary first step to winning justice for all workers” and called on corporations to “dismantle racism and economic exploitation wherever it exists, including in our workplaces.” The Union also posted images of off-duty FM 667 workers in front of their store holding Black Lives Matter signs while wearing shirts and buttons bearing the joint Local 21/BLM logo. (GC Exhs. 38, 41; Tr. 919–920.)

On its Facebook and Twitter pages, the Union posted a video of FM 667 associate Jenna Kalla²⁸ donning both a BLM mask and a Local 21/BLM button accusing Fred Meyer of silencing its associates by forbidding them from wearing BLM gear, while still allowing them to display the PRIDE message. Paraphrasing McMullen’s pro-BLM speech less than 2 months earlier, the Union’s Twitter post additionally noted that Fred Meyer had taken this action despite claiming to be committed to “speaking out against racism” and “being part of the solution.” Each of the posted videos was accompanied by an offer to all UFCW members:

Want to get Black Lives Matter buttons for your store?
Just text your name & work location to (xxx) xxx-2121.
#BlackLivesMatter #UnionStrong”

(GC Exhs. 38, 40; Jt. Exhs. 8, 11.)

3. Carroll and Hovey instruct store management to treat Local 21/BLM buttons as “unauthorized.”

On August 14 and 15, Respondents—guided by Kroger—officially declared Local 21’s BLM buttons to be in violation of their respective dress codes. Carroll and Hovey issued nearly identical emails directing their store managers—without directly mentioning Black Lives Matter—to ensure that their respective dress codes were being “consistently applied” with respect to “unauthorized buttons/ paraphernalia.” It is undisputed that the

words and phrasing of the directive came from Kroger headquarters. There is little doubt that “unauthorized buttons” was understood to refer to Black Lives Matter; as Respondents’ witness Boal testified, “it was the Black Lives Matter buttons.”²⁹ Hovey testified consistently; asked what “unauthorized” gear was contemplated by the directive, he identified only the BLM buttons, which characterized as being a “big deal” at the time. (Tr. 1262, 1265, 1630–1631; Jt. Exhs. 6, 7.)

Attached to Kroger directive, Carroll and Hovey each attached messaging guidelines provided by the “Kroger communications team” for managers to use when addressing dress code violations. The guidelines including the following talking point for dealing with associates:

If you are unwilling to follow our dress code, we will excuse you from the remainder of your shift and ask you to clock out, however we hope that you choose to follow our policies and stay at work because we value your contribution.

The guidelines also suggest that management offer associates the Kroger “Standing Together/Our Values” wristbands to wear in lieu of their Local 21 buttons. As with the FM 667 ban on BLM messaging in June, it is undisputed that Respondents did not provide notice to Local 21 about the ban on its own BLM buttons. (Jt. Exhs. 6, 7.)

4. Store managers at FM 28, FM 122 and QFC 807, with varying success, order associates to remove BLM buttons.

Within days of the Kroger directive, Respondents’ store management began informing associates that they were required to remove their BLM buttons because “corporate” had dictated that they were out of dress code. The effectiveness of this rollout varied by store.

During August, management at FM 28 tried—and failed—to convince associates to remove their buttons. Associate/Union Steward Melissa Goslin flatly refused to remove her button, stating that it had been approved by the Union; she continued to wear it until she stopped working for Fred Meyer in early 2022. Another associate, Sharelle Claiborne, testified that managers appeared to stage a conversation within her hearing range about the buttons not being allowed, but never directly asked her to remove hers. Along with a group of her coworkers, she continued to wear the Local 21/BLM buttons. (Tr. 566, 579–584, 806, 815–816.)

Around the same time, QFC 807 associate Kusanagi was informed by a “shift supervisor” that management wanted her to remove her Local 21/BLM button but ignored the directive.³⁰ She continued to wear it until approximately December. Associate Stryker—who had been permitted a year earlier to wear a pronoun pin despite a customer complaint—was called to the store manager’s office and asked to remove their button and not

²⁷ As Auerbach explained, while it was billed as a “strike,” the Union was careful not to encourage members to actually engage in any work stoppage that might be deemed illegal, and there is no allegation that such an action occurred. (Tr. 919.)

²⁸ Although Kalla was a Fred Meyer employee, she worked in FM 667’s retail department, which was not represented by Local 21. (Tr. 855.)

²⁹ I credit Boal’s initial testimony in this regard, as opposed to her subsequent revision, promoted by a leading question, to add that, at the time, other buttons, such as “Blue Lives Matter” and Trump 2020 buttons were also “a concern.” (Tr. 1019.)

³⁰ The “shift supervisor,” Francisco Gonzalez, was a unit employee who had never before relayed a management directive to Kusanagi. (Tr. 264, 339.)

wear it while things were “sorted out.” Stryker resisted, likening the buttons to an extension of civil rights movement and demanded that management create an “accountability space” for the buttons, especially considering that Kroger’s official, corporate values included “inclusiveness, diversity and feeding [the] human spirit.” They ultimately removed their pin for fear of being sent home. (Tr. 311, 337, 354, 378, 761–762, 778–780.)

At FM 122, the first enforcement of the dress code against BLM buttons did not occur until late September. At that point, the store’s operations manager told associate Zoe Mason (Mason) to remove her pin, as it was a “political statement” and therefore out of dress code. Mason protested but then took off the pin for fear of losing her job. Shortly after this, the store manager confided in Mason that she personally did not agree with the buttons being disallowed; noticing other associates still wearing their buttons, Mason resumed wearing her own. A week later, however, the store manager, accompanied this time by the operations manager, informed her that she had to remove her button. (Tr. 401–405, 407–408.)

5. Local 21 and FM 667 associate Reynolds home publicly questions Kroger’s commitment to BLM.

On August 18, while Reynolds—wearing his Local 21/BLM button—was bagging groceries, he was summoned by Front-end Manager Maron Moody (Moody), who told him, “you’re going to have to take off your pin because corporate is saying it’s against policy” and “you’re just not allowed to wear it.” Reynolds refused to remove the button and instead announced that he was going to take a break. After a few minutes, he returned and told Moody that he was going to leave for the day because he did not “feel comfortable or respected enough” to stay after being told that he could not wear the button.³¹ Reynolds testified that, as a result of leaving, he lost 7.5 hours of pay. (Tr. 90–93, 151, 658; Jt. Exh. 19.)

Within the next few days, Reynolds wrote and posted online an essay in which he called out Kroger for publicly supporting BLM while refusing to allow its associates to do the same and for refusing associates’ requests for employer-issued BLM buttons. As he stated:

We asked nicely the first time and patiently waited for Kroger to give us what we want and deserve. We all know what side Kroger should be on, but what side are they really on? Instead of them being with us they want to stand against us and try to shut us down and shut us up . . .

(GC Exh. 3.) The idea, he testified, was essentially to get management “on blast to show that they’re not about what they say they are.”³² Reynolds posted his essay on social media; he also shared it with his coworkers in-person and presented it at a uni-

on-sponsored online event held in late August 2020 that was viewed by associates from Fred Meyer, QFC and non-Kroger grocer Whole Foods. (Tr. 96, 98, 112–114.)

On September 21, Local 21 filed grievances against Respondents for prohibiting its members from wearing Local 21/BLM buttons. The following day, the Union posted online a video of Fred Meyer and QFC associates lamenting Respondents’ decision to bar them from donning BLM gear, and an article appeared in the Seattle Times on the subject. (GC Exhs. 13, 44, 50–52; Tr. 1068.) Two days later, FM 667 Assistant Store Manager Shephard ordered associate Forest O’Reilly (O’Reilly) to take off his BLM pin. O’Reilly refused and was sent home for the rest of the day. The next day, he showed up for work with “Black Lives Matter” written on his forearms with a Sharpie pen. Shephard did not respond, explaining, “I got to the point where I just couldn’t deal with it anymore, honestly.” (Tr. 667, 1441–1443, 1449; GC Exh. 53.)³³

F. The QFC 881 Protest and Its Fallout

During the summer of 2020, several BLM-related protests were held in the vicinity of QFC 881’s Seattle location. In September, store associate and Union Steward Kristen Wilder (Wilder) learned through her union contacts that QFC was not allowing associates to wear BLM buttons. Working with Local 21 officials and members, as well as the Seattle Chapter of the A. Philip Randolph Institute (APRI), a constituency group of the AFL–CIO that advocates for workers’ and civil rights as a common cause,³⁴ Wilder spent the following month planning a rally—to take place in front of QFC 881—protesting the policy. In late September, she began distributing Local 21/BLM buttons at work and recruiting her coworkers to participate. She was successful, and many agreed to take part in the event. (Tr. 452, 455–456, 1321.)

1. Respondents learn of the planned protest.

The rally was planned for October 17. Several days earlier, Assistant Store Leader Lindsay Walmsley (Walmsley) admittedly learned about the plan, that Wilder was involved, and that the press was expected to show up. After consulting with QFC’s district human resources coordinator, Tyler Cook (Cook), Walmsley testified that she planned to hold a “meeting” with Wilder the next time she was at work. (Tr. 1306, 1322–1323, 1338–1339.)

On October 16—the day before the rally—Wilder arrived at work before her shift and walked throughout the store, handing out buttons (stating “BLM” with the AFL–CIO logo) and masks (which were black with silver “BLM” lettering) to her coworkers, typically handing a bunch to a single person in each department and instructing people them to wear this gear the next day

³¹ I find that, assuming Reynolds had a Section 7–protected right to wear his BLM button, Moody’s directive amounted to a constructive order sending him home. See *Mayrath Co.*, 132 NLRB 1628, 1630 (1961), *enfd.* in pertinent part 319 F.2d 424 (7th Cir. 1963) (finding reasonable inference from employer’s ordering employees to take off their union buttons or “leave” was that employees would be discharged if they did not remove their union buttons; employees were given a “Hobson’s Choice” of foregoing their protected right to wear union buttons or being discharged).

³² To put (or get) someone “on blast” refers to publicly shaming (i.e., “calling out”) someone, typically on social media, by revealing embarrassing or compromising information about them. See <https://www.urbandictionary.com/define.php?term=put%20on%20blast>; <https://idioms.thefreedictionary.com/put+them+on+blast>.

³³ Although properly identified in the record, this exhibit was marked, discussed and received as GC Exh. 50. (See Tr. 1447; GC Exh. 53.) The record is hereby corrected to reflect its correct designation as GC Exh. 53.

³⁴ See Tr. 985; see also <http://www.apri.org/about.html>.

for the rally. According to Wilder, support for the upcoming event was strong; associates were “super fired up” and many put on their newly issued BLM buttons immediately. In more than one department, Wilder actually handed the buttons and masks to a manager (i.e., nonunit employee), and a few of these managers actually put on the buttons themselves. (Tr. 452, 455, 458, 461, 463–465.)

Word of Wilder’s conduct spread quickly throughout QFC management and even spread to Fred Meyer’s corporate human resources department. The same day that Wilder handed out buttons, HR field specialist Kevin Ruoff (who was then responsible for all of QFC’s Seattle-area stores) alerted Fred Meyer’s Carroll, who in turn instructed the HR field specialists in her FM districts to “remain vigilant for any activity that we may see around BLM button protests from Local 21.” (GC Exh. 45.)

2. QFC management tries to stop Wilder’s rally, offering to revise its dress code.

On the day of the protest (October 17), an off-duty Wilder met outside QFC 881 with Local 21 members and local community organizers, including Gabriel Prawl, the President of APRI’s Seattle Chapter and President of ILWU Local 52.³⁵ Also present were Auerbach and two other Local 21 representatives. Wilder was shocked, however, at the low turnout among her coworkers. The protesters’ plan, she testified, was to walk around inside the store and pass out fliers before proceeding to launch their rally outside the store. Once inside, however, Wilder saw “corporate” walking around the store and associates looking scared. “Corporate,” consisted of several district-level QFC officials, including Cook (whom Walmsley had alerted). As the protest started, two of the “corporate” people stood inside the store (which has a fully glassed-in front entrance) observing the protesters gather. (Tr. 454, 466–468, 476, 894–896, 1324, 1338, 1349.)

During the rally that ensued—which lasted between 1 and 2 hours—Wilder and others held signs declaring “Black Lives Matter” and calling out QFC for refusing to allow its associates to display the BLM message:



The protesters also displayed their message on the public sidewalk in front of the store with chalk, including the phrases, “Do Black Lives Matter at QFC?” and “Allow QFC Employees to Wear Black Lives Masks.” (Tr. 476–477; GC Exhs. 14, 34, 35.)

According to Wilder, one of the “corporate” people emerged from the store during the protest and said that management wanted to speak with her. None of the Local 21 representatives was invited along. The only witnesses who testified as to what followed were Wilder and Walmsley. According to Wilder, she was escorted into an office where Walmsley and two other “corporate” individuals asked her to stop the rally and she refused. Then, she testified:

they sat me down and tried to negotiate some—they have — they have this weird black bracelet that they want to put in place of Black Lives Matter. And on the bracelet it says that, we stand with you. And [Walmsley] was like, do you think that's something maybe we could use instead of the mask that you have? And I said, no one's going to understand what that means. No one's going to notice this black bracelet on our wrist. And I told her, no.

Walmsley then stated that management “did not want the BLM buttons that had been distributed because they were “too bold” and suggested that, perhaps QFC could put “like a fist or the Africa-American flag or, you know, a map of Africa” on the mask. Wilder responded that she did not want the BLM message to be “diluted” and that the three words, “Black Lives Matter” were necessary. She then told Walmsley that she did not understand why it was so hard for management to support the employees on this point when they were so willing to support initiatives on the LGBTQ+ community. Walmsley responded that “people in the community” might be offended by the BLM message. The meeting ended when Walmsley again asked Wilder if she was willing to stop the protest and Wilder again refused. (Tr. 531–534.)³⁶

³⁵ <https://www.ilwu.org/gabriel-prawl-first-african-american-president-of-ilwu-local-52/>

³⁶ Walmsley did not deny the key aspects of this exchange and admitted to discussing Kroger wristbands, “an African flag” and QFC permit-

ting associates to wear rainbow-themed masks. While she did not specifically deny asking Wilder to stop the protest, she dissembled when asked the purpose of the meeting, ultimately offering, “I don’t know how

3. Wilder is ordered to remove her Local 21/BLM button.

Following the rally, Wilder entered the store wearing her BLM mask and button. After she clocked in for her shift, Walmsley asked Wilder to take off her mask, stating that it was “not allowed,” and she complied. After the store’s managers had left for the day, however, Wilder put her the mask back on. She continued this practice until October 23, when “fourth manager” Michael Smith (Smith) informed her that Walmsley had instructed him to send her home if he saw her wearing a BLM mask.³⁷ Wilder complied and left the store; according to her, she “missed” the last 4 hours of her shift that day. (Tr. 483–486, 505, 539, 1333, 1336–1337.)

ANALYSIS

The complaint in this proceeding alleges the same violations against each Respondent. Specifically, the complaint alleges that Respondents’ dress code enforcement actions violated their associates’ Section 7 rights in violation of Section 8(a)(1) and (5) of the Act. As detailed above, the record evidence establishes that, prior to the summer of 2020, each Respondent maintained a written dress code that required buttons to be management approved, but that historically this policy was ignored. The record also indicates that, in June, management at FM 667 instructed associates that they were not allowed to wear BLM apparel, including their own self-styled buttons and masks.³⁸

In August, after the Union issued its own BLM buttons, Respondents—based on a directive from their parent company, Kroger—prohibited these buttons and “instructed” (i.e., ordered) several individual employees to remove their buttons. As discussed, *supra*, Fred Meyer sent home O’Reilly and Reynolds (the latter, constructively) for refusing to comply. In October, QFC likewise sent Wilder home for refusing to remove her BLM mask.³⁹

As discussed, above, the General Counsel also alleges that Respondents’ conduct (with the exception of the act of “instructing” employees to remove BLM/Local 21 buttons), constituted a unilateral departure from their past practice and policy (and, in the case of banning BLM insignia on face masks, the unilateral promulgation of new rules) in violation of Section 8(a)(5), and asserts that sending O’Reilly, Reynolds and Wilder home was additionally unlawful pursuant to that theory.

A. Credibility Issues

I have based my credibility resolutions on consideration of a witness’ opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness’ testimony; the quality of the witness’ recol-

lection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying and the form of questions eliciting responses. Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness’ testimony. *Daikichi Sushi*, 335 NLRB 622, 622 (2001).

B. The General Counsel’s Proffered Expert Testimony

Ultimately, whether Respondents’ prohibition of BLM gear violated Section 8(a)(1) the Act turns on whether their associates had a Section 7-protected right to communicate—while at work—the words, “Black Lives Matter,” either alone or accompanied by the Local 21 logo. In this regard, the General Counsel offered the testimony of Professor Paul Frymer, a Professor of Politics at Princeton University. I allowed Professor Frymer to testify provisionally, subject to any arguments made by the parties in their post-hearing briefs. (See Order dated March 25, 2022.) Upon review of his testimony, I find it properly excluded under Federal Rule of Evidence 702.

Professor Frymer’s academic pedigree and scholarship are undeniably impressive but his proffered expert testimony is not suited to assist me in deciding this case. I am charged with assessing the legal status of the specific employee conduct alleged by the General Counsel, not to opine more generally on interrelationship between the civil rights and workers’ rights advocacy movements. As Respondent points out, Professor Frymer did not review research or data specific to the Black Lives Matter movement in the geographical area relevant to this case and did not interview any of Respondents’ associates. As such, I find that his specialized knowledge as to whether the phrase “Black Lives Matter” has been historically tied or is generally viewed as linked to the causes of worker rights and/or civil rights does not assist me, as the trier of fact, with understanding the evidence or determining any facts in issue in this case. See generally *Wal-Mart Stores, Inc.*, 368 NLRB No. 146, slip op. at 69–71 (2019).

Accordingly, I hereby reclassify Professor Frymer’s testimony as an offer of proof and reclassify the exhibits accompanying his testimony (GC Exhs. 4–8 and 60–61) as rejected exhibits, and I have disregarded them in my analysis.

C. “Black Lives Matter” Speech as Protected, Concerted Activity.

Section 7 guarantees that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” Pur-

to answer that.” (Tr. 1324–1326, 1339–1340.) On balance, I credit Wilder’s account.

³⁷ As a “fourth manager” (a bargaining unit position), Smith was responsible for QFC 881’s operations after its statutory supervisors left for the night. (Tr. 485, 519–520.) I find that, under the circumstances—and especially considering Walmsley’s directive 5 days earlier—Wilder would have reasonably believed Smith to be speaking for QFC, rendering him its agent for purposes of sending her home. See *SALA Motor Freight, Inc.*, 334 NLRB 979, 979 (2001) (citing *Waterbed World*, 286 NLRB 425, 426–427 (1987)).

³⁸ In doing so, Fred Meyer explicitly relied on its existing dress code for buttons and orally promulgated a new rule for masks, for which it had no prior written policy. There is no evidence that QFC engaged in any similar conduct in June. For this reason, I recommend that paragraph 9(c) be dismissed as to QFC.

³⁹ As there is no record evidence to support the complaint allegations that Fred Meyer employees Shawntia Cunningham and Larry Lyndsey were sent home for failing to comply with the directive, I also decline to find that a “class” of unidentified employees was similarly treated. Accordingly, I recommend dismissal of paragraph 10(a) of the complaint except insofar as Reynolds, O’Reilly and Wilder are concerned.

suant to Section 7, employees have a protected right to embellish their uniforms with messages relating to their terms and conditions of employment, including unionization and other protected subjects. As such, an employer that maintains or enforces a rule restricting employees from wearing such items violates Section 8(a)(1) of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *Constellation Brands, U.S. Operations, Inc.*, 367 NLRB No. 79 (2019); *In-N-Out Burger, Inc.*, 365 NLRB No. 39 (2017), enf. 894 F.3d 707 (5th Cir. 2018), cert. denied 139 S. Ct. 1259 (2019); *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB 1677 (2016); *Boise Cascade Corp.*, 300 NLRB 80 (1990).

To show that an employer’s prohibition on employee speech is unlawful, the General Counsel need not show it was unlawfully motivated; “rather, the test is whether an employer’s conduct reasonably tends to interfere with the free exercise of employee rights under the Act.” *St. Luke’s Hospital*, 314 NLRB 434 fn. 4 (1994) (citing *Roadway Express*, 250 NLRB 393 (1980)). Accordingly, for the General Counsel to establish that Respondents’ prohibiting their associates from donning BLM and BLM/Local 21 buttons and masks would reasonably tend to interfere with concerted activity protected by Section 7, it must show that the associates’ action in broadcasting their pronoun, pro-BLM message at work was both “concerted” and engaged in to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

1. Concertedness

a. The legal standard

To establish that activity is concerted, the General Counsel must make a factual showing, based on the totality of the evidence, *National Specialties Installations*, 344 NLRB 191, 196 (2005), that the employees’ activity “was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees.” *Meyers Industries*, 281 NLRB 882, 887 (1986) (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). It is not uncommon for employees working for the same employer at different locations to have common interests and concerns they seek to address by concerted action. *Hillhaven Highland House*, 336 NLRB 646, 649 (2001), enf. sub nom. *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003).

Concerted activity often involves discussion among employees about their shared workplace concerns. See, e.g., *White Oak Manor*, 355 NLRB 1280 (2010), adopting 353 NLRB 795, 798–799 (2009) (discussions among employees regarding perceived unfairness of employer’s dress code were concerted), enf. 452 Fed.Appx. 374 (4th Cir. 2011). However, where employees engage in a group protest, it is not necessary to adduce evidence that the employees in question had a previous plan to act in concert. See, e.g., *Morton International*, 315 NLRB 564,

566 (1994), *Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1534–1535 (11th Cir. 1987); see also *NLRB v. Mike Yurasek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995) (affirming, as a primary rationale, Board’s finding that a refusal to work by four employees was concerted despite no express discussion of group protest; the Board’s finding that the employees’ refusal was a “logical outgrowth” of earlier concerted activity was endorsed only secondarily). Moreover, action taken by an individual employee to initiate group conduct and/or enlist the participation of their coworkers in such conduct is concerted. See, e.g., *Barnwell Nursing Home*, 230 NLRB 450 (1977) (handing out union buttons amounts to concerted conduct).

b. The BLM messaging was concerted.

Here, there is no serious dispute that Respondents’ associates acted in concert by customizing their work uniforms with buttons and masks to broadcast their support for Black Lives Matter and that Respondents were aware of this. In the aftermath of the George Floyd killing, associates discussed the event at work, as well as their concerns about other police killings of Black Americans. They participated in Respondents’ “listening sessions” where they discussed how racial injustice was “translated” at work and made suggestions about what could be done differently to support workers of color. They shared and gifted the BLM buttons that they collectively donned on their uniforms and rejected, en masse, the Kroger “wristbands” Respondents offered them.

Once Respondents began ordering associates to remove BLM gear, multiple associates at different locations openly questioned why management was treating the BLM and PRIDE messages differently, and challenged—online and in-person—Kroger’s bona fides as a corporate ally of the BLM movement. They expressed their allegiance to Local 21 by donning the Union’s BLM pins, participated in its promotional videos, and assembled online and in the real-world to object to Respondents’ conduct. Accordingly, I conclude that, the associates’ group action in displaying the BLM message—and resisting Respondents’ effort to ban it from the workplace—was concerted.

The General Counsel alternately argues that the employees’ support for BLM should be recognized as “inherently concerted,” (i.e., presumed concerted absent a showing that employees were in fact acting in concert).⁴⁰ Indeed, the Board has recognized this to be the case in certain circumstances in which employee activity is deemed to “vital” to employee efforts to improve terms and conditions of employment. The Board, however, has never considered whether the value of human lives—specifically those descended from the victims of the greatest wage theft in modern history—is a matter vital to all workers’ interests. It is therefore not my place to do so. See *Pathmark Stores*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (“It is for the Board, not the judge, to determine whether precedent should be varied.”).

⁴⁰ See generally *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 fn. 10 (2014); *Hoodview Vending Co.*, 362 NLRB 690, 690 fn. 1 (2015); *Aroostook County Regional Ophthalmology Center*, 317

NLRB 218, 220 (1995), enf. denied in part 81 F.3d 209 (D.C. Cir. 1996); *Trayco of South Carolina, Inc.*, 297 NLRB 630, 634 (1990).

2. “Mutual aid and protection”

a. *The legal standard*

Regardless of the concerted nature of their associates’ BLM messaging, Respondents were privileged to disallow it if it was not undertaken for “mutual aid and protection.” In making this determination, the critical inquiry is “whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees.” *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014). The Board, which applies an objective standard to this analysis, has found employees’ efforts to address racial discrimination in the workplace to meet this standard. See, e.g., *Vought Corp.*, 273 NLRB 1290, 1294 (1984) (employee statement was protected because it concerned employer’s alleged racial discrimination), *enfd.* 788 F.2d 1378 (8th Cir. 1986); *Honeywell, Inc.*, 250 NLRB 160, 160–161, 161 fn. 6 (1980) (finding protected employee graffiti accusing the employer of racially discriminatory promotional practices), *enfd.* mem., 659 F.2d 1069 (3d Cir. 1981); see also *Dearborn Big Boy No. 3*, 328 NLRB 705, 705, 710, 710 fn. 33 (1999) (adopting ALJ finding that discussion about racial discrimination in hiring was protected).

The Board has also found that employees who collectively don apparel forbidden by their employer’s dress code do so for their mutual aid and protection, in that the wearing of uniforms is a condition of employment and a mandatory subject of collective bargaining. *Ohio Bell Telephone Co.*, 370 NLRB No. 29, slip op. at 11 (2020) (employees who collectively reported for work in street clothes to protest employer’s failure to supply uniforms engaged in protected conduct); See *White Oak Manor*, *supra* at 799 (citing *Eastex*, 437 U.S. at 563–568 fn. 17); see also *New River Industries, Inc.*, 945 F.2d 1290, 1294 (1991) (“The conditions of employment which employees may seek to improve . . . include wages, benefits, working hours...[and] dress codes . . .”) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)); *Valley Oil Co.*, 210 NLRB 370, 379 (1979) (wearing of uniforms is a condition of employment and a mandatory subject of collective bargaining).

Regardless of their means of protest, employees who question the sincerity of their employer’s publically professed “values” may also be engaged in protected conduct, where their doing so aims to improve their working conditions, or those of others. For example, in *Union-Tribune Publishing Co.*, an employee was found to have engaged in protected conduct by participating in the production of a television program lampooning her employer as “the achetype of the hypocritical employer that has no concern whatsoever for the welfare of its employees, but that portrays itself to the community as altruistic, dedicated and concerned.” 307 NLRB 25, 29 (1992). Likewise, the Board has found protected conduct where an employee posted an online warning to his employer: “[b]efore you stand on your soap box, pay your workers a livable wage.” *Lush Cosmetics, LLC*, 372 NLRB No. 54, slip op. at 4–5 (2023). Employee messaging on uniforms that

implicitly critiques an employer’s own uniform messaging as hypocritical has also been found protected. See, e.g., *Woodbridge Winery*, 367 NLRB No. 79, slip op. at 43–44 (2019), *enfd.*, 992 F.3d 642 (7th Cir. 2021).

b. *“Political” or “social protest” speech under the Eastex standard*

There is no serious dispute that employees’ workplace discussions of political and or social-justice issues are a commonplace occurrence. As Professor Cynthia Estlund has stated:

The workplace is where most employed adults converse most often, outside of the family, about political, social, and personal matters. The workplace and the relationships and conversations that it spawns may in fact be more important for the formation and interchange of political and social views among the majority of adult citizens than the voluntary civic and political organizations that make up much of civil society as it is conventionally defined.

Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 Geo. L. J. 1, 3–4 (2000).

In *Eastex, Inc. v. NLRB*, the Supreme Court addressed the intersection of civic or “political” issues and Section 7’s protections. 437 U.S. 556 (1978). Finding that an employer had violated the Act by banning an employee newsletter criticizing a statewide right-to-work proposal and a Presidential veto of a federal minimum wage increase, the *Eastex* Court established that employee speech touching on political issues will not lose protection of the Act where it aims to improve employees’ lot as employees. *Id.* at 570 fn. 20. The *Eastex* decision also makes clear that the Act’s protection is not limited to employees’ embrace of issues solely controlled by their own employer, and protected employee speech includes workers’ support (or criticism) of governmental policies that have an impact on their lives as work or the well-being of workers outside the immediate employee-employer relationship. *Id.* at 565–567 & n. 17.⁴¹

The scope of Section 7’s “mutual aid or protection” clause, however, is not unlimited. As the Supreme Court has noted, “at some point,” the Court noted, the relationship of a proposed activity to employees’ interests as employees “becomes so attenuated that (the) activity cannot fairly be deemed to come within the . . . clause.” The Board has, for example, found unprotected a union’s election eve distribution of a newsletter urging workers to reject both Democratic and Republican politicians and to support formation of an “independent workers party.” While acknowledging that “the election of any political candidate may have an ultimate effect on employment conditions,” the Board reasoned that this possibility was not a sufficient nexus to employment-related issues. *Ford Motor Company*, 221 NLRB 663, 666 (1975), *enfd.* 93 LRRM 2570 (3d Cir. 1976).

The question becomes, then, whether Respondents’ associates donning the “Black Lives Matter” logo bears a sufficiently close

⁴¹ See, e.g., *Nellis Cab Co.*, 362 NLRB 1587, 1587–1589 (2015); *Kaiser Engineers*, 213 NLRB 752, 755 (1974), *enfd.*, 538 F.2d 1379 (9th Cir. 1976). Concerted activity is not undertaken for “mutual aid and protection,” however, where it advocates solely for non-employees.

Amnesty International, 368 NLRB No. 112 (2019) (citing *Five Star Transportation, Inc.*, 349 NLRB 42, 44 (2007)).

relationship to employees' interests as to come within the guarantee of Section 7's "mutual aid or protection" clause, or whether the link is so attenuated that Section 7 does not shelter the activity.

c. The BLM messaging was protected.

I find that, by collectively displaying the "Black Lives Matter" message on their work uniforms, the employees in this case acted to advance their interest—as employees—to an affirmatively anti-racist, pro-civil rights, and pro-justice workplace.

Notably, the earliest incidence of associates collectively wearing BLM gear was at FM 667, a store with a miniscule number of Black associates and no Black managers. As discussed, shortly after the Floyd killing, a group of FM 667 workers, both Black and non-Black, began wearing buttons with the "BLM" slogan and/or COVID masks on which they had handwritten either "Black Lives Matter" or "BLM." While there is no evidence that they did so in response to a specific, tangible managerial action, the credible evidence establishes that their message was unmistakably one of support for their Black coworkers, both at FM 667 and elsewhere, who do not check their skin color at the door when they start their shifts.

At the stores at issue here, and at FM 667 in particular, workplace racism—whether caused by coworkers, management or customers—was a reality. However, as associates Reynolds and Waller had hoped, public outrage over the Floyd murder served as a tipping point, if not for the nation, then at least for corporate America. Respondents, along with other major employers, declared themselves to be unabashedly pro-Black Lives Matter and dedicated themselves to fight racism within their own stores. This was not the first time that Respondents had officially endorsed a social justice movement; in support of LGBTQ+ rights, they had issued associates company-approved PRIDE buttons and allowed them to be worn year-round. This led to associates widely donning "pronoun" pins and other pro-LGBTQ+ insignia. In so doing, Respondents did more than maintain a lax dress code; they cultivated a work culture that condoned, and even celebrated, associates' advocacy on social justice issues, because, in Kroger's view, "[w]hen employees feel comfortable in their work environment, they are more productive and effective."⁴²

When Kroger then declared that "Black Lives Matter," it did so without reservation or qualification; its CEO professed that the Company's Black associates' (and their allies') voices mattered and were being heard on the issue of the day: racial justice. Associates were made to understand that upper management was holding special meetings for the explicit purpose of "listening to Black associates," and wanted them to express themselves—even as "disrupters" and despite of "being afraid or not knowing the first step to take." By these actions, Respondents did more than promote their brand as associated with the BLM movement, they held themselves out (including to their associates) as pro-BLM employers. Under the circumstances,

associates would reasonably understand Respondents to have proclaimed their stores to be "accountability spaces" where their open support for social justice movements, such as LGBTQ+ PRIDE and Black Lives Matter, was both allowed and encouraged. As such, they initially used the BLM message on their uniforms not to complain about a working condition but to announce and celebrate the pro-BLM workplace they reasonably believed Respondents had established.

In June 2020, amid the Floyd demonstrations, public support for the Black Lives Matter movement was at 67%, including 6 in 10 white Americans overall. By September, however, support had dipped to 55%.⁴³ Corporate embrace of Black Lives Matter was no longer necessarily in vogue. Respondents' associates, however, had taken Kroger's words to heart; when FM 667 management tried to reign in their workplace BLM speech, associates resisted. They questioned Kroger's BLM "bona fides," rejected its corporate wristbands as insufficiently authentic, and demanded to know why BLM was being treated differently than PRIDE. Openly casting doubt on CEO McMullen's professed support for BLM, in light of Respondents' refusal to allow them to show their own support, the associates effectively told Respondents to "get off their soapbox" and tend to their own stores. Finally, assisted by Local 21, they began putting Respondents "on blast" for using images of smiling Black associates in publicity shots while denying their real employees the right to speak up for Black lives.

"Virtue signaling" is defined as "the act or practice of conspicuously displaying one's awareness of and attentiveness to political issues, matters of social and racial justice, etc., especially instead of taking effective action."⁴⁴ Regardless of whether, by curating an adamantly anti-racist and pro-Black Lives Matter public image, Respondents can be accused of this tactic, their conduct created a reasonable and direct nexus between the BLM message and the advancement of mutual aid and protection of the associates at their stores.

3. Respondents' defenses

Respondents claim that their conduct did not violate Section 8(a)(1) based on several rationales. First, they claim that barring their associates from donning BLM gear was justified by "special circumstances," as that principle has been recognized by the Board. Second, they assert that requiring them to allow employees to display the BLM message would violate their constitutional rights based on the "forced speech" doctrine. Finally, they argue that extending Section 7 protection to their associates' display of the "Black Lives Matter" message would offend public policy, in that it would effectively mandate granting protected status to opposing views, some of which may "subject Black workers to symbols of hate while depriving employers of any effective means of response." (R. Br. at 108.) I find each of these defenses to lack merit.

⁴² See GC Exh. 49 (Kroger's LGBTQ+ Allyship Guide).

⁴³ Deja Thomas and Juliana Menasce Horowitz, *Support for Black Lives Matter has decreased since June but remains strong among Black Americans*, Pew Research Center (Sep. 16, 2020), [https://www.pewresearch.org/short-reads/2020/09/16/support-for-black-](https://www.pewresearch.org/short-reads/2020/09/16/support-for-black-lives-matter-has-decreased-since-june-but-remains-strong-among-black-americans/)

[lives-matter-has-decreased-since-june-but-remains-strong-among-black-americans/](https://www.pewresearch.org/short-reads/2020/09/16/support-for-black-lives-matter-has-decreased-since-june-but-remains-strong-among-black-americans/).

⁴⁴ See <https://www.merriam-webster.com/dictionary/virtue%20signaling/>.

a. Special circumstances

As discussed, the Act protects employees' right display union and other protected insignia at work, and rules infringing on this right are presumptively invalid. To overcome this presumption, the employer demonstrate substantial evidence of "special circumstances" that justify limiting otherwise protected employee conduct. If the employer fails to meet its burden, the Board will find it to have violated the Act. See, e.g., *Boch Honda*, 362 NLRB 706, 707 (2015), enfd. 826 F.3d 558 (1st Cir. 2016); see also *American Medical Response West*, 370 NLRB No. 58, slip op. at 2 (2020) (citing *Mejer, Inc.*, 318 NLRB 50, 51 (1995), enfd. 130 F.3d 1209 (6th Cir. 1997)); *Pathmark Stores*, 342 NLRB 378 (2004); *E & L Transport Co.*, 331 NLRB 640 fn. 3 (2000).

The Board applies the special circumstances test not only where an employer policy explicitly or outright prohibits the display of union insignia but also where, as here, a facially neutral employer policy would restrict employees' ability to display protected insignia. *Tesla, Inc.*, 371 NLRB No. 113, slip op. at 15 & n. 35 (2022). In addition, these principles apply equally to employer efforts to prohibit other Section 7-protected messages on clothing or adornments. See, e.g., *Long Beach Memorial Medical Center, Inc.*, 366 NLRB No. 66, slip op. at 1 (2018) (applying the special circumstances test where the employer maintained a policy that allowed employees to wear only employer-approved pins and buttons), enfd. mem. 774 Fed.Appx. 1 (D.C. Cir. 2019); *Boch Honda*, 362 NLRB at 707–708 (applying the special circumstances test where the employer maintained a policy that prohibited employees from wearing "pins, insignias, or other message clothing").

The Board has found special circumstances justifying proscription of union insignia and apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees. *Boch Honda*, 362 NLRB at 707. However, a rule that curtails employees' Section 7 right to wear protected insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances. *Id.*; see also *Stabilus, Inc.*, 355 NLRB 836, 868 (2010); *W San Diego*, 348 NLRB 372, 373 (2006).

An employer claiming special circumstances faces an especially uphill battle where it has been shown to have only inconsistently enforced the dress code restriction it now claims as necessary for safety or other purposes. See *AT&T*, 362 NLRB 885, 888 (2015) ("[g]iven the Respondents' history of lax enforcement of its [dress code] policy, we agree with the judge that the Respondents have not demonstrated special circumstances"); *Airport 2000 Concessions, LLC*, 346 NLRB 958, 960 (2006) (employer may not use inconsistently applied uniform policy to establish special circumstances). As a preliminary matter, I find that each of Respondents' special circumstances arguments is undermined by lax enforcement of their own dress code policies. As the record demonstrates, associates have worn, without consequence, numerous items potentially provocative or offensive to its customers, including PRIDE and pronoun pins. Moreover,

even after Kroger decreed that the BLM message was out of dress code, associates at least three stores (FM 28, FM 122 and QFC 807) continued to wear their insignia; at FM 667, management admittedly gave up on enforcing the policy against an associate who penned the words "Black Lives Matter" on his arms in protest. This failure to follow through speaks volumes in terms of how necessary Respondents' BLM ban actually was.

(i) Respondents' public image as a "special circumstance"

In a retail shopping environment, the Board has found that the exposure of customers to protected insignia, standing alone, is not a "special circumstance." See *P.S.K. Supermarkets, Inc.*, 349 NLRB 34 (2007); see also *Wal-Mart Stores v. NLRB*, 400 F.3d 1093 (8th Cir. 2005), enfg. as modified 340 NLRB 637 (2003) (employer violated the Act because there was no evidence that shirts with union logos interfered with the operation of retail store); *Nordstrom, Inc.*, 264 NLRB 698, 701–702 (1982) (noting that customer exposure to union insignia, standing alone, is not a special circumstance that permits an employer to prohibit employees from displaying union insignia).

Retail and service establishments have, however, been permitted to regulate employee appearance to foster a particular public image. See *United Parcel Service, Inc.*, 195 NLRB 441 (1972); *Burger King Corp. v. NLRB*, 725 F. 2d 1053 (6th Cir. 1984). Respondents argue that allowing their associates to wear BLM insignia would interfere with their "carefully cultivated public images" as grocers. Preliminarily, I note that the Board has rejected this defense of a dress code similar to those of Respondents. See *Raley's Inc.*, 311 NLRB 1244, 1250 (1993) (finding grocery store employees' aprons "worn over employee selected white shirts, dark slacks, and shoes are simply not the equivalent of traditional uniforms"). Moreover, Respondents cannot rely on a "public image" argument to defend their dress codes because they each prohibit protected insignia throughout their stores, not just in public, retail areas. See *Target Corp.*, 359 NLRB 953, 974 (2013) (rejecting employer's argument that its ban on all buttons was justified to preserve its public image and business plan, and noting that the ban was overbroad because it applied to employees who worked when the store was closed to the public); *W San Diego*, 348 NLRB at 374 (finding that hotel did not demonstrate that its prohibition on wearing union insignia was justified by special circumstances in hotel's nonpublic areas).

More fundamentally, however, Respondents have failed to demonstrate that the BLM protected message they sought to curtail actually interferes with their own corporate image. See *Eckerd's Market, Inc.*, 183 NLRB 337, 338 (1970); see also *W San Diego*, supra at 373. Respondents claim that associates' donning the BLM slogan would have undermined their public image by causing "dissension" and creating an environment "where customers [felt] pressured to choose a side" on the issue of racial justice; this rather obviously ignores the fact that Respondents themselves had already chosen a side on this very issue.

As detailed herein, in the aftermath of the Floyd killing, Respondents' parent company Kroger declared online that, "Black Lives Matter," and its CEO declared the Company and its grocery brands to stand "against racism and injustice against the

Black community.” Even after this message, delivered alongside a montage of images of BLM protesters facing off with riot police and marching with signs stating, “Black Lives Matter,” “No Justice/No Peace,” and “The Police are Domestic Terrorists,” drew public criticism, Kroger did not rescind, revise or otherwise contextualize it to explain that Kroger supports the BLM racial justice movement everywhere—except within its own stores. Under these circumstances, it is hard to imagine how Respondents’ individual associates wearing insignia echoing Kroger’s own “Black Lives Matter” message could possibly damage Respondents’ public image, however carefully cultivated it may be.

For these reasons, I find that Respondents have failed to meet their burden in establishing that their public image warranted banning associates’ BLM gear.

(ii) Safety considerations as a “special circumstance”

The Board has long acknowledged that “[h]ealth and safety concerns may constitute special circumstances justifying restrictions on employees’ right to wear union insignia.” *W San Diego*, 348 NLRB at 375. The safety concern, however, must be clear and present,⁴⁵ and merely asserting after-the-fact claims regarding potential safety concerns does not suffice. See, e.g., *Sunland Construction Co.*, 311 NLRB 685 (1993). I find that Respondents have failed to adduce substantial evidence that allowing associates to wear Black Lives Matter gear posed an actual safety concern sufficient to curtail employees’ protected conduct.

The bulk of Respondents’ safety argument consists of speculation about potential workplace violence based what Respondents characterize as the “highly politically polarized society” of our day. (R. Br. at 112.) In this regard, Respondents offer hearsay contained in news reports of workplace violence incidents *not* taking place at Respondents’ stores, as well as second or third-hand reports by management witnesses about non-violent incidents at their stores during the summer, including an individual showing up in a “Ku Klux Klan” outfit at one store, “The Proud Boys” showing up in another location and two occasions on which armed individuals bearing “Blue Lives Matter” and “Trump 2020” gear appeared outside a store. (Tr. 989, 992–993.)

None of these incidents, however, appears to have taken place at any of the five stores with which this case is concerned.⁴⁶ The record discloses no violent—or even “near violent”—confrontations between associates and customers based on associates’ display of the BLM message at the stores at issue here. Instead, according to Respondents’ own witnesses, the main source of customer-associate confrontations during the summer months of 2020 was the enforcement of governmental mask mandates. As Englander (QFC labor and relations) testified, he could recall no

violent physical confrontations in stores related to “racial tensions,” but there were “a number” of such incidents related to the mask mandates. (Tr. 1146.)

Respondents point to the fact that FM 667 initially banned BLM insignia following associate Reynolds’ being subject to verbal abuse by an irate, anti-mask and anti-BLM customer. While Fred Meyer undisputedly seized upon this incident to enforce its dress code at the store, there is no corresponding evidence that it considered the situation a legitimate safety concern (i.e., alerted authorities, barred the offending customer from the premises). Likewise, while certain stores were obviously ‘on guard’ during the Floyd protests, the record overall is devoid of evidence that either Respondent took the specter of *anti*-BLM workplace violence as a legitimate security threat.⁴⁷ As such, I find that their after-the-fact safety arguments cannot now justify disallowing employees from communicating the protected-BLM message.

(iii) Employee dissension as a “special circumstance”

As discussed, special circumstances may justify a ban on otherwise protected insignia and apparel where the display in question threatens to exacerbate employee dissension. See, e.g., *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (finding employer did not violate the Act by banning offensive t-shirts that compared its outsourcing to the Japanese attack on Pearl Harbor because the ban was necessary to maintain a harmonious workplace).

To meet this standard, however, an employer must demonstrate more than the mere potential for disciplinary problems among its workforce. Neither employee complaints about the display of such insignia by other employees nor heated arguments between pro-union and anti-union adherents, short of actual physical confrontation, justify a ban on protected insignia. See *Kimble Glass Co.*, 113 NLRB 577 (1955), *enfd.* 230 F.2d 484 (6th Cir. 1956), *cert. denied* 352 U.S. 836 (1956); see also *Raley’s Inc.*, 311 NLRB 1244 (1993) (fact that some employees oppose union does not by itself demonstrate threat of “disruption” in workplace harmony justifying overbroad ban on union insignia).

Management witnesses related accounts of tension and disagreement between associates who supported Black Lives Matter and those who supported counter-movements such as “Blue Lives Matter.” As discussed, I found this testimony to be either uncorroborated hearsay or far too vague in time, place and identifying details to be credited. In the absence of any credible evidence that certain of Respondents’ employees considered the BLM message insulting, provocative or incendiary, I find that Respondents have failed to meet their burden that special cir-

⁴⁵ See, e.g., *W San Diego*, 348 NLRB at 375 (employer presented health and safety special circumstances and lawfully banned wearing union stickers in hotel kitchen where employer observed stickers peeling from employees clothing after only a short while, thus presenting health and safety risk of falling into and contaminating food); *The Kendall Co.*, 267 NLRB 963, 965 (1983) (finding employer did not violate the Act by disallowing union key chains because key chains could become drawn into machinery and endanger employees).

⁴⁶ General Counsel witness Reynolds testified that, in June or July 2020, four individuals parked outside of FM 667 (where he worked) and

stood beside their vehicles with rifles in their hands; there is no indication, however, that these were the individuals cited by Respondents’ witnesses. (Tr. 134, 138–139.)

⁴⁷ Indeed, to the extent Respondents insinuate that their associates’ BLM message could somehow motivate a violent response from a member of the public, it stands to reason that Kroger’s own pro-BLM message—broadcast over the Internet—would subject their associates to an even broader potential number of threats.

cumstances argument based on exacerbating employee dissension were sufficient to justify their ban on BLM insignia. See *Woodbridge Winery*, supra at 43–44 (2019); see also *Rankin v. McPherson*, 483 U.S. 378, 393 (1987) (conversations about “matter[s] of public concern “routinely tak[e] place at all levels in the workplace,” and the risk that such speech “will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful”) (Powell, J. concurring).

b. Respondents’ First Amendment claim

Respondents argue that a Board order requiring them to permit associates’ display of the BLM message would violate their First Amendment right to protection from “compelled speech.” See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). However, two years following its recognition of the compelled-speech doctrine, the Supreme Court recognized that an employer that forbids its employees from donning Section 7-protected insignia violates the Act. Since then, the Court has also rejected employers’ claims (outside of the Act’s own free-speech proviso) that the First Amendment privileges them to do so. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Respondents nonetheless argue that the Supreme Court’s recent decision in *Janus v. American Federation of State, County and Municipal Employees*⁴⁸ should be interpreted to prohibit the Board from “forcing” Respondents (presumably, to the extent they have not already done so), from endorsing the Black Lives Matter movement. To the contrary, I find no reasonable reading of the *Janus* case, which invalidated, on compelled speech grounds, an Illinois state law requiring individual, nonmember public employees to pay agency fees, that would support abandoning the protections enshrined in Section 7, as recognized by the decades-old principles of *Republic Aviation* and *Gissel*. I therefore find Respondents’ First Amendment claim flawed as a matter of law.

c. Respondents’ public policy argument

Respondents assert that a Board finding protected their associates’ BLM messaging will amount to a declaratory judgement that viewpoints opposed to BLM are equally protected, and that this will harm employees overall. Obviously, this is not the case. Translated into a more procedurally seaworthy argument, it stands to reason that a Board finding in this case could potentially serve as precedent in a case in which the government contends that other employee speech should be deemed protected under circumstances similar to those of this case. Obviously, employees’ asserted Section 7 rights cannot preemptively give way to protect future employees from hypothetical, offensive future speech, nor am I inclined or empowered to make such a recommended finding here. See generally *Amalgamated Transit Union Local 85 v. Port Authority of Allegheny Cty.*, 513 F. Supp.3d 593, 616 (2021) (“the Court declines to legitimize the erroneous, if increasingly endemic, view that mere exposure to differences of opinion is a harm to be feared or avoided”).

⁴⁸ 138 S. Ct. 2448 (2018).

⁴⁹ As I have previously found, QFC did not enforce its dress code against BLM gear in June. Accordingly, I recommend dismissal of this aspect of the 8(a)(5) complaint allegations against it.

D. Respondents’ Dress Code Changes violated Section 8(a)(5).

Employers have a duty to bargain in good faith with union representatives about mandatory subjects of bargaining, which include uniform requirements and workplace attire. *Salem Hospital Corp.*, 360 NLRB 768, 769 (2014) (citing *Crittenton Hospital*, 342 NLRB 686, 690 (2004); *Public Service Co. of New Mexico*, 337 NLRB 193, 199 (2001)). This means that the employer must inform the union of its proposed actions under circumstances that afford a reasonable opportunity for counter arguments or proposals. *Defiance Hospital, Inc.*, 330 NLRB 492 (2000) (citing *NLRB v. Centra, Inc.*, 954 F.2d 366, 372 (6th Cir. 1992)). The General Counsel alleges that Fred Meyer’s enforcement of its dress code against BLM gear in June, QFCs promulgation of rules for COVID masks in July, and Respondents’ enforcement of their respective dress codes against Local 21/BLM gear in August constituted unlawful unilateral changes from past practice in violation of Section 8(a)(5) and (d) of the Act. I agree.⁴⁹

It is undisputed that, as of the summer of 2020, each Respondent had in place a neutral dress code policy capable of being interpreted to bar associates from displaying the “Black Lives Matter” slogan on their uniforms. In Fred Meyer’s case, its written policy prohibited “unauthorized buttons,” and QFC likewise prohibited non-“Company approved buttons and pins.” In July 2020, QFC further barred COVID masks bearing any logo, writing or graphic other than a “small manufacturer’s brand logo.” Prior to summer 2020, however, Respondents’ enforcement of their dress codes was scattershot at best and, their supposed prohibitions on “non approved” buttons were basically ignored wholesale. Not only did associates regularly don self-styled, nonwork related buttons, ranging from “I Hate Mornings” to “Stand Up, Resist Hate,” they were permitted to wear union pins, including Local 21-supplied buttons expressing support for civil rights. Finally, both Respondents provided associates with PRIDE pins during June of each year, which led to associates wearing them—as well as their own PRIDE and pronoun pins—throughout the year.⁵⁰

Under similar circumstances, the Board has found an employer’s prohibiting “unauthorized” buttons constitutes an unlawful unilateral departure from past practice. In *Albertson’s, Inc.*, 319 NLRB 93, 97 (1994), the employer claimed that its prohibition on union buttons merely constituted an application of its longstanding handbook prohibition against “unauthorized badges.” The evidence, however, revealed that it had in fact historically tolerated its work force wearing a wide variety of buttons, including Lotto pins, buttons containing pictures of employees’ children, and religious pins. Under the circumstances, the employer was not privileged, without granting the employees’ bargaining representative notice and the opportunity to bargain, to depart from its practice of ignoring the wearing of such nonapproved items.

Respondents’ position is similar. As the documentary evidence shows, Respondents’ associates were historically allowed

⁵⁰ Likewise, as discussed supra, after COVID masks were introduced, Respondents permitted masks that violated the letter of their respective dress codes.

to “customize” their aprons and masks with self-selected images, slogans and messages, and Respondents’ departure from this policy in the summer of 2020 to ban BLM and Local 21/BLM buttons and masks represented a significant change. While Respondents argue that they have never permitted associates to display “political” messages, I disagree. Among the messages tolerated over the years were proclamations akin to “Black Lives Matter,” including pro-civil rights quotes and pro-LGBTQ+ messages. That Respondents’ managers found themselves debating workers over the difference between those messages and the forbidden BLM message is proof that Respondents had an established practice of permitting messages reasonably considered similar in “political” character and tone.

Respondents also claim that Local 21 waived any right to bargain over the alleged unilateral changes because it became aware of Respondents’ dress code enforcement more than 6 months before filing a charge based on the same. The 6-month 10(b) limitations period does not begin to run until the charging party has “clear and unequivocal notice” of a violation of the Act. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enfd. sub nom. East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007). The burden of proof rests on the party asserting a 10(b) defense. See, e.g., *Leach Corp.*, 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995); *Chinese American Planning Council*, 307 NLRB 410, 410 (1992), review denied *mem.* 990 F.2d 624 (2d Cir. 1993). Therefore, to establish that unilateral change allegations must be dismissed as untimely, Respondents were required to show that the Union failed to file a relevant charge within 6 months of being put on clear and unequivocal notice⁵¹ of Respondents’ departure from its prior practice.

Respondents’ evidence that the Union was on such “clear and unequivocal” notice consists of (a) videos of QFC and Fred Meyer associates discussing management’s efforts to ban the BLM message, one of which was apparently posted by Local 21 to its Twitter feed on July 20, 2020; and (b) testimony by Auerbach that a FM 667 associate told him in early June that associates had been ordered to remove their BLM masks, but had also suggested that Fred Meyer might be willing to provide associates with BLM buttons. (See R. Br. at 152.) This amounts to neither clear nor unequivocal notice that Respondents intended to ban all BLM messaging from their associates’ uniforms at each of the locations involved in this case. I therefore reject Respondents’ 10(b) defense.

Accordingly, I recommend that Respondents be found to have violated the Act as alleged, by unilaterally changing their established dress code practices by barring employees from displaying the BLM and Local 21/BLM slogans.

CONCLUSIONS OF LAW

1. Respondent Fred Meyer, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the

Act.

2. Respondent QFC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Charging Party United Food and Commercial Workers Local No. 21 (the Union) is a labor organization within the meaning of Section 2(5) of the Act with 9(a) status under the Act.

4. At all material times, the Union has been the designated exclusive collective-bargaining representative of a number of bargaining units of Respondents’ employees, including those working at Fred Meyer stores numbered 28, 122 and 667, and QFC stores numbered 807 and 881.

5. Respondents Fred Meyers and QFC violated Section 8(a)(1) of the Act by ordering employees to remove buttons and/or masks bearing the insignia “BLM” and/or “Black Lives Matter” (either alone or together with the insignia of the Union).

6. Respondent Fred Meyer violated Section 8(a)(1) of the Act by:

a. Beginning in June 2020, applying its dress code policy (specifically requiring that any buttons worn by its associates at work be “authorized” by Fred Meyer), to prohibit employees from displaying “BLM” and/or “Black Lives Matter” on their person while working at its stores numbered FM 28, 122 and 667 in Washington State.

b. Beginning in June 2020, promulgating, maintaining, and enforcing an overly broad and discriminatory rule prohibiting employees from wearing COVID-masks bearing the insignia, “BLM” and/or “Black Lives Matter.”

c. Beginning in August 2020, applying its dress code policy (specifically requiring that any buttons worn by its associates at work be “authorized” by Fred Meyer), to prohibit employees from displaying “BLM” and/or “Black Lives Matter” (either alone or together with logo or name of the Union) on their person while working at its stores numbered FM 28, FM 122 and FM 667 in Washington State.

d. Sending home bargaining unit employees Herbert Reynolds (in August 2020) and Forest O’Reilly (in October 2020) for refusing to remove buttons bearing the “Black Lives Matter” or “BLM” insignia from their uniforms.

7. Respondent QFC violated Section 8(a)(1) of the Act by:

a. Beginning in August 2020, applying its dress code policy (including its July 2020 COVID mask addendum), specifically requiring that any buttons or masks worn by its associates at work be “approved” by QFC to prohibit employees from displaying “BLM” and/or “Black Lives Matter” on their person while working at its stores numbered QFC 807 and QFC 881 in Washington State.

b. In October 2020, sending home bargaining unit employee Kristin Wilder for refusing to remove her mask displaying the “Black Lives Matter” logo.

8. By enforcing their respective dress code policies for bargaining unit employees, including by sending bargaining unit

⁵¹ For purposes of Sec. 10(b), notice to affected employees is insufficient to establish constructive notice to their bargaining representative. See, e.g., *St. George Warehouse*, 341 NLRB 904, 905 (2004); *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995) (union lacked constructive notice, even though employees were previously aware of unilateral change); *Fire Tech Systems*, 319 NLRB 302, 305 (1995) (employee

awareness outside the 10(b) period insufficient to establish clear and unequivocal notice to the Union); *Patsy Trucking Inc.*, 297 NLRB 860, 862–863 (1990) (knowledge by union members insufficient to trigger statute of limitations).

employees home for refusing to remove buttons bearing the “BLM” or “Black Lives Matter” insignia, without first giving the Union an opportunity to bargain, Respondents failed and refused to bargain with the Union as the exclusive collective-bargaining representative of their employees in violation of Section 8(a)(5) and (1) of the Act.

9. By implementing a new dress code policy for COVID masks in July 2020, without first giving the Union an opportunity to bargain, Respondent QFC failed and refused to bargain with the Union as the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

10. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents have violated Section 8(a)(1) and (5) of the Act by maintaining, promulgating and enforcing overly-broad rules prohibiting employees from wearing non-authorized insignia on their work uniforms (such as buttons and COVID masks), including insignia that relay a message pertaining to wages, hours, terms and condition of employment or union or other protected activities (“protected insignia”), the recommended order requires that Respondent Fred Meyer revise and rescind its “Dress and Appearance” policy and Respondent QFC revise and rescind its “Store Associate Dress Code Standards” policy (including its “Face Mask/Covering Addendum”), and all rules prohibiting the display of protected insignia, and advise its employees in writing that the rules have been so revised or rescinded.

Having found that Respondents violated Section 8(a)(1) of the Act by instructing and/or warning employees that they may not wear any protected insignia, by directing them to remove protected insignia, and by sending them home for refusing to do so, the recommended order requires them to make whole those employees who were unlawfully sent home pursuant to Respondents’ unlawful rules, as well as all direct or foreseeable pecuniary harms suffered as a result of Respondents’ unfair labor practices. *Thryv, Inc.*, 372 NLRB No. 22 (2022). The recommended order additionally requires Respondents to compensate such individuals in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent Fred Meyer shall also be required to expunge from its files any reference to the unlawful instruction and/or warning it gave to Reynolds, Oliver, O’Reilly, Waller, Goslin and Mason requiring them to remove protected insignia, as well as any reference to sending home O’Reilly and Reynolds for

refusing to do so. Respondent QFC shall also be required to expunge from its files any reference to the unlawful instruction and/or warning it gave to Wilder and Stryker requiring them to remove protected insignia, as well as any reference to sending home Wilder for refusing to do so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵²

ORDER

A. Respondent Fred Meyer Stores, Inc. (a subsidiary of The Kroger Company), its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, promulgating or enforcing a rule that prohibits its employees from wearing, while on duty, any “unauthorized buttons, badges, or patches,” and that makes no exception for items that relay a message pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

(b) Instructing and/or warning employees that they may not wear any button, COVID mask or other insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

(c) Directing employees to remove from their clothing or person any button, COVID mask or other insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

(d) Sending employees home for refusing to remove from their clothing or person any button or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

(e) Failing and refusing to bargain collectively and in good faith with United Food and Commercial Workers Local 21 (Union) concerning the wages, hours and other terms and conditions of employment of the bargaining units of employees defined in the Union’s collective-bargaining agreements with Respondent (the unit employees).

(f) Unilaterally changing its dress policy without giving the Union, as the exclusive bargaining representative of the unit employees, prior notice and an opportunity to bargain over such changes.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, or refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representatives of the unit employees.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule in its dress code policy that prohibits employees from wearing any “unauthorized buttons, badges, or patches,” and that makes no exception for items that relay a message pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

(b) Furnish all employees nationwide with inserts for its current employee handbook that (1) advise that this unlawful dress code policy has been rescinded, or (2) provide the language of a

⁵² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

lawful rule; or publish and distribute to all employees nationwide a revised dress code policy that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful instruction and/or warning it gave to employees Herbert Reynolds (Reynolds), Felicia Oliver, Forrest O'Reilly (O'Reilly), Charles Waller, Melissa Goslin and Zoe Mason, requiring them to remove buttons and/or masks pertaining to terms and conditions of employment from their clothing and, within 3 days thereafter, notify each of them in writing that this has been done and that the warning will not be used against them in any way, and take similar remedial steps with respect to any other employee to whom it gave a similar instruction and/or warning.

(d) Within 14 days from the date of this Order, remove from its files any reference to sending home employees O'Reilly and Reynolds in September 2020 for refusing to remove buttons and/or masks pertaining to terms and conditions of employment from their clothing and, within 3 days thereafter, notify each of them in writing that this has been done and that this action will not be used against them in any way.

(e) Make O'Reilly and Reynolds whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of sending them home in September 2020.

(f) Post at its facilities nationwide copies of the attached notice marked "Appendix A." Copies of the notice, on a form provided by the Regional Director for Region 19, being signed by Respondent's authorized representatives, shall be posted by Respondent and maintained for 60 days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site (including "The Feed"), and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Post at its facilities throughout Washington State copies of the attached notice marked "Appendix B." Copies of the notice, on a form provided by the Regional Director for Region 19, being signed by Respondent's authorized representatives, shall be posted by Respondent and maintained for 60 days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site (including "The Feed"), and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

B. Respondent Quality Food Centers, Inc. (a subsidiary of The Kroger Company), its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, promulgating or enforcing a rule that prohibits its employees from wearing, while on duty, any buttons and pins other than those that are "Company approved," and that makes no exception for items that relay a message pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

(b) Maintaining, promulgating or enforcing a rule that prohibits its employees from wearing, while on duty, COVID masks that display "logos, writings or graphics" other than "a small manufacturer's brand logo," and that makes no exception for items that relay a message pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

(c) Instructing and/or warning employees that they may not wear any button, COVID mask or other insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

(d) Directing employees to remove from their clothing or person any button, COVID mask or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

(e) Sending employees home for refusing to remove from their clothing or person any button or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

(f) Failing and refusing to bargain collectively and in good faith with United Food and Commercial Workers Local 21 (Union) concerning the wages, hours and other terms and conditions of employment of the bargaining units of employees defined in the Union's collective-bargaining agreements with Respondent (the unit employees).

(g) Unilaterally changing its dress policy without giving the Union, as the exclusive bargaining representative of the unit employees, prior notice and an opportunity to bargain over such changes.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, or refusing to bargain collectively and in good faith with the Union as the exclusive collective bargaining representatives of the unit employees.

3. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule in its dress code policy that prohibits employees from wearing any buttons and pins other than those that are "Company approved," and that makes no exception for items that relay a message pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

(b) Furnish all employees nationwide with inserts for its current employee handbook that (1) advise that these unlawful dress code policies have been rescinded, or (2) provide the language of a lawful rule; or publish and distribute to all employees nationwide a revised dress code policy that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful instruction and/or warning it gave to employees Kristen Wilder (Wilder) and Cobina Stryker requiring them to remove buttons and/or masks pertaining to terms and conditions of employment from their clothing and,

within 3 days thereafter, notify each of them in writing that this has been done and that the warning will not be used against them in any way, and take similar remedial steps with respect to any other employee to whom it gave a similar instruction and/or warning.

(d) Within 14 days from the date of this Order, remove from its files any reference to sending home Wilder in October 2020 for refusing to remove buttons and/or masks pertaining to terms and conditions of employment from her clothing and, within 3 days thereafter, notify Wilder in writing that this has been done and that this action will not be used against her in any way.

(e) Make Wilder whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of sending her home in September 2020.

(f) Post at its facilities nationwide copies of the attached notice marked "Appendix C." Copies of the notice on a form provided by the Regional Director for Region 19, being signed by Respondent's authorized representatives, shall be posted by Respondent and maintained for 60 days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site (including "The Feed"), and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Post at its facilities throughout Washington State copies of the attached notice marked "Appendix D." Copies of the notice, on a form provided by the Regional Director for Region 19, being signed by Respondent's authorized representatives, shall be posted by Respondent and maintained for 60 days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site (including "The Feed"), and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 3, 2023

APPENDIX A
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 representatives 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 maintain and enforce a rule that prohibits employees from wearing, while on duty, any button, COVID mask or other insignia apart from those we have approved, and that makes no exception for buttons or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL NOT direct employees that they may not wear any button, COVID mask or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL NOT direct employees to remove from their clothing any button, COVID mask or other insignia pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

WE WILL NOT send employees home from work for refusing to remove from their clothing any button, COVID mask or other insignia pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

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

WE WILL rescind the rule in our dress code policy that prohibits its employees from wearing "unauthorized buttons, badges, or patches," without making an exception for buttons and other insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL furnish all employees nationwide with inserts for the current dress code policy that (1) advise that the unlawful dress code policy has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute to all employees nationwide a revised dress code policy that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

FRED MEYER STORES, INC.

The Administrative Law Judge's decision can be found at <https://www.nlrb.gov/case/19-CA-272795> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX B
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 representatives 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 maintain and enforce a rule that prohibits employees from wearing, while on duty, any button, COVID mask or other insignia apart from those we have approved, and that makes no exception for buttons or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL NOT direct employees that they may not wear any button, COVID mask or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL NOT direct employees to remove from their clothing any button, COVID mask or other insignia pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

WE WILL NOT send employees home from work for refusing to remove from their clothing any button, COVID mask or other insignia pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

WE WILL NOT refuse to meet and bargain in good faith with Local 21 about any proposed changes in its represented employees' wages, hours, and working conditions, including changes to our workplace apparel or dress code rules, before we put such changes into effect.

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

WE WILL rescind the rule in our dress code policy that prohibits employees from wearing "unauthorized buttons, badges, or patches," without making an exception for buttons and other insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL furnish all employees nationwide with inserts for the current dress code policy that (1) advise that the unlawful dress code policy has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute to all employees nationwide a revised dress code policy that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful instruction and/or warning we gave to employees Herbert Reynolds, Felicia Oliver, Forrest O'Reilly, Charles Waller, Melissa Goslin and Zoe Mason, requiring them to remove a button, COVID mask or other insignia pertaining to terms and conditions of employment from their clothing and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warning will not be used against them in any way, and WE WILL take similar remedial steps with respect to any other employee to whom we gave similar instructions.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to unlawfully sending home Herbert Reynolds and Forrest O'Reilly in September 2020 for refusing to remove button, COVID masks or other insignia pertaining to terms and conditions of employment from their clothing and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that this action will not be used against them in any way.

WE WILL make Herbert Reynolds and Forrest O'Reilly whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of sending them home in September 2020.

United Food and Commercial Workers Union Local 21 ("Local 21"), is the representative of many of our grocery, meat department, general merchandising, and Central Checkstand ("CCK") employees throughout the State of Washington for purposes of dealing with us regarding their wages, hours, and other working conditions.

WE WILL, if requested by Local 21, rescind any and all changes to its members' terms and conditions of employment that we made without first bargaining with Local 21, including the changes we made to our dress code policy between about June and August 2020, which prohibited them from wearing "Black Lives Matter" or "BLM" buttons, COVID masks and other insignia in the workplace.

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

FRED MEYER STORES, INC.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/19-CA-272795> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX C
 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 representatives 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 maintain and enforce a rule that prohibits employees from wearing, while on duty, any button, COVID mask or other insignia apart from those we have approved, and that makes no exception for buttons or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL NOT direct employees that they may not wear any button, COVID mask or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL NOT direct employees to remove from their clothing any button, COVID mask or other insignia pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

WE WILL NOT send employees home from work for refusing to remove from their clothing any button, COVID mask or other insignia pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

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

WE WILL rescind the rule in our dress code policy that prohibits employees from wearing buttons and pins other than those that are "Company approved," without making an exception for buttons and other insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL rescind the rule in our dress code policy that prohibits employees from wearing COVID masks that displays "logos,

writings or graphics" other than "a small manufacturer's brand logo," without making an exception for buttons and other insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL furnish all employees nationwide with inserts for the current dress code policy that (1) advise that the unlawful dress code policy has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute to all employees nationwide a revised dress code policy that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

QUALITY FOOD CENTERS, INC.

The Administrative Law Judge's decision can be found at <https://www.nlrb.gov/case/19-CA-272795> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling



APPENDIX D
 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 representatives 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 maintain and enforce a rule that prohibits employees from wearing, while on duty, any button, COVID mask or other insignia apart from those we have approved, and that makes no exception for buttons or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL NOT direct employees that they may not wear any button, COVID mask or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL NOT direct employees to remove from their clothing any button, COVID mask or other insignia pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

WE WILL NOT send employees home from work for refusing to remove from their clothing any button, COVID mask or other insignia

pertaining to wages, hours, terms and conditions of employment or union or other protected activities.

WE WILL NOT refuse to meet and bargain in good faith with Local 21 about any proposed changes in its represented employees' wages, hours, and working conditions, including changes to our workplace apparel or dress code rules, before we put such changes into effect.

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

WE WILL rescind the rule in our dress code policy that prohibits employees from wearing buttons and pins other than those that are "Company approved," without making an exception for buttons and other insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL rescind the rule in our dress code policy that prohibits employees from wearing COVID masks that displays "logos, writings or graphics" other than "a small manufacturer's brand logo," without making an exception for buttons and other insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL furnish all employees nationwide with inserts for the current dress code policy that (1) advise that the unlawful dress code policy has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute to all employees nationwide a revised dress code policy that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful instruction and/or warning we gave to employees Kristen Wilder and Cobina "Beans" Stryker, requiring them to remove a button, COVID mask or other item displaying the "Black Lives Matter" or "BLM" message, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warning will not be used against them in any way, and WE WILL take similar remedial steps with respect to any other employee to whom we gave similar instructions.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to unlawfully sending home Kristen Wilder in October 2020 for refusing to remove a button, COVID mask or other item displaying the "Black Lives Matter" or "BLM" message from their clothing, and WE WILL, within 3 days thereafter, notify each of them in

writing that this has been done and that this action will not be used against them in any way.

WE WILL make Kristen Wilder whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of sending them home in September 2020.

United Food and Commercial Workers Union Local 21 ("Local 21"), is the representative of many of our grocery, meat department, general merchandising, and Central Checkstand ("CCK") employees throughout the State of Washington for purposes of dealing with us regarding their wages, hours, and other working conditions.

WE WILL NOT refuse to meet and bargain in good faith with Local 21 about any proposed changes in its represented employees' wages, hours, and working conditions, including changes to our workplace apparel or dress code rules, before we put such changes into effect.

WE WILL, if requested by Local 21, rescind any and all changes to its members' terms and conditions of employment that we made without first bargaining with Local 21, including the changes we made to our dress code policy between about June and August 2020, which prohibited them from wearing "Black Lives Matter" or "BLM" buttons, COVID masks and other insignia in the workplace.

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

QULAITY FOOD CENTERS, INC.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/19-CA-272795> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

