CASE NOS. 24-1406, 24-1513

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER/CROSS-RESPONDENT AND DENIAL OF CROSS-APPLICATION FOR ENFORCEMENT

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/s/ *Thomas A. Berry*
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Dated: May 29, 2024

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*.

This case interests Cato because the right to freedom of speech—including freedom from compelled speech—is essential to liberty and must be protected from government intrusion. The NLRB's decision would give the government a blank check to force employers to turn their place of business into a political soapbox for speech they do not want to platform—even when that speech goes against employers' deeply held beliefs or destroys a carefully curated speech environment. Such intrusion is flatly inconsistent with the freedom of speech guaranteed by the First Amendment.

[1] Fed. R. App. P. 29 Statement: All parties consented to the filing of this brief. No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress passed the National Labor Relations Act (NLRA) to protect the right of workers to organize "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 157. In doing so, Congress did not intend to abolish the First Amendment rights of American employers. Yet the National Labor Relations Board's (NLRB) decision in this case would have precisely that effect. The NLRB's reasoning would require employers to allow a potentially endless volume of controversial political speech in the workplace. The Constitution forbids such a result.

The Supreme Court has long recognized that forcing individuals to convey messages with which they disagree under threat of government punishment is deeply offensive to the spirit of liberty that the Constitution protects. Consequently, it is settled law that the freedom of speech protected by the First Amendment includes the right to be free from compelled speech. Nor do Americans give up their constitutional protection against compelled speech simply because they choose to engage in commerce, create a business, hire employees, or take advantage of the corporate form.

Here, the NLRB chose to overrule its own administrative law judge and held that the NLRA requires Home Depot to allow an employee to display "BLM" (Black Lives Matter) on its official employee uniform—despite Home Depot's policy

against displaying potentially divisive political messages in the workplace. As Home Depot persuasively argues, the NLRA does not compel such a result. Pet. Br. 23–43. But on a more fundamental level, the NLRB's decision cannot stand because it violates the fundamental right to freedom of speech protected by the First Amendment. That is the focus of this *amicus* brief. This Court should apply Eighth Circuit and Supreme Court precedent and vacate the NLRB's unconstitutional order.

ARGUMENT

I. THE RIGHT NOT TO BE FORCED TO SPEAK LIES AT THE HEART OF FREEDOM OF SPEECH.

A. The Supreme Court and This Court Have Repeatedly Reaffirmed the First Amendment Right Against Compelled Speech.

The right to freedom of speech protected by the First Amendment is not limited to affirmative protection of the right to speak what we wish. Freedom of speech would mean little if the government had the power to force Americans to speak government-approved messages or to disseminate the speech of others on pain of punishment. Compelled speech violates the "freedom of the human mind and spirit." *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting). As a consequence, "measures compelling speech are at least as threatening[]" to the First Amendment as government restrictions on what can be said. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018). This is especially

true because "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning[.]" *Id*.

The Supreme Court affirmed the vital importance of the freedom not to be compelled to speak against one's will during the Second World War, after it first made a temporary misstep. Noting that "[n]ational unity is the basis of national security[,]" the Supreme Court first upheld a state law requiring schoolchildren to recite the Pledge of Allegiance, even though doing so violated the deeply held beliefs of students who were Jehovah's Witnesses. *Minersville Sch. Dist.*, 310 U.S. at 595. But this decision contained the seeds of its own reversal. In a dissenting opinion, Justice Stone wrote that the First Amendment is "a command that freedom of mind and spirit must be preserved, which government must obey[.]" *Id*. at 606 (Stone, J., dissenting). Consequently, Stone was "unable to take[] . . . the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their . . . conscience." *Id*. at 602.

Three years later, the Supreme Court realized the injustice of its earlier decision. After taking a second look at the issue, the Court held that state laws forcing students to pledge allegiance to the American flag violate the Constitution. In the words of Justice Jackson, upholding such a law would mean "that a Bill of Rights which guards the individual's right to speak his own mind, left it open to

public authorities to compel him to utter what is not in his mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). The Supreme Court held that the First Amendment forbade such a result, because "compelling the flag salute and pledge . . . invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id*. at 642. The Court thus established the important principle that freedom of speech includes the right to be free from compelled speech. That freedom applies even when the government is pursuing legitimate and important objectives, such as fostering national unity during a time of global war.

The Supreme Court has repeatedly and explicitly reiterated this principle in a host of different contexts. In *Wooley v. Maynard*, the Court held that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely *and the right to refrain from speaking* at all." 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 633–34 (Murphy, J., concurring)) (emphasis added). In *Wooley*, the Supreme Court held that a New Hampshire law requiring drivers to display the state motto "Live Free or Die" on their vehicle license plates violated their First Amendment right to be free from government-compelled speech. *Id*. at 717. *Wooley* established that the constitutional protection against compelled speech is not limited to merely the right not to vocalize spoken words,

such as the Pledge of Allegiance. Rather, the First Amendment also protects the right not to be forced to passively display a written message.

Nor is the First Amendment's prohibition on compelled speech merely a protection against being forced to convey the *government's* message. The First Amendment also forbids the government from forcing a person to convey a third party's message. In 1974, the Supreme Court held that a Florida statute requiring newspapers to grant a political candidate "a right to equal space" to reply to criticism published in that newspaper violated the First Amendment. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 243 (1974). This would be the case "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply[.]" *Id*. at 258. As the Supreme Court explained:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press[.]

Id. In other words, the First Amendment bars any interference with the full, free, and unfettered editorial discretion exercised by any entity that curates and disseminates speech. It is irrelevant whether the total space available for speech is reduced by a

mandate to carry others' speech. The First Amendment protects the right of private parties to choose not to disseminate speech on their own platforms—period.

This right of editorial freedom is not limited only to newspapers or to a narrow set of actors labeled "the press." It belongs to all Americans. In 1995, the Supreme Court ruled that Massachusetts could not use its public accommodations law to force the South Boston Allied War Veterans Council to include an LGBT parade float in its St. Patrick's Day Parade. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 559–566 (1995). The Supreme Court reaffirmed that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.'" *Id*. at 573. "Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers." *Id*. at 574.

Writing for a unanimous Supreme Court, Justice Souter explained why the First Amendment's guarantee of freedom of speech prevented Massachusetts from forcing the parade organizers to include a message they did not wish to include:

> Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. . . . [A]ny contingent of protected individuals with a message would have the right to participate in petitioners' speech[.] . . . But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

Id. at 572–73.

This Court has also recognized that the First Amendment's prohibition on government-compelled speech includes the right not to be forced to convey a third party's message. In the words of this Court, "the government still compels speech when it passes a law that has the effect of foisting a third party's message on a speaker." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 753 (8th Cir. 2019). Accordingly, if a state attempts to compel speech by requiring Christian filmmakers to produce films celebrating same-sex marriages, the state "has gone too far . . . and its interest must give way to the demands of the First Amendment." *Id*. at 758. To do otherwise would be to allow the government

> to require a Muslim tattoo artist to inscribe "My religion is the only true religion" on the body of a Christian if he or she would do the same for a fellow Muslim, or [to] demand that an atheist musician perform at an evangelical church service. In fact, if Minnesota were to do what other jurisdictions have done and declare political affiliation or ideology to be a protected characteristic, then it could force a Democratic speechwriter to provide the same services to a Republican, or it could require a professional entertainer to perform at rallies for both the Republican and Democratic candidates for the same office.

Id. at 756. Once one thread of government-compelled speech is pulled, the entire fabric of Americans' freedom of speech tends to unravel.

B. The NLRB's Order Interferes with Home Depot's Speech and Violates the First Amendment

These precedents apply with full force to the present case. Just like in *Hurley,* the NLRB's approach would mean that "any contingent of protected individuals with a message" would have the right to participate in Home Depot's speech. *Cf. Hurley*, 515 U.S. at 573. Under the NLRB's approach, the NLRA would operate much like the Massachusetts law at issue in *Hurley*, providing employees a right to treat a company's uniform as if it were a public accommodation. But just like the parade organizers in *Hurley*, Home Depot has made an expressive choice with the rules it has established for what speech it allows on its aprons. Home Depot has chosen not to speak on a particular topic (divisive political issues) in a particular location (on official Home Depot employee uniforms). And just as adding a float to a parade changes the message of that parade, adding a statement to a company's uniform changes the message of that uniform. Because Home Depot "has the autonomy to choose the content of [its] own message," the First Amendment forbids this result. *Id.*

None of the NLRB's arguments to the contrary are persuasive. In its order, the NLRB insisted that "accommodating the employee's message does not affect [Home Depot's] speech, because [Home Depot] is not speaking when employees personalize their aprons." App.833/R.2166 (cleaned up). But that is wrong, because Home Depot owns and provides the uniforms, and Home Depot controls what

speech may appear on them. Home Depot speaks by choosing what messages may appear on its uniforms, just as the parade organizers in *Hurley* spoke through their choice of which floats to admit and just as the newspaper in *Tornillo* spoke through its choice of which op-eds to print. Just like a parade is composed of many floats and a newspaper is composed of many articles, Home Depot uniforms are composed of many messages contributed by "multifarious voices." *Cf. Hurley*, 515 U.S. at 569. The NLRB appears to believe that Home Depot does not speak through its uniforms because the messages on its uniforms are written by employees. But the Supreme Court has made clear that "the presentation of an edited compilation of speech generated by other persons" is the speech of the presenter and is entitled to full First Amendment protection. *Id.* at 570.

The NLRB relied on two cases to support its view that a mandate to host speech on a company uniform does not affect the company's speech. These two cases are *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S. 47 (2006) ("*FAIR*"), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). But neither is pertinent to the facts of this case, because neither involved a mandate to add an unwelcome voice to a property owner's communicative display of "multifarious voices."

Both of these cases involved a mandate to host speakers in certain privately owned areas: a shopping plaza in *PruneYard* and a law school campus in *FAIR*. In

both cases, the Supreme Court found that the owners of the private spaces were *not* engaged in speech via the curation of speakers, which was why hosting the speakers did not affect the owners' speech. "Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets" being handed out by the speakers in question. *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 12 (1986) (*PG&E*). And as for the law school programs at issue in *FAIR*, the Court found that the schools invited recruiters only "to assist their students in obtaining jobs," not to curate a symposium with "the expressive quality of a parade, a newsletter, or the editorial page of a newspaper[.]" *FAIR*, 547 U.S. at 64. Neither case is on point here, where Home Depot has explained that it *does* intend its uniforms to send a message to customers and that—for this reason—it *does* carefully curate the speech that may and may not appear on its uniforms.

Finally, the NLRB reasoned that this case "is easily distinguishable from those cases . . . in which individuals were required to convey a message selected by the government. Here, the relevant message is the statutorily protected message chosen by an employee[.] . . . When an employee chooses to display particular insignia in a manner that the Act protects, it is the employee's desired message that is being conveyed, not the government's." App.833/R.2166. But this distinction makes no

difference. As noted above, the Supreme Court's precedents make clear that compelled speech works a First Amendment injury whether the speech at issue was chosen by the government or by other private citizens.

To be sure, the government did dictate the content of the compelled speech at issue in some compelled-speech cases, including both *Wooley* and *Barnette*. But *Hurley* and *Tornillo* concerned speech chosen by other *private* parties. It made no difference to the outcome of these cases that the speech had been chosen by private parties rather than the government; forcing the speech into a private parade or newspaper would have impermissibly altered their message all the same. "[T]he First Amendment is relevant whenever the government compels speech, regardless of who writes the script." *Telescope Media,* 936 F.3d at 753.

C. The NLRB's Order Also Violates the First Amendment by Forcing Home Depot to Disseminate a Message It Does Not Wish to Display.

Setting aside the impermissible interference with Home Depot's own speech, the NLRB's order also violates the First Amendment simply because it forces Home Depot to disseminate a message that Home Depot does not wish to display. This compelled dissemination is itself unconstitutional, apart from any effect it has on Home Depot's own speech. And such compelled dissemination is unconstitutional whether or not the general public interprets the compelled speech as having been endorsed by Home Depot.

In *Wooley*, the Supreme Court made clear that the First Amendment rights of the drivers were violated simply because they were forced to distribute a message. The drivers were "coerced by the State into advertising a slogan" that they did not wish to. *Wooley*, 430 U.S. at 713. The harm, as the Court described it, was "forc[ing] an individual . . . to be an instrument for fostering public adherence to an ideological point of view[.]" *Id.* at 715. The Court described New Hampshire's law as "requir[ing] an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. And the Court similarly (and more colorfully) described the law as requiring drivers to "use their private property as a 'mobile billboard[.]'" *Id.* at 715.

The Court ruled for the drivers in *Wooley* because this forced distribution was itself a First Amendment violation, apart from any compelled appearance of endorsement or interference with the drivers' own speech. The Court held that there is a First Amendment "right to decline to foster" concepts such as "religious, political, and ideological causes." *Id.* at 714. Or as the Court put it another way, there is a First Amendment "right to avoid becoming the courier for" an ideological message. *Id.* at 717. In sum, the Court consistently described the harm to the drivers in *Wooley* as their being forced into "advertising," "fostering," "participat[ing] in the dissemination of," "becoming the courier for," and "us[ing] their private property

as a 'mobile billboard' for" a message that they did not wish to spread. *Id.* at 713–17. All of these various turns of phrase consistently support one interpretation: The First Amendment harm was inflicted the moment the drivers were forced to display a message, whether or not they were falsely identified as believing that message or were hindered in expressing their own message.

The NLRB's order would unquestionably force Home Depot to use its own private property to spread a message it does not wish to, disseminating that message to the customers who may view the apron in question. The NLRB's order would thus force Home Depot to "use [its] private property as a 'mobile billboard'" for a message it does not wish to carry. *Cf. id.* at 715. Even if this did not interfere with Home Depot's own speech and even if customers did not interpret this message as having been endorsed by Home Depot, *Wooley* makes clear that this would still infringe Home Depot's First Amendment rights.[2]

[2] In any event, it is likely that many shoppers *would* falsely believe that Home Depot endorsed the message on its own employee's uniform. In *PruneYard*, the Supreme Court reasoned that because the plaza at issue was "open to the public to come and go as they please," the "views expressed *by members of the public* in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner." *PruneYard*, 447 U.S. at 87 (emphasis added). Here, by contrast, the speech at issue would come not from members of the general public, but rather from Home Depot employees using their Home Depot uniforms. It would be much harder to explain to every Home Depot customer why messages appearing on Home Depot uniforms should not be attributed to Home Depot. *See, e.g.*, *Janus*, 138 S. Ct. at 2474 ("When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer.").

II. AMERICANS WHO ENGAGE IN BUSINESS DO NOT FORFEIT THEIR CONSTITUTIONAL RIGHTS—INCLUDING FREEDOM FROM COMPELLED SPEECH.

Constitutional rights are for all Americans. Nothing in the Constitution denies the enjoyment of the rights protected by the First Amendment to those Americans who engage in business or commerce, hire employees, or use the corporate form. Any decision to the contrary would imply that Americans who choose to participate in the economic life of the country can only do so by forfeiting their fundamental rights. For that reason, the Supreme Court has repeatedly affirmed that business owners, employers, and corporations possess First Amendment rights—and this includes the right to be free from government-compelled speech.

The Supreme Court has held that the Constitution protects a corporation's freedom of speech, and that this right is derived from the First Amendment. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 780 (1978). This is because "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak *and the speakers* who may address a public issue." *Id*. at 784–85 (emphasis added). "In short, the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms." *Id*. at 802 (Burger, C.J., concurring). The Supreme Court most recently reiterated this principle in *Citizens United v. FEC*, citing a long string of precedents. 558 U.S. 310, 342 (2010). As summarized by Justice Scalia, "[t]he

[First] Amendment is written in terms of 'speech,' not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals[.]" *Id*. at 392–93 (Scalia, J., concurring).

A corporation's free speech rights certainly include the right to be free from government-compelled speech. In 1980, the California Public Utilities Commission decided to force Pacific Gas and Electric Company to periodically include the messages of a third party in its monthly billing envelopes. *PG&E*, 475 U.S. at 4–7. Pacific Gas sued, citing the Supreme Court's prohibition on compelled speech as articulated in *Wooley v. Maynard*. *Id.* at 7. The Supreme Court ruled in favor of Pacific Gas, explaining that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Id*. at 9. Furthermore, "[t]he Commission's access order also impermissibly require[d] [Pacific Gas] to associate with speech with which [Pacific Gas] may disagree. . . . For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Id.* at 15–16.

Whether the forum at issue is a business's billing envelopes or employee uniforms, the result compelled by the Constitution is the same. The government

cannot hijack the property of a business and force it to convey the messages of a third party. It could not do so to Pacific Gas, and it cannot do so to Home Depot.

In the same vein, the fact that this case involves a labor law rather than a public accommodations law does not affect the analysis, because the First Amendment's prohibition on compelled speech applies just as much in the labor law context. *See Janus*, 138 S. Ct. at 2460. The Constitution protects Home Depot's expressive choice from being altered by compelled speech, and the Constitution forbids the government from foisting a third party's speech on Home Depot.

III. THE NLRB'S THEORY WOULD ALLOW NEARLY UNLIMITED GOVERNMENT-COMPELLED SPEECH IN PRIVATELY-OWNED WORKPLACES—REGARDLESS OF WHETHER THE SPEECH HARMS BUSINESS OR VIOLATES THE BELIEFS OF EMPLOYERS.

Common sense dictates that employee speech and expressive conduct must be regulated in the workplace. Employees have made an agreement with their employer to provide a particular service, in a particular manner, in exchange for pay. Employee expression on the job that interferes with that agreed-upon service can violate the terms of the employer-employee agreement. Since employee expression in the workplace can greatly help or harm an employer's business—even, perhaps, to the point of making an employer liable for employee misconduct—regulating such expression for the good of the business is essential. The NLRA should not be interpreted in such a way as to make such reasonable regulations impossible.

The NLRB's theory has no limiting principle and applies to any message supposedly related to an employee's terms and conditions of employment, no matter how attenuated. And it is not clear what safeguards, if any, would prevent employees from taking advantage of this policy to advance their own political views. To start with, any employee expressing concern about discrimination in the workplace—sincerely or otherwise—could make the same argument used in this case and would seemingly be protected in displaying any similar slogan on Home Depot's employee apron. Slogans like "White Lives Matter," "Asian Lives Matter," "Jewish Lives Matter," "Muslim Lives Matter," "Veteran Lives Matter," or "Trans Lives Matter" would all become potentially government-required slogans displayed to Home Depot customers on the Home Depot apron. Home Depot would have no choice but to allow a proliferation of controversial statements at the workplace regardless of its impact on Home Depot employees or customers.

But encouraging contentious identity politics in the workplace would likely be only the tip of the iceberg. Indeed, the NLRB's opinion opens the door to forcing Home Depot to allow explicitly partisan speech on its employee uniforms. If a slogan only needs to have a tenuous connection to the working conditions of employees for it to be protected by the NLRA, what would stop an employee from writing "MAGA" or "Build Back Better" on his uniform, on the grounds that such slogans relate to workplace concerns? Nothing in the NLRB's opinion would prevent such

openly partisan and political speech from being protected at the workplace, so long as a connection to workplace conditions can be articulated by an employee or an employee's lawyer. "Support workers, build the wall," "Support workers, vote Biden," "Abortion is healthcare—include it in the employee health plan," "Vote Obama to keep health insurance for workers," or "Legalize it—end employee drug testing," could all be displayed on Home Depot aprons by politically minded employees. If the NLRB's order is upheld, it is likely that there would be many future creative claims that various political messages are protected by the NLRA and that employers thus have no power to regulate such messages.

By contrast, the command of the First Amendment is simple. Business owners have a right not to be forced to convey messages that may disrupt the workplace, alienate customers, or violate their own beliefs. The NLRA was not intended to strip employers of their constitutional right to choose whether to speak or to refrain from speaking, at their own discretion and according to their own judgment.[3] And even if this was Congress's intent, the Constitution prohibits the government from taking such action. Accordingly, the NLRA should be narrowly interpreted in a manner that is consistent with the requirements of the Constitution. It should not be used as a

[3] *See, e.g.*, *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477 (1941) ("Neither the [NLRA] nor the [NLRB]'s order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made.").

blank check for government agencies to transform privately owned businesses into political soapboxes or turn employee uniforms into political billboards.

CONCLUSION

The NLRB's actions violate the First Amendment. The Court should deny the NLRB's cross-application for enforcement and vacate the Board's decision and order.

Respectfully submitted,

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Dated: May 29, 2024

CERTIFICATE OF BRIEF LENGTH & VIRUS CHECK

The undersigned counsel certifies:

1. In accord with FRAP 32(g), this *amicus curiae* brief meets the formatting and type-volume requirements of FRAP 29(a)(4), 29(b)(4), and 32(a). This *amicus curiae* brief is printed in 14-point, proportionately spaced typeface utilizing Microsoft Word and contains 4,866 words. This includes headings, footnotes, and quotations, and excludes all items identified by FRAP 32(f).

2. Per 8th Cir. R. 28A(h)(2), this brief has been scanned and found virus free using Bitdefender Endpoint Security Tools.

/s/ *Thomas A. Berry*
Counsel for Amicus Curiae

Dated: May 29, 2024

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on May 29, 2024, he electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the Eighth Circuit using the CM/ECF system. The undersigned also certifies that all participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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Dated: May 29, 2024