

BLM in the Workplace: Protected, Concerted Activity or Compelled Speech? A case study in the rhetoric of the deregulatory First Amendment

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ABSTRACT

Scholars and Supreme Court Justices alike have observed the “weaponized First Amendment,” which refers to the expanding use of the First Amendment to achieve deregulatory ends. Labor law has been no stranger to this phenomenon, with successful First Amendment challenges being lodged against public union dues collection and the National Labor Relations Board’s (NLRB) notice posting requirements. This Note looks at a new target of employer First Amendment arguments: protected, concerted activity to promote racial justice in the workplace.

Under the National Labor Relations Act (NLRA), employees have the right to engage in protected, concerted activity. For an activity to be protected, it must be for the purpose of mutual aid and protection. The NLRB has established that efforts to address racial discrimination in the workplace satisfy this requirement. Thus, the NLRB recently determined that a Home Depot employee displaying “BLM” (Black Lives Matter) on their uniform was protected under the Act.

At each stage of the NLRB and appeals process, Home Depot raised the argument that requiring the company to accommodate the protected activity at issue constitutes compelled speech in violation of the First Amendment. At least two other employers litigating cases about dress codes restricting BLM messaging before the NLRB have raised nearly identical arguments, suggesting that there may be a coordinated effort to invoke this constitutional framing. Although the Eighth Circuit did not ultimately adopt Home Depot’s First Amendment claims, its arguments are emblematic of a new strategy from the employer-side bar.

This Note contextualizes these emerging arguments as part of the broader trend of the weaponized First Amendment. Drawing on critical legal rhetoric and scholarship on First Amendment expansionism, this Note identifies the primary tropes and rhetorical frames that have propelled the First Amendment into new areas of regulation. It then analyzes how Home Depot was able to draw on this rhetoric in its arguments. In addition to the absolutist rhetoric generally associated with the First Amendment, this Note identifies Home Depot’s use of a “race-as-controversy” frame to both increase the specter of First Amendment harm and obfuscate the social realities of the workplace. To combat

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these ongoing efforts to narrow the scope of protected, concerted activity, this Note argues that advocates should respond with arguments grounded in a more egalitarian First Amendment.

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INTRODUCTION

Imagine you are an employee experiencing a safety issue in your workplace, perhaps related to a piece of malfunctioning equipment. You talk about it with your co-workers and realize that this is a shared experience. You are concerned that

management has not taken any meaningful action to address the issue, so you start to wear a pin that reads “SAFETY NOW.” Your boss calls you into a meeting and tells you that the pin is in violation of the employer’s dress code policy. You are instructed to remove the pin or clock out and miss your shift. If you do this, you will incur disciplinary points. Do you have any recourse?

Because of the National Labor Relations Act (NLRA), the answer is yes. As this Note will discuss, the NLRA protects the rights of employees to engage in concerted activity for the purposes of mutual aid and protection.¹ The hypothetical “SAFETY NOW” pin would almost certainly fit this definition.² As such, absent special circumstances, the employer’s order for you to remove your pin would violate the NLRA and you would be able to file an unfair labor practice (ULP) charge with the National Labor Relations Board (NLRB).³

Now, imagine a different hypothetical. You are an employee experiencing an issue in your workplace, but this time it is that your coworker is making racist comments. You talk to other coworkers and realize others have observed the same behavior and are uncomfortable. In addition, a Black History Month display in the break room was vandalized. You are concerned that management is not doing enough to protect workers from discrimination. You put on a pin that says “BLM,” standing for “Black Lives Matter.” Your boss calls you into a meeting and tells you that the pin is in violation of the employer’s dress code policy. You are instructed to remove the pin or clock out and miss your shift. Do you have any recourse now?

The answer is still yes. In the NLRB’s *Home Depot* decision, the NLRB addressed a nearly identical set of facts, determining that an employee’s display of “BLM” on their work uniform was protected.⁴ This outcome was unsurprising because just like concerns about workplace safety, concerns about racial discrimination relate to core working conditions and thus fall under the ambit of the NLRA’s protection.⁵ Therefore, the analysis should be no different than any other case that relates to donning pins or other messages in the workplace.

1. See discussion *infra* Part I.

2. See, e.g., *Miller Plastic Prod., Inc.*, 372 NLRB No. 134, slip op. at 1 (Aug. 25, 2023) (holding that raising concerns about COVID-19 health and safety measures was protected); *Constellation Brands, U.S. Operations, Inc.*, 367 NLRB No. 79, slip op. at 1 (Jan. 31, 2019) (holding that wearing a vest with a message to draw attention to safety issues was protected), *enforced*, 992 F.3d 642, 644 (7th Cir. 2021); *Sys. with Reliability, Inc.*, 322 NLRB 757, 761 (1996) (holding that a discussion over health effects of chemicals in workplace was protected); *Wabash Alloys*, 282 NLRB 391, 391 (1986) (holding that discussions of safety concerns in the workplace were protected).

3. See *Pac. Bell Tel. Co.*, 362 NLRB 885, 887 (2015) (explaining that the employer must justify why the special circumstances outweigh Section 7 rights).

4. *Home Depot USA, Inc.*, 373 NLRB No. 25, slip op. at 1 (Feb. 21, 2024), *vacated on other grounds*, 158 F.4th 910 (8th Cir. 2025). The primary difference between the hypothetical described above and the facts of the *Home Depot* case are that the employee did not wear a pin, but wrote “BLM” on their apron. Additionally, the employee wrote “BLM” on their apron *before* the group of coworkers initially began to discuss racism in the store, not after as in the hypothetical. However, the NLRB characterized the protected activity at issue as the decision to keep “BLM” on the apron after being confronted by management, which did come after the group activity. *Id.* at 7-10.

5. See, e.g., *Tanner Motor Livery Ltd.*, 148 NLRB 1402, 1404 (1964), *enforced in relevant part*, 349 F.2d 1 (9th Cir. 1965).

Home Depot marshalled a number of arguments in opposition. Some arguments stem from existing labor law doctrine, like the premise that sometimes, employers may invoke “special circumstances,” like safety or brand integrity, to nonetheless justify a bar on protected insignia.⁶ However, Home Depot also raised a more novel argument. Specifically, Home Depot argued that allowing employees to include “BLM” messaging on their uniform is tantamount to compelled government speech and therefore, a violation of their First Amendment rights.⁷ Home Depot continued to resurface this argument at each stage of the NLRB and appeals process.⁸ At least two other employers have raised almost identical compelled speech arguments before the NLRB in other Black Lives Matter related cases, suggesting that this argument is gaining traction.⁹

At first blush, the decision to frame the issue as one arising under the First Amendment seems like an odd choice. The right to display pins, stickers, or other insignia that contain messages related to protected, concerted activity has been established since 1945.¹⁰ Employers that have jealously guarded their First Amendment rights in other arenas have not raised the argument in insignia cases.¹¹ In fact, prior to the BLM cases, only one employer appears to have tried to argue that the NLRA’s protection for insignia violates the First Amendment, and this argument was unsuccessful.¹² Why then are employers dedicating substantial briefing to the First Amendment,

6. See discussion on the special circumstances exception, *infra* notes 47-51 and accompanying text; see also *Boch Imports, Inc.*, 362 NLRB 706, 707 (2015), *enforced*, 826 F.3d 558 (1st Cir. 2016) (outlining the situations where the NLRB has held that the special circumstances exception applies).

7. Home Depot U.S.A., Inc.’s Motion for Summary Judgment at 18, Home Depot USA, Inc., No. 18-CA-273796, 2021 WL 5235066 (N.L.R.B. Nov. 9, 2021) [hereinafter Home Depot Motion for Summary Judgment], <https://apps.nlr.gov/link/document.aspx/09031d458357e22c> [https://perma.cc/H3L2-CS5Y].

8. See *id.* at 2-26; Home Depot U.S.A., Inc.’s Reply in Support of Motion for Summary Judgment at 2-10, Home Depot, 2021 WL 5235066 (No. 18-CA-273796) [hereinafter Home Depot Reply Brief], <https://apps.nlr.gov/link/document.aspx/09031d458359dc7e> [https://perma.cc/JLS7-72JY]; Home Depot U.S.A., Inc.’s Post-Hearing Brief at 36-50, Home Depot USA, Inc., No. 18-CA-273796, 2022 WL 2115188 (N.L.R.B. A.L.J. June 10, 2022) [hereinafter Home Depot Post-Hearing Brief], <https://apps.nlr.gov/link/document.aspx/09031d458362fbf7> [https://perma.cc/E46A-LKS7]; Home Depot U.S.A., Inc.’s Brief in Support of Cross Exceptions to the Decision of the Administrative Law Judge at 27-43, Home Depot, 373 NLRB No. 25 (No. 18-CA-273796) [hereinafter Home Depot Cross Exceptions Brief], <https://apps.nlr.gov/link/document.aspx/09031d458387ecc5> [https://perma.cc/2A5C-ZL7B]; Reply Brief for Petitioner/Cross-Respondent Home Depot U.S.A., Inc., Home Depot USA, Inc. v. NLRB, 158 F.4th 910 (8th Cir. 2025) (Nos. 24-1406, 24-1513), 2024 WL 4204363.

9. See, e.g., Respondent Whole Foods Market’s Supplemental Post Hearing Brief to the Administrative Law Judge on Additional Legal Authority at 7, Whole Foods Mkts., Inc., No. 01-CA-263079, JD(SF)-39-23 (N.L.R.B. A.L.J. December 20, 2023), <https://apps.nlr.gov/link/document.aspx/09031d4583b4777f> [https://perma.cc/C5G7-968D]; Respondents’ Post-Hearing Brief at 132-46, Fred Meyer Stores, Inc., No. 19-CA-272795, JD(SF)-12-23 (N.L.R.B. A.L.J. May 03, 2023), <https://apps.nlr.gov/link/document.aspx/09031d458377f1c8> [https://perma.cc/3QV3-VHSM].

10. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801-03 (1945); In-N-Out Burger, Inc., 365 NLRB 471, 476 (2017) (citing *Boch Imports*, 362 NLRB 706); see also William B. Gould IV, *How Five Young Men Channeled Nine Old Men: Janus and the High Court’s Anti-Labor Policymaking*, 53 U.S.F. L. REV. 209, 257 (2019) (“Since the early 1940s, the wearing of union insignia and buttons has been protected by the NLRA.”).

11. See, e.g., Tesla, Inc., 371 NLRB No. 131 (Aug. 29, 2022) (containing no argument that requiring the employer to accommodate union t-shirts violates the First Amendment, despite the employer raising other First Amendment arguments related to employer social media posts), *vacated*, 86 F.4th 640 (5th Cir. 2023).

12. I performed a search of the NLRB database and found only one instance of an employer raising a compelled speech challenge under the First Amendment in response to unfair labor practice charges relating to

and why are these arguments arising in a set of cases where employees raised concerns about racial discrimination in the workplace rather than cases where employees donned messages about union elections or workplace safety?¹³

This Note argues that Home Depot's invocation of speech rights should be understood as the latest manifestation of the "weaponized First Amendment," a term used to describe the expanding use of First Amendment arguments to achieve a deregulatory agenda.¹⁴ Labor regulation is no stranger to the weaponized First Amendment, with "free speech" arguments being used to bar public sector unions from requiring the payment of representational fees¹⁵ and to prevent the NLRB from requiring

insignia prior to October 5, 2021, which is when Home Depot submitted their Motion for Summary Judgment. Based on my search at the time, the one instance where a compelled speech argument against insignia protections was made before this was in a petition for certiorari from In-N-Out Burger and associated amicus briefs. See *Petition for Writ of Certiorari* at i, *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707 (5th Cir. 2018) (No. 17-60241), 2018 WL 4407379, at *i. In this case, the NLRB held that In-N-Out Burger committed an unfair labor practice when they barred employees from wearing "Fight for 15" pins. *In-N-Out Burger*, 365 NLRB at 471 n.2. The Fifth Circuit upheld this decision. *In-N-Out Burger, Inc.*, 894 F.3d at 711. The employer did not raise the First Amendment argument before the NLRB or before the circuit court. However, the employer raised the argument for the first time in a petition for writ of certiorari. See *Petition for Writ of Certiorari*, *supra*. The Supreme Court denied certiorari. *In-N-Out Burger, Inc. v. NLRB*, 586 U.S. 1192 (2019). After the First Amendment arguments were made in each of the BLM cases, the compelled speech argument was raised in a non-BLM context in *Siren Retail Corp.* See Respondent's Brief in Support of Its Exceptions to the Decision & Order of the Administrative Law Judge at 25, *Siren Retail Corp.*, 373 NLRB No. 140 (Nov. 27, 2024) (No. 02-CA-305984), <https://apps.nlr.gov/link/document.aspx/09031d4583c455a9> [<https://perma.cc/6DGX-9WGX>] (arguing that an ALJ finding that a Starbucks Reserve location could not bar partners from wearing more than one union pin violates the First Amendment under a compelled speech theory). The Board did not address the First Amendment argument in its decision. See *Siren Retail*, 373 NLRB No. 140, slip op. at 4-5. However, the employer has continued to raise a First Amendment argument on appeal in the Second Circuit, demonstrating the spread of these arguments within the employer bar after the BLM cases. See Reply Brief of Petitioner/Cross-Respondent, *Siren Retail Corp. v. NLRB*, No. 24-3168 (2nd Cir. argued Nov. 12, 2025) [hereinafter Starbucks Reply Brief], <https://apps.nlr.gov/link/document.aspx/09031d458409a26b> [<https://perma.cc/TY3K-DTT4>].

13. *Contrast* sources cited *supra* notes 7-9 (examples of employers bringing First Amendment challenges in cases involving employees raising concerns about racial discrimination), *with* Constellation Brands, U.S. Operations, Inc., 367 NLRB No. 79, slip op. at 1 n.3, 8-10 (2019), *enforced*, 992 F.3d 642, 644 (7th Cir. 2021) (no First Amendment challenge brought by employer where an employee wore a vest with the phrase "Cellar Lives Matter" to raise concerns about workplace safety, despite the fact the employer found the term offensive).

14. See Duncan Hosie, *Janus and the Movement Dissent*, 65 B.C. L. REV. 371, 403-10 (2024) (describing the history of the term "weaponized First Amendment"); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, Council 31, 585 U.S. 878, 955 (2018) (Kagan, J., dissenting) ("And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."); Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2161 (2018) ("The Supreme Court's 'weaponized' First Amendment has been its strongest antiregulatory tool in recent decades, slashing campaign-finance regulation, public-sector union financing, and pharmaceutical regulation, and threatening a broader remit."); Seth F. Kreimer, *The 'Weaponized' First Amendment at the Marble Palace and the Firing Line: Reaction and Progressive Advocacy Before the Roberts Court and Lower Federal Courts*, 72 EMORY L.J. 1143, 1151 (2023) ("The Roberts Court's First Amendment doctrine has protected business interests against health and privacy regulation. It has innovated to 'weaponize' the First Amendment against labor unions."); Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1223 (2020) (describing "how and why the First Amendment has gone from a shield of the powerless to a sword of the powerful in the past hundred years").

15. *Janus*, 585 U.S. at 878.

employers to post notices detailing employees' rights under the NLRA.¹⁶ At the same time, core labor activities like picketing and secondary boycotts are denied First Amendment protection even when in the public square, demonstrating how the First Amendment has been used to tip the scale towards employers, not workers.¹⁷ The current First Amendment arguments aimed at limiting the scope of protections for protected, concerted activity threaten to intensify this asymmetry.

This Note examines *how* First Amendment expansion progresses in order to prevent further erosion of labor rights under the NLRA and particularly employees' rights to advance racial justice in the workplace. Additionally, it seeks to understand the role that race plays in animating the current effort by the employer bar to undermine protected activity. To do this, this Note draws on the methodology of critical legal rhetoric to identify the different frames, tropes, and literary devices that animate arguments for expanding the First Amendment to new areas of regulation.¹⁸ Specifically, it identifies a "grammar"¹⁹ of deregulation: 1) maximalist framing of the First Amendment to "speech-ify" conduct previously not covered by the First Amendment; 2) an individualist speaker frame that obfuscates context; and 3) a shift from the statutory focus on balancing multiple rights to an absolutist rights-as-trump frame. It also identifies a new frame, 4) "race-as-controversy," and argues that such rhetoric is an important part of the current attack on labor rights. Specifically, by framing the "BLM" display as a political issue unrelated to the realities of the workplace, Home Depot attempts to recast itself as a speaker in need of protection, rather than an employer barring protected employee speech.

This Note proceeds as follows: Part I describes the established framework for assessing what constitutes protected, concerted activity under the Act, including how the NLRB applied this framework in *Home Depot*. Part II then provides background on the "weaponized First Amendment," focusing on the rhetorical devices that help facilitate the First Amendment's expansion into new areas of law. Part III then engages in rhetorical

16. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956-60, 957 n.13 (D.C. Cir. 2013), *overruled on other grounds by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc); see also Kate Andrias, Janus's *Two Faces*, 2018 SUP. CT. REV. 21, 51-52 [hereinafter Andrias, *Janus*] (describing *Nat'l Ass'n of Mfrs. v. NLRB* as an example of a case that extended the logic of *Janus* to new regulatory contexts).

17. See Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1391 (2023) (discussing the trajectory of labor law and noting that "labor unions increasingly found themselves denied First Amendment protection for the forms of broad, solidaristic protest that built the labor movement"); Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011) [hereinafter Garden, *Citizens*] (arguing that the reasoning in *Citizens United v. FEC* calls into questioning the validity of existing restrictions on picketing, boycotting, striking, and the use of union dues); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2617 (2011) [hereinafter Garden, *Labor Values*] (arguing that union "comprehensive campaigns" targeted by Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuits should be protected speech under the First Amendment); Charlotte Garden, *Speech Inequality After Janus v. AFSCME*, 95 IND. L.J. 269, 269-70 (2020) [hereinafter Garden, *Speech Inequality*] (discussing the contradictions in *Janus* and different ways that the Court treats corporate versus union speech).

18. See, e.g., Lolita Buckner Inniss, "*Other Spaces*" in *Legal Pedagogy*, 28 HARV. J. RACIAL & ETHNIC JUST. 67, 72 (2012) [hereinafter Inniss, *Other Spaces*] (defining critical legal rhetoric).

19. See Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1986 n.154 (2018) (citing KENNETH BURKE, A GRAMMAR OF MOTIVES, at xix (Univ. of Cal. Press 1969) (1945)) (describing the "metaphorical usage of 'grammar'").

analysis of Home Depot's arguments, describing how it draws on the grammar of the deregulatory First Amendment and relies on a "race-as-controversy" framing to propel its argument. Finally, Part IV argues that to combat the First Amendment threat to protected, concerted activity, labor advocates should develop a counter rhetoric that elevates the democratic goals of the First Amendment and emphasizes the important role that protected, concerted activity can play in advancing these goals.

I. THE ESTABLISHED FRAMEWORK FOR ASSESSING PROTECTED, CONCERTED ACTIVITY

To understand the disruptive potential of employers' First Amendment arguments on protected, concerted activity, it is first necessary to understand the established framework for assessing whether the display of particular messaging is protected under the NLRA. This Part a) describes the legal standard for determining whether activities are protected under the NLRA, b) discusses how the NLRB applied this standard in the recent *Home Depot* case, and c) provides an overview of how Home Depot re-cast the issue as one of "free speech."

A. Background on Protected, Concerted Activity

Employers are able to promulgate work rules that impact what employees can say or wear in the workplace.²⁰ At the same time, it is well established that employees have the right to wear certain insignia in the workplace without employer interference, absent special circumstances.²¹ This Section provides background on the boundaries of these competing rights. Specifically, this Section provides an overview of 1) employee rights under the NLRA; 2) employer rights under the NLRA; and 3) the traditional framework for assessing conflicts between employee and employer rights under the Act, particularly as it relates to insignia.

1. Employee Rights Under the Act

The National Labor Relations Act protects more than just union activity. Under Section 7 of the Act, employees have the right to "engage in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection."²² The scope of this protection is broad, covering union and nonunion employees alike.²³ To retain protection under the Act, an employee must engage in an activity that is 1) concerted and 2) for the purpose of mutual aid and protection.²⁴

20. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945).

21. See sources cited *supra* note 10.

22. 29 U.S.C. § 157 (emphasis added).

23. 29 U.S.C. § 152 (defining the employers and employees covered under the NLRA); see also *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 15 (1962) (holding that the walkout of seven unorganized workers was protected under the NLRA even without a union or specific demands).

24. *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 152-53 (2014) (citing *Summit Healthcare Reg'l. Med. Ctr.*, 357 NLRB 1614, 1616 (2011)) ("To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.' Although these elements are closely related, our precedent makes clear that they are analytically distinct.").

An activity satisfies the concerted prong of Section 7 if it is “with or on the authority of other employees, and not solely by and on behalf of the employee.”²⁵ An activity is concerted when more than one employee is involved, even if the employees are not in agreement about the course of action.²⁶ Additionally, an activity may still be deemed concerted if only one individual is involved so long as they “seek to initiate or to induce or to prepare for group action” or raise “truly group complaints.”²⁷ Further, when an individual’s activity is a “logical outgrowth” of prior protected, concerted activity, the activity will also be considered concerted.²⁸ Finally, certain actions are considered “inherently concerted,” meaning they relate to such vital terms and conditions of employment that the actions necessarily implicate other workers.²⁹ Such categories include wages, work schedules, and job security.³⁰

An activity satisfies the mutual aid and protection prong if it relates to improving the terms and conditions of employment or otherwise advances the interests of “employees as employees.”³¹ This is a broad category that encompasses more than traditional labor issues, like wages and hours; reporting safety issues to OSHA,³² investigating sexual harassment,³³ and protesting racial discrimination in the workplace³⁴ all qualify for protection. Additionally, efforts to promote workers’ interests beyond a specific workplace also qualify.³⁵ This is true even if such efforts take the form of political action, such as advocating against right-to-work laws or pushing for higher minimum wage legislation.³⁶ However, activity that is “so purely political” or only “remotely connected” to employee concerns is not protected.³⁷

Protected Section 7 activity can take many different forms. The NLRA’s protections include discussions with coworkers;³⁸ engaging in walkouts;³⁹ posting on social

25. *Meyers Indus.*, 281 NLRB 882, 885 (1986), *aff’d sub nom.*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

26. *See Fresh & Easy*, 361 NLRB at 154 (citing *El Gran Combo*, 284 NLRB 1115, 1117 (1987), *enforced*, 853 F.2d 996 (1st Cir. 1988)).

27. *Meyers Indus.*, 281 NLRB at 887.

28. *See Mike Yurosek & Son, Inc.*, 306 NLRB 1038, 1039 (1992); *Every Woman’s Place, Inc.*, 282 NLRB 413, 413 (1986), *enforced mem.*, 833 F.2d 1012 (6th Cir. 1987).

29. *See, e.g., Hoodview Vending Co.*, 362 NLRB 690, 690 n.1 (2015).

30. *See, e.g., Trayco of S.C., Inc.*, 297 NLRB 630, 634 (1990) (wages inherently concerted), *enforcement denied*, 927 F.2d 597 (4th Cir. 1991); *Aroostook Cnty. Reg’l. Ophthalmology Ctr.*, 317 NLRB 218, 220 (1995) (work schedules inherently concerted), *enforcement denied in part*, 81 F.3d 209 (D.C. Cir. 1996); *Hoodview Vending Co.*, 362 NLRB at 690 n.1 (job security inherently concerted).

31. *Fresh & Easy*, 361 NLRB at 152-53; *see Eastex Inc. v. NLRB*, 437 U.S. 556, 570 n.20 (1978). Activities aimed at improving the interests of customers or other non-employees may be protected if there is an impact on working conditions. *See, e.g., NLRB v. Parr Lance Ambulance Serv.*, 723 F.2d 575, 578 (1983).

32. *Owens Ill., Inc.*, 290 NLRB 1193, 1204-05 (1988), *enforced*, 872 F.2d 413 (3d Cir. 1989).

33. *Fresh & Easy*, 361 NLRB at 151.

34. *See, e.g., Tanner Motor Livery Ltd.*, 148 NLRB 1402, 1404 (1964), *enforced in relevant part*, 349 F.2d 1 (9th Cir. 1965).

35. *Eastex*, 437 U.S. at 570.

36. *Id.* at 569-70.

37. *Id.* at 570 n.20 (“There may well be types of conduct or speech that are so purely political or so remotely connected to the concerns of employees as to be beyond the protection of the clause. But this is a determination that should be left for case-by-case consideration.”).

38. *See, e.g., Hoodview Vending Co.*, 359 NLRB 355, 357 (2012) (finding that discussions related to job security are inherently concerted).

39. *See, e.g., NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 15 (1962) (holding that a walkout in response to working conditions was protected).

media;⁴⁰ and wearing pins, buttons, stickers, shirts, or other insignia (referred to as insignia cases).⁴¹ When determining whether a particular activity is protected, the NLRB will not inquire as to whether the activity was wise, or whether it was the most effective means to accomplish a certain goal.⁴² Instead, the Board will apply an objective standard.⁴³ Employee motive is not relevant and an act will maintain protection even if the employee expresses a motive outside of mutual aid and protection.⁴⁴

An employer commits an unfair labor practice under the Act if they interfere with, restrain, or coerce employees in the exercise of protected activity.⁴⁵ In the insignia context, it is “well settled” law that an employer rule or action restricting insignia related to unions or other protected, concerted activity is presumptively unlawful.⁴⁶ Employers may overcome this presumption only if they demonstrate “special circumstances.”⁴⁷ Such special circumstances include instances where the display of such insignia would 1) jeopardize employee safety; 2) damage equipment or products; 3) exacerbate employee dissension; or 4) unreasonably interfere with established and enforced public image requirements.⁴⁸ Furthermore, an employer may ban messages that engage in product disparagement or offensive commentary.⁴⁹ However, to satisfy these exceptions, the employer must offer actual, non-speculative evidence; the mere presence of disagreement amongst employees will not be enough to establish a special circumstance.⁵⁰ Even with special circumstances, however, a rule restricting protected insignia must still be narrowly tailored.⁵¹

2. Employer Rights Under the Act

Just as employees have rights under the NLRA, so do employers. Section 8(c) of the Act provides that employers may express “any views, argument, or opinion” without it

40. See, e.g., *id.* at 16 (“[R]easonableness of workers’ decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not.”).

41. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-03 (1945) (holding that union pin was protected).

42. See *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 153 (2014).

43. *Id.* (“Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one.” (quoting *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enforced mem.*, 989 F.2d 498 (6th Cir. 1993))).

44. *Id.*

45. 29 U.S.C. § 158.

46. *In-N-Out Burger, Inc.*, 365 NLRB 471, 476 (2017); Gould, *supra* note 10, at 257.

47. *Boch Imports, Inc.*, 362 NLRB 706, 707 (2015), *enforced*, 826 F.3d 558 (1st Cir. 2016).

48. *Id.*

49. See, e.g., *Pathmark Stores, Inc.*, 342 NLRB 378, 379-80 (2004) (upholding bar on shirts that read “Don’t Cheat About the Meat”); *Sw. Bell Tel. Co.*, 200 NLRB 667, 667-70 (1972) (upholding bar on shirts that read “Ma Bell is a Cheap Mother”). But see *Constellation Brands, U.S. Operations, Inc.*, 367 NLRB No. 79, slip op. at 1 n.3 (2019) (upholding NLRB’s determination that the phrase “Cellar Lives Matter” was protected), *enforced*, 992 F.3d 642 (7th Cir. 2021); *Pac. Bell Tel. Co.*, 362 NLRB 885, 885-87 (2015) (upholding NLRB’s determination that insignia reading “Cut the Crap! Not My Healthcare” were protected, as well as insignia that said “No on Prop 32,” referencing a California ballot measure that would have limited the collection of union dues for political activity).

50. See, e.g., *Power Equip. Co.*, 135 NLRB 945, 965-67 (1962), *enforced*, 313 F.2d 438, 441-42 (6th Cir. 1963); *Mead Corp.*, 314 NLRB 732, 734 (1994), *enforced*, 73 F.3d 74 (6th Cir. 1996).

51. *Boch Imports*, 362 NLRB at 707.

being evidence of an unfair labor practice so long as the expression does not contain a “threat of reprisal or force or promise of benefit.”⁵² Thus, employers may make statements relating to unionization or other protected concerted activity (including negative characterizations), but employers may not make statements that constitute threats, misrepresentation, or other forms of coercion.⁵³ In addition to the statutory protection for certain forms of employer speech, employers are also given broad discretion over what are referred to as management rights.⁵⁴ Employers are able to institute reasonable work rules governing employee conduct, so long as these rules do not restrain protected activity.⁵⁵

3. Resolving Conflicts Between Employee and Employer Rights Under the NLRA and the First Amendment

The prior two subsections demonstrate that both employees and employers have rights under the NLRA and that existing Board doctrine strikes a balance between these rights.⁵⁶ For example, in the insignia context, employees have the right to wear buttons with messages related to protected, concerted activity. However, if wearing those buttons would actually interfere with management prerogatives like employee safety, the employer may demonstrate that a rule restricting buttons satisfies the special circumstances exception. If an employee shares a message that an employer does not agree with and no special circumstances apply, employers retain the right under Section 8(c) to express their opinion.

In addition to statutory rights, there have also been alleged conflicts with rights arising under the Constitution. The Supreme Court examined the issue of an alleged conflict between employees’ Section 7 rights and employers’ First Amendment rights in 1969 in *NLRB v. Gissel Packing Co.*⁵⁷ There, the Supreme Court considered whether enforcing the NLRA in regard to employer threats made during a union drive violated the First Amendment by restricting what employers could communicate to their employees.⁵⁸ The Court determined that such enforcement was lawful, finding that

52. 29 U.S.C. § 158(c).

53. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

54. Although there is no “employer rights” section in the NLRA, it is assumed that employers retain this discretion as a matter of common law. See Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 82-83 (2022) (“In legal parlance, the ‘employer prerogative’ refers to management’s authority to make unilateral decisions in the workplace. The employer prerogative is the default governance rule in the workplace; accordingly, all workplace-related decisions fall within the employer’s discretion unless altered by contractual agreements (implicit or explicit, individual or collective), statutes, agency decisions, or other court doctrines.” (emphasis in original)).

55. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (discussing the Board’s presumption); see also *Peyton Packing Co.*, 49 NLRB 828, 843 (1943) (“The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work.”).

56. Some labor scholars have argued that existing labor law overly prioritizes managerial interests. See, e.g., Racabi, *supra* note 54, at 79 (describing the prioritization of the employer prerogative); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 5-33 (2016) [hereinafter Andrias, *New Labor Law*] (describing the challenges of the existing labor law regime); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1536-40 (2002) (canvassing labor’s criticisms of labor law doctrine).

57. *Gissel*, 395 U.S. at 579 (addressing “whether certain specific statements made by an employer to his employees constituted such an election-voiding unfair labor practice and thus fell outside the protection of the First Amendment”).

58. *Id.* at 616-20.

employers' First Amendment rights are adequately protected by Section 8(c) of the NLRA.⁵⁹ This First Amendment protection does not extend to threats and promises of benefit because these constitute unfair labor practices.⁶⁰

In reaching this conclusion, the Court emphasized that the underlying purpose of Section 8(c) was to "encourage free debate on issues dividing labor and management."⁶¹ Therefore, the standard for employer speech must not function to stifle employee speech. Further, the Court noted that the determinations as to whether a particular statement constitutes a threat "must be made in the context of its labor relations setting."⁶² As such, balancing "must take into account the economic dependence of the employees on their employers,"⁶³ as well as the fact that employers may feel "freer to talk."⁶⁴ When presented with the argument that a contextual approach gives the NLRB too much "discretion to curtail free speech," the Court responded by pointing out that it is the employer who retains control over the employment relationship and information.⁶⁵ Accounting for the uneven speech rights of employers and employees is consistent with the NLRA's goal to mitigate the inequality in bargaining power between employers and employees.⁶⁶

There are no court cases that address either the separate issue of whether enforcement of the NLRA regarding employer work rules barring employee speech violates the First Amendment, or the narrower issue of whether banning insignia or pins in the workplace could violate the First Amendment.⁶⁷ The Supreme Court denied certiorari on this issue in *In-N-Out Burger, Inc. v. NLRB*, leaving the Fifth Circuit's holding that "Fight for 15" pins advocating for higher wages were protected under the Act.⁶⁸ The employer only raised the First Amendment argument in the petition for certiorari so neither the Board nor the court of appeals examined the issue.

The lack of case law on the First Amendment and employer work rules relating to insignia is not surprising given the established principles underlying First

59. *Id.* at 617 ("Thus, [Section] 8(c) . . . merely implements the First Amendment . . .").

60. *Id.*

61. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 955 (D.C. Cir. 2013), *overruled on other grounds by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

62. *Gissel*, 395 U.S. at 617.

63. *Id.*

64. *Id.* at 617-18 ("Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.").

65. *Id.* at 620.

66. 29 U.S.C. § 151 ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.").

67. See Home Depot Reply Brief, *supra* note 8, at 5-6 (noting that "[n]either the Board nor any court has ever adjudicated" labor related messages on a First Amendment Challenge).

68. *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 711 (5th Cir. 2018), *cert. denied*, 586 U.S. 1192 (2019).

Amendment law in the workplace. Notably, regulation impacting commercial speech is subject to a lesser level of scrutiny than other forms of speech.⁶⁹ As such, regulations that may impact advertising or public image are generally upheld so long as there is a sufficient governmental interest.⁷⁰ Additionally, work rules related to insignia address *employee* speech, not employer speech. For example, in the public employment context, employee speech is only attributable to the employer when it is part of that employee's official job duties.⁷¹ Thus, courts have rejected the idea that a public employer may prevent employees from donning apparel with messages when doing so is not related to the employees' official job duties.⁷² Although the NLRA covers private workplaces, the same principle should apply here: anything an employee communicates is not automatically attributed to an employer, and thus, there is no First Amendment claim when the NLRA protects employee speech.

Even more fundamentally, when the NLRB requires an employer to allow employees to don messages in the workplace, it is regulating conduct, not speech. At its core, the NLRB regulates what an employer is allowed to do regarding the work rules or dress codes it enforces and the actions that the employer can take towards employees. When an employer tells an employee they must remove a pin or button or be fired, they are not speaking for First Amendment purposes but enforcing a policy or work rule. Although such enforcement may involve literal written or spoken words, effectuating policy is not considered speech for the purpose of First Amendment analysis.⁷³ Unless and until conduct is "inherently expressive," the government may regulate it.⁷⁴ This speech versus conduct threshold explains why there have historically been very few First Amendment challenges to NLRB orders requiring employers to accommodate protected, concerted activity, even when the employee activity involves speech.

B. Applying the Standard for Protected, Concerted Activity and the First Amendment to the Facts of Home Depot

This Section examines the NLRB's application of the "protected, concerted activity" standard to the facts in *Home Depot* to determine that the BLM display at issue was protected under the NLRA. It further analyzes Home Depot's attempt to

69. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

70. *Id.*

71. See *Garcetti v. Ceballos*, 547 U.S. 410, 424-25 (2006); see also The American Federation of Labor and Congress of Industrial Organizations' Amicus Curiae Brief in Support of Respondent/Cross-Petitioner National Labor Relations Board at 4-5, *Home Depot USA, Inc. v. NLRB*, 158 F.4th 910 (8th Cir. 2025) (Nos. 24-1406, 24-1513), 2024 WL 3560114, at *4-5 (discussing legal standard for when employee speech may be attributable to an employer).

72. See *Amalgamated Transit Union Loc. 85 v. Port Auth.*, 39 F.4th 95, 101 (3d Cir. 2022) (finding that public employer's ban on face masks that read "Black Lives Matter" violated the First Amendment because the speech was not attributable to the employer).

73. See *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006) (The U.S. Supreme Court noted that policies requiring institutions to accommodate other's speech are generally conduct not speech, drawing on the example of regulating racial discrimination in the workplace, writing "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.").

74. *Id.* at 64.

circumvent this holding by invoking the First Amendment. Specifically, this Section discusses 1) the factual background of the case; 2) the procedural history; 3) a summary of the NLRB decision; and 4) a summary of Home Depot's First Amendment argument and the NLRB's response.

1. Factual Background

This case focuses on Home Depot's application of its dress code policy to an employee who wrote "BLM" on their apron.⁷⁵ Home Depot requires employees to wear the company's signature orange aprons at work.⁷⁶ Employees are encouraged to customize their aprons with pins, drawings, and other "flair."⁷⁷ Under Home Depot's dress code policy, however, employees are prohibited from displaying political messages "unrelated to workplace issues."⁷⁸

Employee Cáro Linda Bo began working at a Home Depot store located in New Brighton, Minnesota in August of 2020.⁷⁹ Days after beginning work, Bo had encountered another Home Depot employee behaving in a racist manner towards customers, particularly Black customers.⁸⁰ For example, the other employee instructed Bo to monitor a Black customer more closely because they were "more inclined to steal."⁸¹ Bo continued to encounter racism from the employee in question, directed not only toward customers but toward other employees as well.⁸² The employee would refuse to work with coworkers of color and made derogatory comments.⁸³ Bo and other co-workers reported this behavior to management.⁸⁴ Sometime in September 2020, Bo customized their apron by writing "BLM"⁸⁵ in reference to Black Lives Matter. Bo stated doing so was to "show . . . support for people of color or [B]lack associates."⁸⁶

After writing "BLM" on their apron, Bo continued to engage in conversations about racial justice in the workplace. Bo worked with co-workers to create a Black

75. Home Depot USA, Inc., 373 NLRB No. 25, slip op. at 1 (Feb. 21, 2024), *vacated on other grounds*, 158 F.4th 910 (8th Cir. 2025).

76. *Id.* at 22.

77. *Id.*; see also Brief to the Administrative Law Judge on Behalf of the Counsels for General Counsel at 72-76, Home Depot USA, Inc., No. 18-CA-273796, 2022 WL 2115188 (N.L.R.B. A.L.J. June 10, 2022) [hereinafter NLRB Post-Hearing Brief], <https://apps.nlr.gov/link/document.aspx/09031d458362f9d6> [<https://perma.cc/X5JE-399E>] ("Respondent's well-established practice of customizing aprons is so notorious that it has been celebrated at the Smithsonian Museum of American History.").

78. *Home Depot*, slip op. at 4.

79. Earlier in the procedural history of the case, Bo went by another name and was referred to as such. Over the course of litigation, Bo began the process of legally changing their name, and the NLRB updated accordingly. See Brief for the National Labor Relations Board at 2 n.2, *Home Depot USA, Inc. v. NLRB*, 158 F.4th 910 (8th Cir. 2025) (Nos. 24-1406, 24-1513). Bo uses they/them pronouns, which is reflected in the NLRB's materials as well. See *Home Depot*, slip op. at 1 n.5 ("It is the Board's practice to refer to individuals by the personal pronouns that they indicate they use." (quoting Starbucks Corp., 372 NLRB No. 93, slip op. at 1 n.1 (2023))).

80. *Home Depot*, slip op. at 2.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 18.

86. *Id.* at 10.

History Month display for the breakroom, including posters and flashcards.⁸⁷ Shortly after it was put up, the display was vandalized, with someone ripping and tearing down the materials.⁸⁸ The group raised concerns to management and the display was reinstated.⁸⁹ However, when the display was targeted again, Bo became increasingly concerned about the safety of employees and customers of color. Accordingly, Bo continued to display “BLM” on their apron, in protest of what they believed was a lack of meaningful response from management to the vandalism.⁹⁰ In consultation with other coworkers, Bo drafted an email to management requesting an “open discussion about racism” in their store.⁹¹ They wrote that such a dialogue was necessary for coworkers of color to feel safe, as was an acknowledgement from Home Depot management that racist actions would not be allowed to continue.⁹²

Management met with Bo on February 17, 2021 to discuss Bo’s email.⁹³ It was during this meeting that management first noticed the “BLM” on Bo’s apron.⁹⁴ Management told Bo that the BLM message violated the store’s dress code policy and informed Bo that they would not be able to return to work unless they removed it from their apron, going so far as to say that if they allowed the “BLM” message they would also need to allow swastikas.⁹⁵ Bo refused to remove the message from their apron and became upset, and management agreed to reconvene the next day.⁹⁶ When the meeting resumed the following day, management proposed alternative activities that Bo could engage in instead of the “BLM” apron message, but Bo insisted that they wanted to keep displaying “BLM” because it would make “the biggest impact” regarding addressing racism in the store.⁹⁷ Although management acknowledged their shortcomings in responding to concerns about racism in the store, they reiterated that the display was not allowed and Bo could not return to work without removing “BLM” from their apron.⁹⁸ Bo left work early and took the next day off.⁹⁹ That day, Bo sent a letter resigning from their position, writing that they did not feel safe during their

87. *Id.* at 2.

88. *Id.*

89. *Id.* at 2-3.

90. *Id.* at 8.

91. *Id.* at 3.

92. *Id.* (The email stated “I would like to open the floor for a wider discussion if possible. I believe these actions are part of a very serious underlying issue that needs to be a store wide discussion. . . . Home Depot needs to acknowledge that these actions will not be condoned and that they are not a reflection of our policies. During this month of all months specially, our fellow coworkers of color need to feel the support from the store they work for. There are multiple incidents in the break room especially where certain people feel the need to express their intolerant beliefs which cause people like me to feel uncomfortable and disrespected. These actions and those words are blatant intolerance and example [sic] of hatred that is unwelcomed. I do hope that a private investigation is underway, but I believe it is important to help our fellow coworkers of color feel safer about the environment they work in starting with opening up this discussion in a more public manner that shows us that we are as valued as everyone else at Home Depot.” (emphasis in original omitted)).

93. *Id.* at 4.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 6.

98. *Id.* at 4-5.

99. *Id.* at 5.

employment due to the “injustices, micro-aggressions and blatant racism” they and their coworkers experienced.¹⁰⁰ Although the letter did not mention the apron display, Bo later testified that being told to remove “BLM” from their apron was an “important aspect” of their decision to resign.¹⁰¹

2. Procedural History: Unfair Labor Practice Charge & ALJ Decision

Shortly after their resignation, Bo filed an unfair labor practice charge with the NLRB.¹⁰² In August 2021, NLRB Regional Office 18 filed a complaint against Home Depot alleging that Home Depot violated the NLRA when management required Bo to remove “BLM” from their apron because the message constituted protected, concerted activity.¹⁰³ Specifically, the NLRB General Counsel argued that such activity fell under the Board’s “inherently concerted” doctrine because “issues of racial harassment directly impact the working conditions of employees.”¹⁰⁴

In response, Home Depot argued that BLM is too attenuated from workplace concerns to be protected under the NLRA, characterizing BLM primarily as a movement to address police brutality.¹⁰⁵ Home Depot then argued that even if the display was protected, the special circumstances exception should apply because of their concerns about public image, employee safety, and employee dissension.¹⁰⁶ Home Depot also argued that even if the special circumstances exception didn’t apply, Bo’s BLM message nonetheless violated the company’s constitutional rights under the First Amendment¹⁰⁷ and its rights under federal trademark law.¹⁰⁸

On June 10, 2022, Administrative Law Judge (ALJ) Paul Bogas dismissed the complaint.¹⁰⁹ The ALJ held that Bo writing “BLM” on their apron was not protected, concerted activity because 1) it was not for “mutual aid and protection,” because the BLM messaging was deemed to be insufficiently related to workplace issues; and 2) it was unrelated to other collective actions that employees engaged in to address racial discrimination.¹¹⁰ Because the activity was determined not to be protected, the ALJ did not reach the issue of special circumstances, trademark law, or the First Amendment. Both the NLRB General Counsel and Home Depot filed exceptions with the NLRB.¹¹¹

100. *Id.*

101. *Id.*

102. Home Depot Cross Exceptions Brief, *supra* note 8, at 12.

103. *Id.*

104. NLRB Post-Hearing Brief, *supra* note 77, at 37; Kevin Stawicki, *Home Depot Axed Worker for BLM Support, NLRB Suit Says*, LAW360 (Aug 16, 2021), <https://www.law360.com/employment-authority/articles/1413342/home-depot-axed-worker-for-blm-support-nlr-suit-says> [<https://perma.cc/5WYG-JQYW>] (quoting a statement made by NLRB Regional Director Jennifer Hadsall).

105. Home Depot Post-Hearing Brief, *supra* note 8, at 4.

106. *Id.* at 5.

107. *Id.* at 45.

108. *Id.* at 44 n.26.

109. Home Depot USA, Inc., 373 NLRB No. 25, slip op. at 33-45 (Feb. 21, 2024), *vacated on other grounds*, 158 F.4th 910 (8th Cir. 2025).

110. *Id.* at 40.

111. See generally Home Depot Cross Exceptions Brief, *supra* note 8 (brief filed outlining exceptions to ALJ decision); Brief in Support of Exceptions to the National Labor Relations Board on Behalf of Counsel for the General Counsel, *Home Depot*, 373 NLRB No. 25 (No. 18-CA-273796), <https://apps.nlr.gov/link/>

3. NLRB Decision

In a majority NLRB opinion issued in 2024 by a Democrat-controlled Board, the Board reversed the finding of the ALJ.¹¹² First, the Board addressed the issue of whether Bo's actions were concerted, or taken with or on behalf of other workers.¹¹³ The Board held that the display was concerted because Bo's decision to continue displaying BLM was a logical outgrowth of prior group activity.¹¹⁴ Bo and other employees had repeatedly raised concerns about racially discriminatory working conditions and management's response to these conditions.¹¹⁵ Bo's decision not to remove the "BLM" messaging at the February 17th meeting was a direct outgrowth of these prior efforts, in contrast to the ALJ's determination that the action should be measured from when Bo first wrote the message. The Board emphasized that what mattered was Bo's decision to keep displaying "BLM" after they were directed to take it off, which grew out of the earlier efforts to combat racism in the store.¹¹⁶ Thus, the Board concluded that the action was concerted.¹¹⁷

Next, the Board determined that Bo's continued display of BLM on their apron satisfied the second prong of the protected activity test: that the activity was for the purposes of mutual aid and protection.¹¹⁸ The Board emphasized that it is "beyond dispute" that protesting racial discrimination "fall[s] within the ambit of mutual aid or protection."¹¹⁹ The Board noted that the parties did not dispute that Bo's activities regarding complaints about their coworker and concerns about the vandalism of the Black History Month display were protected.¹²⁰ The Board then found that these

document.aspx/09031d458382626f [https://perma.cc/BM5Z-SLQU] (same); *see also generally* Home Depot USA Inc., No. 18-CA-273796, https://www.nlr.gov/case/18-CA-273796 [https://perma.cc/TQ6U-WG6F] (NLRB case docket).

112. *Home Depot*, slip op. at 1-2.

113. *See supra* Section I.A.1 (discussion of concerted activity).

114. *Home Depot*, slip op. at 8 ("The Respondent first began asking [Bo] to remove the BLM marking during meetings in which [Bo] voiced group concerns about the Respondent's response to discriminatory working conditions and articulated the connection between [Bo]'s display of BLM and those group concerns. In these circumstances, [Bo]'s insistence on continuing to wear the BLM marking on their apron in February was, at a minimum, a logical outgrowth of the employees' prior concerted activities.").

115. *Id.* at 7-8.

116. *Id.* at 11.

117. Because the Board determined that Bo's actions were directly connected to group action, the Board did not need to consider the argument that because the "BLM" display related to racial discrimination, such action fell within the "inherent concern" doctrine, under which only one employee acting on their own can satisfy the concert requirement. *Id.* at 9 n.23. However, the Board expressly noted that they would not consider this argument in future cases. *Id.* ("In declining to take up this issue, we do not suggest that protesting workplace racial discrimination is any less central to the exercise of Sec. 7 rights than seeking to improve wages, to obtain desirable work schedules, or to protect job security, all of which we have found inherently concerted, and we express no view as to whether, in a future appropriate case, we would find protests of workplace racial discrimination to be inherently concerted."). Categorizing employee action that addresses racial discrimination as "inherently concerted" would be more protective of employee rights, as the employee would not need to demonstrate that they engaged in group activity. *See supra* Section I.A.1 (discussion of inherently concert).

118. *See supra* Section I.A.1.

119. *Home Depot*, slip op. at 9 (citing *Vought Corp.*, 273 NLRB 1290, 1294 (1984)) ("It is beyond dispute that employees' protests of racially discriminatory working conditions and of their employer's failure to respond to those conditions fall within the ambit of mutual aid or protection.").

120. *Id.*

activities were closely connected to Bo's decision to continue displaying "BLM" on their apron.¹²¹ However, the Board acknowledged that such a direct connection between prior efforts and protected activity was not necessarily a requirement in future cases, noting the broad coverage that Section 7 provides.¹²²

In reaching the conclusion that displaying "BLM" satisfied the mutual aid and protection prong, the Board rejected Home Depot's and the ALJ's argument that Black Lives Matter is too attenuated from the workplace because the BLM movement is generally associated with protesting police brutality. Although concerns about police brutality might have been a motivation for Bo in writing "BLM" on their apron initially, the Board held that the totality of the circumstances showed that Bo was concerned about the treatment of Black customers and other employees in the workplace.¹²³ Importantly, the Board noted that the standard for examining mutual aid and protection is objective and contextual, writing "[n]either the origins of 'BLM messaging,' nor its primary use, dictate how the BLM marking may be used or understood in a particular workplace context (or, indeed, in a broader setting)," therefore finding that the ALJ erred by ignoring objective evidence about the connection to Bo's working conditions.¹²⁴

After determining that displaying "BLM" merited protection under the Act, the Board then held that Home Depot failed to allege any "special circumstances" that would nonetheless allow them to bar the display of protected insignia.¹²⁵ The public image exception was not satisfied because Home Depot encourages employees to customize their aprons and there were no uniform style mandates for aprons.¹²⁶ The employee safety exception was not satisfied because Home Depot did not allege non-speculative, imminent risks.¹²⁷ Finally, the argument that BLM would cause employee dissension was also rejected because Home Depot failed to allege more than just disagreement, as the exception requires evidence of threats or disruption.¹²⁸ Having determined that the activity was protected and that no special circumstances applied, the Board held that applying the dress code policy to Bo's display of BLM was an unfair labor practice.¹²⁹

121. *Id.* at 11 ("Given the direct relationship between those protected concerted activities and [Bo]'s subsequent insistence on continuing to display the BLM marking, we find that the latter was for the purpose of mutual aid or protection.").

122. *Id.* at 9 n.25 ("We do not hold that a direct relationship between wearing the BLM marking and prior protected activity is necessary to establish that wearing such a marking is itself protected activity, only that here the relationship is sufficient for that purpose.").

123. *Id.* at 10.

124. *Id.* at 12.

125. *Id.* at 11-13 (identifying that exceptions may apply in special circumstances to maintain a company's public image, promote public safety, or avoid employee dissension; but rejecting all three as applicable in the case and emphasizing that the exceptions are narrow and require nonspeculative evidence).

126. *Id.* at 14, 14 nn.30-31.

127. *Id.* at 12.

128. *Id.* at 13.

129. *Id.*

C. Home Depot's Introduction of the First Amendment Frame & the NLRB's Response

1. Home Depot's First Amendment Argument

In the post-hearing briefing ahead of the decision, Home Depot contended that even if Bo's BLM display does fall under the NLRA's protection, a Board order requiring it to permit such messaging would violate the First Amendment because such an order would constitute compelled speech.¹³⁰ Specifically, Home Depot argued that its uniform policy is a "deliberate choice not to use its aprons to communicate any political or social messages unrelated to workplace activities, including the BLM speech at issue here."¹³¹ An order requiring Home Depot to accommodate speech contrary to its communicative intent would effectively force the company to alter its own expression, in violation of the Supreme Court's compelled speech doctrine.¹³² Home Depot argued that apron customizations are tantamount to Home Depot's speech, but in the alternative, the government cannot compel speakers to be conduits for others' speech.¹³³ Home Depot emphasized that First Amendment protections extend to corporations.¹³⁴ The company reiterated this argument in a letter to the Board following the Supreme Court's decision in *303 Creative LLC v. Elenis*, which held that a state anti-discrimination law violated a web designer's First Amendment rights by compelling her to potentially create wedding websites for gay couples, an activity the Court characterized as expressive speech.¹³⁵ Home Depot also cited cases demonstrating that the First Amendment applies in the labor context.¹³⁶ Although Home Depot emphasized that the company is committed to racial justice, it argued that allowing "BLM" messaging would not help accomplish this goal. Specifically, it argued that "the most common understanding of the BLM movement corresponds to the purely political issues of police brutality"¹³⁷ and thus should be considered an "ideological message" and "controversial."¹³⁸ Home Depot went on to state that "forcing Home Depot to allow employees to trumpet their personal political and social views on such topics would inflict severe First Amendment harm on Home Depot."¹³⁹ Home Depot further argued that the General Counsel's

130. Home Depot Post-Hearing Brief, *supra* note 8, at 36.

131. *Id.*

132. *Id.* at 36 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

133. *Id.* at 3.

134. *Id.* at 38 (first citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986); and then citing *Citizens United v. FEC*, 558 U.S. 310, 342 (2010)).

135. Notice of Supplemental Authority at 1-2, Home Depot USA, Inc., 373 NLRB No. 25 (Feb. 21, 2024) (No. 18-CA-273796) [hereinafter Home Depot Notice of Supplemental Authority] (citing *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023)), <https://apps.nlr.gov/link/document.aspx/09031d4583afae94> [<https://perma.cc/92KE-R8KF>] ("First, the Court confirmed that businesses like Home Depot enjoy the same First Amendment protections as individual speakers."); see *303 Creative LLC*, 600 U.S. at 603.

136. Home Depot Post-Hearing Brief, *supra* note 8, at 39 (first citing *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, Council 31, 585 U.S. 878 (2018); and then citing *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956-60, 957 n.13 (D.C. Cir. 2013), *overruled on other grounds by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc)).

137. Home Depot Post-Hearing Brief, *supra* note 8, at 47.

138. *Id.* at 41-42, 48.

139. *Id.* at 49.

theory has “sweeping implications” because it would require the company to accommodate any political or social message, including “MAGA,” “Occupy Wall Street,” and “White Lives Matter.”¹⁴⁰

2. The NLRB’s Response to Home Depot’s First Amendment Claims

In its decision, the Board summarily rejected Home Depot’s First Amendment argument, noting that “[Home Depot]’s interpretation of its First Amendment rights would abrogate decades of court and Board precedent insofar as it would broadly permit employers to suppress activity protected by Section 7 simply because the employer did not approve of it.”¹⁴¹ The Board concluded that the compelled speech precedents Home Depot cited were not analogous to the issue at hand because Home Depot was not itself compelled to speak. In those cases, “individuals were required to convey a message selected by the government,” by requiring a specific motto on all license plates, for example, or requiring individuals to salute a flag.¹⁴² By contrast, in the present case the message was selected by an employee, not the government.¹⁴³

The Board similarly rejected Home Depot’s claim that its First Amendment rights were violated because it would be forced to serve as an “unwilling conduit” for employee speech.¹⁴⁴ The Board noted that the core case invoked by Home Depot, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (“FAIR”), set out a clear rule that a compelled speech violation arises only when “the complaining speaker’s own message was affected by the speech it was forced to accommodate.”¹⁴⁵ Here, however, Home Depot remains free to share its own views on BLM regardless of what employees put on their aprons.¹⁴⁶ Moreover, to the degree a Board order requires Home Depot to allow employees to display BLM expression, such an order regulates the company’s *conduct*, not its speech, and therefore does not implicate the First Amendment.¹⁴⁷

Finally, the Board also rejected Home Depot’s “slippery slope” argument that allowing BLM messaging would open the floodgates for employees to display any messages.¹⁴⁸ The Board emphasized that an order to accommodate BLM expressions would only arise in the first place if a message qualifies as protected, concerted activity.¹⁴⁹ Thus, employers are not required to accommodate any and all employee expressions, but only those with a nexus to workplace conditions.¹⁵⁰

140. *Id.* at 47-48 (“Under the General Counsel’s theory, the possibilities are endless.”).

141. Home Depot USA, Inc., 373 NLRB No. 25, slip op. at 13-14 (Feb. 21, 2024), *vacated on other grounds*, 158 F.4th 910 (8th Cir. 2025).

142. *Id.* at 14 nn.31-32 (collecting and distinguishing cases cited by Home Depot); see *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 787-91 (1988); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 882 (2018); *Wooley v. Maynard*, 430 U.S. 705, 713-15 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

143. *Home Depot*, slip op. at 18.

144. *Id.*

145. *Id.* at 18 (citing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 63 (2006)).

146. *Id.*

147. *Id.* at 14 n.32 (distinguishing cases on expressive conduct).

148. *Id.* at 19.

149. *Id.*

150. *Id.* at 40.

3. Home Depot Appeals to the Eighth Circuit and Other Employers Follow Suit

Home Depot appealed the decision to the Eighth Circuit, where the NLRB cross-petitioned for enforcement of its order.¹⁵¹ In its briefing and at oral argument, Home Depot again pressed its First Amendment claim, repeating the same compelled speech arguments it had advanced before the Board.¹⁵² The appeal garnered support from a number of pro-employer and conservative groups that filed amicus briefs echoing the First Amendment compelled speech argument, including the Retail Litigation Center¹⁵³ and the Cato Institute.¹⁵⁴

Ultimately, the Eighth Circuit sided with Home Depot but without reaching the First Amendment.¹⁵⁵ The court determined that the NLRB failed to give enough weight to Home Depot's special circumstances defense, stating that Section 7 rights needed to be balanced with employer prerogatives.¹⁵⁶ In reaching this conclusion, the court emphasized that Bo could still have protested racial discrimination in the store by displaying a "less politically charged" message that was more targeted to the workplace.¹⁵⁷ Unlike the NLRB, the court held that Home Depot's claims that the message could impact the company's public image and/or give rise to safety concerns were reasonable.¹⁵⁸ The court vacated the NLRB's order and remanded for reconsideration of the special circumstances defense in light of the court's opinion.¹⁵⁹

The NLRB has a long-standing practice of "agency nonacquiescence," which refers to "[t]he selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals."¹⁶⁰ This means that although the NLRB must follow the order in the *Home Depot* case itself, it does

151. See *NLRB v. Home Depot U.S.A.*, 158 F.4th 910, 918 (8th Cir. 2025).

152. The attorney who has filed the First Amendment argument briefs with the NLRB, Roman Martinez, is also the attorney of record for the appeal. Roman Martinez has previously litigated deregulatory First Amendment cases at the Supreme Court. See Ronald K.L. Collins & David L. Hudson, Jr., *The Roberts Court: Its First Amendment Free Expression Jurisprudence: 2005–2021*, 87 BROOK. L. REV. 5, 101 (2021) (noting that Roman Martinez was an attorney on record for *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), which held that robocalling regulations violated the First Amendment).

153. Brief of Amicus Curiae Retail Litigation Center, Inc. in Support of Petitioner/Cross-Respondent at 7, *Home Depot*, 158 F.4th 910 (Nos. 24-1406, 24-1513), 2024 WL 2884962, at *7 ("The NLRB's directive thus forces the retailer to speak to its customers on a political issue when that retailer would prefer to remain silent. That compulsion violates the First Amendment.").

154. Brief of the Cato Institute as Amici Curiae Supporting Petitioner at 12, *Home Depot*, 158 F.4th 910 (Nos. 24-1406, 24-1513), 2024 WL 2884965, at *12 ("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.").

155. *Home Depot*, 158 F.4th at 918-24 (noting Home Depot's First Amendment argument but not reaching the issue in the opinion).

156. *Id.* at 913-14.

157. *Id.* at 920.

158. *Id.* at 917-18.

159. *Id.* at 924.

160. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989).

not necessarily need to change its approach to the special circumstances test in other proceedings, unless and until the Supreme Court weighs in.¹⁶¹

That said, the Eighth Circuit's decision is certainly a blow to protected, concerted activity because it will make it easier for employers to claim the special circumstances defense in cases where employees don insignia related to "controversial" topics. Even if the NLRB does not choose to adopt the Eighth Circuit's approach, it may signal to employers that they can bar a wider array of employee insignia on issues that their customers might disagree with, from racial justice to transgender rights.

Still, the court's lack of discussion of Home Depot's First Amendment argument means that there has not been a fundamental shift in the doctrine, so advocates may take some solace. However, the Eighth Circuit's decision does not mark the end of employer compelled speech claims. Other employers have begun to adopt similar arguments in other unfair labor practice proceedings,¹⁶² and more are likely to follow. By the time this Note is published, multiple circuit courts may have weighed in on this issue,¹⁶³ giving employers First Amendment arguments against protected, concerted activities even more airtime and attention. For this reason, it is important for labor advocates to scrutinize the deployment of First Amendment rhetoric in deregulatory efforts and to challenge the legitimacy of these arguments as they arise.

II. THE DEREGULATORY POTENTIAL OF FIRST AMENDMENT RHETORIC

The First Amendment is a familiar sword in labor law. As discussed above, the First Amendment has been used to bar public sector unions from requiring the payment of representational fees¹⁶⁴ and to strike down the NLRB's notice-posting requirements.¹⁶⁵ These cases are often cited as prime examples of the "weaponized First Amendment" in practice.¹⁶⁶ In light of this context, the employer First Amendment arguments in BLM cases should be understood as an attempt to put protected, concerted activity on the deregulatory agenda. For labor advocates, a worthy area of inquiry

161. Under the NLRA, an aggrieved party may appeal a decision in any circuit where the unfair labor practice took place, where that party resides or transacts business, or in the DC Circuit, making it difficult to predict where a particular unfair labor practice charge may be appealed. *See* 29 U.S.C. § 160(f). The practice of not adopting a particular circuit court's determination reflects this geographic uncertainty. For further discussion about agency nonacquiescence and the NLRB's approach, see generally BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV. R47882, AGENCY NONACQUIESCENCE: AN OVERVIEW OF CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS (2023) (providing overview of agency nonacquiescence).

162. *See* sources cited *supra* note 9.

163. Starbucks has raised a compelled speech argument against protected concerted activity before the Second Circuit. *See* Brief of Petitioner/Cross-Respondent and Special Appendix at 57, *Siren Retail Corp. v. NLRB*, No. 24-3168 (2d Cir. argued Nov. 12, 2025), <https://apps.nlr.gov/link/document.aspx/09031d4583fb52e2> [<https://perma.cc/9K8B-TZNR>].

164. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 884-86 (2018); *see also* Andrias, *Janus*, *supra* note 16, at 35 (describing the asymmetric application of the First Amendment in cases relating to union dues, noting "union dues are analogous to the wide range of circumstances where the government compels speech without triggering any First Amendment inquiry").

165. *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34 (D.D.C. 2012), *aff'd in part, rev'd in part*, 717 F.3d 947 (D.C. Cir. 2013).

166. *See supra* note 14 (discussing the weaponized First Amendment framing).

is thus how such arguments take root, and in what contexts they may be most likely to succeed.

The methodology of critical legal rhetoric provides a helpful tool for this inquiry.¹⁶⁷ Critical legal rhetoric builds upon the frameworks of legal realism, critical legal studies, critical race theory, and other discourse focused on how legal doctrines can maintain different forms of hierarchy and subordination.¹⁶⁸ Critical rhetoricians examine the ways in which legal formalism can obfuscate complexity and privilege dominant interests.¹⁶⁹ A study of rhetoric in this vein “examine[s] how the terms, definitions, arguments and evidence used in legal reasoning and decisions are used in the service of maintaining, strengthening, contesting, or changing societal power relations.”¹⁷⁰

The following Part draws on both rhetorical analysis and the scholarship on the weaponized First Amendment to identify the conditions under which deregulatory First Amendment arguments take root. This Part proceeds in the following sections: a) a background summary on the literature regarding the value of rhetorical inquiry and the tools of critical legal rhetoric; b) an examination of how the First Amendment has been used as a tool for deregulation; and c) an identification of the underlying “grammar” of the deregulatory First Amendment.

A. *Background on Rhetoric and the Value of Rhetorical Inquiry*

What is rhetoric, and why is it important to understand the First Amendment arguments at hand? At its core, rhetoric has been defined as the “art of persuasion,”¹⁷¹ but can also be understood more broadly as “a form of discourse.”¹⁷² Traditional rhetorical analysis looks at how arguments function, breaking them down into three categories: *logos* (appealing to logic), *ethos* (appealing to the credibility of the speaker), and *pathos*

167. See, e.g., Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 ST. JOHN'S J. LEGAL COMMENT. 649, 649 (2010) [hereinafter Inniss, *Critical Legal Rhetoric*] (citing MAROUF HASIAN, JR., LEGAL MEMORIES AND AMNESIAS IN AMERICA'S RHETORICAL CULTURE 14 (2000) [hereinafter HASIAN, LEGAL MEMORIES]) (defining and mapping the intellectual history of critical legal rhetoric); Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205, 206 (2020) (contrasting traditional legal rhetoric with critical legal rhetoric); Marouf Hasian, Jr. & Earl Croasmun, *Rhetoric's Revenge: The Prospect of a Critical Legal Rhetoric*, 29 PHIL. & RHETORIC 384, 393-94 (1996) [hereinafter Hasian & Croasmun, *Rhetoric's Revenge*] (contrasting critical legal studies' approaches to rhetoric and critical legal rhetoric); Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 259 (2009) [hereinafter Berger, *Embedded Knowledge*] (engaging in rhetorical analysis of how narrative and metaphor shape judicial decision-making in child custody disputes); Sara L. McKinnon, *Critical Legal Rhetoric Takes on Immigration and Refugee Law*, in RESEARCH HANDBOOK ON MODERN LEGAL REALISM 176, 176-77 (Shaughin Talesh, Elizabeth Mertz & Heinz Klug eds., 2021) (engaging in rhetorical analysis of tropes in immigration and refugee law).

168. See Inniss, *Other Spaces*, *supra* note 18, at 72 (discussing critical legal rhetoric as a critical discourse theory stemming from critical race theory).

169. Inniss, *Critical Legal Rhetoric*, *supra* note 167, at 670 (“A small group of ‘empowered elites’ profit from the denial of the rhetorical nature of law.”) (citing HASIAN, LEGAL MEMORIES, *supra* note 167, at 394).

170. McKinnon, *supra* note 167, at 176.

171. *Id.*

172. See Margaret Jane Radin, *Rhetorical Capture*, 54 ARIZ. L. REV. 457, 458 (2012) (“In previous work as well as here, I have used the term ‘rhetoric’ loosely to mean a form of discourse.”).

(appealing to emotion).¹⁷³ Other rhetorical studies extend this inquiry by examining the literary devices that lawyers use as tools of persuasion, such as narrative, metaphor, and metonym.¹⁷⁴

Rhetoricians also examine the use of particular “rhetorical frames” that rely on existing archetypes to communicate meaning. Frames rely on “idealized cognitive models” that invoke normative baselines.¹⁷⁵ The use of frames “guide an understanding of the meaning of experienced events.”¹⁷⁶ In this way, advocates can “purposefully employ language and visual cues to trigger preferred frames of understanding.”¹⁷⁷ The use of certain rhetorical frames can shift the focus of the question under consideration which then shapes how substantive doctrine develops.¹⁷⁸ Frames can also inject a normative baseline into seemingly neutral legal rules.¹⁷⁹ Additionally, rhetorical frames can shape how jurists interpret facts, alter the meaning of particular facts, or “transform them by use of fictions.”¹⁸⁰ As rhetorician James Boyd White has observed, “[l]ike law, rhetoric invents; and, like law, it invents out of something rather than out of nothing.”¹⁸¹ Identifying the rhetorical elements of legal arguments can illuminate the normative assumptions that animate particular claims.¹⁸²

Critical legal rhetoric provides a helpful methodology for exploring this relationship between the use of particular linguistic framing and legal outcomes. It focuses on understanding “the mechanisms that texts employ to frame meaning,”¹⁸³ with a particular

173. See, e.g., Eric Ruben & Joseph Blocher, “Second-Class” Rhetoric, Ideology, and Doctrinal Change, 110 GEO. L.J. 613, 621 (2022); Jamal Greene, *Constitutional Rhetoric*, 50 VALPARAISO U. L. REV. 519, 522 (2016) [hereinafter Greene, *Rhetoric*].

174. See, e.g., Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 987 (2007) [hereinafter Berger, *Of Metaphor*].

175. Robert L. Tsai, *Speech and Strife*, 67 LAW & CONTEMP. PROBS. 83, 101-02 (2004) (citing George Lakoff, *Categories: An Essay in Cognitive Linguistics*, in LINGUISTICS IN THE MORNING CALM 139, 164-65 (Linguistic Soc’y of Korea ed., 1982)); see also Berger, *Of Metaphor*, *supra* note 174, at 957 (“Spreading beyond everyday conceptual metaphors are the larger systems that Lakoff calls ‘idealized cognitive models’; legal categories are created and legal rules are interpreted within these larger systems. . . . These models affect how we categorize and reason about categories.”).

176. Peter K. Manning & Keith Hawkins, *Legal Decisions: A Frame Analytic Perspective*, in BEYOND GOFFMAN: STUDIES ON COMMUNICATION, INSTITUTION, AND SOCIAL INTERACTION 203, 207 (Stephen H. Riggins ed., 1990).

177. Tsai, *supra* note 175, at 89.

178. See, e.g., Devon Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1482 (2016) (describing how use of the rhetoric of “black-on-black crime” by conservatives shifts the conversation “from police killings of and violence against African-Americans to a discussion about [B]lack people killing and mobilizing violence against themselves”).

179. David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 673 (2010) (“[R]hetoric, as a form of legal reasoning, represents an attempt to persuade members of a polity about what the good life is (or should be) using an appeal to a set of common understandings.”); see also Berger, *Of Metaphor*, *supra* note 174, at 952 (“Courts may find it useful to behave as if these outcomes are determined by neutral principles, but it may be only the frame selected that makes it appear to be so.”).

180. Manning & Hawkins, *supra* note 176, at 216.

181. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 695 (1985).

182. Greene, *Rhetoric*, *supra* note 173, at 522 (“Recognizing the rhetorical nature of [constitutional] claims helps us to understand arguments within these discourses that are otherwise mysterious.”).

183. Inniss, *Critical Legal Rhetoric*, *supra* note 167, at 695 (“Genres of rhetorical criticism such as critical legal rhetoric typically consider the mechanisms that texts employ to frame meaning . . .”).

emphasis on how these mechanisms normalize certain ideological positions as legal fact.¹⁸⁴ As Professor Lolita Buckner Inniss explains, critical legal rhetoric “names the rhetorical practices and clarifies the ideologies that go into making up the law’s articulations.”¹⁸⁵ This exercise of naming can help illuminate the mechanics operating “below the surface of constitutional discourse,” opening up new avenues for analysis and critique.¹⁸⁶ Rhetorical inquiry “identifies the shadows and illusions, and it shines light on underlying themes,”¹⁸⁷ which can allow for a more nuanced understanding of the law. Accordingly, exposing how rhetoric operates can create new pathways for legal argument moving forward.¹⁸⁸

B. *The Weaponized First Amendment & First Amendment Opportunism*

The “weaponized First Amendment”¹⁸⁹ and “new Lochnerism”¹⁹⁰ are terms used to categorize a series of decisions issued by the Roberts Court that adopt First Amendment justification to weaken economic and civil rights regulation.¹⁹¹ Commonly cited

184. McKinnon, *supra* note 167, at 176 (describing how critical legal rhetoric “examin[es] the law as a particular discourse that naturalizes specific definitions, arguments, ideal, and ideologies as legal fact”).

185. Inniss, *Critical Legal Rhetoric*, *supra* note 167, at 649.

186. Tsai, *supra* note 175, at 85.

187. Berger, *Of Metaphor*, *supra* note 174, at 988.

188. See Inniss, *Critical Legal Rhetoric*, *supra* note 167, at 663 (citing Raymie E. McKerrow, *Critical Rhetoric: Theory and Praxis*, 56 COMM’N. MONOGRAPHS 91, 92-93 (1989)) (describing the intellectual history of critical rhetoric, noting that scholars have characterized it “as a project having a theoretical rationale and principles of praxis”); Berger, *Embedded Knowledge*, *supra* note 167, at 307-08 (“If the meaning of legal texts depends on metaphoric and narrative constructions, it is important to discern ‘what interpretive frameworks are at work in specific legal contexts’ so that we can develop competing or complementary rhetorical moves.” (quoting ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 4 (1st ed. 2001))); see also Hasian & Croasmun, *Rhetoric’s Revenge*, *supra* note 167, at 393-94 (describing the purpose of critical legal rhetoric as moving beyond just critique).

189. See Hosie, *supra* note 14, at 403-06; Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 955 (2018) (Kagan, J., dissenting); Purdy, *supra* note 14, at 2161; Kreimer, *supra* note 14, at 1151; MacKinnon, *supra* note 14, at 1223; see also Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015) (“It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation.”); Andrias, *Janus*, *supra* note 16, at 31 (“As scholars have detailed, the Roberts Court’s First Amendment cases, taken together, expand the scope of activity that the First Amendment protects, transforming what was previously understood as ordinary business activity into protected speech.”); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2118 (2018) [hereinafter Lakier, *Antisubordinating*] (“These days, the winners in First Amendment cases are much more likely to be corporations and other economically and politically powerful actors.” (citing John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 248 (2015))).

190. Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 133 (2016) (“Once the mainstay of political liberty, the First Amendment has emerged as a powerful deregulatory engine—and one with great implications for modern governance.”); Kessler & Pozen, *supra* note 19, at 1971 (“Recent scholarship on the political economy of our digital age suggests several factors that may have helped to catalyze First Amendment Lochnerism in the present period.”). But see Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1915-16, 1922 (2016) [hereinafter Kessler, *Lochnerism*] (arguing “that contemporary critics of First Amendment Lochnerism have overstated the phenomenon’s novelty and understated the economically libertarian tendencies that may be intrinsic to judicial enforcement of civil liberties, regardless of the politics of individual judges”).

191. See Kessler & Pozen, *supra* note 19, at 1959 (first citing Shanor, *supra* note 190, at 133; and then citing Kessler, *Lochnerism*, *supra* note 190, at 1917-18 nn.5-8) (“Following the 2008 financial crisis, the Roberts Court handed down a series of rulings that demonstrated the degree to which the First Amendment can be used to thwart economic and social welfare regulation—generating widespread accusations that the Court had created a ‘new Lochner.’”).

examples of this deregulatory trend include *Sorrell v. IMS Health Inc.* (striking down law that restricted the sale, disclosure, and use of certain pharmacy data),¹⁹² *Janus v. AFSCME* (barring public sector unions from collecting agency fees),¹⁹³ and *Citizens United v. FEC* (limiting the reach of campaign finance regulation).¹⁹⁴ The most recent Supreme Court decision in this vein is *303 Creative v. Elenis*, which held a state anti-discrimination statute unconstitutional on the grounds that it had the effect of compelling speech.¹⁹⁵ Deregulatory First Amendment arguments have also been adopted in lower courts.¹⁹⁶ Scholars predict that First Amendment arguments in this vein are likely to expand to new areas of regulation.¹⁹⁷

The weaponized First Amendment as a phrase not only describes the increasing prevalence of First Amendment challenges, but the asymmetry of these challenges in terms of where they are coming from and what they are targeting. Quantitative research shows that corporations are more likely to benefit from First Amendment arguments at the Supreme Court.¹⁹⁸ Although successful First Amendment challenges are still being brought by litigants from across the political spectrum and for purposes outside of deregulation,¹⁹⁹ at the level of Supreme Court litigation, it is deregulatory interests that prevail.²⁰⁰

What facilitates the increasing use of deregulatory First Amendment arguments and these arguments' success? Professor Frederick Schauer has identified "First Amendment opportunism," or the phenomenon of the First Amendment being used in more and

192. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579-80 (2011).

193. *Janus*, 585 U.S. at 879.

194. *Citizens United v. FEC*, 558 U.S. 310 (2010).

195. *303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023).

196. See, e.g., *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956-60, 958 n.13 (D.C. Cir. 2013), *overruled on other grounds by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc).

197. See, e.g., Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 337 (2021) (discussing the deregulatory potential of First Amendment arguments in response to efforts to regulate technology companies); see also Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, WM. & MARY L. REV. 1614, 1633-34 (2015) [hereinafter Schauer, *Politics and Incentives*] ("The foregoing may well support the possibility that the future may see increased receptivity to First Amendment-inspired attacks on securities laws, antitrust laws, consumer protection laws, pharmaceutical and other product labeling laws, and the speech-restricting dimensions of the law of procedure and evidence.").

198. See Coates, *supra* note 189, at 224 (finding that "[n]early half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals"); see also Kreimer, *supra* note 14, at 1155 (finding that out of the 104 First Amendment cases decided by Supreme Court in the 2005 through the 2021 terms, "right-wing and allied litigants prevailed in 76% of their First Amendment cases; progressives and their allies prevailed in only 30% of their assertions of First Amendment rights").

199. See, e.g., Kreimer, *supra* note 14, at 1143, 1162-63 (finding that at the lower court level, "successful litigants were far more likely to come from the ranks of progressives," but in more than half of these successful cases, the plaintiffs lost on appeal or in further litigation, suggesting that their initial success may in part be attributed to a lag in lower courts' adoption of Supreme Court doctrine).

200. *Id.* at 1152-53 ("Among the successful cases [at the Supreme Court], two out of three of the claimants (39/59) came from the coalition of right-wing interests: businesses, right-wing Christian organizations and individuals, mobilization against abortion and LGBTQ+ rights, and right-wing activists."); see also Collins & Hudson, *supra* note 152, at 58 (discussing the libertarian and conservative tilt of successful First Amendment claims).

more areas of law that were previously seen as outside the scope of First Amendment coverage.²⁰¹ Claims that at one point may have seemed frivolous or “off the wall” withstand initial scrutiny, priming the ground for new arguments in new fora.²⁰² According to Schauer, one reason for the expanding use of the First Amendment is the indeterminacy of the legal doctrine that applies when assessing whether or not the First Amendment even applies in the first place.²⁰³ Schauer contends that the answer to whether an issue triggers First Amendment coverage at all is based not on legal doctrine, but on “a complex and seemingly serendipitous array of factors,” providing advocates with a malleable mode of argument.²⁰⁴

Schauer argues that these factors, combined with “the capacious language of the First Amendment,” mean it is “extremely difficult to dismiss almost any First Amendment claim as wildly implausible.”²⁰⁵ Consequently, litigants face few disincentives from adding a First Amendment component to their arguments, accounting for the rise in free speech claims. Another driving force behind the First Amendment’s appearance in new fora is “the omnipresence of speech (in the ordinary language meaning of the word).”²⁰⁶ Because nearly every activity touches on speech in the literal sense, the opportunity to recast an action as speech in need of protection arises in nearly all fora.²⁰⁷ As such, it becomes even more important for advocates to understand how this expansion happens and to illuminate the process as it occurs to stop its expansion and prevent First Amendment claims from stymieing new areas of regulation.

C. Identifying the Rhetoric of the Weaponized First Amendment

In the introductory article to a Columbia Law Review symposium focused on “Free Expression in an Age of Inequality,” professors Jeremy Kessler and David

201. See, e.g., Schauer, *Politics and Incentives*, *supra* note 197, at 1627 (describing the phenomenon of “First Amendment opportunism”); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1796 (2004) [hereinafter Schauer, *Boundaries*] (describing the “outward pressure on the boundaries of the First Amendment”); Frederick Schauer, *The Speech-ing of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 347, 347-48 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) [hereinafter Schauer, *Speech-ing*].

202. Schauer, *Politics and Incentives*, *supra* note 197, at 1629 (citing Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 388 (1982)).

203. Schauer, *Speech-ing*, *supra* note 201, at 348 (“The view that First Amendment scrutiny of the universe of verbal sexual harassment is the proper understanding of the task of the First Amendment, however, presupposes that there are moderately workable and well-known doctrinal or theoretical standards to determine the scope of the First Amendment’s coverage. It turns out, however, that this presupposition is not the case. Although it is now obvious that the overwhelming proportion of verbal or linguistic behavior has nothing whatsoever to do with the First Amendment, the boundary between the speech that implicates the First Amendment and the speech that does not is as much a matter of history, sociology, culture, and politics as it is a matter of formal constitutional doctrine or philosophical free speech theory.”).

204. Schauer, *Boundaries*, *supra* note 201, at 1768.

205. *Id.* at 1797-98.

206. *Id.*

207. Shanor, *supra* note 190, at 133 (“Because nearly all human action operates through communication or expression, the First Amendment possesses near total deregulatory potential.”).

Pozen put forth what they label the “grammar of free speech egalitarianism.”²⁰⁸ They use the term “grammar” to refer to the motifs, tropes, and other rhetorical devices that animate a particular argument.²⁰⁹ They advance an egalitarian grammar to identify “argumentative resources” for advocates who wish to combat the weaponization of the First Amendment.²¹⁰ Specifically, they identify the following rhetorical devices: 1) a minimalist or maximalist framing to either “expand or contract the scope of the First Amendment’s coverage;”²¹¹ 2) adopting a “speech on both sides” framing to emphasize the egalitarian values of the First Amendment;²¹² and 3) shifting from a focus on an individual speaker to a broader system of speakers and listeners.²¹³

The insight that certain arguments may draw on a particular grammar, or set of rhetorical resources, is also helpful for the reverse project of critiquing the rhetoric of the weaponized First Amendment. To this end, this Note builds from Kessler, Pozen, and other scholars to identify the grammar of the deregulatory First Amendment, or the argumentative resources that litigants are likely to draw on. This grammar is the functional inverse of the grammar of an egalitarian First Amendment. Specifically, deregulatory First Amendment arguments share the following characteristics: 1) a maximalist framing of the First Amendment to “speechify” conduct previously not covered by the First Amendment; 2) an individualist speaker frame that obfuscates societal or statutory context; and 3) a shift from balancing multiple rights to an absolutist rights-as-trump frame. The following Part discusses these frames further and identifies how Home Depot drew on this grammar of First Amendment deregulation. Although Home Depot was not successful in getting the Eighth Circuit to adopt its reasoning, as noted, other employers will likely follow suit, and thus, it is helpful to utilize Home Depot’s arguments as a case study in how this rhetoric is deployed in the labor context.

III. EVALUATING THE USE OF RHETORIC IN HOME DEPOT’S FIRST AMENDMENT ARGUMENTS

The NLRA has been cited as an example of regulation that typifies content-based regulation of speech not covered by the First Amendment.²¹⁴ Home Depot, however, tried to cast doubt on this determination.²¹⁵ This Part demystifies the rhetoric that animates Home Depot’s First Amendment argument that the First Amendment should

208. Kessler & Pozen, *supra* note 19, at 1953-54; *see also* discussion *infra* Part IV (applying Kessler and Pozen’s framework to the issue of protected, concerted activity).

209. *Id.* at 1986 n.154 (describing the “metaphorical usage of ‘grammar’”).

210. *Id.* at 1986.

211. *Id.*

212. *Id.* at 1995.

213. *Id.* at 2001.

214. *See, e.g.,* Schauer, *Boundaries*, *supra* note 201, at 1768 (listing the National Labor Relations Act as a content-based restriction of speech that does not “present serious First Amendment issues”).

215. During the drafting of this Note, the Eighth Circuit reached its decision in *Home Depot* without reaching the First Amendment argument. *See* NLRB v. Home Depot U.S.A., 158 F.4th 910 (8th Cir. 2025). However, in the part that follows, I utilize the present tense to describe Home Depot’s argument to put a clearer emphasis on the role that rhetoric plays in animating the underlying legal claims.

insulate employer dress codes that violate the NLRA. To this end, I discuss how Home Depot's arguments employ the grammar of the deregulatory First Amendment identified above. Specifically, the arguments rely on 1) a maximalist framing of the First Amendment that "speechifies" NLRB regulation; 2) invocation of an individualist speaker frame that obfuscates the workplace context; and 3) a shift from balancing multiple rights under the NLRA to an absolutist rights-as-trump frame. In addition, I argue that there is a new element of rhetoric that Home Depot deployed: 4) characterizing race as controversial. Home Depot's argument relies on a characterization of BLM as a divisive ideological issue divorced from the workplace, rather than a message that advances better working conditions. Framing issues of race as political issues outside the boundaries of the workplace both increases the salience of the First Amendment framing and attempts to narrow the scope of what topics can receive protection under labor law.

*A. Home Depot Employs a Maximalist Framing of the First Amendment that
"Speechifies" NLRB Regulation*

1. Background on "Speech-ing" Conduct

A core hurdle that litigants seeking to invoke the First Amendment must overcome is to successfully argue that the First Amendment even applies at all.²¹⁶ Rather than arguing whether speech should be protected or not, a litigant must first make the case that the conduct at hand triggers First Amendment coverage.²¹⁷ Indeed, as Schauer and others point out, it is generally accepted that a wide array of regulations that might touch on speech are outside of the First Amendment's scope, from securities regulation to the Uniform Commercial Code.²¹⁸ Historically, it has been recognized that although these established regulatory regimes may have an impact on what people or companies can say, they do not actually trigger First Amendment scrutiny.²¹⁹ Thus, litigants hoping to invoke the First Amendment must adopt certain

216. Schauer, *Boundaries*, *supra* note 201, at 1769 ("Even before we see what a rule *does*, we must make the initial determination of whether it *applies* at all—whether we are within its scope of operation. So too with the First Amendment, which of course is not infinitely applicable." (emphasis in original)).

217. *Id.* ("Though many cases involve the First Amendment, many more do not. The acts, behaviors, and restrictions not encompassed by the First Amendment at all—the events that remain wholly untouched by the First Amendment—are the ones that are simply not *covered* by the First Amendment. It is not that the speech is not *protected*. Rather, the entire event—an event that often involves 'speech' in the ordinary language sense of the word—does not present a First Amendment issue at all, and the government's action is consequently measured against no First Amendment standard whatsoever. The First Amendment just does not show up." (emphasis in original)).

218. *Id.* at 1768 (noting that "the content-based restrictions of speech in the Securities Act of 1933, the Sherman Antitrust Act, the National Labor Relations Act, the Uniform Commercial Code, the law of fraud, conspiracy law, the law of evidence, and countless other areas of statutory and common law do not, at the least, present serious First Amendment issues").

219. *Id.* at 1805-06 ("It is one thing to make it harder to regulate a certain type of utterance, but another thing entirely to dismantle a longstanding regulatory structure.").

rhetorical devices to cast their particular actions as now falling within the scope. Schauer has labeled this process as “speech-ing.”²²⁰

“Speech-ing” conduct that would otherwise not be subject to First Amendment scrutiny is made possible in part because of the difference between “speech” as a term of art and “speech” in the literal sense of the word.²²¹ Litigants take advantage of the fact that the term “speech” in a colloquial sense encompasses a wide array of activity.²²² Litigants are therefore incentivized to characterize the action at hand as speech and emphasize the communicative potential of the activity being regulated.²²³ As a result, First Amendment rhetoric puts a premium on narrative. The focus on narrative means that First Amendment rhetoric is relatively malleable: “Free speech law has become a kind of game in which well-heeled litigants looking to evade regulation characterize their acts in purely expressive terms, and often get away with it.”²²⁴

Litigants are also incentivized to characterize the First Amendment as broad and absolute, providing robust protection against minuscule incursions on the litigant’s actual ability to communicate with the world. Invoking the absolutist frame often involves bold pronouncements about the state of the law, including the text of the First Amendment itself which states “Congress shall make no law . . . abridging the freedom of speech.”²²⁵ However, “freedom of speech” is also a term of art and “[t]he First Amendment has never before protected expression in its totality.”²²⁶ In actuality, the “freedom of speech is a far more limited right than our rhetoric suggests,”²²⁷ which indicates that absolutist rhetoric can obscure complexities of doctrine and encourage an overly broad application of the First Amendment.²²⁸

220. See generally Schauer, *Speech-ing*, *supra* note 201 (describing the process of how First Amendment claims brought against sexual harassment regulation moved from being dismissed to being accepted).

221. See *id.* at 348-49; Schauer, *Boundaries*, *supra* note 201, at 1797-98 (describing how “the capacious language of the First Amendment, the indeterminacy of the First Amendment’s purposes, the omnipresence of speech (in the ordinary language meaning of the word)” combine to make it “extremely difficult to dismiss almost any First Amendment claim as wildly implausible.”).

222. Leslie Kendrick, *First Amendment Expansion*, 56 WM. & MARY L. REV. 1199, 1212-16 (2015).

223. See *id.* at 1209 (“[T]he First Amendment offers strong protection at a seemingly low price of admission. The incentives are clear. Just as ketchup can suddenly look like a vegetable to a strapped USDA, so too can general antiregulatory sentiment suddenly look like a speech claim to any litigant who can remotely characterize her activity as one that involves communication. A bit of speech, like a dab of tomato sauce, puts one in a whole new category.”).

224. JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* 112 (2021) [hereinafter GREENE, RIGHTS].

225. U.S. CONST. amend. I.

226. Shanor, *supra* note 190, at 193 (“The First Amendment provides that ‘Congress shall make no law . . . abridging the freedom of speech.’ But, as demonstrated above, were the First Amendment to extend to all ‘speech’ or ‘expression’ as such, nearly the entire regulatory state and criminal law would come under constitutional scrutiny—a situation that even the most casual observer knows is not currently the case.” (omission in original)).

227. J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CAL. L. REV. 277, 293 (2010).

228. *Id.*

2. Home Depot's Use of Maximalist First Amendment Framing

Examples of emblematic rhetoric:

"Curating those messages [on employees' aprons] as a way of communicating Home Depot's values and presenting an image that connects with customers is undoubtedly speech. Forcing Home Depot to alter the content of that speech is not compatible with the First Amendment."²²⁹

"This case seeks to compel Home Depot's speech in violation of the First Amendment."²³⁰

"First, and most directly, the government cannot compel a speaker to alter the content of its own speech in favor of conveying the government's desired speech."²³¹

To make a successful First Amendment claim, Home Depot must first establish that the First Amendment applies, a claim that runs counter to existing doctrine. Therefore, the conduct at issue (an employer's work rule barring protected activity) must be transformed into compelled speech. Home Depot accomplishes this "speech-ing" by recasting its rule limiting apron customizations as a primarily communicative policy and then employing maximalist language about the compelled speech doctrine.

Home Depot argues that its apron policy is primarily communicative, utilizing verbs like "curating" and "presenting."²³² This focus on communication and artistry is consistent with the observation that litigants will craft a narrative that emphasizes the expressive elements of their conduct.²³³ However, work aprons serve many purposes unrelated to communication, such as allowing customers to locate employees in the store or providing a low-cost uniform. By characterizing Home Depot's policy of restricting what employees may put on their aprons as "curating" rather than maintaining a dress code, Home Depot is drawing associations to the expressive activity at the heart of the First Amendment.

However, there is still a challenge for Home Depot. The NLRB rule at hand relates to employee communications, not employer speech. To address this, Home Depot relies on maximalist rhetoric related to the scope of the First Amendment and the scope of the compelled speech doctrine, pulling bold pronouncements from Supreme Court decisions without relating back to the facts at hand. For example, Home Depot quotes the text of the First Amendment stating:

The First Amendment flatly prohibits any law "abridging the freedom of speech."
U.S. Const. amend. I. Inherent in that freedom is "the decision of both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S.

229. Home Depot Motion for Summary Judgment, *supra* note 7, at 18.

230. *Id.* at 1.

231. Home Depot Post-Hearing Brief, *supra* note 8, at 36 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

232. See, e.g., Home Depot Post-Hearing Brief, *supra* note 8, at 44.

233. GREENE, RIGHTS, *supra* note 224, at 112.

781, 797 (1988). The First Amendment thus does not merely limit the government's power to restrain speech, but also "prohibits the government from telling people what they must say." *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.* ("FAIR"), 547 U.S. 47, 61 (2006).²³⁴

Although these pronouncements are accurate statements of the law at hand, the broad proclamation of the First Amendment obfuscates the nuances of doctrine. The cases cited by Home Depot are factually distinct, but Home Depot presents them without factual context. For example, in *FAIR*, the Supreme Court held that a federal law that conditioned the receipt of federal funding for universities on allowing military recruiters on campus *did not* violate the First Amendment.²³⁵ Although campuses had to accommodate the speech of a third party, the Court held that such an accommodation did not violate the First Amendment because universities were still free to disseminate their own speech.²³⁶ As the NLRB notes in its decision, the facts of *FAIR* actually support the proposition that it is entirely lawful to require Home Depot to accommodate employee messages.²³⁷ Home Depot however focuses on a broader quotation from *FAIR* that obfuscates this nuance, consistent with maximalist rhetoric.

B. Home Depot Invokes an Individual Speaker Frame that Obfuscates the Workplace Context

1. Background on the Individual Speaker Frame

The next rhetorical move to expand First Amendment coverage is portraying the litigant as a speaker in need of protection. Focusing on individual speaker rights often invokes language that emphasizes normative values of individual autonomy over other democratic values underlying the First Amendment, such as access to information.²³⁸ The individual speaker frame draws on the conception of the First Amendment as primarily an individual "negative autonomy right" to be free from state interference.²³⁹ Invoking phrases like "free speech" emphasizes the individual, rather than the audience for that speech, or the systems-level aspects of speech. Professor Leslie Kendrick summarizes this phenomenon as follows: "[i]f the value underlying 'the freedom of speech' is individual autonomy, employers and manufacturers may cast themselves as unwilling speakers whose autonomy rights are being violated."²⁴⁰

234. Home Depot Cross Exceptions Brief, *supra* note 8, at 28.

235. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 70 (2006).

236. *Id.* at 64-65.

237. Home Depot USA, Inc., 373 NLRB No. 25, slip op. at 14 (Feb. 21, 2024), *vacated on other grounds*, 158 F.4th 910 (8th Cir. 2025).

238. See Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1246-47 (2020) [hereinafter Lakier, *Lochner Problem*].

239. *Id.* ("[T]he real source of the similarities between contemporary free speech law and *Lochner*-era freedom of contract jurisprudence is that both construe the constitutional right they vindicate as a strong but limited negative autonomy right: as a right that guarantees freedom from intentional government interference with an individual's autonomy, but one that provides almost no protection whatsoever against private interference and constraint.").

240. Kendrick, *supra* note 222, at 1214.

Litigants will invoke particular speaker tropes to further increase the salience of the individual rights frame and cast themselves as the actor in need of protection.²⁴¹ This is a particularly important tool when the litigant is a corporation. Through invoking individual speaker tropes, corporate litigants will analogize themselves to individual people engaging in the type of expressive or political speech that the First Amendment guards carefully. For example, Professor Sonya Bonneau details the role of the idealized artistic speaker trope in recent First Amendment cases, describing how litigants analogize themselves to expressive speakers entitled to the utmost scrutiny.²⁴²

Language invoking imagery of an individual speaker also likens corporate communications to the “everyday speech” of individuals, thereby sidestepping the distinct legal regime that applies to commercial speech.²⁴³ Historically, commercial speech has been entitled to a lesser degree of First Amendment protections.²⁴⁴ Corporate litigants are able to skip discussing these complexities and “need only tap into common cultural notions that speech is speech is speech.”²⁴⁵ This “speech is speech” frame anthropomorphizes corporations by equating powerful litigants with everyday people, glossing over power imbalances between parties.²⁴⁶ Additionally, this language can distract from the initial purpose of the underlying regulation, which is often to promote more equal social or economic conditions. As articulated by Professor Catharine MacKinnon:

The First Amendment, firmly ensconced within the liberal tradition, tends reflexively to see power as residing in the state, which it sees as power’s fountainhead. . . . Freedom—here, freedom of speech—thus becomes about protecting existing social arrangements, which includes inequalities of power in society, from the state. This includes protecting inequality when the state supports intervention to address that inequality by means of, for example, civil laws against discrimination that include an expressive element.²⁴⁷

241. See, e.g., Purdy, *supra* note 14, at 2165 (discussing how the Roberts Court’s political spending decisions focused on the voice of speakers, “as if corporations were marginalized populations in search of dignity, and liberally invoke the language of nondiscrimination, almost reflexively borrowing the moral language of First Amendment liberties”).

242. See generally Sonya G. Bonneau, *The Romantic Author as Compelled Speaker*, 97 TUL. L. REV. 53 (2022) (describing the emergence of the “romantic author trope” in First Amendment compelled speech jurisprudence, and how the trope functions to privilege the rights of businesses over other conflicting rights).

243. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)) (collecting examples of regulation touching on commercial speech, stating “[e]ach of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity”).

244. Shanor, *supra* note 190, at 146 (noting how commercial speech was once characterized as having a “subordinate position in the scale of First Amendment values” but is now provided with more robust protection); see also *Ohralik*, 436 U.S. at 456 (noting that the Court has “afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values”).

245. Shanor, *supra* note 190, at 189.

246. *Id.* at 200-02.

247. MacKinnon, *supra* note 14, at 1226.

In this way, adopting an individual speaker frame is a rhetorical tool that allows litigants to ignore the very power imbalances that drove the regulation in the first place.

2. Home Depot's Use of the Individual Speaker Frame

Examples of emblematic rhetoric:

"Just like the plaintiffs in *Maynard*—who were forced to 'use their private property as a "mobile billboard" for the State's ideological message or suffer a penalty'—the General Counsel seeks to force Home Depot to use its most recognizable symbol, worn by its most public-facing employees, to display a BLM message under threat of legal sanction."²⁴⁸

"A customer who sees an associate wearing a BLM message on his apron—or any other kind of political or social slogan, for that matter—will naturally conclude that the message is being conveyed either on Home Depot's behalf, or with Home Depot's blessing."²⁴⁹

Home Depot is able to invoke the individual speaker frame by citing cases that explicitly confer First Amendment rights to corporations. For example, quoting *303 Creative*, Home Depot writes:

First, the Court confirmed that businesses like Home Depot enjoy the same First Amendment protections as individual speakers. It did not "make[] a difference" that the plaintiff "offer[ed] her speech for pay and d[id] so through 303 Creative LLC," because speakers do not "shed their First Amendment protections by employing the corporate form to disseminate their speech."²⁵⁰

By adopting the language of corporate personhood, Home Depot is able to shift the focus from its role of an employer to its role as a speaker.²⁵¹ However, it is notable that *303 Creative*'s holding was focused on a discrete expressive activity (i.e., website design). Here, Home Depot is focused on its branding and public reputation, which is, arguably, better categorized as commercial speech, and thus subject to a less stringent First Amendment standard.²⁵²

Home Depot then emphasizes that, as an individual speaker, it is entitled to "free speech rights."²⁵³ Focusing on individual rights prioritizes the negative liberty conception of the First Amendment rather than the idea that the First Amendment

248. Home Depot Post-Hearing Brief, *supra* note 8, at 42 (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

249. Home Depot Motion for Summary Judgment, *supra* note 7, at 18.

250. Home Depot Notice of Supplemental Authority, *supra* note 135, at 1.

251. For more on the power of the corporate personhood frame, see Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 384-85 (2015).

252. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (establishing lower standard for commercial speech).

253. Home Depot Cross Exceptions Brief, *supra* note 8, at 8 ("[T]he General Counsel's complaint is unconstitutional because it infringes Home Depot's free speech rights.").

should promote a democratic forum. The sidelining of the democratic role of the First Amendment can also be seen in the failure to discuss the value of employee speech. Indeed, employees engaging in protected activity are strikingly absent from the analysis, reduced to “third parties” that Home Depot is being compelled to serve as a conduit for their speech.²⁵⁴

The other primary actor in the framing of the issue is the NLRB, which further sidelines the role and interests of employees. By centering its complaint on the NLRB as a party, rather than the individual employees, Home Depot frames the issue as one of state coercion and negative liberty. This framing is consistent with other corporate litigants that bring First Amendment claims.²⁵⁵ Home Depot employs terms like “force” and “threat of legal sanction” to amplify this theme.²⁵⁶ For example, Home Depot wrote: “[t]he stated purpose of the General Counsel’s Complaint is to force Home Depot to communicate certain specific political and social messages on Home Depot-owned aprons.”²⁵⁷ This passage ascribes intent to the General Counsel that does not actually exist. The focus of the General Counsel was not on Home Depot’s speech at all, but on protecting the employees’ rights under the NLRA. Focusing on the alleged result of NLRB enforcement rather than the underlying reason for enforcement (i.e., an unfair labor practice) obscures the state’s interest in ensuring compliance with labor law.

The individual speaker narrative also serves to transform employee speech into employer speech. As the NLRB noted in the *Home Depot* decision, the NLRA “protects the right of employees to choose for *themselves* whether to engage in or refrain from engaging in protected concerted activities. 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.”²⁵⁸ Home Depot, however, invokes the individual speaker trope to obscure the element of employee choice. Specifically, it emphasizes the expressive characteristics of its uniform policy, which, as discussed above, makes the policy seem less like a work rule that can be regulated by the NLRB and more like an activity that is traditionally regulated by the First Amendment (such as a parade).²⁵⁹ Emphasizing the artistic qualities of Home Depot’s conduct is also consistent with evoking the romantic author trope identified by Professor Bonneau.²⁶⁰ The result is that Home Depot presents itself as a more sympathetic litigant.

In addition to emphasizing the artistic nature of its activity, Home Depot invokes language characterizing itself as a political dissenter in need of protection. This

254. Home Depot Motion for Summary Judgment, *supra* note 7, at 5.

255. See *supra* note 239.

256. Home Depot Post-Hearing Brief, *supra* note 8, at 42.

257. Home Depot Motion for Summary Judgment, *supra* note 7, at 1.

258. Home Depot USA, Inc., 373 NLRB No. 25, slip op. at 14 (Feb. 21, 2024), *vacated on other grounds*, 158 F.4th 910 (8th Cir. 2025).

259. Home Depot Motion for Summary Judgment, *supra* note 7, at 13–14 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 575–76 (1995)).

260. Bonneau, *supra* note 242, at 53.

characterization further increases the salience of the First Amendment frame. Home Depot uses vocabulary such as “controversy,” “political speech,” and “ideological message” to cast the issue as one that the First Amendment should be particularly concerned with. However, claiming the role of marginalized political speaker obfuscates that, in reality, Home Depot maintains its vast speech rights and political power. Home Depot still retains the right to share opinions under Section 8(c) of the NLRA.²⁶¹ Home Depot also retains power over workers to enforce its dress code against employee speech with the threat of discipline, as long as doing so would not abrogate Section 7 rights.²⁶² In addition, Home Depot has far more resources than individual employees to ensure that its message is heard.²⁶³ However, the use of the individual speaker frame allows Home Depot to ignore these realities and instead frame itself as a victim of government overreach.

C. Home Depot Employs an Absolutist Rights-as-Trump Frame that Overshadows Employee Rights Under the NLRA

1. Review of the First Amendment Absolutist Rights-as-Trump Frame

Once a litigant has established that the First Amendment applies to the conduct in question, there is a built-in advantage to First Amendment challenges: the cultural salience of free speech rights. Constitutional law professor Jamal Greene describes the “rights as trumps” frame, wherein individual rights generally override competing public interests.²⁶⁴ Under this framework, rights are often discussed as absolute, and conflicts are positioned as zero sum games.²⁶⁵ Consequently, invoking rights rhetoric “gives an argument a sense of a determined outcome.”²⁶⁶ This is due, in part, to the cultural appeal of the language of the Constitution; generally, “Americans are receptive to the language of rights.”²⁶⁷ Therefore, just invoking the language of “rights” provides litigants with a rhetorical advantage.

261. See *supra* Section I.A.2-3.

262. *Id.* at 3.

263. In 2023, Home Depot’s revenue was approximately \$153 billion. See *Revenue for Home Depot (HD)*, COMPANIESMARKETCAP, <https://companiesmarketcap.com/home-depot/revenue> [<https://perma.cc/65KM-GCCF>] (last visited June 17, 2026).

264. Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 30-35 (2018) [hereinafter Greene, *Trumps*].

265. *Id.* at 34. Greene argues that, from a normative point of view, this dichotomy is corrosive to our constitutional dialogue: “When rights are trumps, they favor rhetoric over judgment, simplicity over context, homogeneity over diversity. The frame requires us to formulate constitutional politics as a battle between those who are of constitutional concern and those who are not. It coarsens us, and by leaving us farther apart at the end of a dispute than we were at the beginning, it diminishes us.” *Id.*; see also Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1419 (1984) (“Thus . . . conventional rights rhetoric assumes a ‘zero-sum’ game.”).

266. Laura K. Klein, *Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System*, 98 GEO. L.J. 505, 509 (2010).

267. *Id.* at 509.

The First Amendment is no exception to this trend. First Amendment rights occupy a particular cultural space in the American psyche.²⁶⁸ As stated by Professor Toni Massaro, “[w]e love our First Amendment rhetoric and many of its results, despite the analytical chaos they produce.”²⁶⁹ The result of this cultural salience is that “once a new zone gains free speech protection, we are loath to remove it.”²⁷⁰ First Amendment arguments, therefore, carry a level of staying power.

Schauer refers to this cultural salience as “the First Amendment’s magnetism.”²⁷¹ The prioritization of the First Amendment is part of the United States’ “rhetorical terrain.”²⁷² Said another way, “First Amendment rhetoric has a special political cachet in the United States that allows free speech claims to trump equality claims when the two conflict, or are perceived to do so.”²⁷³ Thus, litigants employing a First Amendment frame often start with a persuasive advantage.²⁷⁴ Professor Kate Andrias describes how the rights-as-trumps frame operated in *Janus v. AFSCME*:

In the First Amendment area, once a regulation falls into the category of restricting or compelling protected speech, and in particular political speech, the regulation is likely to fail. The work is done by the categorization. At that point, little attention is paid to how burdensome a regime is in practice, or how good a reason the government has for its regulation in light of the particular situation. *Janus* is part and parcel of this approach: once the Court concluded that political speech was burdened, the union objector was destined to win. The government’s interests could not outweigh this categorically grievous harm.²⁷⁵

Litigants do not need to demonstrate actual harm to prevail. Rather, litigants will focus on the concept of “First Amendment harm,” which is distinct from any material reality. To increase the persuasiveness of this harm, litigants employ slippery slope arguments or hypothetical extremes to make their point.

268. GREENE, RIGHTS, *supra* note 224, at 13 (“Americans often view the First Amendment as sacred and inviolable.”)

269. Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 371 (2014).

270. *Id.*

271. Schauer, *Boundaries*, *supra* note 201, at 1789.

272. *Id.* (“[T]he First Amendment, freedom of speech, and freedom of the press provid[ing] considerable rhetorical power and argumentative authority.”); *see also* GREENE, RIGHTS, *supra* note 224, at 13 (“Americans often view the First Amendment as sacred and inviolable.”); Massaro, *supra* note 269, at 371 (“We love our First Amendment rhetoric and many of its results, despite the analytical chaos they produce.” (emphasis in original)); Klein, *supra* note 266, at 505 (“Americans are receptive to the language of rights.”); Andrias, *Janus*, *supra* note 16, at 56 (“In our constitutional culture, the First Amendment has extraordinary power and resonance.”).

273. Schauer, *Speech-ing*, *supra* note 201, at 355.

274. Schauer, *Boundaries*, *supra* note 201, at 1790 (“The individual or group on the side of free speech often seems to believe, and often correctly, that it has secured the upper hand in public debate. The First Amendment not only attracts attention, but also strikes fear in the hearts of many who do not want to be seen as opposing the freedoms it enshrines.”); *see also* Greene, *Trumps*, *supra* note 264, at 34 (describing how rights are often described as absolute, and thus outcome determinative).

275. Andrias, *Janus*, *supra* note 16, at 38.

2. Home Depot's Use of the First Amendment Absolutist Rights-as-Trump Frame

Examples of emblematic rhetoric:

"And the NLRA cannot trump the Constitution."²⁷⁶

"Even apart from the harmful impact on customers and employees, forcing Home Depot to allow employees to trumpet their personal political and social views on such topics would inflict severe First Amendment harm on Home Depot, and other employers."²⁷⁷

"No [government] interest is sufficiently compelling to justify the General Counsel's attempt to require Home Depot to communicate messages on its aprons that it does not want to communicate there."²⁷⁸

Home Depot's argument relies on the rights-as-trump frame and the cultural salience of freedom of speech. Throughout its arguments, Home Depot emphasizes that the Constitution must trump the NLRA. However, given that First Amendment coverage is not firmly established, use of this "rights-as-trump" framing presupposes that Home Depot has a First Amendment interest in maintaining its dress code policy. The other impact of the "rights-as-trump" frame is that it leaves no room to discuss conflicting rights, both in terms of the employees' rights under the NLRA and potential First Amendment interests regarding freedom of association.

Consistent with this approach, Home Depot also employs the language of "severe First Amendment harm"²⁷⁹ and suggests that this harm alone is enough to decide the issue, regardless of the government's interests in implementing the NLRA.²⁸⁰ Such a pronouncement is indicative of the type of absolutist framing that Professor Kate Andrias observed in *Janus*: "the work is done by the categorization."²⁸¹ Home Depot need not produce actual evidence of harm to succeed, which provides it with a persuasive advantage over the NLRB standard for "special exceptions," which requires non-speculative evidence. For example, Home Depot consistently claims that the BLM message will be misattributed as its own. However, in evaluating whether allowing the BLM message violated trademark law, the Board found there was no evidence of customer confusion.²⁸² The gulf between Home Depot's rhetoric about misattribution and the factual record (showing no misattribution) demonstrates how the First Amendment framing benefits Home Depot. Home Depot can invoke the language of "harm" despite an evidentiary record that suggests very few individuals actually took

276. Home Depot Motion for Summary Judgment, *supra* note 7, at 25.

277. *Id.* at 22.

278. *Id.* at 23.

279. *Id.* at 22.

280. *Id.* at 23.

281. Andrias, *Janus*, *supra* note 16, at 38.

282. Home Depot USA, Inc., 373 NLRB No. 25, slip op. at 14 (Feb. 21, 2024), *vacated on other grounds*, 158 F.4th 910 (8th Cir. 2025).

note of the “BLM” display. During Bo’s five months of displaying BLM on their apron, no one from management even noticed.²⁸³ However, Home Depot’s language about the potential harm (as well as phrases like “trumpet their political views” in reference to the impact of the apron display) would lead one to believe that the message was much more visible and disruptive.

The focus on potential harm also obscures that the NLRA does provide a mechanism for employers to address many of the concerns listed by Home Depot. Employers can invoke the special circumstances exception to accommodating protected insignia. For example, Home Depot argues that one of the potential harms of protecting BLM is that this will cause conflict with customers and other employees. However, at the point that an employee displaying a BLM message actually causes a non-speculative, imminent risk, Home Depot would be able to invoke the employee safety exception.²⁸⁴ Thus, First Amendment absolutism obscures the ways that the NLRA already protects employer interests.

D. Home Depot Portrays Race as Controversial Issue Unrelated to the Workplace

All the rhetorical resources identified in the previous sections are available to any employer who wants to contest protection of insignia they disagree with. And yet the first three cases where employers have made arguments before the NLRB that insignia protections constitute compelled speech occurred in the context of Black Lives Matter displays. This is not a coincidence. Home Depot is taking advantage of the fact that “Black Lives Matter” is considered controversial, and this is a key component of its rhetoric. This Section provides a background on literature focusing on the role of rhetoric in conversations about race. It then discusses how Home Depot uses this rhetoric to amplify its First Amendment argument.

1. Review of Race-as-Controversial Frame

A number of legal scholars have explored the myriad of ways that legal rhetoric can obscure meaningful discussion of race and racism.²⁸⁵ One core concept is the use of colorblind rhetoric, that sees racism as something that happens “out there,” or as a historical artifact.²⁸⁶ According to Professor Jonathan Feingold, “[c]olorblindness, at its core, reduces race to an otherwise arbitrary physical attribute and situates racism in an ignoble past.”²⁸⁷ Rhetoric that obscures race has also made its way not only to the right, but the left as well, in a process he refers to as “colorblind capture.”²⁸⁸ The

283. Home Depot Post-Hearing Brief, *supra* note 8, at 22 (noting that there is no evidence that “any Home Depot representatives with responsibility for enforcing the dress code and apron policies . . . ever noticed [Bo]’s BLM display prior to this February 17, 2021, meeting”).

284. *Id.* at 16.

285. See, e.g., Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 24-25 (2022) (describing the Roberts Court’s “impoverished conceptualization of what ‘counts’ as racism”); Jonathan P. Feingold, *Colorblind Capture*, 102 B.U. L. REV. 1949, 1949 (2022) (identifying the phenomenon of “colorblind capture”); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 2 (1990) (identifying the phenomenon of “[B]lack abstraction”).

286. Bridges, *supra* note 285, at 24.

287. Feingold, *supra* note 285, at 1955.

288. *Id.*

impact of colorblind capture is to “erod[e] any meaningful legal or moral distinction between antiracism and racism.”²⁸⁹ Without the distinction between race and racism, pronouncements of anti-racism can be treated as divisive or controversial. Taken to its extreme, colorblind rhetoric can produce phenomena like the backlash against teaching issues of race in schools.²⁹⁰

Another feature of colorblind rhetoric is “[B]lack abstraction,” which is defined as “the refusal to depict [B]lacks in any real and vividly drawn social context.”²⁹¹ A feature of such rhetoric is the absence of language, or a glossing over of race and racism. In the realm of issues intersecting with corporate power, colorblind rhetoric can obscure that “corporate privilege has a clear racial allegiance—undergirding the property interests in whiteness.”²⁹² Thus, much like how First Amendment rhetoric can function to hide power imbalances, so too does colorblind rhetoric.²⁹³

2. Home Depot’s Use of Race-as-Controversial Frame

Examples of emblematic rhetoric:

“Consistent with this self-described purpose, the vast majority of public articulations and explanations of BLM-related activities focus on issues of police brutality and other violence against Black communities, without reference to workplace matters.”²⁹⁴

“As with most political issues, the Black Lives Matter movement evokes widely divergent viewpoints amongst different population groups.”²⁹⁵

“If accepted, [the General Counsel’s theory] would inevitably lead to polarization by politicizing workplaces, thus harming the in-store experience for customers and employees alike.”²⁹⁶

Home Depot uses rhetoric to portray BLM as a divisive, and even dangerous, statement. For example, Home Depot states that if it allows BLM, it would need to allow phrases including “MAGA,” “White Lives Matter,” and “Blue Lives Matter.”²⁹⁷ During the ALJ hearing, counsel for Home Depot used the example of a

289. *Id.* at 1957.

290. See, e.g., Dylan Saul, *School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans*, 107 MINN. L. REV. 1311, 1326 (2023) (quoting Republican Senator Ted Cruz as saying CRT is as “every bit as racist as the Klansmen in white sheets”).

291. Ross, *supra* note 285, at 2.

292. Amanda Werner, *Corporations Are (White) People: How Corporate Privilege Reifies Whiteness as Property*, 31 HARV. J. RACIAL & ETHNIC JUST. 129, 142 (2015).

293. Cf. MacKinnon, *supra* note 14, at 1238 (discussing the intersection between First Amendment doctrine and racism, noting that early doctrine about the First Amendment “submerg[ed] powerful evidence of substantive inequality, frequently protecting and furthering it”).

294. Home Depot Post-Hearing Brief, *supra* note 8, at 10.

295. *Id.* at 11.

296. Home Depot Motion for Summary Judgment, *supra* note 7, at 20.

297. Home Depot Post-Hearing Brief, *supra* note 8, at 47–48 (“Under the General Counsel’s theory, the possibilities are endless.”).

swastika on an apron as an attempt to try and portray Bo as inconsistent on their thoughts about messages on apron.²⁹⁸ Through these comparisons, Home Depot is attempting to erase the line between racism and antiracism, or at least suggest there is no workable legal distinction between the two. This erasure is consistent with the framework of “colorblind capture” identified above which “erodes any meaningful legal or moral distinction between” antiracism and racism.²⁹⁹

Additionally, Home Depot cites these examples of controversial slogans to create a “slippery slope” argument that the NLRB’s enforcement may enhance racism in the workplace rather than protect employees.³⁰⁰ However, this slippery slope rhetoric does not acknowledge that there is in fact a limiting principle embedded in the NLRB’s test: messages must be related to the interests of employers and employees. There is a substantive difference between declarations that “Black Lives Matter,” in workplaces where racial discrimination has been an issue, and a declaration like “Blue Lives Matter” which is focused on public police officers. It is difficult to imagine how a private sector worker covered by the NLRA would be able to demonstrate the necessary nexus to employment interests to justify a phrase that refers to a pro-police catchphrase. Additionally, equating the use of “BLM” in this context with an employee donning the phrase “White Lives Matter” trivializes Bo’s observations of racism in the workplace.³⁰¹ Ignoring the reality of racial discrimination in the workplace is consistent with the rhetoric of abstraction identified above. Indeed, Home Depot states explicitly that the facts regarding racial discrimination in the workplace do not matter to First Amendment analysis,³⁰² which goes beyond abstraction to purposeful exclusion.

Home Depot uses language that positions BLM as a matter of personal opinion rather than as an issue that has intersections with the workplace. This is a false dichotomy. As the record in Home Depot shows, employees themselves are drawing connections between the message of “Black Lives Matter” and the goal of creating a safe workplace environment.³⁰³ Home Depot also creates a false dichotomy between “ideological” issues and workplace issues. For example, Home Depot writes “Nothing about the ‘labor relations setting’ makes it constitutional for the Board to

298. *Id.* at 43-44 (“Most notably, during [Bo]’s cross-examination, counsel for Home Depot presented [Bo] with the following hypothetical question: ‘If you walked into a Home Depot and you saw an associate wearing a—be[ing] allowed to wear a swastika on their apron, would that suggest to you that Home Depot endorses it?’ Without hesitation or qualification, [Bo] immediately responded, ‘Yes.’” (third alteration in original) (internal citation to record omitted)).

299. Feingold, *supra* note 285, at 1976.

300. Home Depot Post-Hearing Brief, *supra* note 8, at 48 (“The display of such controversial messages, then, can stir discord among customers and employees. Worse, the discord can even lead to violence, as Home Depot itself and other employers have witnessed.”)

301. For example, “[o]n [Bo]’s first day of employment, they shadowed Gumm [the other employee], who told them to watch out for Somali customers because, she claimed, they are more likely to steal.” *Id.* at 14.

302. See, e.g., Home Depot Reply Brief, *supra* note 8, at 4 (“While these and the other facts referenced by the General Counsel provide helpful color to the Board in understanding the context of this dispute, they are not material factual disputes that make any difference to the legal question presented by Home Depot’s First Amendment defense.”).

303. See *supra* Section I.B.1 (discussing Bo’s motivations for displaying “BLM” on their apron).

force Home Depot to display ideological messages on its aprons,” juxtaposing labor on the one hand and ideological messages on the other.³⁰⁴ However, many protected labor messages are also ideological, and it is likely that almost any meaningful statement about the intersection of race and labor would be.

In making its arguments, Home Depot relied on familiar tools of the weaponized First Amendment. First, Home Depot adopted a maximalist framing of the First Amendment that transformed complying with regulation into compelled speech. Second, Home Depot utilized narrative to cast itself not as a large employer, but an individual speaker in need of protection from government overreach. Third, Home Depot invoked absolutist language, emphasizing that any impact on its alleged right to stay silent on an issue is a constitutional harm. However, it is the final element, characterizing race as a controversial issue, that propels its argument forward. By characterizing BLM as a controversial political issue, Home Depot portrays itself not just as an individual speaker, but a victim, subjected to an ideology it does not agree with. Doing so completely obscures the reality of the situation, both in terms of Home Depot’s actual power as an economic and political actor and in terms of the reality of the workplace at issue.

IV. DEVELOPING A COUNTER RHETORIC TO CABIN THE REACH OF FIRST AMENDMENT ARGUMENTS AGAINST PROTECTED, CONCERTED ACTIVITY

If Home Depot’s rhetoric functions to privilege its own alleged “speech” over employees’ rights under the NLRA, it is worth assessing why protected, concerted activity is important in the first place. Extending protections to employees in the workplace helps to accomplish one of the main purposes of the NLRA, which is to address “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association.”³⁰⁵ Embedded in this statement is the notion that employment-at-will, the norm in non-unionized workplaces, tilts the scales towards employers. The NLRA seeks to remedy this inequality through collective bargaining.³⁰⁶ Robust protections for Section 7 activity help to realize these objectives by ensuring that employees cannot be terminated for attempting to improve their working conditions.

Protected, concerted activity is particularly important in a non-union environment where employees do not yet have the protections or resources that come with a union contract, which is a vast majority of the workforce.³⁰⁷ Organizing in not-yet-unionized workplaces is propelling forward important campaigns to improve the working conditions of low-wage workers, such as the Fight for \$15.³⁰⁸ Moreover, as described in Part I, protections for Section 7 activity allows employees to address a

304. Home Depot Motion for Summary Judgment, *supra* note 7, at 25.

305. 29 U.S.C. § 151.

306. *Id.*

307. See Press Release, Bureau of Lab. Stat., U.S. Dep’t of Lab., Union Members—2024 (Jan. 19, 2023), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/3HKL-4T5P>].

308. See Andrias, *New Labor Law*, *supra* note 56, at 47–48.

myriad of issues from workplace safety to low pay. Robust protections for Section 7 activity are also important to help ensure the effectuation of rights under other worker protection statutes such as anti-discrimination or workplace safety laws. These protections ensure that workers cannot be terminated for working together to bring complaints to other government agencies. Finally, protected, concerted activity can also serve as a “fundamental precursor” to more organizing; robust protections for non-union activity are therefore consistent with the goals of the NLRA to promote collective bargaining.³⁰⁹

The targeting of “BLM” is particularly concerning because protected, concerted activity can be a powerful tool to address racism in the workplace. Although Home Depot focuses specifically on the phrase “BLM,” it is unclear why its arguments wouldn’t apply to other statements protesting racism. For instance, Home Depot emphasizes that customers may disagree with BLM. However, customers may be just as likely to disagree with other messaging related to racism in the workplace, especially in light of the recent political attacks on Critical Race Theory³¹⁰ and the Trump Administration’s villainization of diversity, equity, and inclusion initiatives.³¹¹ In addition, the logic that employers should be given more latitude to restrict divisive messages threatens to limit protections for a myriad of other workplace issues. For example, this logic could be applied to employees advocating for their healthcare plan to cover abortion access; employees protesting discrimination of trans workers; and employees subject to Islamophobic harassment or antisemitism. These are all issues that have been politicized, but this politicization does not take away from the fact that there may still be a nexus to working conditions.

More broadly, Home Depot’s First Amendment framing has rhetorical appeal that threatens to subordinate employee rights to employer interests. Although Home Depot emphasizes that this is an as-applied challenge to the use of “BLM” in its workplace, what it is advocating for is a case-by-case First Amendment analysis.³¹² Given the incentives described above, employers would then be likely to bring First Amendment challenges in all cases where insignia otherwise protected by the NLRA contains speech that they do not want to platform. Given that almost all labor disputes contain some political dimension, focusing on divisiveness or political speech

309. Memorandum GC 21-03 from Peter Sung Ohr, Acting Gen. Couns., Nat’l Lab. Rels. Bd., to All Reg’l Dirs., Officers-in-Charge, & Resident Officers, on Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines, at 2 (March 31, 2021), <https://apps.nlr.gov/link/document.aspx/09031d45833ea1f3> [<https://perma.cc/34YL-AU8V>].

310. See, e.g., Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 21, 2021) <https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory/> [<https://perma.cc/4JCJ-YL8E>] (collecting state laws targeting Critical Race Theory).

311. See, e.g., Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025) (Executive Order issued by the Trump Administration entitled “Ending Radical And Wasteful Government DEI Programs And Preferencing,” which characterized previous DEI efforts as “illegal and immoral discrimination”).

312. Home Depot Reply Brief, *supra* note 8, at 1-2 (“How the First Amendment might apply to other messages turns on the specifics of those messages, how they are displayed, the strength of the government’s interests in having them communicated, and the available alternatives to compelling employer speech.”).

threatens to swallow almost any messaging in a First Amendment argument.³¹³ Moreover, an increase in First Amendment challenges would increase the litigation burden on employees, unions, and the NLRB.

Given the importance of protected, concerted activity, labor advocates should take arguments like Home Depot's seriously. To do this, they will need counter-rhetoric to the forces propelling the First Amendment into new areas of regulation. The following Section begins to sketch out what this alternative rhetoric could look like.

A. Building an Alternative Rhetoric to Combat Deregulatory First Amendment Arguments

As discussed above, professors Jeremy Kessler and David Pozen put forward what they label the "grammar of free speech egalitarianism."³¹⁴ Canvassing scholarship on First Amendment Lochnerism, they outline the "basic motifs—the transsubstantive themes, tropes, and fault lines—of First Amendment egalitarian argument."³¹⁵ The purpose of articulating this new grammar is to help provide "argumentative resources" to advocates who wish to combat the weaponization of the First Amendment.³¹⁶ Specifically, Kessler and Pozen identify three primary rhetorical tools that advocates can employ: 1) using minimalist or maximalist framing to either "expand or contract the scope of the First Amendment's coverage;"³¹⁷ 2) adopting a "speech on both sides" framing to emphasize the egalitarian values of the First Amendment;³¹⁸ and 3) shifting from a focus on an individual speaker to a broader system of speakers and listeners.³¹⁹ I provide an initial sketch of how labor advocates can adopt each of these rhetorical devices in the subsections below.

1. Minimalist or Maximalist Framing of the First Amendment

One tool that advocates have is to focus on the scope of coverage under the First Amendment, either by presenting a minimalist First Amendment or a maximalist First Amendment based on the particular context of the challenge at hand. A minimalist First Amendment approach seeks to get First Amendment doctrine "out of the way."³²⁰ An example of a minimalist argument would be arguing that algorithms do not constitute speech, and as such, regulation can proceed without any First Amendment review.³²¹ Advocates and scholars adopting this approach argue that the First Amendment is both ill equipped and incapable of achieving progressive aims and that even progressive First Amendment arguments may later be used to expand

313. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570 n.20 ("As almost every issue can be viewed by some as political, the clear purpose of the 'mutual aid or protection' clause would be frustrated if the mere characterization of conduct or speech removed it from the protection of the Act.").

314. Kessler & Pozen, *supra* note 19, at 1984.

315. *Id.* at 1986.

316. *Id.*

317. *Id.* at 1986.

318. *Id.* at 1995.

319. *Id.* at 2001.

320. *Id.* at 1987.

321. *Id.* at 1988-89.

corporate rights.³²² Thus the aim is to reconstitute the First Amendment as a less powerful tool and instead rely on regulation to enhance democracy and freedom in other ways.³²³ The downside to this approach is that there may be “valuable expression and association activity” that would then fall outside of the scope of protection.³²⁴ Additionally, a minimalist approach would be challenging given the cultural salience of the First Amendment and the rhetorical pull of expansionist arguments.³²⁵

On the other side, some advocates promote a maximalist approach that seeks to reinvigorate the First Amendment to help realize its more egalitarian goals. Scholars who advocate for this approach direct attention to the workplace as a prime example.³²⁶ For example, Cynthia Estlund has argued that the private workplace is the location where most people engage in public debate, and thus an important site of democratic deliberation.³²⁷ As such, the workplace is an important “satellite forum” for speech, and should not be seen as outside the scope of the First Amendment.³²⁸ Other scholars direct their attention to the asymmetric application of the First Amendment to the workplace, and argue that the First Amendment should be used to expand protections for labor picketing and boycotts rather than employer rights.³²⁹ The challenge for maximalist arguments that rely on expanding the First

322. *Id.* at 1987-88.

323. *Id.* at 1988-89.

324. Andrias, *Janus*, *supra* note 16, at 55; *see also* Kessler & Pozen, *supra* note 19, at 1988-89 (“With the First Amendment thus chastened, legislators and administrators could pursue a broader set of egalitarian projects. Of course, this gain in freedom to regulate would likely come at the expense of some valuable expression.”).

325. Andrias, *Janus*, *supra* note 16, at 56 (“Seeking merely to pull back the reach of the First Amendment without engaging in a debate about what it means to protect freedom of speech and expression in our constitutional democracy concedes the terrain of the Constitution.” (first citing Joseph Fiskin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 672 (2014); and then citing Kate Andrias, *Building Labor’s Constitution*, 94 TEX. L. REV. 1591 (2016))); *see also* Kessler & Pozen, *supra* note 19, at 1989-90 (“Despite the appeals of minimalism, achieving any significant rollback of First Amendment doctrine looks like an uphill battle given the rise of informational capitalism in the marketplace, the First Amendment-industrial complex in civil society, and First Amendment Lochnerism in the courts.”).

326. *See, e.g.*, Schauer, *Speech-ing*, *supra* note 201, at 357; Andrias, *Janus*, *supra* note 16, at 44; Kessler & Pozen, *supra* note 19, at 1989-90.

327. Schauer, *Speech-ing*, *supra* note 201, at 357 (citing Cynthia Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEXAS L. REV. 687 (1997)) (“One possibility, raised most prominently in the writings of Cynthia Estlund, is that the workplace is for most people an important—perhaps even the most important—place in which they engage in the kind of social, cultural, ideological, and political discourse that lies both at the center of democracy and at the center of the most compelling arguments for freedom of speech. To Estlund and others, the traditional exclusion of the workplace from First Amendment norms represents a failure to appreciate the role of workplace speech in the deliberative universe.”).

328. Estlund, *supra* note 327, at 695, 718-41 (outlining “a conception of the workplace as a satellite forum for public discourse”); *see also* Andrias, *Janus*, *supra* note 16, at 44 (discussing the fluidity between the “public square” and the private workplace).

329. *See, e.g.*, Kessler & Pozen, *supra* note 19, at 1989-90 (citing Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2076-91 (2018)); Garden, *Citizens*, *supra* note 17, at 53 (arguing that “the *Citizens United* Court’s articulation of general First Amendment principles, as applied to corporations, has potentially significant consequences for labor unions” and can be used to expand protections for labor picketing and boycotts); Garden, *Speech Inequality*, *supra*

Amendment is that they do not displace existing deregulatory doctrine, and may in fact lead to further weaponization by creating precedent that corporate interests can invoke.³³⁰ However, the goal is that, through a maximalist framing, “the political valence of First Amendment case law might begin to tack back toward the left.”³³¹

Labor advocates interested in cabining the reach of Home Depot and future employers’ arguments should draw on both the minimalist and maximalist traditions. Advocates should adopt a minimalist framing of the First Amendment in terms of its reach into labor law. The NLRB’s discussion of Home Depot’s First Amendment argument is an example of this approach by homing in on the fact that the speech in question does not belong to the government or the employer, but the employee.³³² Advocates should focus on “un-speech-ing” the conduct in question through careful analysis of what is being characterized as speech. At the same time, advocates should also draw on maximalist arguments that focus on the asymmetry of the First Amendment and the need to expand its protections to the labor context. Focusing on the ways in which labor activities are denied First Amendment protection can help provide a necessary rhetorical counterweight to employer arguments that they are disfavored speakers.

2. Adopt a “Speech on Both Sides” Framing of the Issue

The next element of the grammar of the egalitarian First Amendment is adopting a “speech on both sides” framing to combat prioritizing only one side’s speech.³³³ Such framing focuses on the expressive interests of third parties rather than solely focusing on the rights of the litigant.³³⁴ As summarized by Kessler and Pozen, “[w]hereas minimalist and maximalist arguments focus on the degree to which the First Amendment should shield a particular party’s expressive activity from state interference, arguments involving speech on both sides focus on the degree to which one party’s expressive activity compromises the ability of other private parties to exercise their own First Amendment rights.”³³⁵ The “speech on both sides” approach also emphasizes the positive liberty element of the First Amendment by focusing on vindicating the rights of those who will lose access to speech if the other party gains protection.³³⁶

A challenge to utilizing the both-sides approach, however, is that emphasizing the rights of a particular third party may come into conflict with the Court’s doctrines requiring viewpoint neutrality and equality of treatment.³³⁷ However, advocates should not limit themselves to literal equality, and should instead put forth a more

note 17, at 270 (arguing “the Court’s solicitude towards the First Amendment rights of wealthy or corporate speakers is in tension with its cramped view of the First Amendment rights of unions and union members”).

330. Kessler & Pozen, *supra* note 19, at 1992.

331. *Id.*

332. See Home Depot USA, Inc., 373 NLRB No. 25, slip op. at 15 (Feb. 21, 2024), *vacated on other grounds*, 158 F.4th 910 (8th Cir. 2025).

333. Kessler & Pozen, *supra* note 19, at 1994-95.

334. *Id.*

335. *Id.*

336. *Id.* at 1995.

337. Kessler & Pozen, *supra* note 19, at 1999-2000.

contextual standard that focuses on addressing existing inequities in speech power. Under this view, equality under the First Amendment focuses on ensuring equal opportunity to participate in speech rather than treating each speaker exactly the same.³³⁸ In other words, “[a]n egalitarian First Amendment jurisprudence should seek a version of neutrality that aims at supporting political equality against economic inequality.”³³⁹ Advocates should emphasize these themes and draw on decisions that set out these egalitarian goals.

The “speech-on-both sides framing” has already been deployed in the labor setting. For example, this was the mode of argument used to justify restrictions on employers’ anti-union speech.³⁴⁰ Advocates should continue to emphasize the ways in which the NLRA helps realize First Amendment goals. Specifically, advocates should emphasize the importance of Section 7 protections in providing a counterweight to the fact that employees are denied First Amendment protections in the workplace while employers have explicit speech protections via Section 8(c). In this vein, advocates should emphasize the existence of “speech inequality” framing and draw attention to “the unequal distribution of opportunities to persuade” in the workplace.³⁴¹ Indeed, this unequal persuasion power is precisely what the Supreme Court observed in *Gissel*, holding the standard for determining the bounds of employer speech protection should take into account that employers have more speech rights.³⁴²

3. Shift From Focus on Individual Speaker to Broader System

The third element of the grammar of the egalitarian First Amendment identified by Kessler and Pozen is shifting from an individual speaker frame to a focus on the broader speech system.³⁴³ A strategy in this vein “resists the lure of the vexing individual case and emphasizes instead the importance of examining the system of free expression at the macro level.”³⁴⁴ This strategy involves shifting from a focus on an individual speaker to a broad set of listeners.³⁴⁵ Under this framing, the goal of First Amendment law is not only to prevent censorship but also to build the “infrastructure of free expression.”³⁴⁶ In addition, this framing relies on pushing back on skepticism of state power and instead recognizes that some regulation may be speech and democracy enhancing.³⁴⁷

338. *Id.* at 2000 (“From this perspective, expressive equality is not about treating all speakers the same. It is about ensuring that all speakers have a more or less equal opportunity to participate in the public sphere.”).

339. Purdy, *supra* note 14, at 2176.

340. Kessler & Pozen, *supra* note 19, at 1997.

341. Garden, *Speech Inequality*, *supra* note 17, at 269.

342. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969) (“Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.”).

343. Kessler & Pozen, *supra* note 19, at 2001.

344. *Id.*

345. *Id.*

346. *Id.* at 2004 (quoting Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 432 (2009)).

347. *Id.* at 2006.

Labor advocates are well positioned to adopt the speaker-to-system approach. Unions and labor activity more generally are democracy enhancing because they encourage participation in the workplace and in the political process.³⁴⁸ As such, labor rights are “essential to an overall system of free speech, expression, and association.”³⁴⁹ Advocates should focus on the democracy-enhancing nature of protected, concerted activity and connect this back to both the goals of the NLRA and the First Amendment. Indeed, the view that unions and labor protections can help enhance civil liberty was core to the enactment of the NLRA. Part of the logic behind promoting workplace democracy was to “redistribute expressive and associational rights to undercapitalized groups.”³⁵⁰ Although this redistributive element of the First Amendment has fallen out of favor, advocates can reinvigorate the rhetoric of progressive civil libertarianism that focuses on this original goal.³⁵¹ Again, citing *Gissel* will be helpful for this project, as it is often cited by scholars as an example of the anti-subordinating First Amendment.³⁵² Labor advocates should draw on this tradition as a counterweight to the weaponized First Amendment jurisprudence.

CONCLUSION

Under the NLRA, employees have the right to engage in activities to promote mutual aid and protection. This right is broad and encompasses the interests of “employees as employees,” regardless of whether they share a workplace. A core principle inherent to the right to engage in protected, concerted activity is solidarity.³⁵³

Cáro Linda Bo embodied this principle of solidarity when they wrote “BLM” on their apron, aiming to signal support to their Black coworkers. The NLRB recognized this principle when it held that Bo’s display was protected under the Act. However, Home Depot’s First Amendment arguments demonstrate an attempt to undermine the ability for employees to stand in solidarity with one another by narrowing the scope of protected, concerted activity.

Arguments like Home Depot’s are not only a threat to employees like Bo who want to take a stand against racism but also to all protected activity, from donning a union pin to posting signs advertising rallies. There is no limit to Home Depot’s argument in terms of the labor activity that it covers. As documented in this Note, First Amendment opportunism creates a feedback loop: the more areas where First Amendment coverage is extended, the more lawyers are able to put forward “off the wall” arguments that previously would have been dismissed.³⁵⁴ Home Depot may

348. Andrias, *Janus*, *supra* note 16, at 56-57.

349. *Id.* at 57.

350. See Kessler & Pozen, *supra* note 19, at 1984 (describing the role of the NLRB after the New Deal).

351. Lakier, *Antisubordinating*, *supra* note 189, at 2120 (“Since the 1970s, however, the Court has moved increasingly far away from this context-sensitive, substantive-equality-promoting view of the First Amendment.”).

352. *Id.* at 2151-52 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969)).

353. *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 155 (2014) (“In enacting Section 7, Congress created a framework for employees to ‘band together’ in solidarity to address their terms and conditions of employment with their employer.”).

354. Schauer, *Politics and Incentives*, *supra* note 197, at 1629 (citing Levinson, *supra* note 202, at 388).

have started with a BLM case to take advantage of the supposed controversy of the acronym, but the employer bar has bigger goals, and has already raised the compelled speech argument in other arenas.³⁵⁵ Although the Eighth Circuit did not take up the mantle, other courts might, which poses a threat to Section 7 rights writ large.

That said, although the threat of eroding the scope of protected activity impacts all workers, it is especially concerning for workers of color protesting racial discrimination. Workers of color continue to face a myriad of obstacles in the workplace. For example, the wage gap between Black workers and white workers has continued to grow since the 1970s.³⁵⁶ Black and Latinx workers continue to be underrepresented in occupations that pay more,³⁵⁷ suggesting that they face barriers in hiring, recruitment, and advancement. Workers of color receive worse schedules than their white colleagues.³⁵⁸ Also, studies have shown that women of color are more likely to face sexual harassment in the workplace than white women.³⁵⁹

Although it is no panacea,³⁶⁰ the NLRA provides an important tool for workers to organize to combat these issues and create more just and equitable workplaces.³⁶¹ Any effort to restrict what constitutes protected, concerted activity will stymie these efforts. Moreover, maintaining robust protections for workers is especially important in light of the Trump Administration's targeting of other protections that workers of color could rely on, such as filing complaints with the EEOC.³⁶² Section 7 of the NLRA is a tool we cannot afford to lose.

Because of this, labor advocates cannot let the First Amendment swallow employee rights under the NLRA. Although advocates should recognize the compelled

355. See Starbucks Reply Brief, *supra* note 12, at 20-26 (arguing that accommodating union pins is compelled speech).

356. VALERIE WILSON & WILLIAM DARITY JR., ECON. POL'Y INST., UNDERSTANDING BLACK-WHITE DISPARITIES IN LABOR MARKET OUTCOMES REQUIRES MODELS THAT ACCOUNT FOR PERSISTENT DISCRIMINATION AND UNEQUAL BARGAINING POWER 2 (2022), <https://files.epi.org/uploads/215219.pdf> [<https://perma.cc/FV9W-2NWT>].

357. Press Release, Econ. Pol'y Inst., Black and Latinx Workers Are Underrepresented in Professional Occupations (June 8, 2021), <https://www.epi.org/press/black-and-latinx-workers-are-underrepresented-in-professional-occupations/> [<https://perma.cc/A32T-G5UN>].

358. CESAR PEREZ & ALIX GOULD-WERTH, WASH. CTR. FOR EQUITABLE GROWTH, HOW U.S. WORKERS' JUST-IN-TIME SCHEDULES PERPETUATE RACIAL AND ETHNIC INEQUALITY 2-3, 6-7 (2019), <https://equitablegrowth.org/wp-content/uploads/2019/10/101719-stable-scheds.pdf> [<https://perma.cc/4F2T-SVBF>].

359. See, e.g., Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. APPLIED PSYCH. 426, 428 (2006).

360. Currently, agricultural workers and domestic workers are excluded from the Act's protections, which disproportionately impacts workers of color. See, e.g., Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 126-27 (2011); Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 419 n.38 (2012).

361. Labor organizing is generally associated with reducing racial disparities. See WILSON & DARITY, *supra* note 356, at 16-17 (compiling economic research on the impact of unions on Black workers, finding "collective bargaining has been an effective tool for reducing wage inequality").

362. See, e.g., Adewale A. Maye & Valerie Wilson, *Trump Is Making It Easier for Employers to Discriminate. This Stifles Equity and Hurts Economic Growth*, ECON. POL'Y INST. (May 27, 2025, at 11:18), <https://www.epi.org/blog/trump-is-making-it-easier-for-employers-to-discriminate-this-stifles-equity-and-hurts-economic-growth/> [<https://perma.cc/9YYQ-MZCM>] (describing the Trump Administration's efforts to undermine the EEOC).

speech line of argument as a serious threat, First Amendment expansionism is not inevitable. To counter this current deregulatory effort, advocates should employ rhetoric associated with an egalitarian First Amendment and emphasize the ways that robust protections for protected, concerted activity are not only consistent with the goals of the NLRA but also with the democratic ideals of the First Amendment. As Justice Kagan observed in her *Janus* dissent, “[t]he First Amendment was meant for better things.”³⁶³ Rather than being used as a tool to silence workers, it should be used to enhance the powerful collective rights embodied in the NLRA.

363. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 956 (2018) (Kagan, J., dissenting).