Tesla, Inc. *and* Michael Sanchez, Jonathan Galescu, and Richard Ortiz and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO. Cases 32–CA–197020, 32–CA–197058, 32–CA–197091, 32–CA–197197, 32–CA–200530, 32–CA–208614, 32–CA–210879, and 32–CA–220777

February 12, 2021

NOTICE AND INVITATION TO FILE BRIEFS

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, EMANUEL, AND RING

On September 27, 2019, Administrative Law Judge Amita Baman Tracy issued a decision in this case, finding, inter alia, that the Respondent violated Section 8(a)(1) by maintaining and enforcing its team-wear policy. Pursuant to the team-wear policy, the Respondent requires its General Assembly (GA) production associates to wear black cotton shirts with the Respondent's logo and black cotton pants with no buttons, rivets, or exposed zippers, unless their supervisor permits them to substitute all-black clothing for the required team wear. As a result, GA production associates are prohibited from wearing shirts with union logos (or any other logo or emblem) in place of the required team wear.

The judge found that the Respondent's team-wear policy unlawfully prohibits GA production associates from wearing union shirts because the Respondent failed to establish that the team-wear policy is justified by "special circumstances" under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). In excepting to this finding, the Respondent argues, among other things, that its team-wear policy does not interfere with GA production associates' Section 7 right to display union insignia and that the *Republic Aviation* "special circumstances" analysis is not applicable here because its GA production associates have freely and openly worn union stickers and hats and are merely prohibited from substituting union shirts for the required team wear. However, in *Stabilus, Inc.*, 355 NLRB 836, 838 (2010), the Board stated that "[a]n employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia."

To aid in the consideration of this issue, the Board now invites the filing of briefs in order to afford the parties and interested amici the opportunity to address the following questions.

1. Does *Stabilus* specify the correct standard to apply when an employer maintains and consistently enforces a nondiscriminatory uniform policy that implicitly allows employees to wear union insignia (buttons, pins, stickers, etc.) on their uniforms?

2. If *Stabilus* does not specify the correct standard to apply in those circumstances, what standard should the Board apply?

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C., on or before March 15, 2021. The parties may file responsive briefs on or before March 30, 2021, which shall not exceed 15 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically by going to www.nlrb.gov and clicking on "eFiling." The parties and amici are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/32-CA-197020. If assistance is needed in E-filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Executive Secretary Roxanne Rothschild at 202-273-2917.

Dated, Washington, D.C. February 12, 2021

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Marvin E. Kaplan, Member

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William J. Emanuel Member

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John F. Ring Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

Contrary to my colleagues, I see no need for the Board to revisit our decision in *Stabilus, Inc.*, 355 NLRB 836, 838 (2010), addressing the lawfulness of employer restrictions on the wearing of union insignia in the workplace.[1] That said, I commend their decision to seek briefing before changing precedent. I will consider the case

[1] I see no conflict between *Stabilus* and well-established legal principles. Employer work rules that prohibit employees from wearing union insignia are unlawful unless they are justified by special circumstances. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945); see also, e.g., *Healthbridge Mgmt.*, 360 NLRB 937, 938 (2014), enfd. 798 F.3d 1059 (D.C. Cir. 2015). It is the employer's burden to prove the existence of special circumstances justifying the prohibition on union insignia and the employer's rule must be narrowly tailored and not extend beyond the

with an open mind, and I trust that my colleagues will, in turn, also remain equally open to adhering to and applying current law.

Dated, Washington, D.C. February 12, 2021

Lauren McFerran, Chairman

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special circumstances justifying the ban or prohibition. *American Medical Response West*, 370 NLRB No. 58, slip op. at 1 (2020). In the 75 years since the Supreme Court decided *Republic Aviation*, the Board has applied the special circumstances test to evaluate a wide variety of employer restrictions on employees' wearing of union insignia in the workplace, including cases where employees are required to wear uniforms. See, e.g., *Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66, slip op. at 2–3 (2018), enfd. 774 Fed.Appx. 1 (D.C. Cir. 2019).