UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

WHOLE FOODS MARKETS, INC.	
And	**Cases 01-CA-263079; 01-CA-263108; 01-CA-264917; 01-CA-265183; 01-CA-266440; 01-CA-273840; 04-CA-262738; 04-CA-263142; 04-CA-264240; 04-CA-264841; 05-CA-264906; 05-CA-266403; 10-CA-264875; 19-CA-263263; 20-CA-264834; 25-CA-264904; 32-CA-263226; 32-CA-266442**
SAVANNAH LYNN KINZER, SUVERINO FRITH, LEEA MARY KELLY, ANA BELEN DEL RIO-RAMIREZ, CAMILLE TUCKER-TOLBERT, TRUMAN READ, ABDULAI BARRY, HALEY ASHLEY EVANS, CASSIDY VISCO, JUSTINE O'NEILL, SARITA WILSON, LYLAH MARCELLA STYLES, YURI LONDON, SHANNON LISS-RIORDAN, ESQ., CHRISTOPHER MICHNO, SAVANNAH KINZER, KIRBY BURT AND KAYLEB RAE CANDRILLI, as Individuals	

SUPPLEMENTAL POST-HEARING BRIEF OF CHARING PARTIES TRUMAN READ AND KAYLEB RAE CANDRILLI

This supplemental brief is filed pursuant to the order of August 7, 2023, directing the parties to file supplemental briefs addressing *Stericycle, Inc.*, 372 NLRB No. 113 (2023) and *303 Creative LLC v. Elenis*, No 21-476 (U.S. June 30, 2023).

A. *Stericycle* supports the charging parties' claims for relief.

Stericycle stands for three key propositions, each of which gives additional reason to grant relief to the charging parties. First, it holds that the employer's rule will be interpreted "from the perspective of the reasonable employee who is economically dependent on her

employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in." *Stericycle*, at 8. With the Philadelphia Whole Foods' arbitrary, ambiguous, and selective enforcement of its clothing policy – allowing clothing that supported certain controversial positions (gay pride, sports teams) while not allowing buttons that supported anti-racism in response to the employer's discriminatory behavior towards Black employees – the reasonable, economically dependent employee (as charging parties were) would be afraid that the policy would be enforced should their speech hit "too close to home," i.e. protest working conditions and show solidarity with other workers.

Second, *Stericycle* requires "employers to narrowly tailor their rules is a critical part of working out the proper adjustment between employee rights and employer interests in the work-rules context." *Id.* at 10. Having an overbroad clothing policy and then selectively enforcing it when workers protest racial discrimination in the workplace is the opposite of "narrow tailoring." Instead, it targets employees wearing an anti-racist slogan in a workplace where they were protesting how Black employees had been kept at low-level positions, passed over for promotions, denied raises, received the less desirable assignments, and felt unsafe while store leadership failed to protect them.

Finally, *Stericycle* calls for a "case-specific approach," in which several factors must be considered, including "the specific industry and workplace context in which it is maintained." *Id.* at 13. As charging parties Candrilli and Read testified, the context in their specific workplace included the above-mentioned patterns of discrimination against African American employees. The context in the Philadelphia store also included a white manager compelling a Black employee to climb a ladder in public view on a busy street to hang a banner with the Whole Foods logo that reads "Racism has no place here. We support the

Black community." And the context included protest against management's callous gesture of giving free food to police during the time of a protest against police brutality, when African American employees were concerned for their safety. And when the context is that the Philadelphia store used a previously unenforced dress-code policy against employees concerned for the way management was treating employees, relief is due.

B. *Elenis* does not support the employer's position.

The Supreme Court's decision in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308 (2023) does not in any way prohibit this Tribunal from enforcing Section 7. *Elenis* does not address, let alone curtail, the rights of employees to protest racism against fellow workers. In *Elenis*, a website designer refused to create websites that she perceived as promoting gay marriage, which she believed went against her religion. There is no mention in the opinion that she was trying to suppress any speech of her employees, let alone Section 7 protected protests about her treatment of a particular group. If an employer were allowed to suppress such a protest on the grounds that it infringed on the employer's "Freedom of Speech," then it would effectively end the entire labor movement, which is not remotely contemplated by the *Elenis* decision. Employees protesting is not compelling an employer to speak, and so *Elenis* is irrelevant.

The *Elenis* decision is also notably different because the designer in that case was consistent in opposing certain messages; while the employer in the instant matter purported to support the very ideas it was suppressing its employees from expressing. As the Court explained in *Elenis*, the website designer raising the First Amendment claim "has ***never*** created expressions that contradict her own views for anyone," and therefore the government could not "force her to express views with which she disagrees." 143 S. Ct. at

2308 (emphasis added). Here, Jeff Bezos, the CEO of Whole Foods' parent company Amazon.Com, Inc. ("Amazon"), publicly stated, "'Black Lives Matter' doesn't mean other lives don't matter. Black lives matter speaks to racism and the disproportionate risk that Black people face in our law enforcement and justice system." Annie Palmer, "Jeff Bezos Amazon customer angry over Black Lives Matter message" (CNBC, June 5, 2020) https://www.cnbc.com/2020/06/05/jeff-bezos-amazon-customer-angry-over-black-lives-matter-message.html. And the Philadelphia store publicly hung a banner from the that read "Racism has no place here. We support the Black community." This would be like if the website designer in *Elenis* had publicly proclaimed that "gay marriage is a holy sacrament" and then refused to design anything celebrating it on the grounds that it contradicted her religion. Had that been the case, the entire reasoning of the Supreme Court would have been rendered a nullity. And thus, the *Elenis* case should not be used to suppress the charging parties' protected speech in the name of "freedom of speech." Relief should be granted.[1]

Respectfully submitted,

Dated: September 11, 2023

/s/ Samuel H. Ritterman

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[1] The charging parties also adopt any favorable arguments made by General Counsel or the counsel for the others charging parties.

CERTIFICATE OF SERVICE

I certify that the above response has been filed electronically and is therefore available for viewing and downloading by all counsel of record.

Respectfully submitted,

Dated: September 11, 2023

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