No. 21-1256

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMALGAMATED TRANSIT UNION LOCAL 85, JAMES HANNA, SASHA CRAIG, AND MONIKA WHEELER

Plaintiffs - Appellees,

v.

PORT AUTHORITY OF ALLEGHENY COUNTY,

Defendant – Appellant.

Appeal from an order granting Appellees' Motion for Preliminary Injunction in the United States District Court for the Western District of Pennsylvania, entered on January 19, 2021 in Civil Action No. 2:20-cv-01471-NR

APPELLEES' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Under F.R.A.P. 26.1 and L.A.R. 26.1.1, there is no parent corporation for Appellee, Amalgamated Transit Union Local 85. The Union is an unincorporated association, a labor organization affiliated with the Amalgamated Transit Union, AFL-CIO, another unincorporated association and a labor organization.

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I. STATEMENT OF RELATED CASES AND PROCEEDINGS

Pursuant to L.A.R. 28.2 and 28.1(a) (2), Appellees state that this case has not been before this Court previously and Appellees are not aware of any other related, case or proceeding.

II. STATEMENT OF THE CASE

The District Court's Opinions thoroughly described the fundamental facts of this case. (A6-27[1]; D.C. ECF 56). The following will succinctly focus on the facts most pertinent to this appeal.

A. Factual and Procedural Background

1. The Parties

Appellee Amalgamated Transit Union Local 85 ("Union" or "Local 85") is an unincorporated voluntary association, a labor organization and the certified exclusive labor representative of a bargaining unit of employees employed by the Appellant Port Authority of Allegheny County ("Authority" or "PAT"), a public transit authority organized under the second class Port Authority Act 55 P.S. §551, *et. seq*. (A11 at FOF 1, 3 (a); A102 at ¶¶ 9, 13). Appellees James Hanna, Sasha Craig, and Monika Wheeler are members of the Union employed by the Authority. (A12 at FOF 3(b)-(d); A102 at ¶¶10-12). Union members perform various roles for the

[1] References to the Appendix will be "A___" and references to the Supplemental Appendix will be "SA___."

Authority—for instance, some are bus operators, others are mechanics, others are instructors, and others are first level supervisors. (A11, FOF 3(a), A244-246, 256-257, 372-373). Some of these positions involve interaction with the public while others do not. (*Id*.).

2. Black Lives Matter

For generations, People of Color have faced systemic and rampant violence and discrimination because of the color of their skin. Recent tragedies involving police murdering People of Color have shed light on this horrific, longstanding, and deep-seated societal problem anew. Founded in 2013, "Black Lives Matter" ("BLM") is an anti-racist movement seeking to eradicate racial prejudices, advocate for equal justice, and build power to intervene in systemic violence inflicted on Black and Brown communities by state actors and vigilantes. (A103 at ¶19). BLM garnered widespread national and global support in the wake of the murder of George Floyd while in police custody on May 25, 2020. (A 103 at ¶¶ 20, 21). The Amalgamated Transit Union and Local 85 have offered a full-throated endorsement of support for the BLM movement. (A 101, 104 at ¶¶ 2, 22). The Port Authority itself has publicly endorsed BLM. (A19 at FOF 18; A102 at ¶8, A662-665; SA 47-49; SA 115-116).

3. The uniform standards, the Covid-19 pandemic, and facemasks

Port Authority employees are required to wear uniforms. (A12, FOF 4; A524). Since approximately 1972, the Authority has prohibited uniform adornments, such as buttons, stickers or jewelry bearing messages "of a political or social protest nature…". (A534-535). The Authority, without evidence, claims the policy is necessary to avoid workplace disruption. (A12, FOF 7; A551-552). The Authority, however, has laxly enforced this policy if at all, over the nearly five decades since. (A13-18, FOF 9, 10; A224, 238-241, 250-251, 254-257, 259-260, 272, 273, 308-309, 311, 319, 320, 342, 343, 357-358, 369-370, 397, 431, 446-447, 468-469, 475, 476, 483-484, 485, 487). Indeed, over the years, employees wore myriad uniform adornments while at work over the decades without censure or discipline. (*Id*.). These adornments, including buttons, stickers, ribbons, hats, and jewelry included: expressions of support for political candidates like Barack Obama, Bernie Sanders, Hilary Clinton, Joe Biden, Donald Trump, and candidates for Union office, celebrations of gay pride, Black Lives Matter, ankhs, Black power fists, and other expressions supportive of People of Color and African American culture, MAGA, necklaces with crosses, masonic pins, expressions in support of the victims of the Tree of Life massacre such as "stronger than hate" buttons, the peace symbol, and others. (*Id*.). Additionally, the Authority allows employees to engage in the exact same manner of "political or social protest" speech by other means, such as during casual conversations with coworkers or the public. (A12, FOF 8; A666-684).

The Covid-19 pandemic, a public health crisis, spawned drastic changes in daily life in the United States starting in March of 2020. One such change recommended and later required by government orders, which has since become ubiquitous, is the wearing of masks or face coverings while in public. During the early stages of the pandemic, the Authority did not provide masks to all its employees but still required its employees to wear a face-covering while at work. (A18-19, FOF 14, 15, A536-538). As a result, Union members, including bus drivers operating in revenue service transporting members of the public wore face coverings of their choosing, which they had procured or made themselves, for months without incident. (*Id*.; A19, FOF 16, 17; A276, 285, 286, 287, 308, 318, 331-332, 340, 351, 359, 368, 370-371, 403, 440-441, 486-487). Some employees wore face coverings displaying a peaceful and passive expression of support for "Black Lives Matter" or a similar message. (*Id*.).

On July 23, 2020, the Authority unilaterally promulgated Uniform standards for employees which addressed face coverings and masks—the wearing of which has become a daily necessity due to the global COVID-19 pandemic. (A104, ¶23; A113-115, A679-681, SA 2-9). That policy extended the prior uniform standards and prohibited the donning of "Buttons, stickers, jewelry and clothing (**including masks or other face coverings**) of a political or social protest nature…" while at work. Further, the Port Authority—for the first time ever—began to enforce these

guidelines against the employees who wore masks with messaging in support of the BLM movement, even though they had permitted this type of passive speech countless times in the past. (A104-105, 106-107, ¶¶28, 33-42). The Authority amended the uniform standards to ban social and political messaging on facemasks after Union members began wearing masks bearing the message "Black Lives Matter." (A101-102, ¶¶7, 8). In this way, the BLM message was specifically targeted; the Authority designed and began enforcing its policy in order to ban this particular message and squash any public speech by Union members on this significant issue of public concern.

4. The Authority disciplines Union members for wearing BLM masks.

Shortly after promulgating this policy change, various employees, including Appellees Mr. Craig and Ms. Wheeler reported to work wearing a face covering which stated across the front "Black Lives Matter". (A106-107, ¶¶33-36, 39-41). In a blatant act of censorship, Authority management directed Mr. Craig and Ms. Wheeler to remove their masks or face discipline. Mr. Craig and Ms. Wheeler refused to remove their BLM masks and, as a result, were dismissed from work for that day. (SA 217—241). Thereafter, on or about August 13, 2020, the Authority also disciplined Appellee James Hanna—a 31 year veteran of the Authority and elected board person (a/k/a Union steward)—for wearing a BLM face covering. (SA 178—216). Other employees have been reprimanded, warned, disciplined and/or

threatened with discipline for wearing BLM masks. Local 85 and its affiliated parent organization, the Amalgamated Transit Union International, fully endorse and support the Black Lives Matter movement. (SA77—83).

5. The Authority revises its mask policy to restrict still more speech.

Subsequently, the Authority unilaterally promulgated additional revisions to its Uniform standards, which became effective on September 27, 2020 and which remained effective until enjoined by the District Court on January 19, 2021. (A104, ¶24, A116-124, SA 14-18, 40-45). That policy announced certain changes to the previous policy with respect to the wearing of masks and face coverings at work. Amongst other changes, the Authority would provide masks to employees in a few acceptable styles. However, the new Uniform standards, like the previous standards contained the following identical prohibition: "Buttons, stickers, jewelry and clothing (including masks or other face coverings) of a political or social protest nature are not permitted to be worn." (A113-124). The Authority enforced this unconstitutional policy to ban operators from donning face coverings bearing the message BLM until enjoined by the District Court. (A107, ¶42). In so doing, the Authority frustrated a purpose of Local 85 and its members by restricting speech of members precisely when that speech promotes equal justice and union goals. (A101, ¶3). The Authority publicly stated its supposed rationale for banning all social and political messaging, like BLM. (A125-128, 662-665). On one hand, the Authority

claims that it endorses BLM but then threatens to discipline employees if they silently express support for the exact same message—a violation of employees' rights to free, peaceful expression. (A102, ¶8). The Authority publicly and unequivocally supports BLM and yet, paternalistically denies employees the right to express the exact same message. (A19, FOF 18; A105, ¶31; A125-128, 603, 662-665; SA 47-49, 115-116).

Prior to promulgating these policies, employees had worn BLM masks without any adverse incident, without facing any discipline or threat of discipline, without any interference with their duties and responsibilities, and without any interruption in service. (A22-23, FOF 30-32, A104, ¶27, A589). Union members have also donned buttons, stickers, and other paraphernalia promoting various messages, political, social, and otherwise, in the past in the course of their employment, both before and after the pandemic without causing any disruption and without facing discipline. (A13-18, FOF 9, 10; A224, 238-241, 250-251, 254-257, 259-260, 272, 273, 308-309, 311, 319, 320, 342, 343, 357-358, 369-370, 397, 431, 446-447, 468-469, 475, 476, 483-484, 485, 487; A105, ¶ 30). Prior to the announcement of the new uniform policy, multiple union members wore a BLM mask without any objection from the public or coworkers. (A22, FOF 27; A106, ¶ 38, A225-228, 542-543, 584). Indeed, comments received regarding the wearing of BLM masks and adornments had been nearly universally positive. (A22, FOF 28;

A322, 354, 393, 470). Over the course of decades, the Authority's uniform policy has been laxly enforced.[2] (A13-18, FOF 9, 10; A224, 238-241, 250-251, 254-257, 259-260, 272, 273, 308-309, 311, 319, 320, 342, 343, 357-358, 369-370, 397, 431, 446-447, 468-469, 475, 476, 483-484, 485, 487).

In the past, the Authority has repeatedly adopted, promoted, celebrated and endorsed messages analogous to BLM supporting, for instance, Pride Month in support of the LGBTQ+ community, African American Heritage day to celebrate African American history, support for individuals and families victimized in the October 2019 mass shooting and hate crime committed at the Tree of Life Synagogue, support for the victims and families of three slain Pittsburgh Police officers in April of 2009, women's rights, the American flag, and the ADA promoting accessibility and equality for individuals with disabilities. (A23, FOF 34; A104-105 ¶ 28; A480-48, 569, SA 51-64). The Authority prominently displayed this messaging on the interior and exterior of in-service busses and in the Authority endorsed these messages in official public statements and stances. (A105, ¶29, A129-141, SA 51-64).

[2] The Authority asserts that supervisors refused to report uniform violations. (ECF 19 at n.2). This is a mischaracterization of the testimony. Firstly, James Savage is not a supervisor. (A316-317). And the one first level supervisor who did testify (Ross Nicotero) stated that he would report serious uniform violations. (A384-385).

6. The District Court enjoins the Authority from enforcing its unconstitutional speech restriction.

On January 19, 2021 and January 20, 2021, the District Court entered an Opinion (A6-50), and Orders of Court (A3-5), granting Appellees' Motion for Preliminary Injunction (A91-99) and denying Appellant's Motion to Dismiss. (DC ECF 18). The Court's order enjoined the Authority, from enforcing its unconstitutional uniform policy to prohibit employees from peacefully expressing support for the Black Lives Matter movement and equal justice for People of Color. (A4-5).

III. ARGUMENT SUMMARY

The Union respectfully requests this Court uphold the District Court's decision. First and foremost, the District Court correctly concluded Appellant's broad prior restraint on high-value speech, which prohibited peaceful messages on face coverings in support of equal rights for People of Color, violated the First Amendment, whether assessed under the standard enunciated in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) or the modified standard set forth in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995). This is so because Union members spoke as citizens on a matter of undisputed public concern (BLM) and the employees' interest in this high value speech far outweighs any entirely speculative concerns of disruption to the Authority's operations.

Appellant's arguments are unavailing. First, Appellant's assertions to the contrary notwithstanding, the Court's opinion and order granting Appellees' preliminary injunction did not conclude that the Authority could or should engage in viewpoint discrimination. Quite the opposite, the Court enjoined the Authority from prohibiting, wholesale and bluntly, a broad category of high-value speech based on an exceedingly remote and entirely unproven concern that it might cause some disruption. Second, the Court did not disregard the Authority's interests in "protecting captive customers from political or social messages"—but rather considered this interest so miniscule that it could not justify a categorical prohibition on all high-value speech of the Authority's employees. Third, nothing in the Court's order required the Authority to show actual disruption—instead, the Court determined that the Authority's concern about potential disruption was not supported by the evidence and was too speculative to warrant a blanket ban on passive peaceful expression in support of BLM - a matter of utmost public concern. Presumably, if the Authority had advanced any competent or persuasive evidence of a reasonable concern that BLM masks could cause disruption, the result may have been different. Fourth, the Court recognized that public employers have slightly more interest in restricting the speech of its employees than the public but emphasized that public employees do not check their First Amendment rights at the door when they step into the workplace.

Each of these arguments will be addressed in turn to demonstrate that the District Court did not commit reversible error and its decision should therefore be upheld.

IV. STANDARD OF REVIEW

When reviewing a grant or denial of a preliminary injunction, the Third Circuit, "employ[s] a tripartite standard of review: findings of fact are reviewed for clear error, legal conclusions are reviewed de novo, and the decision to grant or deny an injunction is reviewed for abuse of discretion." *Del. Strong Families v. AG of Del.*, 793 F.3d 304 (3d. Cir. 2015). (citations omitted). Additionally:

> "In *A. O. Smith Corp. v. FTC*, 530 F.2d 515, 525 (3d Cir. 1976), we summarized those considerations followed by an appellate court in reviewing the grant or denial of preliminary injunctions. We emphasized that **the law has entrusted the power to grant or dissolve an injunction to the discretion of the trial court in the first instance**, and not to the appellate court, and that **unless the trial court misuses that discretion, commits an obvious error in applying the law, or makes a serious mistake in considering the proof, the appellate court must take the judgment of the trial court as presumptively correct**. 'This limited review is necessitated because the grant or denial . . . is almost always on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief.' *United States Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1970)." *Glasco v. Hills*, 558 F.2d 179, 180 (3d. Cir. 1977). (emphasis added).

In the First Amendment context, the Third Circuit independently examines the whole record but nonetheless defers to the District Court's factual findings regarding witness credibility. *Ctr. for Investigative Reporting v. Septa*, 975 F. 3d 300 (3d. Cir.

2020) citing *Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny Cnty.*, 653 F. 3d. 290 (3d. Cir. 2011) and *Fulton v. City of Philadelphia*, 922 F. 3d 140 (3d. Cir. 2019).

V. ARGUMENT

As a preliminary and fundamental consideration, political and social protest speech is the very core type of speech the First Amendment protects. When analyzing the Authority's attempt to stymie its employees' free speech rights, this concept stands at the forefront because the Supreme Court "has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983). (cleaned up).

In order to prevail on a claim for preliminary injunctive relief, Appellees were required to show: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Center for Investigative Reporting v. Southeast Pa. Transp. Auth.*, 975 F. 3d. 300 (3d. Cir. 2020). (citing *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)). In a First Amendment case,

> the moving party must first "mak[e] a colorable claim" that the law restricts some form of speech. The government must then "justify its restriction on speech under whatever level of scrutiny is appropriate (intermediate or strict) given the restriction in question." … If the government cannot

> establish that the law is constitutional, the challenger must still demonstrate irreparable harm, though that is generally presumed where the moving party's freedom of speech right is being infringed.

Greater Philadelphia Chamber of Commerce v. City of Philadelphia, 949 F.3d 116, 133 (3d. Cir. 2020). In the present case, and as the District Court held, all four factors favored the Appellees' claims. Because the Port Authority's uniform policy plainly restricted its employees' speech and could not be justified for any legitimate reason, the District Court determined the Appellees were likely to succeed on the merits of the First Amendment claim, Appellees would have suffered irreparable harm absent the injunction, the Authority would not suffer greater harm than Appellees, and the public interest favored preliminary relief. As such, the Court properly entered a preliminary injunction against the policy, which unconstitutionally prohibited the wearing of BLM facemasks.

A. The District Court correctly concluded the Appellees were likely to prevail under either the Pickering or NTEU standard.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court established a balancing test to determine whether a prohibition on public employee speech was constitutional when a public employer punishes an employee for past expression. In that case, the Court reaffirmed the principle that "[t]he theory that public employment which may be denied altogether may be subjected to any conditions regardless of how unreasonable, has been uniformly rejected." *Id*. Indeed, "[p]ublic employees do not surrender their First Amendment rights merely because

they work for the government." *Baloga v. Pittston Area Sch. Dist.*, 927 F.3d 742, 753 (3d. Cir. 2019) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Baldassare v. State of N.J.,* 250 F.3d 188, 194 (3d Cir. 2001)). However, acknowledging public employers also have a legitimate interest in efficient and undisrupted operation and therefore can regulate some on duty conduct, the Courts endeavor to strike an appropriate balance between the two interests. *Pickering* at 568. To do so, the Third Circuit applies a three-pronged test in evaluating whether a public employer has properly struck the balance between a public employee's right to free speech and the government's interest in maintaining efficient operations:

> (l) whether the employee spoke as a citizen; (2) whether the statement involved a matter of public concern; and (3) whether the government employer nevertheless had "an adequate justification for treating the employee differently from any other member of the general public" based on its needs as an employer.

Baloga v. Pittston Area Sch. Dist., 927 F.3d 742, 753 (3d. Cir. 2019) (quoting *Palardy v. Township of Millburn*, 906 F.3d 76, 81 (3d. Cir. 2018)). Under this standard, a public employer may only limit employee speech if it is reasonably likely to disrupt the efficient operation of the workplace. *Grigsby v. Kane*, 157 F. App'x 539, 542 (3d. Cir. 2005).

The Supreme Court modified the Pickering standard in *United States v. NTEU*, 513 U.S. 454 (1995). That standard applies to the instant case because, like the honoraria ban, which broadly restricted the speech of federal employees, this case

involves a blanket prohibition of all employee speech of a "political or social protest nature." Because the Authority's uniform policy chills employee speech before it can be expressed, First Amendment jurisprudence requires the Authority to meet a heightened legal standard, more exacting than the traditional *Pickering* analysis. Under this standard, the Port Authority was required to advance a strong justification for its uniform policy, one supported by evidence, not merely a conjectural worry of potential disruption. This the Authority did not do. As such, the District Court properly granted Appellees' motion for preliminary injunction because under the modified *Pickering* standard announced in *NTEU*, Appellees have a substantial interest as citizens in commenting upon matters of public concern, be it Black Lives Matter or some other issue, and the Authority utterly failed to demonstrate any real or potential harm that the uniform policy would alleviate.

Even if the heightened standard of NTEU does not apply to this case, Appellees should still prevail under the traditional Pickering framework. This is so because the Appellees' interest as citizens in commenting upon matters of public concern, such as BLM, far outweigh any interest the Port Authority may have in enacting a startlingly broad restriction on its employee speech in a misguided attempt to promote the efficiency of the public service it provides.

1. The modified Pickering standard articulated in United States v. NTEU, 513 U.S. 454 (1995) applies to the instant dispute.

In *NTEU,* the United States Supreme Court addressed whether a statutory ban on certain federal employees receiving honoraria for speaking engagements or writing articles violated the First Amendment. 513 U.S. 454 (1995). Essentially, the restriction at issue prohibited millions of federal employees wholesale from receiving remuneration in exchange for giving presentations or writing for publications for the general public on their own time. *Id*. at 465. For the most part, the content of the Plaintiffs' speech in *NTEU* did not involve their official duties or job responsibilities but rather matters of personal interest or expertise. *Id*. The Court first examined the *Pickering* standard as generally applicable to public employer speech restrictions imposed upon public employees. *Id*. at 465-466. Under this standard, in determining the validity of a restraint on speech, Courts balance the interests of employees, as citizens, in commenting on matters of public concern and the interest of the public employer in promoting the efficiency of the public services it delivers through its employees. *Id*., citing and quoting *Pickering*. The Court found that the honoraria ban constituted, "a wholesale deterrent to a broad category of expression by a massive number of potential speakers," and the honoraria ban chilled speech before it happened. *Id*. at 466-467, 475. Consequently, the Court ruled such a broad prior speech restriction required the government to meet a heavier burden than the traditional *Pickering* standard, "[t]he Government must show that the

interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government." *Id*. at 466-468. In *NTEU*, the government attempted to justify the speech restriction of the honoraria ban as necessary to prevent government officials' misuse of power or the appearance of impropriety gleaned from accepting payment for writing articles or giving presentations. *Id*. at 472. The government also cited administrative convenience as a justification for the honoraria ban. *Id*. The Court found both of these attempted justifications, in light of scant evidence of actual, potential, or apparent impropriety to be entirely unpersuasive. *Id*. at 472-476. In so doing, the Court emphasized the relevant standard:

> "[W]hen the Government defends a regulation on speech as a means to redress past harms or **prevent anticipated harms,** it must do more than simply posit the existence of the disease sought to be cured . . . **It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way** . . . a reasonable burden on expression requires a justification far stronger than mere speculation about serious harms. Fear of serious injury alone cannot justify suppression of free speech and assembly. Men feared witches and burnt women . . . **To justify suppression of free speech there must be a reasonable ground to fear that serious evil will result if free speech is practiced**." *Id*. at 475-476 (emphasis added) (citations and quotations omitted).

Under this standard, the Court found the speculative benefits of the honoraria ban entirely insufficient to justify a broad and "crudely crafted burden" on public employees' free speech rights. *Id*.

The Third Circuit applied the *NTEU* standard in *Swartzwelder v. McNeilly*, 297 F.3d. 228 (3rd. Cir. 2002) and *Lodge No. 5 of FOP v. City of Phila.*, 763 F. 3d. 358 (3rd. Cir. 2014). The speech restriction at issue in *Swartzwelder* prohibited police officers from testifying as an expert witness without permission from the chief of police. *Id*. That ban also failed to specify any cognizable standard for how the chief of police would determine whether the expert testimony would be approved. *Id*. This Court expressly endorsed the *NTEU* standard as applicable to the City of Pittsburgh's sweeping, nebulous restriction of its employees' free speech. *Id*. at 237. In so doing, this Court rejected all of the City's attempted justifications—some had little relationship to the ban and the ban was not "carefully crafted" to serve others. *Id*. at 238. More specifically, because the ban prohibited all expert testimony not merely testimony that could lead to civil disruption, the Court held that the City could not justify such a broad restriction under the *NTEU* standard. *Id*. at 238. In addition, the Court found the regulation to be unduly broad and patently unclear because it did not specify how the chief of police would determine whether a police officer could testify or not. *Id*. at 239-240. Moreover, the Court found the City's attempted justification of encouraging workplace harmony between colleagues as

too speculative to "warrant the broad prior restraint" on employee speech. *Id*. at 240-241.

The *NTEU* standard applies to the instant dispute and the District Court correctly concluded the Appellees were likely to prevail under that standard. Initially, much like the honoraria ban in the *NTEU* case, the Port Authority's uniform policy is startlingly broad as it prohibits the donning of all "[b]uttons, stickers, jewelry and clothing (including masks or other face coverings) of a political or social protest nature…" while at work. There is a dizzying array of different speech on matters of public concern that this single far-reaching sentence could prohibit. In this sense, the Port Authority's uniform standard is quite similar to the statute the Supreme Court held unconstitutional in *NTEU*, which prohibited federal employees from receiving honoraria for speeches or writing articles on a sweeping range of subjects. The instant dispute also fits neatly into the *NTEU* framework because, like the honoraria ban, the Port Authority's uniform standards prevent, discourage, and chill employee speech before it occurs. The fact that the Port Authority has disciplined some employees under the policy for wearing a mask bearing the message "Black Lives Matter" solidifies the policy's chilling effects on free speech.

The Authority argues that this case is different from *NTEU* because the honoraria ban prohibited speech outside the workplace while the uniform policy only applies to employees while they are at work. (ECF 19 at pp. 18-22). However, the

Authority's attempted on-duty or off-duty distinction does not negate the undeniably sweeping scope of the Authority's restriction on free speech before it occurs and does not render the *NTEU* standard inapplicable here. The District Court squarely rejected the Authority's argument on this point, and with good reason:

> The Port Authority argues that the NTEU standard should not apply because the Supreme Court later "clarified," in *City of San Diego v. Roe*, 543 U.S. 77 (2004), that "the heightened NTEU standard only applies if the policy restricts speech **outside the workplace** on topics unrelated to the employment." ECF 41, pp. 4-5 (emphasis added). But the Port Authority reads too much into the quote it cites from *Roe*, in which the Supreme Court merely observed that public-employee speech **"[o]utside of [the] category [of matters of public concern]**" can still be protected by the First Amendment "when government employees speak or write on their own time on topics unrelated to their employment[.] *Roe*, 543 U.S. at 80 (emphasis added). The Court did not discuss or impose any "off the clock" requirement on speech related to matters of public concern.
>
> On that point, the Third Circuit has broadly described *NTEU* as applying in any case involving a "generally applicable statute or regulation, as opposed to a particular disciplinary action[.]" *Lodge No. 5 of Fraternal Order of Police ex rel. McNesby v. City of Phila.*, 763 F. 3d. 358, 369 (3d. Cir. 2014) (cleaned up). Consistent with this precedent, the [D.C. District] Court found that while both "*Pickering* and *NTEU* arose in the context of speech activities that occurred during non-duty hours," they, "also recognized that the same balancing test applies during duty hours, although the potential for 'immediate workplace disruption' would be greater in such situations." *Am. Fed'n of Gov't Employees v. D.C.*, No. 05-0472, 2005 WL 1017877 at *10 (D.D.C. May 2, 2005). Thus, consistent with the First Amendment's broader disfavor of prior restraints, the key distinction drawn by *NTEU* was not between speech at work and speech outside of work, but between, on one hand, broad prior restraints on speech related to matters of public concern, and, on the other hand, after-the-fact disciplinary proceedings against individual employees. *See Urofsky v. Gilmore*, 216 F. 3d. 401, 407 (4th Cir. 2000) ("[T]he place where the

> speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace."); *Milwaukee Police Ass'n v. Jones*, 192 F.3d. 742, 749-50 (7th Cir. 1999) ("The Court [in *NTEU*] recognized that a prior restraint, as opposed to a *post hoc* disciplinary decision, poses problems not present in *Pickering*. With a prior restraint, the impact is more widespread than any single supervisory decision would be[.]" (citation omitted); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect"). (A30-31 at n. 7). (emphasis in original).

Furthermore, the Authority's speech restriction is even stricter than the honoraria ban in at least one significant sense because the honoraria ban did not prohibit federal employees from speaking entirely but rather only prohibited employees from receiving remuneration for speaking engagements. In contrast, the uniform policy bans all speech entirely. As such, the uniform policy is broader and more restrictive than the honoraria ban of *NTEU*.

Analyzing this case under the *NTEU* standard reveals the strong merit of Appellees' case against the abject weakness of the Authority's apparent justifications. As a threshold consideration, by wearing a mask bearing the message "Black Lives Matter" Appellees silently expressed support as citizens advocating for social justice and racial equality. None spoke on behalf of their employer. The uniform policy expressly bans and suppresses a broad range of employee high value speech and messages on any number of different topics be it on face coverings, or some other adornment such as a button, sticker, or jewelry. Additionally, the message "Black Lives Matter" is a matter of serious and widespread public concern

because the BLM movement has permeated much of daily life in the wake of the repeated murder of People of Color at the hands of the police.

The Authority does not seem to dispute the above points and so, the Authority was required to make a strong showing of likely disruption in order to overcome its employees' significant First Amendment interest.[3] Instead, the Authority relied on unpersuasive and unsubstantiated justifications in support of its policy. The Authority's seeming overarching justification is that the uniform policy tightly restricting employee speech somehow serves to prevent disruption in the workplace. However, bald allegations of potential disruption are insufficient[4] and the Authority was required, with specific evidence, to "make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." *Waters v. Churchill*, 511 U.S. 661, 674 (1994). Preventing actual disruption in the workplace may be a legitimate goal but the Authority provided scant, if any, evidence of workplace disruption (potential or actual) caused by messages on face coverings or uniforms. *Grigsby*, 157 F. App'x at 542. There has been no work stoppage at all much less one

[3] "In short, the inquiry involves a sliding scale in which the amount of disruption a public employer has to tolerate is directly proportional to the importance of the disputed speech to the public. The more tightly the First Amendment embraces the employee's speech, the more vigorous a showing of disruption must be made by the employer." *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d. 454, 472 (3d. Cir. 2015). (cleaned up).

[4] *Sexton v. Martin*, 210 F. 3d 905, 912 (8th. Cir. 2000); *Harman v. City of New York*, 140 F. 3d. 111 (2d. Cir 1998).

related to messages on employee masks. There has not been any workplace violence either between coworkers or with the public regarding messages on employee masks. There has not been a single complaint filed with the Port Authority by the bus riding public regarding messages on employee uniforms or masks, even though employees have worn face coverings since March of 2020.[5] Bus operators wearing masks or other adornments bearing messages have not caused any interruption in the Port Authority's operations—busses have continued operating and transporting the public around the County without incident.[6] In addition, Authority employees have worn uniform adornments bearing various political and social protest messages across nearly five decades without incident and the Authority has laxly enforced its prohibition on such speech. Given these circumstances, the harms the Port Authority apparently hopes to avoid are entirely speculative and conjectural. None are rooted in fact or a reasonable "fear that serious evil will result." *NTEU* at 475-476. The Authority's speculative worry is simply not enough to restrain employee speech so strictly. As such, the District Court correctly concluded that the uniform policy's blanket ban must fall as unconstitutional under *NTEU*.

[5] *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 556 (WD. Pa. 2003) (wearing a cross at work was not disruptive).

[6] Although evidence of actual disruption is not required, it remains highly relevant to the analysis. *Watters v. City of Phila.*, 55 F. 3d. 886, 896 (3d. Cir. 1995).

The Authority's other justifications likewise lack merit. As Union President Stephen Palonis and Union Business Agent Theodore Keilur testified, a couple Union members complained about the Union's response to the uniform policy. (A26-27, FOF 41). A matter of internal Union affairs, that is a far cry from "necessary impact on the actual operation of" the Port Authority. Local 85 represents a large, diverse, bargaining unit of individual employees and such a group necessarily has a broad array of viewpoints and opinions. Minor disagreements between coworkers are commonplace in nearly any work setting and do not rise to the level of disruption which justifies an absolute restriction on free speech. In *Swartzwelder*, this Court flatly rejected a similar harmony amongst coworkers justification as too speculative to warrant a broad speech restraint. Id. at 240-241.

The Authority also asserts that its wholesale ban on all messaging on employee uniforms will be easier to administer. Authority Chief Legal Officer Mike Cetra acknowledged why the Authority adopted a prohibition on masks bearing the message BLM but allowed five other mask styles. He stated unequivocally, "it eliminated the guesswork." (A574-575). In other words, since the policy permits only five different "approved expressions" it becomes nothing more than an administrative convenience. However, administrative convenience is not a good reason to completely abridge employees' rights to freedom of expression—the Supreme Court has condemned this exact justification as weak. *NTEU* at 472-476.

Much like the expert testimony ban in *Swartzwelder*, the Port Authority's uniform policy is too sweeping and vague to pass constitutional muster. Nothing in the Authority's uniform policy details exactly what type and manner of speech is prohibited and what is permitted. It is entirely unclear what exactly could be classified as speech of a "political or social protest nature." The Authority's only witness, Mr. Cetra could not describe with any particularity how the organization would determine what violated the policy and what did not. Mr. Cetra conceded the policy has gray areas (A529) and he viewed lowercase "blm" as somehow different than uppercase "BLM" yet it would be impermissible for a Port Authority bus operator to utter or express either message. (A571-572, 578). The uncertainty of the definition of "political or social protest nature" is obvious in Mr. Cetra's statement that a button with the message "obey the Constitution" would probably not constitute a political message. (A576-577). If the Authority's own Chief Legal Officer does not know whether a statement is political or not, then who would? The ambiguity of the ban is highlighted by an employee who asked his supervisor if he could wear a "white lives matter" mask. The supervisor was unsure. (A581-582). Appellee James Hanna asked if he could wear a mask that read "Unapologetically Black and Proud" and the supervisor indicated that it comported with the policy so long as it did not say "Black Lives Matter." (A463-464). It is therefore not surprising that Mr. Cetra could not define exactly what the policy meant by the terms "political" or "social

protest". (A572-573). Despite middle and upper management being assigned the task of deciding on a case-by-case basis what is and what is not a "political" and/or "social protest" message, that decision may be overruled by the CEO of the Port Authority. (A572-573). This exemplifies a policy that is not capable of reasoned application and unconstitutionally vague. *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). *Center for Investigative Reporting v. Southeast Pa. Transp. Auth.*, 975 F. 3d 300 (3d. Cir. 2020). The Authority's blanket ban on all speech of a "political or social protest nature" is vastly overbroad, unworkable, and not narrowly tailored to any goal of preventing workplace disruption. The ban was not "carefully crafted" to meet the Authority's supposed goals but was rather hastily assembled and promulgated as a wholesale restriction.[7] Because the Authority's uniform policy shares many of the unsavory characteristics of the expert testimony prohibition in *Swartzwelder* it should be deemed unconstitutional.

2. Appellees would also prevail under the traditional Pickering analysis.

If this Court determines the heightened standard of *NTEU* does not apply to this case, or any portion of this case, Appellees are still entitled to prevail under the traditional *Pickering* framework. In applying *Pickering*, the Third Circuit follows a

[7] Indeed, given the timing and nature of Defendant's policy it seems clear that the new policy was specifically designed to ban the viewpoint that Black Lives Matter. It is well established that such viewpoint discrimination is unlawful. *NE. PA. Freethought v. the City of Lackawanna Transit System*, 938 F.3d 424 (3rd Cir. 2019).

three-pronged test to evaluate whether a public employer has properly struck the balance between a public employee's right to freedom of expression and the government's interest in maintaining efficient operations: (1) whether the employee spoke as a citizen; (2) on a matter of public concern; and (3) whether the employer nevertheless had an adequate justification for treating the employee differently than members of the general public. *Baloga v. Pittston Area Sch. Dist.,* 927 F.3d 742, 753 (3rd. Cir. 2019) (quoting *Palardy v. Township of Millburn*, 906 F.3d 76, 81 (3rd. Cir. 2018)). In this case, all three factors favored the Appellees. First, by wearing a mask bearing the message "Black Lives Matter" Appellees silently expressed support as citizens advocating for social justice and racial equality. None spoke on behalf of their employer or specifically about their employment. Second, the message "Black Lives Matter" is a matter of serious and widespread public concern because the BLM movement has permeated much of daily life in the wake of the repeated murder of People of Color at the hands of the police. Here, the Authority does not seem to dispute the first two factors because employees wearing masks bearing the message "Black Lives Matter" spoke as citizens on a matter of serious and widespread public concern. Rather, this case largely turns on the third factor. And this factor clearly favors the Appellees because the Appellees' interest as citizens in commenting upon matters of public concern, such as BLM, far outweigh any interest the Port Authority may have in enacting a startlingly broad restriction on its employees' speech in an

attempt to promote the efficiency of the public service it provides. *Curinga v. City of Clairton*, 357 F. 3d. 305, 312 (3d. Cir. 2004).

As set forth in detail above, the Authority failed to demonstrate any legitimate reason to treat the Union and its members any differently than members of the general public and the passive expression of support for the Black Lives Matter movement has not caused and is not likely to cause any disruption in the efficient operation of the Port Authority. Although Mr. Cetra attempted to justify the Authority's action by focusing on an incident that happened fifty years ago during a work stoppage, there is no indication that any such activity is remotely possible as a result of an individual wearing a BLM face covering. Mr. Cetra also cited to several incidents which occurred in the past fourteen to fifteen years, but nevertheless conceded that, "obviously over the years we had other incidents between employees not getting along and getting in disputes and filing complaints against each other." (A550). It is patently clear that in a workforce of more than 2,500 employees, there will always be disputes between individuals and the race of those individuals is not always the cause. Aside from the isolated and limited incidents over the past fourteen years, since March 2020 through September 2020 both black and white employees wore Black Lives Matter masks, and not a single patron complained or a single hostile action amongst employees occurred. The Port Authority's contention that it needs to ban employees from saying Black Lives Matter rings hollow. Moreover,

the only conceivable protest was that of an employee who was wearing a mask that said, "It's all bullshit" protesting against the need to wear a mask at all. (A429-431). Indeed, if "social protest" is unacceptable, the very wearing of a mask has become a social protest.

When weighing the speech prohibition of "political or social protest" apparel against the employer's fear that others might use other counter-expressions that may cause disruption, the Port Authority's reasons are similarly unpersuasive. Clearly, if someone wore a swastika, it may reasonably be construed as potentially disruptive because a swastika represents racial and ethnic hatred, totalitarian government, and was the cause of a world war resulting in millions of deaths. The Authority's assertion that if it allows one message, it must allow all is fanciful. Wearing of a swastika or a Ku Klux Klan's headdress is a far cry from a peaceful expression asking nothing more than all people presumed to be created equal are entitled to equal justice. In evaluating the speech of a public employee, we must be mindful that public employee's speech is already limited to matters of "public concern" and by the very definition of "public concern" there will always be disagreements amongst the public. The Appellees offered a noble and peaceful plea that all men who are supposedly created equal must likewise be treated equal. We have worked too long and too hard and too much blood has been spilled to prohibit such a peaceful message as "Black Lives Matter". In weighing the purported reasons for the

draconian policy against the peaceful nonviolent speech of these employees, the Authority's rule against "political and social protest" cannot withstand any reasonable standard.

B. The District Court's Order does not require the Authority to engage in viewpoint discrimination.

Plucking a single sentence out of the dicta of the District Court's Opinion and placing it out of context, Appellant strenuously argues that the Court's Order permits the Authority to engage in viewpoint discrimination by permitting some facemasks while prohibiting others. (ECF 19, pp. 24-29). This is not so. As an initial consideration, the Court's opinion and order applied the relevant law to the specific facts and circumstances of the case before it. (A47-48, D.C. ECF 56, p. 5-6). This case involves a specific policy and specific speech that the Authority had restricted including discipline and threats of discipline. Under the applicable legal standard, the Court weighed Appellant's blanket prohibition of speech based on an unsupported and purely speculative worry of potential disruption against employees' substantial First Amendment interest in peacefully expressing support for BLM—a matter of significant public concern. In so doing, the Court concluded that the Authority violated the First Amendment with its broad prior speech restraint and enjoined the Authority from enforcing its uniform policy to prohibit employees from wearing facemasks bearing the message "Black Lives Matter" or other substantially similar messages. (A4-50). The Court's ruling was limited to the issues and

messages before it. (A47-48, D.C. ECF 56, p. 5-6). Nothing about the Court's directive requires or even arguably encourages the Authority to engage in viewpoint discrimination offensive to the First Amendment. (D.C. ECF 56, pp. 8-9). The opinion does not speak to the innumerable other potential future messages and manners of speech that may arise or be uttered or expressed by Authority employees in the future. In fact, the Court recognized that the Authority could analyze "specific instances of employee speech for potential disruptiveness, rather than imposing a prior restraint on an entire category of important and highly protected speech." (A47). In other words, instead of mandating a broad prior restriction on high value speech, the Authority could assess employee speech on a case-by-case basis without being viewpoint discriminatory or violating the First Amendment. (D.C. ECF 56, pp. 8-9). For instance, where the speech could reasonably lead to disruption, the Authority may be able to restrict it. On the other hand, as in this case, where there is no evidence that speech would lead potential disruption, it cannot be so restrained. Similarly, if the speech did not touch on a matter of public concern, it could be more restricted by the Authority. On the other hand, as in this case, the First Amendment affords speech on matters of public concern, such as BLM, greater protection under the First Amendment. This has nothing to do with the viewpoint expressed. In short, the Authority can abide by the Court's directive and the requirements of the First Amendment without engaging in viewpoint discrimination. (D.C. ECF 56, pp. 8-9).

C. The District Court thoughtfully considered the effect of messaging on facemasks on the bus riding public but found it insufficient to prohibit a staggeringly broad restriction on employee speech.

Appellant next asserts that it should prevail because the District Court "disregarded" the Authority's interest in protecting customers from "political or social protest" messages. (ECF 19 at pp. 29-36). The Authority's argument on this point mischaracterizes or misunderstands the Court's order or both because the District Court did in fact analyze the impact of passive employee expressions of support for BLM on the bus riding public. (A12-27, FOF 7-41, A33-41; D.C. ECF 56, pp.10-11). More specifically, the Court found that there was no evidence that a single bus passenger had complained about bus drivers wearing masks supporting BLM. (A22 FOF 27; D.C. ECF 56, p.10). The evidence of record supported the opposite conclusion because public commentary to bus drivers wearing BLM masks had been universally positive. (A22, FOF 28, A41). In any event, society, including the bus riding public benefits from open discourse even if it is controversial—it benefits both the speaker and the listener especially when the commentary is a matter of significant public concern. (A8, A38); See *Ne. Pa. Freethought Soc'y v. Cty. Of Lackawanna Transit Sys.*, 938 F.3d. 424, 439-441 (3rd. Cir. 2019). As the District Court aptly noted, "…the entire premise of the First Amendment . . . is that disagreement and debate are not evils to be feared or purged but societal goods to be welcomed and nurtured. Simply put, Americans have both the 'right and civic duty

to engage in open, dynamic, rational discourse,' and those 'ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.'" (A38 citing *United States v. Alvarez*, 567 U.S. 709, 728 (2012)).

Moreover, the Court considered that a bus driver sits behind a spit shield and members of the public have limited brief interactions with drivers when boarding or exiting a bus. (A23, FOF 33; D.C. ECF 56, p. 10-11). Employee masks are unlike an advertisement on the interior of a bus because advertisements are placed on areas of busses that are continually visible to patrons. Employee masks are far less visible as an operator faces forward, driving, and a passenger briefly boards or exits the bus. As such, bus patrons are not a "captive audience" subject to "propaganda" but may only briefly see a driver's mask, if they see it at all. Additionally, the Court noted that the Authority itself has engaged in public speech on a variety of political and social protest issues—none of which had resulted in complaints from the public or other negative consequences. (A19, A23, FOF 18, 34; A35-36, n. 10). Surely, the Authority itself considered the impact of its own public statements and decided such messages including "Black Lives Matter" were worth disseminating and would not cause disruption of its operations. The Court also noted that bus drivers remain free to speak with passengers on any number of topics as a part of casual conversations that periodically occur between drivers and passengers. (A12, FOF 8). Furthermore, the Court emphasized that the Authority's uniform policy banning political or social

protest messages generally had been laxly enforced over many years – further evidence that there had been no negative effect of allowing the public to be exposed to such messages. (A13-18, FOF 9-13, A43; D.C. ECF 56, pp. 10-11). All of this makes clear that the Court carefully analyzed and addressed how bus drivers wearing BLM masks could affect the public. In so doing, the Court correctly applied the relevant law to conclude that the public benefits from more speech on matters of public concern, not less, and the Authority's professed remote concern of some speculative negative influence on the public did not warrant such a broad restraint on speech which prohibited bus drivers from passively expressing support for the BLM movement. In denying the Authority's motion for stay, the District Court succinctly ruled: "Given the record before the Court, the Port Authority's argument regarding 'captive' customers being subjected to the 'blare of political and social protest propaganda' is simply unsupported." (D.C. ECF 56, p. 11). For this reason too, the Authority's appeal lacks merit.

D. The District Court did not require the Authority to prove actual disruption, only a fear of potential disruption.

The Authority's arguments to the contrary notwithstanding (ECF 19, pp.17-23), the District Court's order did not require the Authority to prove actual disruption to justify its overarching prior speech restriction. The District Court repeatedly made clear that *Pickering* or *NTEU* require the Authority to demonstrate, with specific evidence, that speech is "likely to be disruptive" or disruption can "reasonably be

expected to occur" to justify its abridgment of First Amendment rights. (A8, A28-31, D.C. ECF 56 at pp. 11-13). As the Court noted, "while the government 'need not show the existence of actual disruption' caused by the employee's speech, it must at least show 'that disruption is likely to occur because of the speech.'" (A29, A35); citing *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d. 454, 472 (3d. Cir. 2015); *Waters v. Churchill,* 511 U.S. 661, 674 (1994). However, conjectural worry or a speculative fear of potential disruption is simply not enough to meet this exacting standard. (A 8, A34-35, A36-38; D.C. ECF 56 at pp. 11-13). When someone boards a plane, there is a remote possibility that the plane will crash and kill them. But that does not mean the fear is reasonable—plane crashes occur very rarely and nearly all flights reach their destination without incident. Under either *Pickering* or *NTEU*, the Court concluded that the uniform policy failed to pass constitutional muster because the Authority failed to prove, with specific evidence, that its blanket ban on employee speech was based on a reasonable calculation that disruption was likely to occur if employees were permitted to wear BLM masks. (A31-32, A34-40; D.C. ECF 56 at pp. 11-13); *Nichol v. Arin Intermediate Unit*, F. Supp. 2d. 536 (W.D. Pa. 2003); *Munroe*. Rather, the Authority's justification for its sweeping speech restriction was far too speculative to warrant the severe limitation on employees' high value speech. (A33-34, A37-38; D.C. ECF 56 at pp. 11-13). The Court supported its conclusion and analysis with myriad record evidence demonstrating that disruption, in the form

of disagreements between coworkers or with the public or an interruption in the Authority's operations because of bus drivers wearing BLM masks was not likely to occur. (A33-41; D.C. ECF 56 at pp. 11-13). Mindful of context, the Court also considered the timing and circumstances surrounding the wearing of BLM masks—emphasizing that although the speech occurred while racial tensions in society at large were relatively high—there had still been no disruptive counter speech because of BLM masks. (A6, A48, D.C. ECF 56, n. 7). The Authority's disagreement with the Court's conclusion does not mean the Court applied the incorrect standard or required the Authority to show actual disruption.

E. Despite the Authority's slightly increased interest in regulating employee conduct, public employees retain significant First Amendment protections while at work.

The Authority's argument—that it should prevail on appeal because the District Court failed to recognize employees' "limited interest" in engaging in protected speech while on duty—suffers from similar fatal flaws. (ECF 19, pp. 43-46). The protections of the First Amendment extend to public employees on the clock.[8] Even though the government acting as an employer has a slightly increased interest in limiting its employees speech, that discretion has limitations and public

[8] "An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace." *Urofsky*, 216 F. 3d. at 407; see also *Rankin v. McPherson*, 483 U.S. 378 (1987), *Am. Fed'n of Gov't Employees v. D.C.*, No. 05-0472, 2005 WL 1017877 at *10 (D.D.C. May 2, 2005).

employees retain significant First Amendment rights when speaking on matters of public concern. *Curinga v. City of Clairton*, 357 F. 3d. 305, 309 (3d. Cir. 2004); *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Again, the Court addressed this issue recognizing that public employers have more latitude to restrict the speech of public employees than the general public—such as when such employee speech is reasonably likely to lead to workplace disruption or does not touch on a matter of public concern. (A8, A32-33; D.C. ECF 56, pp. 13-14). This necessarily means that the First Amendment protections afforded to public employees are somewhat reduced while at work as opposed to when they are off duty. Nonetheless, the Court noted, citing U.S. Supreme Court and Third Circuit precedent, that public employees do not entirely surrender their First Amendment rights when they report to work. (A8, A28-29, A32-33). Indeed, public employees retain the right to speak freely on matters of public concern as long as that speech is not likely to create workplace disruption. (*Id*.). There is no dispute that BLM is a matter of widespread concern—making it highly valued speech that Authority employees retained an important right to express. And the District Court found that such speech was not likely to lead to workplace disruption. Therefore, despite the Authority's somewhat increased interest in regulating the speech of its employees, and the Union members' correspondingly decreased First Amendment protections, the Authority's broad prior restraint on employee speech still violated the First Amendment.

The Authority's bald and paternalistic assertion that People of Color, who have faced systematic discrimination and persecution for centuries because of the color of their skin have no "specialized knowledge" of the need to peacefully advocate for equal justice under the law should be dismissed out of hand. (ECF 19 at pp. 43-45). People of Color have lived through pervasive hatred, violence, and discrimination because of the color of their skin for generations. Without a doubt, living through such discrimination—ranging from horrific tragedies to everyday slights—does in fact bestow specialized knowledge as to the dire need for equal justice upon the countless People of Color who have been forced to suffer through it. Each has a unique experience and important perspective worth sharing. Furthermore, many of the Appellees' witnesses—People of Color and Caucasians—described themselves as civil rights advocates who had regularly attended marches and participated in demonstrations advocating for equal rights. Nevertheless, whether or not Union members have any "specialized" knowledge regarding BLM or not is of no moment. What matters is that employees spoke in support of BLM—a matter of significant public concern, passively and peacefully, and the Authority failed to prove that such speech was likely to lead to a disruption of the Authority's operations. (D.C. ECF 56, pp.13-14).

F. The Authority's generalized interest in a pristine uniform cannot justify a sweeping restriction on high-value speech.

The Authority attempts to justify its blanket ban on any uniform adornments which bear social or political messages for both public and non-public facing employees by citing cases (none of which are binding on this Court and almost all of which are in the Fifth Circuit) where certain uniform policies were upheld as constitutional. (ECF 19 at pp. 22-24). However, these cases are readily distinguishable from the instant case because those cases involved police departments, paramilitary organizations, or hospitals. *U.S. Department of Justice v. FLRA*, 955 F. 2d 998 (5th. Cir. 1992) (policy prohibiting immigration border patrol agent from wearing a union lapel pin constitutional because unique nature of paramilitary organization required uniformity of appearance); *Risk v. Burgettstown Borough,* 2007 U.S. Dist. Lexis 70048 (W.D. Pa. September 21, 2007) (police officer wearing a religious cross uniform adornment); *Communications Workers of America v. Ector County Hospital*, 467 F.3d. 427 (5th. Cir. 2006) (public hospital carpenter wearing "Union Yes" button could be constitutionally prohibited because message touched on a matter of public concern only in a weak or attenuated sense); but compare *Herrerra and CWA v. Med. Ctr. Hosp.*, 241 F. Supp. 2d. 601, 611-612 (E.D. La. 2002) (questioning the hospital's interest in a uniform free of a pro-union adornment). As the District Court noted, what each of these public employers share, and what the Authority does not, "is a uniquely strong interest in projecting uniformity, discipline, and neutrality, either internally or to the general public." (A42

citing *Risk*; *Smith v. United States*, 502 F.2d. 512 (5th. Cir. 1974). Outside the police or paramilitary context, public employer uniform policies do not enjoy the same level of deference. *Scott v. Goodman*, 961 F. Supp. 424, 428 (E.D.N.Y. 1997), *aff'd sub nom. Scott v. Meyers*, 191 F.3d. 82 (2d. Cir. 1999); *Liverman v. City of Petersburg*, 844 F. 3d. 400, 407-408 (4th. Cir. 2016); *Herrerra and CWA v. Med. Ctr. Hosp.*, 241 F. Supp. 2d. 601, 611-612 (E.D. La. 2002).

In a case involving public transit employees—obviously far more relevant to the instant dispute—the Court ruled that a similarly sweeping anti-adornment rule violated the First Amendment because it was overbroad and the government's interest did not outweigh employees' free speech rights. *Scott v. Goodman*, 961 F. Supp. 424 (E.D.N.Y. 1997), *aff'd sub nom. Scott v. Meyers*, 191 F.3d. 82 (2d. Cir. 1999). In so doing, that Court held, "[m]ere incantations that a pristine uniform is necessary to provide safe public transportation . . . clearly insufficient to legitimize an anti-adornment rule which renders nugatory all expressions of constitutionally protected speech contained on a button, badge or insignia." *Id*. at 428. The Authority may have a small interest in its employees wearing uniforms but because it is not a law enforcement organization or paramilitary organization, it has no compelling or strong interest in enforcing a pristine uniform. *American Federation of Government Employees v. Pierce*, 586 F. Supp. 1559 (D.C. D.C. 1984). Indeed, as set forth in detail above, the Authority's uniform policy has been laxly enforced over decades

and the Authority itself described uniform infractions as minor which "undermines (and calls into doubt the existence of) any such interest." (A43-44). As such, the Authority's generalized interest in employees wearing uniforms cannot justify a broad restriction on all uniform adornments bearing peaceful messages or logos.

Appellant's argument that its uniform policy requires strict uniformity is not persuasive. Masks were never a part of Authority uniforms until the onset of the COVID-19 pandemic. Bus riding patrons can easily identify a transit operator by his badge number or basic shirt, hat and pants. A mask, Mr. Cetra acknowledged, is nothing a member of the bus riding public would focus on. When asked as a rider if he ever noticed uniform violations, Mr. Cetra's response was emblematic of what most passengers might say, "I never observed it. I can't sit here and tell you I was getting on looking for it. The reality is you are getting on a bus. The bus driver is sitting behind the fare box. Not all of them have it but even then, most of them. There is a spit shield, the driver shield, now it has become a COVID shield. But a shield they can deploy in front of them. They are typically facing this way (indicating as if the driver was looking straight ahead). I'm not dressing them down to see if they are in uniform." (A567). If the enforcer of the uniform code would not notice uniform violations, it would hardly be noticed by an ordinary passenger that a driver looking straight ahead was wearing a mask bearing the message Black Lives Matter. Even if they did see it, there is no indication anyone would be offended by it. Certainly not

to the extent that there would be disruption to the public service being provided by the Port Authority. Moreover, the record is replete with testimony from various witnesses that wore buttons and stickers supporting various political candidates for both public and union office as well as social causes such as support for the victims and families of the Tree of Life synagogue massacre. There was also testimony that employees donned various buttons such as shamrocks and chains and necklaces bearing African and Egyptian religious and spiritual symbols. Appellee Hanna can be seen wearing such jewelry in a photograph taken alongside Authority CEO Kelleman. (SA 101).

G. The Authority will not suffer irreparable harm because of the preliminary injunction.

Because the Port Authority did not and cannot demonstrate that employees peacefully expressing support for BLM would likely lead to any disruption in its operations, the Authority did not and will not suffer irreparable harm because of the injunction. Entirely generalized, speculative fears of disruption resulting from peaceful passive expression of support for equal rights, remote worries unsupported by evidence, do not constitute an irreparable harm. (D.C. ECF 56, pp. 3-5). In any event, Appellant cannot claim an interest in continued enforcement of an unconstitutional policy. *ACLU v. Ashcroft,* 322 F.3d 240, 251 n.11 (3d Cir. 2003); *Am. Freedom Def. Initiative v. Se. Pennsylvania Transp. Auth.*, 92 F. Supp. 3d. 314, 330 (E.D. Pa. 2015).

H. Appellees would have suffered irreparable harm without a preliminary injunction.

There is no dispute that Appellant restricted the free speech of its employees by prohibiting them and/or disciplining them from donning masks bearing the message "Black Lives Matter." Free speech limitations, "even for minimal periods of time, constitute irreparable harm." *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 556 (WD. Pa. 2003) at 560-561 citing *Elrod v. Burns*, 427 U.S. 347 (1976). Appellant's restriction of free speech in and of itself caused Appellees to suffer an irreparable harm. *Malik v. International Brotherhood of Electrical Workers*, 644 F.2d 228 (3d. Cir. 1981). In granting the preliminary injunction, the Court granted Appellees significant relief from the Authority's unlawful speech restraint. If the Circuit Court were to reverse course, Union membership would be subject to this unlawful restriction on speech and suffer corresponding irreparable harm once again. This factor favors upholding the District Court's decision. (D.C. ECF 56, pp. 2-3).

I. Issuing the injunction served the public interest.

Public interest favored granting the preliminary injunction and favors denying Appellant's appeal because the public interest strongly favors the preservation of Appellees' constitutional free speech and associational rights. (D.C. ECF 56, pp. 2-3); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d. Cir. 1997); *Am. Freedom Def. Initiative v. Se. Pennsylvania Transp. Auth*., 92 F. Supp.

3d. 314, 330 (E.D. Pa. 2015). In the court below, the Authority claimed that granting a stay would serve the public interest because the bus riding public would be free from exposure to the peaceful message on employee masks that Black Lives Matter—an important message which the Authority itself publicly claims to endorse. (A19 at FOF 18; A102 at ¶8, A662-665; SA 47-49; SA 115-116). The hypocrisy of that claim is obvious. In addition, as the Court noted, the public benefits from more speech on matters of public concern, not less. Despite the Authority's assertions to the contrary, Authority employees do have valuable insight to share, and the Authority's policy deprived its employees from sharing that valuable insight with the public and from engaging in peaceful social discourse. The Authority's other argument why public interest favors granting a stay—to avoid potential disruption—is too speculative as discussed in greater detail *supra*. As such, public interest favors upholding the trial court's decision.

VI. CONCLUSION

Based upon the foregoing reasons, arguments, and authorities, the Union respectfully urges this Court to affirm the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH TYPE VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND VIRUS CHECK

I, Patrick K. Lemon, counsel for Appellees, certify, pursuant to L.A.R. 28.3 (d) that I am a member in good standing of the Bar of the Court of Appeals for the Third Circuit. I also certify, pursuant to F.R.A.P. 27(d), 32(a)(5)-(7) and L.A.R. 31.1(c) and L.A.R. 32.1 (c) that the foregoing is proportionately spaced and has typeface of 14-point Times New Roman, contains 11,060 words not counting those excluded from the word count by Rule 32 (f), and that the text of the electronic brief is identical to the text of the paper copies. I further certify, pursuant to L.A.R. 31.1 (c) that a Windows virus scan has been conducted on this brief before filing and no virus was detected.

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CERTIFICATE OF SERVICE

I, Patrick K. Lemon, counsel for Appellees, certify that on July 6, 2021, I filed the foregoing Brief on Behalf of Appellees via the Court's CM/ECF system, causing a Notice of Docket Activity and a copy of the document to be served upon the following counsel of record who are registered CM/ECF Filing Users:

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