UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 29

AMAZON.COM SERVICES LLC,	)	
	)	
Employer,	)	
	)	
And	)	Case No. 29-RC-288020
	)	
AMAZON LABOR UNION,	)	
	)	
Petitioner.	)	
	)	

AMAZON LABOR UNION'S CLOSING BRIEF IN OPPOSITION TO AMAZON.COM SERVICES LLC'S OBJECTIONS TO THE CERTIFICATION OF THE JFK8 ELECTION AND IN SUPPORT OF CERTIFICATION

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Preliminary Statement

Petitioner, Amazon Labor Union (hereinafter "ALU" or "Union" or "Petitioner"), by its attorneys, after the Hearing on Amazon.com Services, LLC's (hereinafter "Amazon" or "Employer") 25 Objections to the Certification of the Election at JFK8 submits the below Closing Brief in Opposition to Amazon's Objections and in Support of the Certification of the April 1, 2022 Election Tally, the latter which demonstrates that the Amazon Labor Union was chosen as the bargaining representative by a margin of 523 votes.

Petitioner began these proceedings arguing their Motion to Dismiss Objections 1-9, 12, 14-18, 20-21, and 23-25. Petitioner argued these Objections were so legally deficient that no amount of testimony would turn them into viable objections. The record reflects that Petitioner has reason to stand by its arguments. Twenty-four days of hearings, which developed a transcript of over 5000 pages, only reinforced Petitioner's arguments in its original motion. The Employer's Objections, which Petitioner stated at the outset were legally deficient, remain so. Furthermore, the Employer failed to carry its burden of proof as to the other five Objections which were not the subject of Petitioner's Motion to Dismiss, as well: Objections 10, 11, 13, 19, and 22.

Standard of Review

In *Laurel Baye Healthcare of Lake Lanier, LLC v. NLRB,* 209 F. App'x 345, (4th Cir.. 2006) the Court stated:

> It is well settled that the Board is vested "with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" through an election. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S. Ct. 324, 91 L. Ed. 322 (1946); *see NLRB v. Kentucky Tennessee Clay Co.*, 295 F. 3d 436, 441 (4th Cir. 2002).

> The results of an NLRB-supervised representative election are presumptively valid and we must uphold findings and conclusions of the Board so long as the decision is reasonable and based upon substantial evidence in the record considered as a whole." *Kentucky Tennessee*, 295 F.3d at 441 (internal quotation marks, citation, and alterations omitted)."
>
> However, "because the employees' right to exercise a fair and free choice in a representation election is the mandate, elections must be conducted in laboratory conditions, free from behavior that improperly influences the outcome." *Id*. (internal quotation marks and citations omitted); *see also NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1242 (4th Cir. 1976). The employer may rebut the presumption that the election is valid, but only if it presents "specific evidence not only that the alleged acts of interference occurred but also that such acts sufficiently inhibited the free choice of employees as to affect materially the results of the election." *Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 623 (4th Cir. 2002) (internal quotation marks omitted); *see also NLRB v. Urban Tel. Corp.*, 499 F.2d 239, 242 (7th Cir. 1974) ("For conduct to warrant setting aside an election, not only must the conduct be coercive, but it must be so related to the election as to have had a probable effect upon the employees' actions at the polls.").

"It is well established that "in making its determination as to whether the [alleged] conduct has the tendency to interfere with employees' freedom of choice, the Board will consider, *inter alia,* the closeness of the election." *Cambridge Tool & Mfg. Co*., 316 NLRB 716, 716 (1995). The Hearing Officer and the Regional Director should also consider the Board's admonition in *Newport News Shipbuilding & Dry Dock Co.*, 239 NLRB 82, 90 (1978), to "avoid unrealistic standards which insist on improbable purity of word and deed on the part of the parties or Board agents. Otherwise, in any hard-fought campaign involving a large number of voters, it would be impossible to conduct an election which could not be invalidated by a party disappointed in the election results." *See also NLRB v. Herbert Halperin Distrib. Corp*., 826 F.2d 287, 290 (4th Cir. 1987) (it has long been recognized that representation elections are "heated affair[s]" and, consequently, an election will not be set aside "unless an atmosphere of fear and coercion rendered free choice impossible.")

It is also well settled that a representation election is not lightly set aside. *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equip. Co.,* 470 F.2d 1329, 1333 (5th Cir.1972)). The burden of proof on parties seeking to have a Board-

supervised election set aside is a heavy one. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). In *General Shoe Corp*., 77 NLRB 124, 127 (1948), the Board held that conduct which creates an atmosphere which renders improbable a free choice will warrant invalidating an election. The Board reasoned as follows:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again. *Id*. at 127.

Under the *General Shoe* doctrine, the test of conduct which may interfere with the "laboratory conditions" for an election is considerably more restrictive than the test of conduct amounting to interference, restraint, or coercion which violates Section 8(a)(1). See, e.g., *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 3 fn. 12 (2014); *Dal-Tex Optical Co*., 137 NLRB 1782, 1786–1787 (1962); see also *Heartland Human Services v. NLRB*, 746 F.3d 802, 804 (7th Cir. 2014).

In evaluating party conduct during the critical period, the Board applies an objective standard, under which conduct is found to be objectionable if it has "the tendency to interfere with the employees' freedom of choice." *See, Cambridge Tool & Mfg. Co*., *supra*, at 716.

Consequently, the challenging party must bear the heavy burden of proving, by specific evidence, both that improprieties occurred and that these improprieties prevented a fair election. By extension, "minor violations . . . of 'policy,' having no apparent effect on an election result, may not serve as the basis to overturn such election." *Elizabethtown Gas*, 212 F.3d at 268; *Case Farms*

of N.C., Inc. v. NLRB, 128 F.3d 841, 844 (4th Cir. 1997) (noting that while the NLRB's goal in supervising elections is to create "laboratory conditions" in which to ascertain the desires of the employees, "elections do not occur in a laboratory," and, accordingly, "the actual facts must be assessed in the light of realistic standards of human conduct" (internal quotations omitted)). *Mail Contractors of Am., Inc. v. NLRB*, 122 F. App'x 635, 637 (4th Cir. 2005). As established by the hearing, no conduct warrants overturning the election results, and the wide margin of victory establishes that the April 1, 2022 Election Tally must be certified.

Scope for the Hearing

The Casehandling Manual at Section 11395.3 states, "The Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director." In the instant matter, Regional Director for Region 28 of the National Labor Relations Board, Cornele A. Overstreet, to whom this proceeding was transferred upon an April 8, 2022 motion by the Employer, considered the Employer's offers of proof filed on April 22, 2022. On April 29, 2022 Regional Director Overstreet ruled that "the hearing on objections **as described above** will be conducted before the Hearing Officer of the National Labor Relations Board …" *See* Board Exhibit 1a (*emphasis added).* Section 11424.3(b) states, "The Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. Thus, any allegations based on any new legal theory or different factual circumstances are insufficiently related to the objections set by the Regional Director for hearing and should not be considered. *See Precision Products Group, Inc.*, 319 NLRB 640 (1995); *Iowa Lamb Corp.*, 275 NLRB 185 (1985)." Thus, despite the Employer's repeated attempts throughout the record to expand the scope of its Objections, the appropriate scope for this Hearing on Objections must be

only as ordered and listed pursuant to Regional Director Overstreet's April 29, 2022 "Order Directing Hearing and Notice of Hearing on Objections." *See* Board Exhibit 1a. Despite arguing that the Regional Director's Order was only a summary of the Objections set for hearing, the Employer conceded in the record that the "Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific Objection set for hearing by the Regional Director." *See* Tr. 3178: 9-13.

I. ALL OF THE OBJECTIONS DIRECTED AT REGION 29 MUST BE OVERRULED

As noted, the Board is vested "with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" through an election. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S. Ct. 324, 91 L. Ed. 322 (1946); *see NLRB v. Kentucky Tennessee Clay Co.*, 295 F. 3d 436, 441 (4th Cir. 2002).

The Employer's Objections 1-9 and 12 were the subject of Petitioner's Motion to Dismiss. One of the main bases for the motion, which the record has not disturbed, is that there is no precedent for the Employer's claims that actions of the Region or the NLRB General Counsel, outside of the election itself, can be a legitimate basis for an Objection to the Certification of the Tally. Indeed, the case-law relied on by Amazon for many of its Objections against Region 29, *Ensign Sonoma, LLC,* 342 NLRB 933(2004), and *Athbro Precision Engineering Corp.*, 166 NLRB 116 (1967), refer only to conduct of Board agents during the actual conducting of the election, not to conduct outside the context of a representation election. In *Ensign Sonoma*, the Board adopted the standard that elections may be set aside if the conduct of the Board agent tends to destroy the confidence in the election process or could be reasonably interpreted as impairing the election procedures that the Board seeks to maintain. These cases are limited to actual elections and require Board agents to maintain strict neutrality in how they act and speak while conducting the

representation election. These cases do not extend to other actions of the NLRB, its Regions or the General Counsel. This is true for good reason. The NLRB has many functions other than conducting representation elections. The Board must ensure, for example, that workers' Section 7 rights to form and join unions, collectively bargain, and engage in other mutual aid and protection are protected. The majority of the allegations made by the Employer against the Region, are collateral attacks on the agency's functions outside the actual running of representation elections. Accordingly, as argued herein, even if such facts regarding the conduct of the Board were established—which they were not—such conduct would not form a basis to overturn the results of the election.

A. Objections 1 and 2 Impermissibly Invade the Agency's Prosecutorial Discretion

Objections 1 and 2 state as follows:

> **Objection 1 :** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it sought a 10(j) injunction in *Drew-King v. Amazon.com Services LLC*, E.D.N.Y., No. 22-01479, on March 17, 2022
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> **Objection 2:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it delayed investigating numerous unmeritorious and frivolous unfair labor practice charges that were pending during the critical period rather than properly dismissing them or soliciting withdrawals

Objections 1 and 2 threaten the heart of the Section 7 rights that are enshrined in the National Labor Relations Act ("NLRA" or "the Act") and the power and duty of the General Counsel for the National Labor Relations Board to enforce those rights when the Federal Government determines they were likely violated. Before even proceeding to the law and absence of evidence in the record, simple logic suggests that Objections 1 and 2 are baseless.

In an effort to cast doubt on the integrity of Region 29, Amazon misstated the identity of the party that sought 10(j) relief in the framing of Objection 1. It is widely known that under the Act, it is the Board itself and not the General Counsel or "the Region" that authorizes a petition for 10(j) relief. *See*, 29 U.S.C. § 160(j). Amazon's Objection describing "the Region" as the actor is thus misplaced. Indeed, the Order of the Hearing Officer rejecting the Employer's offers of proof as to Objections 1-5 was correct given their legally deficient nature.

In response to Objection 2, it is also undisputed that the General Counsel did authorize the issuance of Complaints on a substantial number of the unfair labor practice charges filed by the Petitioner during and before the critical period. *See*, ALU Exs. 31, 32. Thus, Amazon alleges no action that in any way might have benefited the Union or influenced employees to favor union representation. In fact, unsuccessfully seeking 10(j) relief and failing to issue complaints in response to unfair labor practice charges are more likely to have reduced support for the Petitioner than encouraged support. With respect to the petition for 10(j) relief, the Regional Director had already found merit in the Unfair Labor Practice charge and issued a complaint on December 22, 2020 The delay in seeking Court intervention was caused by Amazon itself. In fact, subsequent to the filing for 10(j) relief, ALJ Benjamin Green determined that Amazon had violated the NLRA in terminating the employment of Gerald Bryson and found that Mr. Bryson should be restored to his previous position without loss of seniority and with back pay. In addition, ALJ Green found that Amazon's own failure to comply with lawfully issued subpoenas caused the undue delay in the Bryson hearing. *See*, ALU. Ex. 30, at Pg 10 - 11. The Employer simply cannot get any benefit from causing the delayed circumstances that it now complains of and points to as a reason for not certifying the results of this election. There is simply no reason to believe the alleged actions or delays (in the General Counsel seeking 10(j) relief in the Gerald Bryson matter) had any "tendency

to interfere with the employees' freedom of choice" or affected the outcome of the election. *Cambridge Tool & Mfg. Co*., 316 NLRB 716, 716 (1995). The alleged actions or omissions simply cannot have "had a probable effect on the employee's action at the polls." *Great Atl. & Pac. Tea Co*., 177 NLRB 942, 942-43 (1969).

Despite the Board seeking 10(j) relief on March 17, 2022, the court did not act on the request prior to the election, and the General Counsel took no affirmative action on certain unfair labor practice charges filed by the Petitioner prior to the election. Amazon's objections to the filing of a petition for a preliminary injunction under Section 10(j) and the timing of processing unfair labor practice charges cannot be a basis for a claim that the "Region failed to protect the neutrality and integrity of the Board procedures creating the impression of Board assistance to the ALU." To sustain such an objection would mean every determination by the General Counsel prior to a representation election could be subject to a claim of bias by the disappointed party to frustrate Section 7 election activities when the General Counsel was merely acting within her unreviewable discretion to enforce the NLRA.

Similar arguments exist to support overruling Objection 2. Even if there was any logic to these two objections, the law is clear that Amazon cannot challenge the General Counsel's prosecutorial decisions through an Objections hearing in a Representation Case. Quoting the Conference Committee Report on the Taft-Hartley amendments, the Supreme Court has made it clear that it is the "General Counsel of the Board ... [who] is to have the final authority to act in the name of, but independently of any direction, control, or *review* by, the Board *in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board.*" H.R.Conf.Rep. No. 510, 80th Cong., 1st Sess., 37 (1947), U.S.Code Cong.Serv.1947, p. 1135." *NLRB v. United Food and Commercial*

Workers Union, Local 23, 484 U.S. 112, 124-25 (1987) (*emphasis added*). The Supreme Court characterized the General Counsel's authority in these respects as "unreviewable discretion" and made clear that "'prosecutorial' determinations" are "to be made solely by the General Counsel" and "are not subject to review under the Act." *Id*. at 126, 130. Thus, the General Counsel's decisions about how quickly to investigate charges, whether to dismiss charges, and whether to recommend to the Board that it petition for 10(j) relief are not reviewable by the Board or the courts in any proceeding under the Act, including a representation proceeding in which the Board is the ultimate decision-maker. *See* 29 U.S.C. § 153(b); 29 C.F.R. § 206.69(c)(2).

Of course, there are many factors that may bear on how the General Counsel exercises her discretion in a case like this. The regional office may be busy and understaffed. Charges that appear on their face to be meritorious may be prioritized over other charges for investigation. The General Counsel may wish to wait for the record to close in an unfair labor practice proceeding or for a decision by an Administrative Law Judge before seeking authorization to pursue 10(j) relief. That complex of considerations is why Congress deliberately chose to insulate the General Counsel's decisions from review by the Board and the courts. Objections 1 and 2 fail for this reason as well and cannot be relied on to overturn this election.

Finally, Amazon even being permitted to pursue these objections is contrary to the fundamental policies underlying the Act and potentially could open a floodgate of Objections to Elections to pour through. Unions will object that the General Counsel failed to issue a complaint or failed to issue a complaint soon enough. Employers will object that the General Counsel issued a complaint or issued it during the critical period. Unions will object that the General Counsel failed to seek 10(j) relief. Employers will object that the General Counsel sought 10(j) relief. It is the General Counsel's and the Board's duty to uphold that policy using the mechanisms available

under Section 10. If parties subject to unfair labor practice charges can question and investigate the General Counsel's and Board's actions under Section 10 via a collateral attack under Section 9, the policies underlying the Act will be undermined and its enforcement crippled. This will completely frustrate the fundamental policy of the Act that employees be able to exercise their Section 7 rights free from interference. Obviously one of the most sacred of rights is to choose whether or not to elect a collective bargaining representative.

Not surprisingly, Amazon has entered no relevant evidence in support of these Objections to overturn this election into the record. Although the Employer was allowed to introduce into the record the Petitioner's withdrawn ULP charges filed during or before the critical period, the Petitioner in response entered two consolidated ULP charges (encompassing 11 individual charges) which were issued. *See*, Emp. Exs. 728 - 738, 2728, Pet. Exs. 31 and 32. Thus any claim that the Petitioner filed unmeritorious and frivolous charges fails.

Most telling, with respect to Objections 1 and 2, the Employer failed to produce even **one witness**, or attempt to proffer such testimony of a witness, who had any knowledge of either the 10(j) or any unfair labor practices charges. Thus raising Objections 1 and 2 is fundamental legal error and amounts to frivolous sanctionable conduct. As a result these Objections must be overruled as a matter of both fact and law.

B. Objections 3-5 Are an Impermissible Collateral Attack on the Board's Finding That the Petitioner Had A Sufficient Showing of Interest to Proceed to An Election

Objections 3-5 state as follows:

> **Objections 3:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it allowed the Petitioner's petition in Case 29-RC-288020 to proceed to election knowing that the Petitioner

> did not have the required 30% showing of interest in the petitioned-for unit.
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> **Objection 4:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it impermissibly allowed the Petitioner for more than a month (from December 22, 2021 to January 25,2022) to continue gathering and submitting late signatures to bolster its insufficient showing of interest.
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> **Objection 5:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it unilaterally altered the scope and size of the petitioned-for unit for the purpose of investigating the Petitioner's showing of interest

Objections 3-5, while couched in terms of integrity and neutrality, are nothing more than an impermissible collateral legal attack on the Regional Director's finding that an adequate showing of interest has been established to proceed to an election. It is clearly established, however, that the adequacy of the showing of interest cannot be litigated post-election. It should also be emphasized that the Employer voluntarily entered into a Stipulated Election Agreement on February 17, 2022, which Stipulation did not dispute the showing of interest despite the fact that it had raised it in Attachment E to its Statement of Position dated January 28, 2022. *See* BD Exhibit 1(i), Attachment A. Under the Stipulated Election Agreement "[t]he parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations." Nowhere in the February 17, 2022 Agreement does the Employer raise any concerns about the showing of interest and by signing such agreement it has waived its right to raise any concerns it had with the showing of interest via a pre-election hearing.

Furthermore, the Board has clearly held that the adequacy of the showing of interest is a matter for the Board alone and is not litigable by the parties. Moreover, given that the purpose of the showing of interest requirement is simply to ensure that it is not a waste of government resources for the Region to conduct an election, after an election is held, the adequacy of such showing of interest is irrelevant, as the Region's resources have already been expended. Thus, in *Gaylord Bag Co*., 313 NLRB 306, 306-07 (1993), the Board explained:

> The Board consistently has held that the showing of interest is a matter for administrative determination, and is not litigable by the parties. See, e.g., *Barnes Hospital*, 306 NLRB 201 fn. 2 (1992); *Globe Iron Foundry*, 112 NLRB 1200 (1955); *Potomac Electric Power Co.*, 111 NLRB 553, 554 (1955). It is exclusively within the Board's discretion to determine whether a party's showing of interest is sufficient to warrant processing a petition. *S. H. Kress & Co.*, 137 NLRB 1244, 1248 (1962). The purpose of a showing of interest is to determine whether the conduct of an election serves a useful purpose under the statute—that is, whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election. *NLRB v. J. I. Case Co.*, 201 F.2d 597 (9th Cir. 1953); *Stockton Roofing Co.*, 304 NLRB 699 (1991), and cases cited there. Whether the employees desire representation is determined by the election, not by the showing of interest. *NLRB v. J. I. Case Co.*, supra.

Couching the Region's actions as somehow failing to "protect the integrity and neutrality of its procedures and creat[ing] the impression of Board assistance and support for the ALU" by making a determination that there was a sufficient showing of interest is an impermissible collateral attack on the Agency. These findings certainly have no impact on laboratory conditions during the actual election and/or critical period.

As early as 1946, the Board made clear that the adequacy of a showing of interest is "not subject to direct *or collateral* attack at hearings." *O.D. Jennings & Co*., 68 NLRB 516, 518 (1946). Finally, "[a]n integral and essential element of the Board's showing-of-interest rule is the nonlitigability of a petitioner's evidence as to such interest. The Board reserves to itself the function of investigating such claims, and in its investigation it endeavors to keep the identity of

the employees involved secret from the employer and other participating labor organizations. . . . The Board's requirement that petitions be supported by a 30-percent showing of interest gives rise to no special obligation or right on the part of employers." *S. H. Kress & Co.*, 137 NLRB 1244, 1248–1249 (1962).

On the record the Hearing Officer ruled, consistent with settled case law: "[w]hile any information offered by a party bearing on the validity and authenticity of the showing should be considered, no party has the right to litigate the subject either directly or collaterally, including during any representation hearing that may be held after an election has been held. The adequacy of the showing of interest is irrelevant. *Gaylord Bag Company*, 313 NLRB 306 (1993)." *See* Tr. 2258:14-22. The Employer's attempt to introduce records which it claimed put the finding of an adequate showing of interest in doubt were properly rejected by the Hearing Officer.

These particular Objections are illogical as the only remedy available to the Employer should Objections 3 - 5 be sustained, would be the ordering of a re-run election where no new showing of interest is required, demonstrating that the showing of interest is wholly not relevant to the Employer's ultimate remedy in this hearing. *See, River City Elevator Co,* 339 NLRB 616 (2003); CHM Sec. 22-120. In this context Amazon could continue to renew the same Objections 3-5 to the original showing of interest, *ad nauseum*, every time the Amazon Labor Union were to win a re-run election, in a never ending loop. Such a finding would be completely antithetical to the written word, spirit and purpose of the Act. This is clearly not the intention of the rules and applicable law and is just one of the many reasons that the determination of showing of interest is non-litigable. To raise the showing of interest as an Objection in the post election period is legal error and amounts to frivolous sanctionable conduct.

C. Objections 6 and 7 Must Be Rejected as They Are Merely *Ex-Post Facto* criticism of the Regional Director's Discretion to Make Reasonable Choices in How to Deploy the Agency's Resources

Objections 6 and 7 state as follows:

> **Objection 6:** The Region failed to protect the integrity of its procedures when it deviated from the Casehandling Manual on Representation Proceedings by failing to staff the election adequately. Among other things, the Region provided an insufficient number of Board Agents for check-in and failed to provide adequate equipment for the election, supplying only three voting booths for an election with more than 8,000 potential voters.
>
> **Objection 7:** The Region failed to protect the integrity of its procedures when it turned away voters when they attempted to vote during open polling sessions, and told voters they were only being allowed to vote in alphabetical order

Objections 6 and 7 are nothing more than *ex-post facto* criticism of reasonable choices made by the Regional Director, in its wide discretion regarding how to deploy its resources to conduct this election, which for the most part, the Employer, without complaint, was aware of beforehand. That is, after consenting to a procedure well in advance of the election, the Employer, unsatisfied with the outcome of the election, now in bad faith seeks to attack the reasonable decisions made by the Regional Director. Such arguments are not properly the basis of Objections. Further, in arguing that long lines on the first day affected the outcome of the election, Amazon in bad faith, complains of a condition of its own creation by failing to implement crowd control as it had agreed to do. Most crucially, however, Objections 6 and 7 fail as no testimony was elicited to establish that any voters were turned away as a result of such lines.

It is well settled that the Regional Director has broad discretion in making election arrangements, and in the absence of objective evidence that this discretion has been abused, the election is upheld. See, e.g., *Milham Products Co*., 114 NLRB 1544, 1546 (1955); *Independent Rice Mill, Inc*., 111 NLRB 536, 537 (1955); see also *Comfort Slipper Corp*., 112 NLRB 183 (1955)

(discretion to determine date of election); *New York Shipping Assn*., 109 NLRB 310 (1954) (use of IBM voting cards as an additional means of identification of voters). Under Section 11308 of the Case Handling Manual: "The Board agent in charge of an election, with his/her supervisor, should anticipate the need for sufficient Board personnel to run the election. In so doing, the Board agent should keep in mind the fact that the administration of Section 9 constitutes one of the most important aspects of the Agency's work; the Board agent should plan, not with respect to the routine aspects of an uneventful election, but with due regard for all potential emergencies. Generally speaking, one Board agent will be required for each check-in table at each polling place. In addition, Board agents may be required for relief and for supervision. Due provision should be made for extended hours." Eight (8) Board Agents were present for the first voting session. *See*, Tr. 330:6 - 336:15.

There are no absolute guidelines, however, as clearly stated in *Polymers, Inc.*, 174 NLRB at 282: Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance. The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election. Thus, an objection relating to the integrity of the election process requires an assessment of whether the facts indicate that "a reasonable possibility of irregularity inhered" in the conduct of the election. *See, Peoples Drug Stores, Inc*., 202 NLRB 1145 (1973) (in which the Board examined the theoretical possibility as against the improbabilities of the factual circumstances).

Section 11395.5 of the CHM states that: "With respect to any given election … there should be one or more check-in tables, a challenge table, if necessary, and sufficient chairs for all Board agents and observers." The Employer presented no evidence that Amazon ever objected at any time prior to the election to the use of 3 voting booths and 1 challenge booth. In fact, the Employer, through Counsel, confirmed their agreement to this arrangement as early as February 17, 2022 without articulating any complaint or concerns. *See*, ALU Ex. 9. The Employer presented absolutely no evidence that they ever objected to Region 29's clearly stated intentions to break up the voting lines into three (3) groups based on the letter of employees' last names, again, through counsel the Employer failed to raise any questions or concerns about the procedures for the election. *See*, ALU Ex. 3. Before the election started, the Board Agents set up four (4) voting booths (including one for challenged voters) and separated the check-in tables for voters on an alphabetical basis. *See*, Tr. 336:16 - 337:13; Tr. 626:7 - 626:19; Tr. 674:13 - 674:20; Tr. 4462:14 - 4462:23. Amazon's Director of Employee Relations admitted on the record that Amazon "had no issues with voters voting pursuant to the terms of the agreement and checking into a table based on their last name." *See*, Tr. 2340:22 - 2340:24

The employer failed to demonstrate both that the election was not properly staffed nor supplied, and failed to demonstrate that the voting list divided by the first initial of the voter's last name actually had any effect on the election whatsoever. The employer presented absolutely no evidence that **even a single employee** was unable to cast a ballot due to the alleged lack of staffing and equipment at the JFK8 election or because the check-in tables were broken down alphabetically. **More importantly there was not even one employee who testified that they were turned away from voting. Such failure by Amazon is alone dispositive of Objections 6 and 7.**

Throughout the election, the election set up complied with the Casehandling Manual and was consented to by the parties in the pre-election conferences and inspection[1]. The Employer produced no evidence that it had ever raised any concerns about staffing or equipment during the morning session of and prior to March 25, 2022. On March 22, 2022 during the pre-election inspection, representatives from the Employer had an earlier opportunity to raise any issue with the Region regarding dissatisfaction with the number of voting booths and failed to do so. *See* Tr 2278:5-2279:15. The concerns that they raised after the morning session were considered by the Board Agent in charge of the election as well as by her supervisor, and they determined that the conditions were in complete compliance with the Casehandling Manual.

Amazon Director of Employee Relations, Barbara Russell testified she approached Ioulia Federova, Region 29 Board Agent, to:

> "request[ ] that the Board set up additional voting booths. The Board had brought more voting booths than they were using, and we showed that there was sufficient space to put up additional voting booths. Ioulia declined our request and indicated that the number of voting booths was sufficient. And she said that the number of voting booths was not what was causing the delays in voting. We asked if Ioulia would send additional Board agents to help with the staffing, again, to better expedite voting as well as better monitor the no-electioneering zone from media and other interference. And she declined our request to

[1] The tent in which the election took place was a 30' x 100' white tent similar to the style of tent that might be used in a wedding. See, Tr. 304:11 - 305:1; *See* also, Emp. Ex. 182. The tent was located in the parking lot in front of the main entrance to the Employer's facility, which is the north-facing side of the building. See, Tr. 309:17 - 309:22; Emp. Ex. 182; See also, Tr. 1678:20 - 1678:24. An inspection of the tent was conducted by Amazon, Region 29 and the ALU on March 22. See, Tr. 310:7 - 311:20. At the inspection, other than Region 29 asking for a table to be moved (which was in fact moved immediately) neither Amazon, nor Region 29 asked for any additional modifications nor were any concerns raised with respect to the tent. See, Tr. 312:25 - 313:18. The condition of the inside of the tent prior to the start of the election but after the inspection is reflected in a photograph admitted as Employer Exhibit 185. Subsequent to the inspection but prior to the election, Amazon added an awning to the side of the tent in order to protect voters from potential rain. See, Tr. 323:2 - 323:10. Despite eliciting a generous amount of testimony on the set up of the voting tent and the placement of the stanchions to make lines efficient, the Employer never raised any concerns about the tent set up in the pre-election period, nor did the testimony elicited substantiate their Objections.

add more Board agents. She, more than once, said that things were busy, but it's fine." *See,* Tr. 2324-2325.

Not satisfied with this answer, Ms. Russell also approached Assistant Regional Director for Region 29, Teresa Poor: "Ms. Poor indicated that she had spoken to Ioulia and that it was expected that the first voting period would be busy, but that Ioulia had indicated that things were fine, that they did not need to add more check-in tables, they did not need to add more voting tables, and they did not need to add more Board agents." *See* Tr. 2335:12 - 2335:24. Indeed, the testimony establishes that Region 29 adequately staffed the election, and did not do anything to compromise the integrity of its procedures.

On the morning of March 25, 2022, the Company and Union representatives left the voting tent by 7:59 a.m. *See*, Tr. 344:24 - 345:1. Prior to 8:00 a.m., the board agents gave instructions to the observers. *See*, Tr. 541:24 - 544:18. Amazon and the Union each had three (3) observers present for each voting session. *See*, Tr. 4456:22 - 4457:9; Emp. Ex. 182. The employer failed to elicit any testimony from its over 50 witnesses that each check-in table did not have one Board agent present at the polls throughout this election.

In the very first session, Amazon's observers were Antonia Famiglietti, Dio Sanchez, and Emmanuel DeLeon. *See*, Tr. 578:3 - 578:25; Tr. 636:5 - 636:9 Tr. 1335:2 - 1335:15. During this first voting session there were four (4) voting booths, one for each of the three check-in tables as well as a booth for challenged ballots, and in addition there were two (2) ballot boxes; one for regular ballots and another for challenged ballots. *See*, Tr. 612:15 - 612:25. There was a board agent present at each of the three check-in tables. *See*, Tr. 620:11 - 620:14; Tr. 1335:16 - 1336:6.; Tr. 1353:21 - 1354:18. Prior to the start of the first voting session, observers were given instructions wherein they were told how to check off voters on the voter list as they came to vote,

each observer was given a specific colored pencil and each observer was instructed that if a voter's name was not on the list that that voter should be directed to speak to a board agent. The observers were also given buttons to wear identifying themselves as observers. Additionally, prior to the voting session commencing, the NLRB showed the observers the empty ballot boxes for regular and challenged ballots so they could ensure the boxes started empty. The observers were additionally told that they should not speak to the voters and that if the voters had questions they should be directed to NLRB agents who would answer those questions. *See*, Tr. 622:18 - 623:23; Tr. 626:20 - 627:4; Tr. 647:4 - 647:22; Tr. 675:1 - 675:20; Tr. 677:1 - 677:22; Tr. 1354:19 - 1356:13; Tr. 4457:10 - 4459:18. These same instructions were given at subsequent voting sessions as well. *See*, Tr. 1357:1 - 1357:9; Tr. 1566:3 - 1566:12; Tr. 1567:10 - 1568:12; Tr. 4460:25 - 4462:5.

At all times during the election, voters all agreed that there was a company observer, an ALU observer and an NLRB agent at each check-in table, and that voters' IDs were checked, they were given ballots by an NLRB agent and were directed to vote in one of the voting booths. *See*, Tr. 793:2 - 794:19; Tr. 841:11 - 842:7; Tr. 855:6 - 856:5; Tr. 979:19 - 979:25; Tr. 980:2 - 981:2; Tr. 1034:5 - 1034:22; Tr. 1063:16 - 1064:3; Tr. 1066:3 - 1066:9; Tr. 1094:11 - 1095:3; Tr. 1138:10 - 1139:16; Tr. 1229:23 - 1230:1; Tr. 1273:16 - 1274:4; Tr. 1429:14 - 1430:16; Tr. 1550:19 - 1550:24; Tr. 1568:19 - 1569:16.

Despite these appropriate election conditions, Amazon's points to long lines during the very first voting session as evidence in support of Objection 6. While Amazon's evidence in support of Objection 6 essentially consisted of testimony regarding long lines during the very first voting session, noticeably absent, however, was any evidence of interference with voter free choice. Although there were long lines to vote, this fact is not a basis upon which a representation

election can be set aside, especially where the margin of victory is 523 votes or 11% and the Employer has failed to present **even a single witness who** actually testified that they did not vote as a result of the long lines. The thrust of Employer's Objection 6 is disingenuous, since Amazon is the party responsible for the long lines during the first voting session on March 25, 2022, not Region 29[2]. The Employer is attempting to overturn the election based on its own bad conduct. The Employer failed to explain how the length of the voting lines, or the number of Board Agents interfered in any way with employee free choice.

Moreover, Amazon's own witness, Tyler Grabowski, admitted on cross examination that he signed and filed a Certification under penalty of perjury with Region 29 regarding the instant Representation petition. *See* Tr. 2647:20 - 2647:22; *See also,* ALU Ex. 18. Pursuant to paragraph 2 of ALU Ex. 18, Grabowski certified: "Amazon will implement crowd control protocols to minimize the number of voters congregating at polling areas, including staggered self-release from work to vote, and will ensure enough space within each voting or waiting tent to allow for proper distancing." Despite his certification that Amazon would implement crowd control protocols, Mr. Grabowski admitted that he did nothing to make sure such protocols were adhered to and in fact had no knowledge as to who was supervising these "protocols". *See* Tr. 2652- 2657. In fact, the sum and substance of Mr. Grabowski's testimony regarding his certification was that he did not remember who prepared the certification he signed under penalty of perjury nor did he remember why he was told he needed to sign the document nor what his certification on this document meant. *See* Tr. 2658-2669. Despite filing a certification that Amazon would implement crowd control protocols to minimize the number of voters congregating at the polls, their own witnesses failed to provide evidence in support of such a contention. In fact, the evidence demonstrated that

[2] To the extent long lines are objectionable, which of course they are not.

Amazon intentionally created long lines during the first voting session. Mr. Grabowski's credibility as an authorized representative of the Employer qualified and competent to file this certification is dubious at best and can only point to the fact that it never intended to stagger the release of voters to control the number of voters in line.

Voter Gopi Vaidya testified regarding the length of the lines that she observed on March 25, 2022. Ms. Vaidya stated on direct examination that "the whole floor has to sign out and they all send all the associates downstairs to go and vote within that hour." *See*, Tr. 2076:24 - 2077:2. In fact Ms. Vaidya's testimony makes it very clear that Amazon was responsible for the length of the voting lines on March 25, 2022. The Employer is now attempting in bad faith to complain of conditions that they themselves created. Ms. Vaidya was forced to admit on cross examination that managers and process assistants were communicating to her and other employees on March 25, 2022 that employees would be released to vote only from 8:00am to 9:00am and that all employees must return to their workstations before 9:00am. *See*, Tr. 2107:7 - 2108:25. She elaborated further on cross examination that on March 29, 2022 "There were, like, no long lines at that time because people -- they weren't voting in that time frame. But the tents were open at that point, but the floor managers and everybody wouldn't allow all the associates to come out at that time." *See*, Tr. 2111:6 - 15.

Voter Lisa Laporta also testified that on March 25, 2022 the employer "got us all together in a straight line to get ready to walk out of the building to go vote. … They just said, "form a line, we're going to vote."' *See*, Tr. 2138:22 - 2139:5 Clearly, not only was the employer violating the release time agreement by its conduct, it also was acting to coerce employees to vote by making them form a line to go and vote by whole department.

Such conduct on behalf of the employer is a total repudiation of the agreement that they had made with Region 29 and the Petitioner that employees would be released pursuant to a schedule and that voters would also be permitted to vote at any time without any negative employment action. It is unrebutted that the employer, through its own conduct, caused many employees to believe that they needed to vote on March 25, 2022 in the morning session and that they would not be given another opportunity to vote. Not even one manager testified that they were communicating with employees that the polls would remain open for several days and that there were times other than the morning session on March 25, 2022 when they could vote.

Although not a single employee testified that they were unable to vote as a result of the long lines, there were a couple of witnesses who testified they saw voters leave the line. This is simply not evidence that these employees did not subsequently vote on another date. In fact, Gopi Vaidya testified on cross examination that those voters that she saw leave the voting line on March 25, 2022 "went the next day and they finished their voting." *See*, Tr. 2109:4-:2109:8. The employer also called Robert Nicoletti who, when asked how many people he had seen leave the line without voting, testified "[n]ot many. Not many. … Maybe a handful, five people." *See*, Tr. 2199: 4-10. On cross examination, Mr. Nicoletti was forced to admit that he "would not have spoken to them about their experience voting or not voting … [and] would have no idea if, after they left the line, if they came back on another day in time to vote ". *See*, Tr. 2208:5-2208:12. During cross examination by the Representative for Region 29, Mr. Nicoletti also admitted that he knew "[f]rom what they told me, they were going to vote the next day and that they voted on that Saturday because they were working the next day." *See*, Tr. 2211:10 - 2211:15.

The remaining witnesses who testified with respect to the long lines on March 25, 2022 were all able to cast their ballots despite the length of the line. It should be noted that no voter testified to being "turned away" from voting by Region 29.

Natasha Grajeda testified that she voted during the very first voting session on March 25, 2022. She went out to vote around 8:30 - 9:00 a.m. and exited the voting tent around 11:30 a.m. *See*, Tr. 745:8 - 745:24. Ms. Grajeda went outside to vote pursuant to the voter release schedule that was posted in the building and she understood that while she was outside waiting on line that she would be paid for her time. *See*, Tr. 782:7 - 783:4. Ms. Grajeda also indicated that pursuant to the voter release schedule, her section stopped working again on Saturday, and she again would have had the opportunity to vote on company time had she not done so on Friday. *See*, Tr. 783:5 - 783:22.

The long lines did not deter voters from exercising their free choice. For instance, Devlin Parent testified that he voted on March 25, 2022 during the morning session and that it took him approximately ninety-five (95) minutes to vote and Mian Asad went to vote at approximately 12:00 p.m. and completed the voting process in about two (2) hours. *See*, Tr. 1042:12 - 1042:25; Tr. 1189:19 - 1190:6.

Kevin Chu testified that although he had intended to vote during his lunch break on March 25, due to the long lines, he decided to leave and try again another time. *See*, Tr. 836:16 - 837:6. On March 28, 2022, Mr. Chu went to vote at 11:00 a.m. during his lunch break but saw a line that seemed too long for him, so he decided to return to vote. *See*, Tr. 838:2 - 838:14. Mr. Chu agreed that it was his personal choice not to wait on the line on March 25 or March 28 and that no one told him that he could not wait on the line or turned him away from the polls. *See*, Tr. 853:23 -

855:1. On March 29, 2022, Mr. Chu went again to vote during his lunch break at 11:00 a.m. and this time he went straight to the front of the line. *See*, Tr. 840:6 - 840:17.

Jasmine Gordon, similar to Kevin Chu, was going to vote on March 25, 2022, but due to the length of the lines, simply decided to vote on March 30, 2022 instead. Ms. Gordon did not testify to any type of long wait when voted. *See*, Tr. 1631:14 - 1632:13.

The testimony was inconsistent on whether voters actually even experienced line voting lines during the first session on March 25, 2022. Patrick Delancy also voted during the first session on March 25, 2022. He went out to vote around 11:30 a.m. - 12:00 p.m. *See*, Tr. 1227:18 - 1228:2. Mr. Delancy testified that he only waited on line for approximately forty-five minutes. *See*, Tr. 1228:3 - 1228:6. Noemi Abreu also voted during the first session on March 25, 2022. She went out to vote around 8:20 a.m. *See*, Tr. 1372:4 - 1372:15. Ms. Abreu completed the voting process in about 20 minutes. *See*, Tr. 1383:6 - 1383:7. Adina Goriva testified that when she went to vote during the evening session on March 29, 2022 that she only waited in line for approximately ten (10) minutes. *See*, Tr. 887:6 - 888:4. Matthew Cordova testified that he voted at about 9:00 a.m. on the third day of voting and that the entire process took him less than 10 minutes. *See*, Tr. 1284:25 - 1285:15. Robert Castellano voted in the morning session of the final day, March 30, 2022 at approximately 8:00 a.m. See, Tr. 1093:22 - 1094:7. Mr. Castellano testified that his entire voting experience only took a few minutes. *See*, Tr. 1139:17 - 1139:20. Gregory Purpura testified that he voted during the morning voting session on March 29, 2022. *See*, Tr. 727:25 - 728:3. Mr. Purpura testified that Amazon made it clear to him that he could vote on company time. *See*, Tr. 728:24 - 729:5. There was almost no line to vote when Mr. Purpura went to vote. *See*, Tr. 729:6 - 729:11.

Amarilis Villalongo testified that when she went to vote on Tuesday, March 29, 2022 there were no lines but she did not actually vote because she did not like the "attitude" of the Board agent who was handing her a ballot. When asked on direct examination what "attitude" discouraged Ms. Villalongo to vote, she testified "It's not what you say, it's how you said it. And she was like, the way she said it felt like as if she already knew that the ALU had won." *See*, Tr. 2905:25-2806:4. Further on cross examination when asked to expand on her answer, Ms. Villalongo testified: "Attitude meaning, I believe they know that I wasn't with the ALU because I had a shirt one time at my job that says Vote No." *See*, Tr. 2821:3 – 2821:5. Ms. Vilalongo's confusion was further highlighted when she admitted that she did not know that the government was supervising this election and that she did not know whether the agents from the NLRB had ever seen her wearing her "Vote No" shirt the week before the election. *See*, Tr. 2821:9-2821:25. The witness also conceded on cross examination that she voluntarily decided not to vote, nobody told her not to vote and that she could have returned for a different voting session, but chose not to vote on her own. *See*, Tr. 2822.

With respect to Objection 7, the testimony reveals that about 30 minutes into the first voting session, the NLRB changed the way the voting line was set up so that once voters entered the voting tent, instead of there being one (1) long snaking line, the line broke into three (3) segments which coincided with the alphabetical manner in which the check-in tables had been broken down (A - F; G - N; O- Z). *See*, Tr. 607:2 - 607:13; *See also*, Tr. 612:1 - 612:4; Tr. 625:11 - 625:19; Tr. 786:7 - 786:19; Tr. 1051;14 - 1054:12.; Tr. 1286:16 - 1286:25.

This change enabled the voting lines to move faster. *See*, Tr. 612:15 - 612:17; 1190:14 - 1190:22; *See also*, Tr. 1382:22 - 1383:7; Tr. 1388:3 - 1388:14. As a result of this change, NLRB agents were able to split voters up by last name so that all three voting tables inside the tent were

being used more efficiently. This meant that as voters came closer in proximity to the voting tent they were split into 3 separate lines. *See*, Tr. 748:2 - 748:16; Tr. 749:11 - 750:20; Tr. 754:5 - 754:17; Tr. 787:3 - 787:11; Tr. 788:13 - 788:19.

Ms. Grajeda observed that at one point NLRB agents were asking for "voters on the A line" to enter the tent. See, Tr. 801:9 - 801:11. Noemi Abreu made similar observations. *See*, Tr. 1382:13 - 1382:24. Dio Sanchez, an observer for three (3) sessions, did not see an NLRB agent turn away a single voter as a result of the alphabetical breakdown of the lines or for any other reason. *See*, Tr. 1356:14 - 1356:21; Tr. 1357:10 - 1357:17.

Regional directors have discretion to determine how elections are conducted. *See*, *V. LaRosa & Sons*, 121 NLRB 671, 673 (1958); *Independent-Rice Mill*, 111 NLRB 536, 537 (1955). Exercising discretion necessarily involves predictions about turnout, weather, and other contingencies. Elections are not and should not be overturned when they do not proceed exactly as planned. Even when Board agents' conduct in an election is not "optimal," the Board will not overturn an election when a party has failed to create "reasonable doubt as to the fairness and validity of the election." *Trustees of Columbia University in the City of New York*, 365 NLRB No. 136, slip op. at n.2 (2017). *See also San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998); *1621 Route 22 West Operating Co. v. NLRB*, 725 F. App'x 129, 140 (3d Cir. 2018); *Garda CL Atlantic, Inc. v. NLRB*, 2018 WL 2943941 (D.C. Cir. May 22, 2018). "The objecting party's showing of prejudicial harm must be more than speculative to establish that a new election is required." *Guardsmark, LLC*, 363 NLRB No. 103, slip op. at 4 (2016).

Amazon's allegations, even if proven, do not come close to satisfying its burden of proof that there was any interference with voter free choice in the manner in which the election was

staffed or conducted by the Region. Its claims in these Objections are nothing more than speculative, especially in a context where the Amazon Labor Union prevailed by 523 votes. As the Board observed in *Newport News Shipbuilding & Dry Dock Co*., 239 NLRB 82, 89-90 (1978), "These objections illustrate the unanticipated problems which often arise in the conduct of large elections. . . . Although reasonable people can differ whether the decision of those Board agents was the best one, our task is to decide whether it amounted to an abuse of discretion. We think not."

D. Objection 8 Must Be Overruled As The *Employer* Failed to Control the Media's Presence And Failed to Establish That The Presence of Media Created an Atmosphere of Fear and Reprisal

Objection 8 states as follows:

> **Objection 8:** The Region failed to protect the integrity of its procedures when it failed to control media presence in and around the voting area.

The thrust of Objection 8 is that there was media present "in and around the voting area" and that media agents filmed employees and asked employees how they intended to vote. As a matter of law, this conduct, even if true or widespread, is not objectionable under the heightened standard applicable to third party conduct. Conduct by third parties, such as the media, is only objectionable if it "creates a general atmosphere of fear and reprisal that renders a fair election impossible." *Accubuilt, Inc*. 340 NLRB 1337, 1337 (2003). *See also Millard Processing Services v. NLRB,* 2 F.3d 258, 261 (8th Cir. 1993); *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 265-268 (D.C. Cir. 1998) (applying third-party standards to objections based on video-taping by union supporters on the day of election).

Any argument by the Employer that the media violated the *Milchem* rule must also fail. *See Milchem, Inc*. 170 NLRB 362 (1968). *L.C. Cassidy Son, Inc. v. N.L.R.B*, 745 F.2d 1059, 1063

(7th Cir. 1984) ("*See NLRB v. Newton-New Haven Co.,* 506 F.2d 1035, 1037 (2d Cir. 1974) ("[T]he rationale of *Milchem* is to eliminate the last-minute advantage given **a party** who intrudes upon the privacy of the employee while he is in the polling place or standing on line to vote."). (*emphasis added) Cf. Midwest Stock Exchange v. NLRB,* 620 F.2d 629 (7th Cir.) ") Thus the Board has specifically held that the *Milchem* rule does not apply to third parties, such as the media. *Rheem Mfg. Co*., 309 NLRB 459, 463 (1992) (not applying *Milchem, Inc*., 170 NLRB 362 (1968)). *See also Yukon Mfg. Co.*, 310 NLRB 324, 330 (1993); *Crestwood Convalescent Hospital*, 316 NLRB 1057, 1057 (1995).

Amazon's reliance on the media presence within the "no electioneering" zone as the basis for Objection 8 is misplaced. By its definition, the "no electioneering" zone is an area that the Board will not permit any party to campaign to influence the results of an election. The media is not a party to the election. Moreover, not one witness described the presence of the media as synonymous with "electioneering" despite Amazon's attempts to conflate the two. No evidence was placed in the record by the Employer that any member of the media, none of whom were established as agents for the Petitioner, engaged in any attempt to influence a voter's vote. *See, e.g.,* Tr. 528:20 - 529:14.

In explaining where **the parties** could not electioneer, Barbara Russell, the Director of Employee Relations testified: "We explained that we had put barriers up to the left and to the right of the tent in both that middle drive lane and in the drive lane closest to the facility so that vehicles could not travel into the area near the tent. The parties discussed, and Ioulia indicated, that those barriers provided a reasonable line by which we could establish the no-electioneering zone." *See* Tr. 2277: 7-14. On March 25, 2022 during the pre-election conference, Russell claimed that Kate Anderson, a Board Agent from Region 29, said that Region 29 would police the media "between

the barricades on the left and the barricades on the right and the two drive lanes that we had blocked." *See* Tr. 2295:16 - 2296:5. At no point in her testimony did Ms. Russell explain or describe how the media was electioneering. She also admitted that the Employer was responsible for handling the media so when she observed a member of the media approach the voting tent she "went up and greeted that individual, introduced myself, inquired if he was a member of the media, asked that he stand to the side while I called a member of our public relations department to come out and speak with him." *See* Tr. 2296:6 - 2296:15.

Later, Russell also testified that Counsel for Amazon, Amber Rogers "asked that the Board do more to effectively police the voting area and keep the media out." *See* Tr. 2332:6 - 2332:8. Region 29 "responded only by reiterating that they were doing it the best that they could. Ms. Rogers asked again that the Board add additional agents to help with the policing. Ioulia answered that that would not be necessary and that they would not be taking that step." *See* Tr. 2332:11 - 2332:16. Neither Amber Rogers nor Barbara Russell explained to the Region nor to the Hearing Officer how the media was engaged in electioneering. When Russell, who was never asked on direct examination to explain her understanding of "electioneering", was unsatisfied with the answers she received from Board Agent Fedorova, Russell and counsel for Amazon, Amber Rogers, approached Fedorova's supervisor, Assistant Regional Director Teresa Poor: "Ms. Poor said that, with respect to the media, the Board agents were doing the best that they could and there was only so much that they could see and did not agree to take any additional steps to protect the voters from the media in that voting and electioneering area." *See* Tr. 2335:12 - 2335:24. Ms. Russell, also admitted that Employer's counsel, Amber Rogers reiterated in her call to Agent Poor "that the company was going to send a member of its public relations department out to greet any media that we became aware were on our property solely for the member of the public relations

team to direct the media off our property." *See* Tr. 2336:7 - 2336:12. During cross examination, Ms. Russell was forced to admit that prior to March 25, 2022 "It was my understanding that we, Amazon, did want to send representatives of our public relations department to interface with any members of the media who are on the property solely to instruct them to leave the property." *See* Tr. 2365:8 - 2365:12, ALU Exhibit 6. Despite making the representation to the Region and to Petitioner that it would monitor and interface with members of the media prior to March 25, 2022, Amazon began improperly asking the Region to do so on March 25, 2022 and in bad faith used this as a basis for an objection about media presence in and around the voting area in an illegitimate attempt to overturn an election won by a margin of more than 500 votes. This is especially egregious because both counsel of record for the Employer in this matter made representations to the Region and Petitioner that it would handle the media presence, yet failed to do so and then used that failure as a basis for making an electioneering Objection.

Despite Amazon's attempts to cast the Region as the party responsible for controlling the media, it is unrefuted that the election took place on Amazon's property and that Amazon had taken responsibility for controlling the media prior to the election taking place. Specifically, Amazon agreed and communicated that it would use their public relations team to directly engage with media that the Employer wished to leave its property. *See*, Tr. 526:7 - 526:18; *See also,* Tr. 535:11 - 535:16; ALU Exhibit 6. According to voters that stood on the line during the first voting session, Amazon Public Relations representatives failed to engage with the media. *See*, Tr. 791:20 - 792:21. Only one voter testified that they saw the Employer's Public Relations staff attempt to engage with the media. *See*, Tr. 1271:7 - 1271:19. In the one instance where Amazon did directly engage with the media, the media promptly left the property and there was no testimony of media electioneering. *See*, Tr. 1290:21 - 1292:2.

A party to an election case is ordinarily estopped from relying on its own misconduct as objectionable. *B. J. Titan Service Co*., 296 NLRB 668, 668 fn. 2 (1989); *Republic Electronics*, 266 NLRB 852, 853 (1983); see also Rules Sec. 102.62(d), (e) and 102.67(k), (l) (applying estoppel principles to voter list service failures and notice of election posting or distribution failures). By tailoring an Objection based on Amazon's own failure to comply with its counsel's agreement to engage with the media and then for the Employer to fail to connect the media's presence to electioneering in violation of the Board's *Milchem* rules, is bad faith.

Moreover, Amazon failed to establish how laboratory conditions were disturbed to impinge on employee free choice. Natasha Grajeda testified that although she was photographed while she was standing in the voting line, she only came to realize this ***after*** she had voted. *See*, Tr. 759:7 - 760:10. Ms. Grajeda was wearing a blue "VOTE NO" shirt as she waited on the line outside. *See*, Tr. 784:10 - 784:17. Despite the presence of the media, Ms. Grajeda remained on the voting line. *See*, Tr. 791:4 - 791:13. The witness did not testify that the media photographer engaged in any electioneering or conversation with her. Nonetheless, the Employer failed to establish any agency relationship between the media photographer and the Petitioner.

Patrick Delancey testified that he voluntarily spoke with the media and it did not at all prevent him from voting. *See*, Tr. 1275:2 - 1275:24. The Employer failed to elicit any testimony that Mr. Delancey's voluntary conversation with the media constituted electioneering nor that the media person he spoke to was an agent of the Petitioner.

Adina Goriva voted on March 29, 2022 despite having previously seen photos of voters standing in line in the "Staten Island Advance" earlier during the voting period. *See*, Tr. 888:5 - 890:4. This testimony shows that the media coverage had no effect on voters.

Devlin Parent, while not pleased about the presence of the media, waited on line to vote anyway. *See*, Tr. 1059:13 - 1059:17. However, Mr. Parent also noted that many other people on the line appeared to be posing for photos to be taken by the media. *See*, Tr. 1059:21 - 1060:3. Again there is no testimony that the media that was present were agents of the Petitioner nor was any electioneering by the media described. Mr. Mian Asad testified very similarly: he didn't really want to speak with the media, but he voluntarily chose to do so and it did not cause him to leave the line or otherwise not vote. *See*, Tr. 1222:10 - 1222:22; Tr. 1223:21 - 1224:2. The employer failed to describe how the media's presence prevented any voter from exercising their free choice.

Of all its witnesses presented in support of Objection 8, perhaps the most incredible was Amarilis Villalongo who testified that on March 25, 2022 when she came outside JFK8 during her break she saw Brett Daniels, the ALU Director of Organizing, with a news camera on his shoulder videotaping the voting line. *See* Tr. 2809:10 - 22 She failed to describe any conversations that she witnessed Mr. Daniels allegedly engaged in with voters. She continued testifying on cross examination that when she allegedly saw Daniels recording the line with the news camera, she began an Instagram live video to record Mr. Daniels activities, however when she was asked to produce this Instagram live video, conveniently the video was no longer available. *See* Tr. 2809:23-2810:13. On cross examination, Ms. Villalongo admitted that she gave another video that **she** took to counsel for Amazon, who produced it on re-direct, but that video just shows voters in line on Monday, March 28, 2022, not Petitioner electioneering or Petitioner acting as media. Ms. Villalongo's account was not corroborated by any other witness, nor was it corroborated by any video evidence; her testimony in this regard should not be credited.

After the first voting session, Amazon, with the approval of the NLRB installed an additional tent for voters to queue up in as well as a 6 ½ foot tall mesh covered fence to further

obscure voters from members of the media. *See*, Tr. 391:23 - 393:14; Emp. Ex. 672. There was never any testimony that the purpose for the fence covering was to prohibit electioneering by the media.

In fact, the testimony revealed that Amazon itself engaged in surveillance and coercion during the first day of the election by using the Regional Loss Prevention Manager for all Fulfillment Centers in New York and Connecticut, Joe Troy (a past Loss Prevention manager from JFK8), to accompany the Public Relations team as an "escalation point" at or near the voting tents while the polls were open and voters were in line, to control the media. He testified that a joint decision was made with counsel for Amazon, Amazon's Employee Relations Team Members and himself, for Mr. Troy to provide assistance to control the media on March 25, 2022. *See* Tr. 1922:11 - 1922:19. This is true, despite the fact that Amazon had clearly agreed to ***not*** use its loss prevention personnel to engage with the media during the election. *See*, Tr. 528:20 - 529:14. In fact, Ms. Barbara Russell, the Director of Employee Relations testified that "My understanding is that members of our management team were not to go anywhere near the voting tent, and were not to go outside and interact with the media. …[but] I wanted Mr. Troy to accompany our public relations team for security purposes." *See* Tr. 2365:20 - 2365:23, 2366:19 - 2366:20. Mr. Troy himself admitted during his own direct that Verena Gross was onsite at JFK8 that day to engage with the media because "we made a decision to have folks that were not associated with JFK8 in any way be there to respond during the election times… it wasn't going to have the appearance of surveillance." *See*, Tr. 1683:10 - 1683:23. But then the decision was made with the blessing from counsel for the Employer to send the Regional Loss Prevention Manager who had previously worked at JFK8 in the recent past, even though he admitted he would be able to easily identify

voters, and even as it was clearly apparent that his presence would interfere with the free choice of voters by constituting surveillance of employee Section 7 rights.

On that first day of the election, Verena Gross from the Amazon Public Relations Department was accompanied by Mr. Troy to confront the media and ask them to leave Amazon's private property. Specifically, Mr. Troy testified that Ms. Gross was responsible for engaging with the media near the polls and Mr. Troy was responsible for being an "escalation point" in case the media refused to comply or became agitated. *See,* Tr. 1926-1931. The Employer and its counsel chose Mr. Troy for this role despite the fact that the witness admitted that his picture was up on multiple video screens in the "Green mile" so that employees would "be comfortable knowing and understanding who all of the leaders are in the facility…" *See* Tr. 1935:6 - 1935:8. Mr. Troy testified for certain that his photo identifying him as a member of the Senior Leadership Team at JFK8 was present from September 2020 to June 2021 and he does not know if his photo was still present on the screens in the Green Mile from June 2021 to March 2022. However, Mr. Troy also admitted that from September 2020 to June 2021 employees at JFK8 identified him as an investigator on behalf of management who interviewed employees for misconduct and would also recommend discipline against employees. *See* Tr. 1939:15 - 1939:23 On cross examination, Mr. Troy was forced to admit that while he was acting as the "escalation point" for the Employer's Public Relations team on the first day of polling, he saw people he could identify who were in line to vote. *See* Tr. 1936:3 - 1936:14; *See also*, Tr. 1781:21 - 1782:16; Tr. 1783:16 - 1783:19. In fact, on direct examination and later confirmed on cross examination, Mr. Troy testified that he had approached the first member of the media within 25 yards of the voting tent, the second member of the media within 10 feet from the voting tent and a third member of the media within 5-6 feet of the voting tent. *See*, Tr. 1781:1 - 1781:13; Tr. 1782:17 - 1782:22; Tr. 1784:8 - 1785:7. Mr.

Troy testified that he came in such close proximity to the voting tent on March 25, 2022 during polling hours even though he knew that being a member of management in direct view of the voters could affect the integrity of the election. *See* Tr. 1943-1947; *See also*, Tr. 1785:20 - 1785:23. Joe Troy also testified that during the evening voting session of March 25 that he conducted "walk throughs" of the voting area every two (2) hours and saw voters on the line each time. *See*, Tr. 1788:14 - 1789:2. There was no testimony that counsel for Amazon ever told Mr. Troy to not surveil voters nor informed the Region or Petitioner that it would be using members of its senior management team to engage with the media within feet of the voting tent.

Amazon cannot evade its high burden to show that voters were not able to exercise their free choice to vote in this election merely by casting Objection 8 as against the Region for permitting the media's third-party conduct, when it is well established that the Employer agreed to engage with the media. Moreover, the Employer failed to establish that the media members present at the election that Troy and Gross failed to engage with were agents of the Petitioner. Finally, the Employer failed to demonstrate that the media presence even constituted electioneering. The third-party media's conduct was not objectionable, thus there is no grounds for overturning the election based on Objection 8.

E. <u>The Employer Failed to Produce any Evidence of Loitering or Electioneering by the Petitioner</u>

Although argument I of this brief addresses the Objections directed at the Region, the Employer put forward two objections in addition to Objection 9, which allege similar conduct and are similarly baseless such that the Petitioner will address all three objections in this section of the brief.

Objections 9, 23 and 25 state as follows:

> **Objection 9:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it allowed non-employee Petitioner President Smalls to loiter around the polling location and within the "no-electioneering zone" established by the Region on multiple occasions during polling times, where he was able to observe who participated in the election.
>
> **Objection 23:** On March 25, Petitioner's President Christian Smalls posted to his social media accounts a video of himself standing outside the voting area over 20 minutes after voting began and after he had told certain employees that the Petitioner would know how they voted. Employees viewing a video of the Petitioner's President appearing to stand outside the polling area while the polls were open reasonably tended to coerce and intimidate voters and potential voters and lead them to believe that the Petitioner and Mr. Smalls was or would surveil them. Mr. Smalls' social media post also reasonably tended to create the impression with voters that the Board supported Petitioner in the election, as it failed to properly police and/or took no actions to remove him from the "no-electioneering zone" established by the Board.
>
> **Objection 25:** Petitioner's officials, agents, and supporters, including but not limited to non-employee Petitioner President Smalls and non-employee Gerald Bryson engaged in objectionable conduct, including loitering in the "no-electioneering zone" established by the Board and/or within view of the polling area while polls were open, creating the impression among employees that the Petitioner was surveilling the polling area, and otherwise engaging in electioneering. This conduct reasonably tended to coerce and intimidate voters and potential voters.

As noted above, Objection 9 alleges that Region 29 failed to properly police the "no-electioneering zone" as evidenced by the allegation that Petitioner President Chris Smalls was permitted to "loiter" in the no-electioneering zone. Objection 23 is almost the same as Objection 9, but it is instead framed as causing an impression of surveillance based on Mr. Smalls' social media posts that employees might "believe" President Smalls is "loitering in the no-electioneering" zone. On the other hand, Objection 25 essentially complains of "loitering" and "electioneering" by Petitioner's agents, supporters or "non-employees" in the "no-electioneering" zone and/or "within view of the polling area."

In determining whether electioneering warrants an inference that it interfered with employee's free choice, the Board considers (1) the nature and extent of electioneering, (2) whether it was conducted by a party or employees, (3) whether the conduct occurred in a designated no electioneering area, and (4) whether the conduct contravened instructions of a Board agent. *See Boston Insulated Wire Co*., 259 NLRB 1118, 1119 (1982); see also *J. P. Mascaro & Sons*, 345 NLRB 637, 638 (2005). In the event there is not a designated no electioneering area, the Board will treat the area "at or near the polls" as equivalent for the purposes of this standard. *See Pearson Education, Inc.*, 336 NLRB 979, 979–980 (2001) (citing *Bally's Park Place, Inc*., 265 NLRB 703 (1982)).

Board precedent, endorsed by the Sixth Circuit, holds that "[p]resence alone, in the absence of evidence or coercion or other objectionable conduct, is insufficient to warrant setting aside an election." *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974); *C & G Heating & Air Conditioning, Inc.*, 356 NLRB 1054, 1054 (2011) (upholding election after union representative sat in his truck and observed entrance to polling area for half the time polls were open); *Lowe's HIW, Inc.*, 349 NLRB 478, 478-79 (2007) (upholding election after employer's agent held the door open for voters entering the polling area for at least twenty minutes and later waited outside office where voting was taking place). Indeed, Board regulations provide that union representatives may observe election proceedings. 29 CFR § 102.69(a)(5).

The Board has made clear that the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable. *See Station Operators*, 307 NLRB 263 (1992); *see also C & G Heating & Air Conditioning, Inc.*, 365 NLRB No. 133 (2011). Indeed, the Board has affirmed that both union and employer representatives may observe election proceedings. *See Breman Steel Co.*, 115 NLRB 247 (1956).

1. <u>Objection 9 is Legally Deficient and Not Supported by the Evidence</u>

Objection 9, is directed at Region 29. Essentially, Objection 9 argues that the Region ``failed to protect the integrity and neutrality of its procedures…" when it allowed President Smalls to "loiter around the polling location and within the "no-electioneering zone" established by the Region on multiple occasions during polling times… where he was able to observe who voted" As Petitioner argued in its motion to dismiss, the mere act of "loitering" without more is *per se* not objectionable conduct. Thus, it cannot be objectionable even if it were true, which it is not. The claim that voters had the impression that the Board was not a neutral party because of Mr. Smalls' "loitering" is totally devoid of any merit.

First of all, under any construction of the operative facts, Region 29 is at most responsible for policing "electioneering" from occurring in the "no-electioneering" zone. Region 29 certainly has no responsibility for the area "around the polling location" that is not within the "no-electioneering zone" nor do they have any responsibility to prevent "loitering" that does not constitute "electioneering;" thus, the portions of Employer's Objection 9 related to Mr. Smalls' alleged presence "around the polling location" but not in the "no-electioneering zone" as well as his "loitering" as opposed to "electioneering" should be disregarded. *Cf., Bally's Park Place, Inc.*, 265 NLRB 703 (1982) (*holding* that in the absence of a designated "no-electioneering zone" the area "**at or near the polls**" is the area for which the Board applies strict rules against electioneering). *(emphasis added).*

In any event, as explained *supra,* the mere presence of Mr. Smalls "around the polling location" is not objectionable conduct. The mere presence of Mr. Smalls in the "no-electioneering" zone would be similarly non-objectionable for the same reasons cited, *supra*. Thus, even if Mr.

Smalls was present in the "no-electioneering zone" (a fact which the Employer has failed to establish), Region 29 would not be responsible for asking Mr. Smalls to leave unless he had been electioneering.

The "no-electioneering" zone established by Region 29 was an area in the parking lot directly in front of JFK8 that consisted of the two (2) closest drive lanes that ran parallel to the JFK8 facility bounded on either side by the closest drive lanes running perpendicular to the main entrance of the facility. *See*, Tr. 2294:11 - 2302:21; Emp. Ex. 695-E. **Although they attempted on several occasions, Amazon failed to produce a single witness that actually placed President Smalls in the "no electioneering" zone during the times the polls were open, much less witnessing actual electioneering by him.**

Voter Karen Martinez testified that while waiting to vote on March 25, 2022 between 9:45 am and 10:00 am she saw President Smalls 10 -15 or 15-20 feet away from the entrance to the voting tent for less than three (3) minutes. *See*, Tr. 1999:21 - 2007:3. Fifteen to twenty feet away from the Entrance to the tent in the direction described by Ms. Martinez is an area that is clearly outside of the "no-electioneering" zone established by Region 29.

While Voter Jeanne Cancellor testified that she saw President Smalls outside of the voting tent for five minutes on March 25, 2022 sometime before 11am while she was in the line to vote, her testimony lacked credibility and should be disregarded. *See* Tr. 2169:2 - 2172:11. Ms. Cancellor testified that during that five minutes President Smalls "was standing next to the cameraman" who was trying to take her photograph and that she then proceeded inside the voting tent. *See* Tr. 2171:10 - 2172:11; Tr. 2180-2181. Notwithstanding the five (5) minutes that Ms. Cancellor testified that she observed Mr. Smalls, on cross examination Ms. Cancellor was

completely unable to describe any of President Smalls' clothing or accessories that he was wearing when she allegedly saw him on March 25, 2022. *See* Tr. 2178:1 - 2179:5. Incredibly, she also was unable to describe what the cameraman looked like that she had testified was standing next to Mr. Smalls for that five (5) minute period. *See* Tr. 2181:8 - 2181:12. Finally, on redirect, Ms. Cancellor placed an "X" at the location where she had seen President Smalls on March 25, 2022 for 5 minutes next to the entrance of the tent. *See*, Emp. Ex. 695-B; Tr. 2183:21 - 2185:11. Based on Ms. Cancellor's placement of the "x," Mr. Smalls would have been located ***behind*** the voting tent and thus not actually visible to voters on the line. In any event, even if Mr. Smalls was present in that location and visible to Ms. Cancellor, that particular location was still outside of the "no-electioneering" zone. *See,* Emp. Exs. 695-B, 695-E.

The employer also elicited testimony from voter Taheera Aluqdah. Ms. Aluqdah was either mistaken or confused regarding the location of Mr. Smalls' vehicle on March 25, 2022. Ms. Aluqdah testified that she saw President Smalls in his "black truck" sometime between 2:30 and 2:45PM parked outside of the breakroom, approximately 1000 feet away from the entrance of the voting tent. Clearly, 1000 feet from the voting tent is nowhere near the "no-electioneering zone."

Ms. Aluqdah testified: "So he was, like, parked in the fire zone, I guess, where the lines are at, outside there." *See* Tr. 2220:13 - 2220:24; Tr. 2251:13 - 2251:17; *See also,* Emp. Ex. 695-D; ALU Ex. 17. A review of Emp. Ex. 695-D in conjunction with the testimony of Barbara Russell and Emp. Ex. 695-E demonstrates that Ms. Aluqdah placed President Smalls in his vehicle in an area that had been blocked off by the placement of orange barriers. *See,* Emp. Exs. 695-D, 695-E, ALU Ex. 17; Tr. 2294:11 - 2302:21. There is no possible way that President Smalls could have driven his "black truck" into the area that witness Aluqdah testified to. Even more so, a review of ALU Ex. 17, upon which Ms. Aluqdah drew her diagram of where the tent was and where the

voting line was, shows that she has clearly placed President Smalls' black truck right in the voting line making her testimony even more unbelievable.

Amarilis Villalongo was another witness lacking any credibility presented by the Employer in an attempt to support these baseless objections. Ms. Villalongo's testimony was that she saw five ALU supporters, to wit, Christian Smalls, Jordan Flowers, Jason Anthony, Brett Daniels and Tristan Martinez, on March 25, 2022, 25 feet from the tent, but she could not hear what they were saying. *See* Tr. 2791:3 - 2798:14. It is important to note, Jordan Flowers, Jason Anthony and Tristan Martinez are ***not*** agents of the Petitioner. Bizarrely, Ms. Villalongo then went on to identify Jordan Flowers as someone who she "thought was security" standing "inside the voting tent" and directing her what line to stand in. *See* Tr. 2816:7 - 2816:24. Clearly, Ms. Villalongo was confusing an NLRB agent for Jordan Flowers.

In any event, Ms. Villalongo's own direct testimony clearly established that the location Ms. Villalongo believed she observed these five (5) individuals was in fact outside of the "no electioneering zone." *See*, Tr. 2294:11 - 2302:21; Tr. 2799:1 - 2800:11; Tr. 2831:10 - 2831:15; Emp. Exs. 695-E, 695-H.

Finally, not a single witness testified to Mr. Smalls as engaging in any conduct which could be considered objectionable "electioneering." For these reasons Objection 9 must be overruled.

2. <u>There is No Factual Basis to Support Objection 23</u>

Objection 23 is the most preposterous of this trio of baseless objections. A careful reading of Objection 23 indicates that the Objection does not even allege that President Smalls ***actually*** was present "outside the voting area" while the polls were open, it only alleges that President Smalls "posted to his social media accounts a video of himself standing outside the voting area

over 20 minutes after voting began…" The evidence in fact bears that out. The video tweeted by President Smalls at 8:20 a.m. and retweeted by the Amazon Labor Union shortly thereafter clearly demonstrates that Petitioner President, who it is undisputed was present at the pre-election conference on March 25, 2022, was standing outside of the voting tent at a time when there were clearly ***no voters*** waiting to vote, approaching the tent, or exiting the tent. *See*, Emp. Exs. 227, 227-V, 229; Tr.. 588:14 - 588:18; Tr. 643:24 - 645:11; Tr. 646:3 - 646:7; Tr. 4376:13 - 4377:5. Obviously, the fact that a video is tweeted at 8:20 a.m. on March 25, 2022 does not mean that it was taken at 8:20 a.m., it means that it was taken at some time ***prior*** to 8:20 a.m. on March 25, 2022, presumably around the time of the pre-election conference on March 25, 2022. Employer's Exhibit 227-V fails to provide any evidence that the polls were open at the time that this social media video was taken.

It is truly absurd for Amazon to argue that "employees viewing a video of the Petitioner's President appearing to stand outside the polling area while the polls were open reasonably tended to coerce and intimidate voters and potential voters and lead them to believe that the Petitioner and Mr. Smalls was or would surveil them." In the year 2022, the average person who uses social media certainly understands that the time a video is tweeted out is not equivalent to the time a video is taken. Amazon presented ***no evidence*** from any witness who actually believed anything contrary nor did they provide any evidence that an employee might have believed the contrary. That is, Amazon presented no voters who testified to feeling coerced, intimidated or surveilled by the social media posting. Most importantly there is no evidence that watching President Smalls' video had any effect on the free choice of voters.

Even assuming, *arguendo,* the social media post of the video did cause a voter to believe that President Smalls was in fact standing outside of the voting area while the polls were open, and

in fact, even if that video was actually taken while the polls were open, such conduct is still not the basis of a valid objection. Again, the Board has made clear that the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable. *See Station Operators*, 307 NLRB 263 (1992); *See also, Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974); *C & G Heating & Air Conditioning, Inc.*, 356 NLRB 1054, 1054 (2011) (upholding election after union representative sat in his truck and observed entrance to polling area for half the time polls were open); *Lowe's HIW, Inc.*, 349 NLRB 478, 478-79 (2007) (upholding election after employer's agent held the door open for voters entering the polling area for at least twenty minutes and later waited outside the office where voting was taking place). Indeed, Board regulations provide that union representatives may observe election proceedings. *See*, 29 CFR § 102.69(a)(5); *See also, Breman Steel Co.*, 115 NLRB 247 (1956).

Finally, the Employer failed to submit any evidence that the Petitioner told any employees that they would know how employees voted. Amazon never elicited testimony in this lengthy hearing with 50+ witnesses that President Smalls' social media posts "tended to coerce and intimidate voters and potential voters and lead them to believe that the Petitioner and Mr. Smalls was or would surveil them." Moreover any allegation that "Mr. Smalls' social media post also reasonably tended to create the impression with voters that the Board supported Petitioner in the election, as it failed to properly police and/or took no actions to remove him from the "no-electioneering zone" established by the Board" is pure fantasy that is further addressed under Objection 8. Objection 23 must be rejected as the Employer has completely failed to meet its burden of proof.

3. <u>There is No Evidence of Electioneering or Loitering by Any of Petitioner's Agents or Supporters in the "No-Electioneering" Zone or Otherwise "in and around" the Polls</u>

Objection 25, is similar to Objection 9, except this objection is directed at the Petitioner and the objection includes the conduct of not only Christian Smalls but also other "officials, agents and supporters" of the Petitioner[3]. This objection also claims that Petitioner "otherwise engag[ed] in electioneering."

As discussed *supra*, the testimony of Ms. Cancellor, Ms. Martinez, Ms. Aluqdah and Ms. Villalongo established that Mr. Smalls[4] was at most only seen "within view of the polling area" and ***not*** within the "no-electioneering zone," the latter which was much closer to the actual voting tent than an area "within view of the polling area."

In addition, Ms. Martinez also testified that when she saw President Smalls he was just standing there not talking to anyone and that his presence "actually didn't bother me at all." *See,* Tr. 2013:11 - 2013:12. Ms. Martinez also testified on cross examination that she never told anyone that she saw President Smalls at the polls when she voted. *See*, Tr. 2013:13 - 2013:16. Ms. Aluqdah similarly testified that seeing President Smalls had no effect on her ability to vote and she further testified that he never even exited his vehicle or interacted with any other employees. *See* Tr. 2246:13 - 2246:18; Tr. 2251:7 - 2151:12.

As discussed *supra,* although Ms. Aluqdah was certainly mistaken as to the location she saw Mr. Smalls in his vehicle, it is quite likely that Mr. Smalls was somewhere on the Amazon property during the timeframe testified to by Ms. Aluqdah. The first voting session concluded at approximately 2:45 p.m. at which time President Smalls was present for the post-election

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[3] Arguably, unlike Objection 9, allegations that the Petitioner and its officials, agents and supporters were also loitering "within view of the polling area" as opposed to in the "no-electioneering zone" could conceivably support Objection 25, but only to the extent that "loitering within view of the polling area" is itself objectionable, which, as explained in detail herein, it is not.

[4] And in the case of Ms. Villalongo, additional agents and supporters of the Petitioner

conference. *See*, Tr. 362:23 - 363:8; 380:18 - 381:1; Tr. 2281:24 - 2282:1. Therefore, it is logical that Mr. Smalls was present somewhere on the Amazon property at this time and Ms. Aluqdah simply confused seeing Mr. Smalls at that location for another time she may have seen Mr. Smalls at that particular location.

In addition to being present for the post-election conference on March 25, 2022, Mr. Smalls was also present for the pre-election conference on March 25, 2022. *See*, Tr. 588:14 - 588:18; Tr. 643:24 - 645:11; Tr. 646:3 - 646:7. These facts are consistent with Kevin Chu's testimony that he saw Christian Smalls in the parking lot (**nowhere near the tent)** at approximately 11:05 - 11:10 a.m. as well as Joe Troy's testimony that he saw Christian Smalls in a vehicle across from the parking garage at around 11:00 a.m. *See*, Tr. 843:7 - 843:23; Tr. 873:1 - 873:11; Tr. 1709: - 1710:7; Tr. *See also,* Emp. Ex. 695.

Mr. Chu further testified that he had no idea if Mr. Smalls could see him or anybody else waiting in line to vote nor did he feel coerced or intimidated by virtue of having seen Mr. Smalls. *See*, Tr. 852:20 - 853:10; Tr. 873:13 - 874:9.

Stephanie Lopez testified that she saw Connor Spence standing casually outside of the voting tent exit around noon on March 30, 2022. *See* Tr. 2700-2701. On cross examination Ms. Lopez admitted that she had only "glimpsed" Mr. Spence, not long enough to even register what clothing he was wearing nor to see in which direction he was looking when she "glimpsed" him[5]. *See* Tr. 2718:3 - 2718:15. Furthermore, Ms. Lopez also admitted that she does not know what Mr. Spence was doing outside of the tent and conceded that he could have just finished voting himself. *See* Tr. 2736:25 - 2737:11. Matthew Cordova also testified that he saw Connor Spence just outside

[5] Thus, it is not even clear if Ms. Lopez actually saw Connor Spence at that day and time

of the voting tent at the time he voted, which was approximately 9:00 a.m. on Monday, March 28, 2022. *See*, Tr. 1285:3 - 1285:11; Tr. 1304:13 - 1304:24. Inasmuch as it is undisputed that Connor Spence worked at JFK8, and in fact would have been scheduled to work (and receive break times) during the very times that Ms. Lopez and Mr. Cordova claimed to have seen Mr. Spence, it is completely irrelevant that they may have seen Mr. Spence casually standing or walking through the parking lot or near the voting area (in the parking lot) during the times testified to. *See*, Tr. 4290:1 - 4290:10.

Again, the mere presence of Union representatives in or near the polling area is not in and of itself objectionable conduct. In fact, even if these Union representatives had engaged in conversations or otherwise interacted with the voters (for which there is absolutely no evidence) such conduct would ***still*** not be objectionable.

The Board has made clear that the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable. *See Station Operators*, 307 NLRB 263 (1992); *see also C & G Heating & Air Conditioning, Inc.*, 365 NLRB No. 133 (2011). Indeed, the Board has affirmed that both union and employer representatives may observe election proceedings. *See Breman Steel Co.*, 115 NLRB 247 (1956).

In addition to the above, Charlene Novoa, an Employer observer testified that on March 28, 2022, she witnessed Petitioner Observer Cassio Mendoza interact with voters: "He didn't say anything. It was a lot of facial expressions and hand movements." *See* Tr. 2881:22 -2881:23. When asked to describe the hand gestures and facial expressions, Ms. Novoa testified that it consisted of "[t]humbs up and big smiles. … like, three or four times …" *See* Tr. 2884:24 - 2885:2; Tr. 2885:23 - 2885:24. She went on to expound that on March 29, 2022, Cassio Mendoza

communicated with voters by, "facial expressions such as big smiles and general over happiness. … A certain enthusiasm that didn't seem necessary. … A certain friendliness." *See* Tr. 2888:17 - 25 - 2889:17. According to Ms. Novoa, on March 29, 2022 Cassio Mendoza did not make any thumbs up gestures, "just big smiles." *See,* Tr. 2902:11 - 2902:13. When confronted with the fact that as a part of the election procedures, observers were required to wear masks, Ms. Novoa testified that Mr. Mendoza did not wear a mask properly and had it pulled down to his chin, but that she did not make anyone aware of this fact during the election. *See* Tr. 2903:1 - 2903:8; Tr. 2904:14 - 2904:22.

Not only did Mr. Mendoza credibly deny failing to properly wear a mask during the time he served as an observer, Mr. Mendoza also credibly explained that the hand gestures he used were to address what he saw as possible confusion by the voter as to where to go next. He said he was waving voters over to the proper table and giving thumbs up gestures to voters in order to signal to them that they understood and were approaching the correct table. *See*, Tr. 5024:5 - 5025:22; Tr. 5028:16 - 5028:25. These are almost the precise gestures that Ms. Novoa also admitted to giving to voters on her cross-examination but they were not in the context which Mr. Mendoza put them. *See*, 2921:1 - 2921:18.

Although the Board has found that a Union observer giving a "thumbs-up" gesture could be considered electioneering at the polls when combined with additional objectionable conduct, the single case wherein a "thumbs-up" gesture resulted in an election being set aside is distinguishable on multiple grounds. *Compare, Brinks, Inc.*, 331 NLRB 46 (2000) (*holding* that election should be set aside where Union observer gave "thumbs up" signal to voters after being admonished by Board Agent ***and*** specifically telling four (4) employees to vote for the Union, ***and*** at least one (1) of those employees told other employees what the observer had said) *with U-*

Haul Co. of Nevada, Inc., 341 NLRB 195 (2004), *Enfc'd*, 490 F.3d. 957 (D.C. Cir. 2007) (*holding* that the election ***should not*** be overturned where the union observer was giving "thumbs up" and "smiles" to voters unaccompanied by any verbal exchange, the observer was not admonished by a Board Agent concerning this conduct and no one reported this conduct to a Board Agent). *See also, e.g., Downtown Bid Services Corp.*, 2010 NLRB LEXIS 89 (2010) (*holding* that employer objection should be overruled where a Union observer was making facial gestures at voters and attempted to embrace another voter who left the tent without voting as a result).

In this case it is undisputed that Mr. Mendoza did not accompany the "thumbs-up" gesture with any verbal communication, Mr. Mendoza's behavior was not reported to the Board, nor was Mr. Mendoza ever admonished by a Board Agent to cease his alleged conduct. *See*, Tr. 2881:16 - 2881:18; 2887:17 - 2887:22l Tr. 2899:14 - 2899:21. This is despite the fact that the voting tent was relatively quiet on the evenings of March 28 and 29 and such conduct would have been easily observed by a Board Agent in the tent. *See*, Tr. 2899:14 - 2899:21; Tr. 5022:24 - 5023:19.[6]

For all of the above reasons, Objections 9, 23 and 25 should be rejected as a basis to overturn this election.

F. Region 29 Did Not Disparately Enforce The Wearing of Paraphernalia

[6] No testimony regarding other alleged electioneering was elicited, but even if it had been, the Board has found various types of electioneering conduct unobjectionable. See, e.g., *J.P. Mascaro & Sons*, 345 NLRB 637, 638 (2005)(conversations that took place outside the front entrance, away from any no-electioneering zone, that did not violate any Board agent instructions); *American Medical Response*, 339 NLRB 23, 23 fn. 1 (2003)(pro-union poster affixed to tree 100 feet from polling area and distributing pro-union flyers 50 to 80 feet from polling area); *Del Ray Tortilleria*, 272 NLRB 1106, 1107-1108 (1984)(union organizer shaking hands and speaking briefly with voters outside the polling place); *Boston Insulated Wire*, 259 NLRB at 1118-1119 (passing out leaflets and speaking to employees as they entered building where glass-paneled doors effectively insulated voters from the electioneering); see also *Marvel International Security Service*, 173 NLRB 1260 (1968)(union representatives conversed with voters at foot of 10-foot staircase leading to second floor where polling area was 20 to 25 feet down a hallway, beyond no-electioneering area established by Board agent); *Harold W. Moore & Son*, 173 NLRB 1258 (1968)(conversations taking place 30 feet from building entrance, which was itself 30 feet from polling area); *Sewanee Coal Operators' Assn.*, 146 NLRB 1145, 1147 (1964) (persons wearing pro-union placards circulated about the voting line outside of polling area and Board agent had not designated no-electioneering area); *NLRB v. Le Fort Enterprises, Inc.*, 791 F.3d 207, 213-214 (1st Cir. 2015) (electioneering and name calling engaged in by employees outside of any no-electioneering area which could not be heard in polling place not objectionable).

Objection 10 states as follows:

> **OBJECTION 10:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it directed voters to cover up "Vote NO" shirts, but allowed other voters to wear Petitioner shirts and other Petitioner paraphernalia in the polling area.

The essence of this Objection is that the Board treated voters who were wearing "Vote No" T- shirts differently than those who had Petitioner's paraphernalia. First of all, the Board has held that wearing stickers, buttons, and similar campaign insignia by participants as well as observers at an election without more, is not prejudicial. *R. H Osbrink Mfg. Co*., 114 NLRB 940, 942 (1955); see also *Furniture City Upholstery Co*., 115 NLRB 1433, 1434-1435 (1956). Precedent is clear that observers wearing buttons or other insignia merely bearing the name of their union is not prejudicial to the fair conduct of an election. *Electric Wheel Co*., 120 NLRB 1644, 1646 (1958). Viewing the identity and special interests of employer observers as not reasonably presumed to be less well known than that of union observers, the Board holds that the impact on voters is not materially different "whether the observers wear pro-union or anti-union insignia of this kind." *Larkwood Farms*, 178 NLRB 226 (1969) (observer wearing "Vote No" hat not objectionable); see also *Fiber Industries*, 267 NLRB 840, 850 (1983) (appearance of words "yes" or "no" in polling area, without more, not grounds to set aside election); *Delaware Mills, Inc.*, 123 NLRB 943, 946 (1959) (*overruling* objection based on employee, who, because her vote was challenged, was required to sit at polling place wearing union T-shirt and "Vote Yes" button and allegedly waved and smiled at other voters). However in the instant election the testimony bears out that logos from both parties (the ALU box with 3 fists and the Amazon "smile") were present in the polling area, as were "Vote No" t-shirts in large font and "Vote Yes" lanyards in small font.

Based upon the operative law, it is ***irrelevant*** whether or not voters or observers were wearing pro-union or anti-union insignia of any kind while in the voting tent. The only questions to be analyzed are: "Did the Region direct voters to cover up "Vote NO" shirts but allow[ ] other voters to wear Petitioner shirts and other Petitioner paraphernalia in the polling area[7]," and, if the Region did in fact do this, "[d]id the Region fai[l] to protect the integrity and neutrality of its procedures and creat[e] the impression of Board assistance or support for the Petitioner" by virtue of that conduct. The answer to both questions is a resounding no.

First of all there is substantial testimony in the record that voters were directed to cover up not just anti-union paraphernalia but pro-union paraphernalia as well. For instance, Cassio Mendoza, an observer at six (6) of the ten (10) voting sessions testified that Board Agent Ioulia Fedorova asked voters on numerous occasions to put away their ALU lanyards, and that voters were complying with this instruction. *See*, Tr. 5018:17 - 5021:13. Additionally, Employer witness, Natalie Monarrez, who brought a sign to the voting tent on which she had written, *inter alia,* that she would be voting no, also stated that a male NLRB agent made an announcement to everyone that nobody was allowed to have any signs or any T-shirts that said anything at all about the election. It needed to be put away. Or it would be taken away. Tr. 4003:13 - 4003:17. She further stated she saw all people complying with the NLRB agent's admonition. Tr. 4003:22 - 4003:24. Furthermore, Ms. Monarrez specifically stated when she went to vote she did not see any people wearing ALU paraphernalia inside the tent. Tr. 4004:14 - 4004:18. Gregory Purpura

[7] And even if the answer was "yes", operative case law holds that without further proof that the conduct by the Board Agents actually "had an impact on employees voting" the objection should still be overruled. *See, Firestone Textiles Co*., 244 NLRB 168, 170 (1979) (*overruling* an employer objection wherein a Board Agent required employee observers to remove a pocket saver bearing the name of the employer but another Board Agent allowed Union observers to wear campaign insignia);

was another employee witness who testified to not observing any voter or observers wearing any pins or buttons related to the election. *See*, Tr. 730:8 - 730:10.

Further, to the extent that the Board failed to detect every instance that a voter was wearing Vote Yes or Vote No paraphernalia, there is no evidence that such inaction was in any way disparately applied. That is, just as certain voters were able to wear the yellow lanyards which stated in small letters "Vote Yes", other voters were permitted entry to the tent wearing "Vote NO" shirts. Sophia Campbell was an observer for two (2) voting sessions and she saw a voter enter the tent wearing a "VOTE NO" shirt. See, Tr. 1565:5 - 1565:9. Jasmine Gordon also was permitted to enter the tent wearing a "VOTE NO" shirt, it was only when she reached the very front of the line and attempted to check in that she was asked to cover her shirt. See, Tr. 1632:14 - 1633:16. Cassio Mendoza similarly testified that he observed the NLRB permit at least one (1) voter to vote wearing a "Vote NO" T-shirt. See, Tr. 5021:14 - 5022:7. The fact that there was testimony in the record that some voters were permitted to vote while wearing their yellow ALU lanyards. thus, is of no moment. Although Xiomara Rosado actually recalled seeing that the lanyards stated "Vote Yes," *See*, Tr. 3085:1 - 3085:7; Tr. 3088:4 - 3088:9, it is obviously much smaller and substantially harder to actually read when it is around someone's neck than the large "VOTE NO" printed across the front of a T-Shirt. *See*, Tr. 3599:24 - 3600:8; Emp. Ex. 725.[8] In addition, it is undisputed that it was quite cold for the duration of time that the polls were open and that most voters were wearing jackets, sweatshirts, and other clothing that could act to obscure a lanyard around one's neck. *See, e.g.,* Tr. 801:17 - 801:25; Tr. 836:25 - 837:1; Tr. 838:2 - 838:7; Tr. 2503:18 - 2503:23; Tr. 2690:3 - 2690:7; Tr. 2901:15 - 2902:7; Tr. 3100:24 - 3101:5; In fact, most voters, many of whom had

[8] While Megan Matos testified that she did observe the yellow lanyards to say "Vote Yes," it became obvious on cross examination that she only knew the lanyards said "Vote Yes" because an Amazon attorney had pointed it out to her prior to her testifying in this hearing. *See*, Tr. 3252:6 - 3252:25.

testified to seeing these lanyards around the facility for some time, did not even realize that they said "Vote Yes" on them, most believed they only said "ALU" on them. Jodi Tredici, an employee witness testified that she saw one (1) voter enter the tent wearing a yellow ALU lanyard that she believed had the words "ALU" on it; she did not see whether the ALU lanyard said "Vote Yes" on it. *See*, Tr. 984:9 - 985:7; Tr. 1035:16 - 1035:18. Catherine Litto, another employee witness also testified that when she saw yellow lanyards inside the voting tent they said "ALU" on them and she did not see any paraphernalia that stated "Vote Yes". *See,*Tr. 2775:3 - 2775:19. Charlene Novoa, another employee witness also testified that the yellow ALU lanyard only said ALU in bright white letters. *See* Tr. 2896:2 - 2896:14. Matthew Cordova, was yet another employee witness that did not observe the yellow lanyard to say "Vote Yes." *See*, Tr. 1292:9 - 1295:11. Adekunle Oyalaja, another employee witness that saw the yellow lanyards also believed they only stated "ALU" on them. *See,* Tr. 2505:5-2505:13.

It is quite obvious that the testimony elicited throughout this hearing reveals that certain Board agents did not realize that the yellow lanyards said "Vote Yes" at least in part due to the fact that many of the voters were invariably wearing jackets and other cold weather clothing due to the cold temperatures during the polling sessions which would have obscured anyone's ability to actually see what the lanyards said on them. In addition, Board Agents are not robots and cannot be expected to be perfect. Perfection is not the standard. *See, e.g., Polymers, Inc.*, 174 NLRB 282 (1969), enf'd 414 F.2d. 999 (2d. Cir. 1969)[9]. There was nothing about certain Board agents

[9] "Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance. The question which the Board must decide in each case in which there is a challenge to the conduct of the election is whether the manner in which the election is conducted raises a reasonable doubt as to the fairness or validity of the election."

permitting certain voters to wear yellow ALU lanyards that would create a "reasonable doubt as to the fairness or validity of the election."

Further, there was a clear distinction in the paraphernalia the Board was permitting to be worn in the voting area versus that which they were prohibiting. Shirts that say "Vote NO" clearly convey an actual message, a message directing a voter how specifically to vote. Furthermore, it is undisputed that the text on the "Vote NO" shirts that voters wore to the polls was quite large. See, Tr. 985:12 - 985:25; Emp. Ex. 545. On the other hand, ALU buttons were simply a button with an image of three raised fists coming out of a box. See, Tr. 2870:4 - 2870:19; Emp. Ex. 232-A. ALU T-shirts were just that, T-shirts that came in multiple colors that had the letters "ALU" emblazoned across the front along with the same image of raised fists that appeared on ALU pins. The T-shirts and ALU buttons did not contain the words "Vote YES" or any such similar language directing a voter to take any specific action. See, e.g., Emp. Ex. 527; Tr. 3088:25 - 3089:6. Although Gregory Purpura testified that on Tuesday, March 29, he went to vote while wearing three (3) pins, and was asked to cover them before voting, this situation is clearly distinguishable. See, Tr. 704:20 - 705:10; Tr. 707:2 - 707:12. The pins that Mr. Purpura was wearing were ALU pins with the ALU symbol that he had obtained from the ALU table but had been modified such that the pins had writing, in bold black letters that stated "FUCK NO, " "NO," and "VOTE NO." See, Tr. 705:18 - 706:10; Emp. Ex. 524; See also, Tr. 723:2 - 723:24. Again, unlike the unaltered ALU pins, Mr. Purpura's pins clearly contained a message directing others how to vote. Once he closed his shirt, Mr. Purpura was permitted to vote. See, Tr. 707:2 - 707:12.

With respect to the presence of logos, approximately 70% of JFK8 associates use a lanyard to carry their IDs around their neck. Amazon also gives away lanyards to its employees based on years of service and they come in different colors and are visible all over the JFK8 facility. *See*,

Tr. 1434:1 - 1435:15; *See also*, Tr. 1523:10 - 1523:20. Guillermo Rentas, a witness who voted during the morning session on March 25, 2022 testified that he was permitted to wear his "Amazon" lanyard while voting. *See*, Tr. 1524:12 - 1524:14; Tr. 1525:16 - 1525:18.

In any event, the actual voters in this election were completely unphased by the fact that certain voters wore their yellow lanyards while other voters were told to cover up "Vote NO" T-shirts. Ms. Rosado put it best when she testified "[s]o why would I sit there and try to lie to you today and say, I can identify who was wearing what? I didn't know that you're not supposed to do that. So why would I pay any more detail to it? I just realized, oh, wow, they got a T-shirt on. Oh, wow, they have a lanyard on. I can't say anything else." *See* Tr. 3102:13 - 3102:19. Ms. Tredici, similarly, did not see any voters enter the tent and then turn around without voting because the voter saw an ALU lanyard or as a result of a voter being told to cover up their "VOTE NO" t-shirt. *See*, Tr. 1035:19 - 1036:6. Robert Castellano testified very similarly. *See*, Tr. 1140:5 - 1140:11. As did Sophia Campbell. *See*, Tr. 1646:9 - 1646:17. Megan Matos, who testified to seeing many lanyards in addition to the yellow ALU lanyards believed that the other lanyards stated "Vote NO" but it did not concern her enough to report that to anyone. *See,* Tr. 3245:10 - 3246:5; Tr. 3257:9 - 3257:12. Ms. Matos similarly did not see anyone enter the tent and turn around to leave without voting. *See*, Tr. 3257:17 - 3257:24.

For all of the above reasons, Objection 10 should be overruled.

G. No Evidence was Presented of Video or Audio Recording of the Voting Area

Objection 11 states as follows:

> **OBJECTION 11**: The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it repeatedly allowed

> Petitioner's observer to audio/video record the check-in tables and voting area on his mobile phone while serving as an observer during multiple voting sessions.

The Employer utterly failed in presenting any evidence in support of this objection. Emmanuel DeLeon, an observer during the first voting session, testified that he observed one of the Petitioner's observers (later identified as Jason Anthony) to have his cellular phone clipped to his waist belt and that he observed the phone flashing. *See,* Tr. 666:8 - 668:7. On cross examination however, Mr. DeLeon indicated that he observed Mr. Anthony with his phone flashing ***before*** the voting actually started, and that once he pointed this out to the Board Agent, she asked the observer to put the phone away, and he complied. *See*, Tr. 672:12 - 673:4; Tr. 678:23 - 679:2; Tr. 3466:17 - 3467:1. Never mind that a light flashing on a phone does not necessarily signify that it is recording, Mr. DeLeon was quite clear that the phone was put away ***before*** voting even started.

Anthony Momodu, an observer at the same table as Jason Anthony during the evening voting session on March 25, 2022 testified that he witnessed an NLRB Agent ask Jason Anthony to put his phone away three times in twenty minutes because Mr. Anthony had his cellular phone on the table or in his hand. Tr. 3354:5 - 3357:7; Tr. 3358:20 - 3359:12. Although he did not put his phone away immediately, Mr. Anthony did eventually comply and the phone was returned to his pocket within twenty (20) minutes. *See*, Tr. 3359:13 - 3359:17. More importantly, on cross examination, Mr. Momodu specifically testified that Jason Anthony was not recording, nor did he witness Mr. Anthony ever point the phone at other voters. *See*, Tr. 3374:19 -3374:23; Tr. 3376:14 - 3376:17.

Charlene Novoa provided even less probative evidence. Ms. Novoa testified that while she was serving as an observer during the evening session of March 29, 2022, she observed Union

observer Cassio Mendoza "glance" at his cell phone and then put it away. *See* Tr. 2873:7 - 2873:18. On cross examination Ms. Novoa expounded on what she meant by observing Mr. Mendoza "glance" at his phone. Ms. Novoa testified that she observed Mr. Mendoza "pull out his phone" followed by him "click[ing] on his screen and put[ting] it back in his pocket." *See*, Tr. 2927:4 - 2927:16. It is quite obvious that the conduct described by Ms. Novoa consisted of Mr. Mendoza checking the time on his phone. At the time this occurred, Ms. Novoa could not even recall if there were any voters in the tent. *See*, Tr. 2927:21 - 2927:23.

Even if this objection was aimed at the conduct of Union observers, there is a complete lack of any evidence to establish that Jason Anthony or Cassio Mendoza were ever audio and/or video recording check-in tables or the voting area. However, this objection is not even directed at the conduct of a Union Observer, rather, it is aimed at Region 29 for allegedly "fail[ing] to protect the integrity and neutrality of its procedures and creat[ing] the impression of Board assistance or support for the Petitioner when it repeatedly allowed a Petitioner's observer to audio/video record the check-in table and voting area on his mobile phone while serving as an observer during multiple voting sessions." Even if the evidence established that Mr. Anthony was recording[10] (which it most certainly does not), the evidence clearly demonstrates that on each occasion a Board Agent became aware of an observer's phone being out of his pocket for any reason, they were immediately instructed to put the phone away. With respect to Mr. Mendoza, inasmuch as the testimony established he only "glanced" at his phone, presumably to check the time, and then immediately returned the phone to his pocket, there would have been no reason for a Board agent to intervene even if they had noticed the conduct that lasted only a brief instant.

[10] Which is ***not*** an objection made by the Employer.

For the above reasons Objection 11 should be overruled.

H. Not a Single Board Agent Solicited a Single Unfair Labor Practice Charge or Other Complaint During the Administration of this Election

Objection 12 states as follows:

> **Objection 12:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it solicited unfair labor practice charges against the Employer in the presence of voters in the polling area while the polls were open.

The evidence presented by the Employer in support of Objection 12 was somewhere between laughably flimsy and non-existent. The sole testimony concerning this objection came from Employer observer Robert Nicoletti. Mr. Nicoletti essentially testified that a voter came into the voting area and was making statements that "it wasn't right" that Amazon was holding captive audience meetings and telling employees they should "vote no." *See*, Tr. 2203:17 - 2204:6. Mr. Nicoletti further testified that when the voter first came in they were speaking loudly and were quite "animated." *See*, Tr. 2208:22 - 2209:14. In direct response to this voters' actions, a Board agent stood up and directly engaged with this voter and gave him ***content neutral*** information that ***supported*** the employer's right to hold captive audience meetings and instruct their employees to "Vote no." *See*, Tr. 2209:15 - 2209:22. The Board Agent provided additional ***content neutral*** information that despite Amazon's actions being legal, if he wanted to file a complaint, he could do so; but the Agent never offered to assist the voter with filing the complaint nor did the Board Agent give advice or offer opinion as to whether or not the complaint should actually be filed. *See*, Tr. 2210:2 - 2210:12. The end result of this conversation between the Board agent and the voter was that the voter calmed down, received a ballot and voted without further incident. *See*, Tr.

2209:23 - 2210:1. Mr. Nicoletti in fact confirmed that it appeared to him that the Board Agent's actions were taken in an attempt to control the situation. *See*, Tr. 2212:21 - 2212:25.

While "[c]onfidence in the Board election process and standards can be undermined when Board agents fail to maintain strict neutrality in what they say while conducting Board Elections," there is absolutely nothing in the testimony elicited that could possibly indicate a statement of opinion by the Board Agent in this case. *See*, *Ensign Sonoma*, 342 NLRB 933 (2004). Clearly, the Board Agent ably dealt with an "animated" individual by providing him ***content neutral*** advice. There is simply no need to even evaluate the Board's standard for judging an agent's statement under *Athbro*[11] in this matter as the statements made by the Board agent are objectively neutral. In any event, the statements made by the Board Agent in *Ensign Sonoma Health Care Center*[12], in which the election was upheld, were clearly not neutral, especially as compared to the completely neutral and innocuous statements made in this matter.

Clearly, Objection 12 should be overruled.

II. THE OBJECTIONS DIRECTED AT THE ACTIONS OF THE PETITIONER MUST BE REJECTED

Amazon's objections directed to the conduct of the Petitioner are equally unsupported as those directed against the Board.

A. The Employer Failed to Prove Petitioner Engaged in Threats That Affected Voter Free Choice

Objection 13 states as follows:

[11] Which remains the controlling standard for evaluating Board Agent conduct. *See Ensign Sonoma*, at 933.

[12] "Companies don't like Unions because they cannot fire or hire anyone and they cannot take benefits from the staff."

> **Objection 13:** During the critical period and while the polls were open, the Petitioner's members and agents harassed and threatened physical violence and other reprisals against employees who were not supportive of the Petitioner's cause.

In order to evaluate the conduct alleged by the Employer in support of Objection 13, one must start from the premise that "[a] certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election," and the Act does not impose a general civility code on employees with passionate beliefs about unionization. *See*, *Nabisco Inc. v. NLRB*, 738 F.2d. 955, 957 (8th Cir. 1984). The test for whether a certain statement or action should actually be considered a threat is an objective one, to wit, whether a remark can reasonably be interpreted by an employee as a threat. The test is not the intent of the speaker or the effect on the listener. *See, Smithers Tire and Automotive Testing of Texas, Inc.*, 308 NLRB 72 (1992).

Before evaluating the Employer's *de minimis* evidence in support of this objection, it is necessary to dispense with certain conduct alleged or implied by the Employer to be objectionable.

Videotaping and Home Visits Are Not Threats

The record is replete with various references by employees to a Union supporter or agent video recording various activities.[13] Such references should essentially be disregarded as they are dispositive of nothing. The law is clear: videotaping by the Union of employees, even if engaged in protected activity, unaccompanied by threats or other coercive conduct, is ***not*** objectionable conduct. *See, Randell Warehouse of Arizona*, 328 NLRB 1034 (1999); *Cf., Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989) (Election overturned where Union representative that was filming

[13] By no means is this argument addressed towards any allegation that there was videotaping by Union agents of the Voting Line nor any allegations that there was video or audio recording inside of the voting tent. Those allegations are addressed separately in this Brief.

told anti-union activist that "we've got it on film… we know who you guys are… after the Union wins the election some of you may not be here…"). There is not a single instance in this record of a witness testifying that any perceived videotaping was connected with any perceived threat by a Union agent or supporter, thus any references to videotaping by the Union should be disregarded in evaluating Objection 13.

The Employer produced Gopi Vaidya who testified that four (4) Union supporters came to her door approximately one (1) week before the election to remind her about the upcoming election, to ask her how she would vote, and to ask her if she had any questions. *See*, Tr. 2085:5 - 2086:14. Ms. Vaidya did in fact have a couple of questions for the Union supporters which they attempted to answer for her. *See*, Tr. 2103:25 - 2105:14; 2113:21 - 2113:24. Ms. Vaidya also reported that one of the (4) supporters appeared to be videotaping the interaction. *See, Id*, at 2105. On cross examination Ms. Vaidya confirmed that when she told Petitioner supporter, Ms. Medina, that she did not want to reveal how she intended to vote, Ms. Medina respected that decision and did not press the issue. *See*, Tr. 2113:12 - 2113:15. There is simply no construction of the facts under which these allegations could be considered a "threat" or otherwise constitute objectionable conduct by the Union. A home visit by Union agents,[14] unaccompanied by threats, is not in and of itself coercive or objectionable. As the only activity that occurred in conjunction with the home visit was alleged videotaping, and such conduct is also in and of itself not coercive or threatening, no objectionable activity occurred. *See, Randell Warehouse of Arizona*. In fact, photographing employees so that the Union can learn the identity and leanings of various employees was an express reason cited in *Randell Warehouse of Arizona* to support the proposition that Union videotaping and photographing was not coercive nor objectionable. *Id*., at 1036.

[14] To be clear, none of the four (4) individuals at Ms. Vaidya's door were ever demonstrated to be Union agents

Robert Castellano was not Threatened

Robert Castellano testified that Derrick Palmer approached him during the small group meeting on February 7, 2022 and said "I know who you are. I trained you. You are only a PA. You don't know anything." *See*, Tr. 1111:12 - 1112:18. On its face, this statement is clearly not a threat; at worst it is an insult. Even out of context, no reasonable person should feel threatened by those statements. More importantly, once this interaction is actually put into context, it is crystal clear that no reasonable person could ever perceive Mr. Palmer's statement as a threat. Mr. Castellano admitted that he initiated this interaction by screaming at Mr. Palmer that "the ALU is just a bunch of thugs." Mr. Castellano further testified that he did not actually fear for his physical safety as a result of this interaction with Mr. Palmer. *See*, Tr. 1120:18 - 1121:16; Tr. 1122:8 - 1124:21; Tr. 1130:11 - 1130:21; *See also*, Tr. 1175:15 - 1175:22. Mr. Castellano claimed that this reaction made him feel harassed and intimidated. *See*, Tr. 1114:11 - 1114:13. This testimony is belied by Mr. Castellano's subsequent statement to Mr. Palmer that "I'm not hiding from you" and proceeded to show him his Amazon identification. *See*, Tr. 1118:20 - 1119:4. Furthermore, Mr. Castellano then waited a week to make a report concerning this incident, and even after making the report, Amazon never followed up and Mr. Castellano failed to follow up again as well. *See*, Tr. 1125:12 - 1126:18. Clearly, neither Mr. Castellano, nor the Employer or any other reasonable person could find this conduct to be threatening.

Adina Goriva Was not Threatened

Adina Goriva testified that Jason Anthony called her a "bitch" under his breath when she refused to take a flyer from him at the ALU table located in the break room. *See*, Tr. 917:1 - 917:12. Clearly, referring to someone as a "bitch" under your breath is ***not*** harassment and it is

certainly not "threats of physical violence or other reprisals." Again, no reasonable person could feel threatened by such conduct.

Andrea Baltazer was Not Threatened

Andrea Baltazer testified to two (2) alleged incidents of "harassment." However, upon review of the actual facts, absolutely nothing that Ms. Baltazer testified to could constitute harassment under any objective standard; certainly the alleged conduct should not cause a reasonable person to feel threatened. Ms. Baltazer first testified that on March 23, 2022, Derrick Palmer laughed at her "for a couple of seconds" as she walked past him. *See*, Tr. 1447:16 - 1448:11. Never mind that laughing at someone is not "harassment," the witness cannot actually testify with any certainty as to why Derrick Palmer was actually laughing. Ms. Baltazer did not take the time to report this conduct, even though she was well aware that Amazon has a policy where if you are being harassed there is a specific way to report it. *See*, Tr. 1477:10 - 1477:20.

Ms. Baltazer then testified to an alleged second incident wherein someone named Sam Bowman tried to give her an ALU lanyard and when Ms. Baltazer refused, Mr. Bowman replied "who will protect you?" *See*, Tr. 1455:15 - 1456:8; Tr. 1458:3 - 1458:12; *see also* Emp. Ex. 494.6. This testimony was worthless for two (2) reasons. First of all, there was absolutely zero evidence offered by Amazon that Sam Bowman is an agent of the ALU. More importantly, Ms. Baltazer admitted on cross-examination that when Mr. Bowman asked her "who will protect you?" she knew that he meant "who will protect you" from Amazon.[15] *See*, Tr. 1476:11 - 1476:15. Additionally, Human Resources representative Anna Leonarti closed Baltazer's public complaint

[15] As this is an objective standard, it is also clear from the context of the conversation that ***any*** reasonable person would have come to the same conclusion as Ms. Baltazer; the statement "[w]ho will protect you?" was clearly not a threat, especially in the specific context of responding to someone who is hesitant to support a Union.

five (5) hours later without any investigation or comment other than that "Amazon respects every employee's right to participate in voting." *See,* Emp. Ex. 494.6. Tyler Grabowski, Human Resources manager, admitted that Ms. Baltazar's complaint was not about a threat of physical violence, nor harassment, nor a threat of other reprisal by the Petitioner. *See* Tr. 2633:13 - 2633:24. Clearly, neither Ms. Baltazer, the Employer or any other reasonable person could have found this conduct to constitute a "threat."

Lori Adenji was Not Threatened

Although Lori Adenji testified that she heard ALU members talking amongst themselves that they had to "get Felipe," on cross examination Ms. Adenji admitted that she also could have heard them say they have to "do something about Felipe." *See*, Tr. 1506:1 - 1506:10. It is clear from context that Jason Anthony and Brett Daniels were discussing Felipe's action that took place during the February 7, 2022 small group meeting wherein Felipe Santos told ALU supporters that they needed to leave the meeting or they would be considered insubordinate, and whether or how the ALU should respond. *See*, Tr. 1499:10 - 1499:17; Emp. Exs. 304, 662. There simply was no threat made.

Nakeisha Fray was Not Threatened

Jodi Tredici testified that a few weeks before the election she observed her co-worker Nakeisha ("Keisha") be approached by two (2) ALU supporters and that they spoke to her in an angry tone. *See*, Tr. 993:6 - 996:1. This was allegedly because Ms. Fray had covered up the "ALU" on her ALU tee shirt with red tape. *See*, Tr. 1582:25 - 1583:8. They asked Ms. Fray if "Amazon made [her] cover that up." *See*, Tr. 991:8 - 991:9. Ms. Fray had been a supporter of the Petitioner and was in fact in possession of several ALU t-shirts. *See*, Tr. 1591:2 - 1591:10; Tr.

1624:3 - 1624:5; *See also*, Tr. 4446:11 - 4446:20. Ms. Fray testified that Connor Spence kept saying words to the effect of "if a manager told you to cover your shirt… that's a lawsuit " See, Tr. 1602:3 - 1603:6. In this same conversation, Mr. Spence also reiterated to Ms. Fray that Amazon wanted employees to be against the ALU and that she should support the ALU. However, Mr. Spence credibly explained that he approached Ms. Fray because he was concerned, based upon a conversation with another co-worker, that Ms. Fray had been pressured by management to cover up the shirt and to no longer support the ALU, which would have been a violation of her rights. It was only after speaking with Ms. Fray that Mr. Spence realized this was a decision that she made on her own. At that point, Mr. Spence told her that if she has any further questions about the ALU she should speak to him and that she shouldn't necessarily believe everything that management tells her. *See*, Tr. 4443:4 - 4447:23 After the conversation about the shirt Mr. Spence and Ms. Fray continued to remain on friendly terms. They would say hello and goodbye to one another, she continued to ask questions at the ALU table and Mr. Spence offered Ms. Fray his phone number if she had any additional questions about the ALU and she accepted it[16]. *See*, Tr. 1626:7 - 1626:23; Tr. 4448:1 - 4448:13.

Most importantly, asking someone, no matter the context, if they were forced to cover up their shirt by management cannot be reasonably interpreted to be a threat by anyone. Nor can giving them legal advice[17] whether it was solicited or not, be interpreted to be a threat by someone. Secondly, any employee that heard the entire conversation would have understood the context and

[16] Although subjective beliefs are not relevant, employees that witnessed the first interaction between Connor and Keisha could have certainly witnessed Keisha continuing to approach the ALU table and continuing to ask questions. Witnessing such activity should provide additional objective reasons for those employees to not have considered the conversation between Connor and Keisha to be threatening in any respect.

[17] Particularly when that advice is to advise someone that they may have a lawsuit for which they would have the right to sue another party.

clearly understood that Mr. Spence was legitimately concerned that Ms. Fray was the victim of unlawful behavior by the employer, and Mr. Spence was trying to assist her in that respect, not threaten her. Again, under no construction of these facts could any reasonable person perceive these statements or actions as a threat.

The Written Complaints Produced by Amazon do not Constitute Threats

The Employer went on to produce a number of written "complaints" that they alleged are kept in the ordinary course of business and should be treated as business records.[18] Although these are not business records, and should not be admitted for the truth, none of the allegations in the "complaints" would even constitute threats.

The employer first produced a complaint filed by Dana Miller, against Natalie Monarrez for conduct that on its face was a personal issue between two (2) individual employees that occurred more than one (1) month after Ms. Monarrez left the ALU. *See*, Emp. Exs. 237, 242; Tr. 3956:9 - 3956:19. The Petitioner was not even named in this Complaint, and nothing in this Complaint in any way implicated the ALU.

The employer also produced a Voice of Amazon ("VOA") post by Dana Miller which complained of "bullying and harassment" but did not provide any other specifics such that any reasonable person could find the "bullying and harassment" to actually be "threatening" or "coercive." *See*, Emp. Ex. 238. Two days after Ms. Miller[19] posted this "complaint" on the VOA

[18] Petitioner argued unsuccessfully that these records should not be admitted under the business record exception to the hearsay rule. Petitioner continues to believe these documents should not be considered. Employee complaints are not records kept in the ordinary course of business by the employer. An employee complaint is generated by an employee making a specific allegation to which the truth of the allegation is highly relevant; yet by admitting these employee complaint forms without testimony from the employees for the truth of what was contained therein, Petitioner was denied the opportunity to cross-examine these employees with respect to their alleged complaints

[19] Whom the Employer failed to call as a witness in this proceeding

Board, Senior Human Resources Manager, Tyler Grabowski responded by closing her complaint and commenting that "Amazon.com was asking her to vote NO to ALU representation." On cross examination, Grabowski admitted that he did not believe the complaint was "an immediate threat," did not remember if he had investigated this complaint, and was forced to concede that he decided that "no action was required". *See* Tr. 2596:23 - 2596:24; Tr 2597:3 - 2600:8. He was also forced to admit to not having spoken to any member of the Petitioner regarding alleged harassment or bullying of Dana Miller. *See* Tr. 2601:21 - 2602:4.

The employer also produced an additional VOA post by Dana Miller wherein she simply gives her reasons for voting against the ALU; certainly there is no evidence of a "threat" being made to anyone contained therein. *See*, Emp. Ex. 494.2. Furthermore, within 2 hours of making that "complaint," Dana Miller's public complaint was closed by Anna Leonarti, a member of JFK8 Human Resources management. Despite the fact that her complaint was closed so quickly, Mr. Grabowski, lateral to Ms. Leonarti, testified incredibly that "it varies" in regards to whether investigations into threats and/or harassing behavior can be completed in 2 hours. *See* Tr. 2628:2 - 2628:11. Mr. Grabowski did concede on cross examination that there are no allegations by Ms. Miller against Petitioner for harassment, for any physical violence or for any other reprisals. *See* Tr. 2628:15 - - 2629:5. He also could not testify with any certainty if this complaint was ever investigated at any time. *See*, Tr. 2628:12 - 2628:14. None of Dana Miller's "complaints" possibly constitute harassment or a threat under any reasonable objective standard.

The employer then offered a complaint filed by Jodi Tredici[20]. In addition to her obvious bias against the ALU, Ms. Tredici's complaint should be disregarded for an additional reason. Her

[20] The self-professed individual who "started the Vote No" campaign and distributed 1000 "Vote NO" t-shirts in the week before the election. *See*, Tr. 1031:4 - 1032:3.

"complaint" is not a "complaint" of any type of threat of any kind. It is merely a baseless and unsupported statement grounded in obvious racism that Amazon should have been embarrassed to even proffer but have shamelessly entered into this record. *See,* Emp. Ex. 239 (wherein Ms. Tredici baselessly alleges that President Smalls is a gang member and she does not understand how "people like him" can run a Union).

The employer also offered a VOA post by Stephanie Lopez wherein she asks "[w]hat's up with these ALU members bullying…" without offering any explanation of what she means by bullying. *See*, Emp. Ex. 497. Ms. Lopez testified that she wrote this comment because she felt that "certain people" "were bullying, and that's about it." *See* Tr. 2722:12 - 2722:14. However she was forced to admit that "the ALU was never bullying" her. *See* Tr. 2725:9 - 2725:11. Later she changed her testimony to say that when Jason Anthony replied to her online comments, the ALU was bullying her, but she never printed out those online "bullying" comments and never gave them to the Employer to make a complaint. *See* Tr. 2725:13 - 2726:8. On redirect, Ms. Lopez further clarified that what she found bullying about Mr. Anthony was that he would use the words "crap" or "shit". *See* Tr. 2739:19 - 2740:24. Ms. Lopez also testified that what she considered to be bullying from Jason Anthony was: "[h]e would come against my post, talking negatively, saying how it's basically -- whatever I shared or posted -- was ridiculous." *See* Tr. 2749:6 - 2749:24.

Ms. Lopez also testified that she has no recollection of anyone from Amazon ever investigating her complaint. *See* Tr. 2723:2 - 2723:6. Ms. Lopez also admitted that she made this complaint four (4) days before she voted and that "of course" her complaint did not stop her from voting. *See,* Tr. 2724:17 - 2724:22. Certainly, based upon all of the above, neither Ms. Lopez, Amazon nor any other reasonable person would find the conduct (which essentially consists of coarse language and differences in opinion) alleged by Ms. Lopez to be a "threat."

The employer then offered two (2) VOA posts by Jason Anthony wherein he accused Natalie Monarrez of "turning women against the ALU," "being the most racist person [he] has ever met," and being "ungrateful." *See*, Emp. Exs. 240, 241. Again, under no construction of the facts could any employee perceive these comments as a threat.

Finally, the employer offered multiple VOA posts and an employee complaint form filed by Natalie Monarrez. *See*, Emp. Exs. 242, 243, 244, 494.5 Although these exhibits are certainly not evidence of a threat owing to their hearsay nature, inasmuch as there was significant testimony regarding the allegations made in these complaints, that testimony shall be addressed, *infra.*

Natalie Monarrez Provoked Multiple Confrontations but was Never Threatened

Amazon points to isolated verbal altercations between ALU supporters and *one* anti-union employee, Natalie Monarrez, on March 25, which occurred *after* she had already voted. *See*, Tr. 4112:22 - 4113:22. In Ms. Monarrez's telling, apparently after she made provocative remarks to him concerning his mental disability, Ms. Monarrez states that ALU supporter Jason Anthony began "screaming and cursing," "took a step forward towards [her] and started putting his fingers in [her] face," and accused her of being a "traitor" who had "turned [her] back on the ALU." *See,* Tr. 4011:13 - 4012:14. Ms. Monarrez never testified that Mr. Anthony made any physical contact[21] with her or made an actual threat against her, and she testified that she "got tired of it, and turned around and walked away." *See*, Tr. 4012:20 - 4013:2. In contrast, while agreeing that their interaction on March 25, 2022 was about her "banner" (sign) which was hostile to the ALU, Mr. Anthony still wanted to approach her with kindness "...since she was a former member of the ALU and we helped her in the Union and me, personally, knew her situation, I expressed my

[21] This fact was confirmed by Employer witness Andrea Baltazer. *See*, Tr. 1470:18 - 1470:19.

disappointment in a very, very polite way." Tr. 3679:5 - 3679:17. But, when Mr. Anthony told her she had betrayed the union, Ms. Monarrez responded in a "very, very demeaning way, telling me, like, I wasn't worth nothing. Saying words that I'm not going to say it here in this forum. And even saying things towards my sexual orientation, towards my mental illness, that even I don't even say towards a woman." *See*, Tr. 3679:21 - 3680:3.

Petitioner witness Cassio Mendoza also credibly rebutted Ms. Monarrez's testimony and corroborated Mr. Anthony's version of the events. Specifically, Mr. Mendoza testified that after Mr. Anthony told her she was a traitor to the Union that "[Natalie] really exploded and started screaming '[s]crew you Jason, screw you. You're a child, screw you' and stormed out of the break room." *See*, Tr. 5039:19 - 5039:24. Ms. Monarrez in fact corroborated this testimony by Mr. Mendoza when she again, in reference to Mr. Anthony, testified that "he has the mind of a child." *See*, Tr. 4013:21 - 4013:25.

Ms. Monarrez went on to testify that, later that afternoon, ALU officers Derrick Palmer, Angelika Maldonado, and Brett Daniels yelled at her in the break room when she displayed an anti-union banner, calling her various names and cursing at her. *See*, Tr. 4044:23 - 4045:15. Ms. Monarrez alleged that, after the other two ALU officers left, Ms. Maldonado returned and threatened to "kick [her] ass in the parking lot."[22] *See*, Tr. 4046:25 - 4047:5. Ms. Maldonado credibly denied this testimony. When specifically asked if she had made any threatening statements to Ms. Monarrez, Ms. Maldonado replied "[s]o I would never take that risk. And risk

[22] The Board has repeatedly embraced the commonsense notion that such statements are not, in fact, bona fide threats of physical violence. *See Lamar Co*., 340 NLRB 979, 981 (2003) ("Viewed objectively, a threat by one employee to another to "kick ass," *without more*, is mere bravado that is unlikely to intimidate the listener."); *Leasco, Inc*., 289 NLRB 549, 549 n.1 (1988) (phrase "constitutes a colloquialism that standing alone does not convey a threat of actual physical harm").

our whole election and threaten a coworker and even my job for - you know, to sacrifice the time I took away from my child and all the effort that I put hours into the building connecting with our coworkers, to make a threat against another coworker. And even so, that's just not my nature. I don't go around threatening people." *See*, Tr. 4251:2 - 4252:6. It is uncontested that no ALU supporter, in fact, harmed Ms. Monarrez at any time and that she was not, in fact, dissuaded from voting against the ALU or from expressing her views to other Amazon employees.

Ms. Monarrez also testified that ALU supporters sent her text messages expressing disappointment in her actions and threatening to tell a candidate for elected office that she no longer supported the ALU. There is no indication that this "threat" to convey accurate information—that Ms. Monarrez was, in fact, opposing the ALU's union drive—was ever acted upon or disseminated to anyone else in the bargaining unit. Amazon fails to articulate a theory as to how this could have possibly coerced the free choice of other bargaining unit members. Perhaps even more importantly, as explained by Cassio Mendoza, who is not an agent of the ALU, his texts to Ms. Monarrez were made on a personal level and had not been directed by the Petitioner. The fact that officers of the ALU may have ***considered*** informing a candidate for elected office of truthful information, is certainly not probative of this objection. *See*, Tr. 5043:8 - 5043:25; Tr. 5073:9 - 5073:21; Tr. 5082:21 - 5083:8.

Ms. Monarrez's credibility is further undermined by her own statements that the incidents she complained of occurred in view of Amazon's security cameras and security personnel, which the employer failed to produce. *See*, Tr. 4013:10 - 4013:14; Tr. 4045:9 - 4045:15; Tr. 4060:13 - 4060:19. On that basis, a negative inference must be drawn against the Employer with respect to Ms. Monarrez's claims.

Standard for Evaluating the Conduct

Amazon's objection that ALU members "harassed and threatened physical violence and other reprisals" against employees unsupportive of the union is frivolous. In an election where over 4,800 ballots were counted and the margin of victory exceeds 500 votes, even assuming the veracity of the testimony, Amazon points to only isolated verbal altercations.

When the conduct of union agents is at issue, the Board considers whether it "reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). The term "employees," of course, is stated in the plural, referring to the total group of employees voting to select their representative and the context of the election as a whole. The question then, is whether two verbal altercations involving one employee[23]—who, having already voted, thereafter continued her anti-union agitation undeterred—tended to interfere with the free choice of *thousands* of bargaining unit members.[24] Though even posing this question is absurd, the answer is evident—no.

The Board has declined to set aside elections involving conduct far more extreme than that alleged here. *See, e.g., Cornell Forge Co.*, 339 NLRB 733 (2003) (election won by 16 votes where member of in-plant union organizing committee allegedly made threats to have "gang friends" harm anti-union employee); *Mastec N. Am., Inc.*, 356 NLRB 809, 810 (2011) (union supporters threatened to "whip [antiunion employee's] ass," and "bitch slap" two other employees, in election

[23] As explained, supra, with the exception of Ms. Monarrez's testimony, none of the other allegations related to Objection 13 come anywhere near meeting the standard for a person to objectively find them "threatening." Similarly, Ms. Monarrez's allegations, even if true, would also not rise to the level of a "threat" but in any event, the extensive testimony at least warrants comment.

[24] Where a threat originates from employees who are not union agents or from other third parties, the Board is even more reticent to set aside elections, doing so only when "the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). ALU does not concede that Jason Anthony or Cassio Mendoza were union agents, but it is clear that their alleged conduct, even if true, does not warrant the setting aside of the election under any standard.

with 2-vote margin); *Bell Trans*., 297 NLRB 280, 281 (1989) (union supporter slapped and threatened to kill union opponent in presence of 13 of 292 bargaining unit members, in election with 14-vote margin). Moreover, where the Board *has* set aside elections on account of alleged threats made by union agents, it has invariably been in exceedingly close elections decided by a handful of votes. *See, e.g., Bellagio, LLC*, 359 NLRB 1116 (2013) (union agent threat to an employee that "if this vote goes through, you're toast" in an election where union prevailed by a single vote)*; Home & Indus. Disposal Service*, 266 NLRB 100 (1983) (threat of violent reprisal made 1 hour before an election where the union prevailed by a single vote).

The employer has utterly failed to meet their burden to prove such threats or reprisals. The employer put into evidence a series of "incidents" that they purport should be considered either "harassment" or "threats of physical violence and other reprisals." Inasmuch as there is no code of civility with respect to representation elections, conduct that might be considered "harassment" (which the Petitioner does not concede occurred) would ***not*** be objectionable unless it was accompanied by actual threats or other coercive conduct that an employee could reasonably construe as a threat.

Amazon's Objection 13 is groundless and should be overruled.

B. The Employer Failed to Demonstrate That the Petitioner's Communication That Dues Would Only Be Charged After A Contract Was Not An Impermissible Grant of Benefit or A Misrepresentation

Objection 14 states as follows:

> **Objection 14:** Petitioner improperly promised employees in the final days of the campaign that it would not charge them dues unless and until the Petitioner secured a raise for employees during collective bargaining. Prior to and during the critical period, the Petitioner was clear that it would charge employees dues immediately following a

> successful vote. After employees expressed reluctance to pay dues, the petitioner directly contradicted its earlier statements and asserted for the first time late in the campaign that it would not charge dues unless and until it secured higher wages in contract negotiations with the Employer.

Between the wording of the actual objection and the scattershot method in which the Employer presented evidence allegedly in support of this objection, it is hard to decipher if the basis of Employer's objection 14 is an "improper grant of benefit" or a "misrepresentation." In either case, the objection should be overruled.

At some point in time "in the middle of the campaign[25]" (definitely after January 20, 2022), the ALU website did state that dues would be taken out of paychecks after a successful union vote but that the ultimate level of dues would be democratically decided by the membership. *See*, Emp. Ex. 286, at Pg. 3; *See also,* Tr. 444:10 - 445:1; Tr. 463:8 - 463:13. At some time prior to January 23, 2022, the Employer began using "table-toppers" to communicate a message to employees that "The ALU… will charge all of its members dues 'roughly equal to a few dollars each week' and that it intends to take that from each paycheck after the election." *See*, Emp. Ex. 3206. Mr. Smalls, in a tweet on January 23, 2022 replied to that campaign message from Amazon by stating both that dues would be democratically decided by the workers, and that "we will not collect a single penny until we are paid more" *See*, Tr. 4600:1 - 4600:25; *See also, e.g.,* Tr. 4604:23 - 4605:1. In late January or early February, in response to employee feedback, the ALU distributed a flyer that stated that "proposed dues" would be "$5 per week for Full Time Associates… pending

[25] Ms. Donaldson testified that she reviewed the Petitioner's website many times over a period of several months; thus it is highly unlikely she can remember with any degree of precision what dates she reviewed which versions of the webpage. *See,* Tr. 442:10 - 442:16. In addition, administrative notice should be taken that the version of the webpage offered is from "The Wayback Machine" which is an internet archive of cached web-pages. This means that the versions of the web page offered were not actually the web page that Ms. Donaldson viewed and printed; rather, she accessed a cached older version of the webpage from The Wayback Machine. Ms. Donaldson's failure to testify to the ***specific*** date of the cache that she accessed should create a negative inference against Amazon.

voting, approval and authorization…" *See*, Tr. 4372:22 - 4373:14. At some point in late-February, the ALU posted their Constitution and bylaws to their website; at that time those documents indicated that "Dues amount and payment frequency will be democratically voted on by the membership. In the period preceding the initial election, dues will be in the amount of five dollars every two weeks." *See*, Tr. 461:3 - 461:6; Emp. Ex. 298. In a posting to the ALU website in March, the ALU again stated that dues would be democratically decided by the membership. *See,* Tr. 451:12 - 452:6; Emp. Ex. 287. Approximately ten (10) days before the election, the ALU distributed a flyer that stated, *inter alia*, "No Dues until Contract… We will not start paying dues of $5/week until we have voted to approve our first contract." *See*, Tr. 4374:10 - 4375:4; Emp. Ex. 491. Shortly before the election date the website was modified to reflect that ***proposed*** dues were $2.50 per week for part associates; $5.00 per week for full time associates and $6.50 per week for Tier 3s. The same information was posted in flyers in the breakroom. *See*, Tr. 458:11 - 459:18; Emp. Ex. 294. Tr. 461:11 - 462:6; Emp. Ex. 288. In a letter to JFK8 associates dated March 22, 2022, Mr. Smalls reiterated that promise as he stated, "I promise, not one single payment of dues will be taken until we have a contract with higher wages signed." *See*, Tr. 4603:1 - 4603:12; Emp. Exs. 290, 291, 529, at Pg. 3. The day before the election, Melissa Martinez testified that she asked a question via text message about dues and received a response that "if we can't win an increase in our wages no dues will be taken from us." *See*, Tr. 2038:17 - 2039:23; Tr. 2043:3 - 2043:5; Emp. Ex. 297.4.

Ms. Martinez testified that prior to receiving the text message regarding dues on March 24, 2022 the only other information she had heard about dues came from what she had been told in the employer's captive audience meetings wherein they stated dues would be taken from her paycheck by the ALU but they did not specify a timeframe or amount. *See*, Tr. 2043:11 - 2044:2.

At a later date, Ms. Martinez reviewed the ALU website and learned that dues would be "$5" or "$3" but it "was based on what shift you worked." *See*, Tr. 2043:13 - 2044:5. On March 24, 2022, based upon the text message she received, her understanding of dues changed to that no dues would be taken until a contract was approved. *See*, Emp. Ex. 297.4. Ms. Martinez confirmed that to date, the Amazon Labor Union has not taken any dues from her. *See*, Tr. 2047:10 - 2047:13.

Ms. Litto, an admitted anti-union witness, testified that she also read the letter written by Mr. Smalls (Emp. Ex. 529) and that she discussed it with several co-workers. *See*, Tr. 2772:4 - 2772:7; Tr. 2760:21 - 2763:11. Ms. Litto went on to explain that no one ever explained to her when dues would be taken out of her paycheck[26] and then incredibly claimed she did not even remember if dues were mentioned in Mr. Smalls' letter that she had just testified to reading. *See*, Tr. 2774:10 - 2775:2.

Ms. Rosado testified that she "had a lot of conversations about dues with several different people… The one that really sticks out is with Brett." *See*, Tr. 3064:1 - 3064:6. Ms. Rosado testified that this conversation with Brett occurred "way before [the election], like the month of January." *See*, Tr. 3067:25 - 3068:7. Ms. Rosado testified that "he wasn't giving any specifics… he was just going off 3 percent, 5 percent, 10 percent, but he couldn't narrow it." *See*, Tr. 3065:9 - 3065:14. Ms. Rosado also testified that she attended eight (8) small group meetings held by Amazon wherein they told her that the Amazon Labor Union would take dues from her paycheck but they did not give a specific time frame or amount. *See*, Tr. 3093:4 - 3095:15. Ms. Rosado similarly confirmed that she has not yet paid any dues to the Amazon Labor Union. *See*, Tr. 3096:4 - 3096:8.

[26] Despite the fact that the letter she just testified to reading would have explained exactly that.

Gopi Vaidya testified that one (1) week before the election four (4) union supporters appeared at her door to discuss the ALU[27]. *See*, Tr. 2085:5 - 2085:16. In response to Ms. Vaidya's question about dues, Union supporter Justine Medina "did not have [a] specific answer" but did elaborate that dues would start coming out "after the negotiation and all that stuff is over." *See*, Tr. 2104:25 - 2105:12.

Andy Martinez testified that in the last couple of days before the election and during the election he engaged in text communications with the Union asking if he had any questions about dues. He asked a couple of questions and was told "no dues taken until a contract was in place and there would be no back paying to settle." *See*, Tr. 3269:3 - 3270:5; *See also*, Emp. Ex. 295. Mr. Martinez also received the same email from Christian Smalls. *See*, Tr. 3272:20 - 3273:12; *See also*, Emp. Ex. 290. On cross examination, Mr. Martinez reiterated that all communications he received from the Amazon Labor Union concerning dues were consistent. *See*, Tr. 3275:3 - 3275:8

Eustaquio Viernes testified that he received an email communication from the Union on March 21, 2022. *See*, Tr. 2943:2 - 2944:23. The email was clear that dues would be $5 per week and no one would pay dues until a first contract is approved. *See*, Emp. Ex. 571. Mr. Viernes also received the letter from Christian Smalls on March 22, 2022. *See*, Tr. 2947:24 - 2948:24. Mr. Viernes confirms that to date, he has not paid any dues to the Amazon Labor Union. *See*, Tr. 2949:15 - 2949:17. On cross examination, Mr. Viernes explained his understanding that dues would not be due until a contract was negotiated and that even then, the actual amount of dues would be democratically decided. *See*, Tr. 2950:2 - 2950:12. According to Mr. Viernes, any confusion he may have regarding the amount of dues and when they would be owed is as a result

[27] Inasmuch as these are Union supporters, and not union agents, the Union is not responsible for this conduct.

of the confusing messaging provided to him in Amazon's small group meetings. *See*, Tr. 2950:13 - 2951:19.

All the employees who testified regarding this Objection testified that they had not been required to pay dues yet and they all understood that dues would not be due and owing until a contract was signed. The only confusion to the employees regarding dues seemed to be as a result of Amazon's small group meetings.

Even if, *arguendo,* the Amazon Labor Union was not taking a consistent position with respect to the dues structure, at worst, this would constitute a campaign misrepresentation. For at least forty (40) years, it has been clear that campaign misrepresentations are ***not*** objectionable. *See, Midland National Life Ins. Co.*, 263 NLRB 127 (1982). In any event, the fact that the ALU Constitution may have suggested a current dues structure while the ALU was simultaneously stating there would be no dues to JFK8 Associates until a contract was approved, is not inconsistent or misleading in any way. The ALU can both have a dues structure—in this case, they do not yet have any other shops, but, if they did, that structure would arguably apply—and offer to ***not*** charge dues to JFK8 employees prior to voting to approve a first contract.

Any suggestion that the Union's offer to not charge dues to JFK8 members until a contract was approved is some sort of "improper grant of benefit" is equally laughable. Again, for decades it has been the law that a Union offer to waive dues or initiation fees to an entire bargaining unit until a first contract is approved is absolutely permissible. *See, L.D. McFarland Co.*, 219 NLRB 575 (1975), *aff'd.* 572 F.2d. 256 (9th Cir. 1978) (*approving* a waiver of initiation fees and dues for all employees in the plant); *See also NLRB v. River City Elevator*, 289 F.3d. 1029, 1032 (7th Cir. 2002); *U-Haul of Nev. Inc. v. NLRB*, 490 F.3d 957, 961-62 (D.C. Cir. 2007); *Cf. NLRB v. Savair*

Mfg. Co., 414 U.S. 270 (1973) (*holding* that waiver of initiation fees conditioned upon the signing of union authorization cards prior to a representation election was improper and should result in the setting aside of the election)

For the above stated reasons, Objection 14 should be overruled, as a matter of fact and law.

C. Objection 15 Must Be Overruled As the Employer Failed to Show Any Conduct By Union Agents of Supporters Interfered With Their Ability to Communicate Its Anti-Union Message

Objection 15 states as follows:

> **Objection 15:** The Petitioner engaged in repeated and deliberate attempts to interfere with and "shutdown" the Employer's small group meetings, solicited employees during the Employer's educational meetings in violation of the Employer's policies, and destroyed the Employer's campaign materials.

By this objection, the Employer is alleging that various supporters of the ALU engaged in misconduct in violation of the Employer's policies to solicit voters. They allege by attending one-and-a-half small group meetings to which they were not invited, and in pulling down a few of the Employer campaign materials, Petitioner's supporters and agents impacted the outcome of the election. The Employer's contention has no basis in fact.

Chaka Donaldson, the co-captain of the JFK8 management team, was responsible for Amazon's informational campaign for associates with respect to the Petitioner for election in JFK8. *See,* Tr. 172:2 - 178:13. In performing her duties in that role, Ms. Donaldson was personally present at the JFK8 facility seven days per week for approximately fourteen (14) to fifteen (15) hours per day during the critical period. *See*, Tr. 178:20 - 179:9.

The information campaign led by Ms. Donaldson consisted of holding small group meetings (also known as informational sessions), putting up posters and table toppers, sending "Text-Em-Alls" (texts to all of the associates) , sending "Push Notifications" through the "A to Z App" for associates, placing "Installments" (signs inside of bathroom stalls), participating in one-on-one engagement with associates, and creating a website (unpackjfk8.com). *See*, Tr. 179:10 - 180:6; *See also*, Tr. 1176:17 - 1181:5. Amazon used multiple methods to communicate with its employees because people learn differently and Amazon wanted to reach as many people as possible. *See*, Tr. 180:12 - 180:20. The purpose of Amazon's informational campaign was to "...provide information to associates. It was to make sure that associates understood Amazon's position and Amazon's [Employee Relations] philosophy." *See*, Tr. 476:3 - 476:13. Amazon's Employer Relations philosophy is that "a direct relationship between Amazon and the employee is the best relationship." *See,* Tr. 477:11 - 477:19.

Ms. Donaldson further described the small group meetings as a meeting of a group of 20-30 Tier 1 and Tier 3 associates in the Day 1 and Career Choice Rooms where two employee relation professionals would give a presentation. One would be speaking and answering questions, while the other would be running the slide show. *See*, Tr. 180:21 - 181:24.

Amazon had scheduled its first set of small group meetings to commence at 8:00 a.m. on February 7, 2022. The meetings were supposed to take approximately thirty (30) minutes each. Amazon scheduled approximately twenty-five (25) meetings for the first day to take place approximately forty-five (45) minutes apart. *See,* Tr. 183:20 - 184:10. The accuracy of this statement is consistent with Ally Miller's testimony that there were meetings held every 45 minutes, about 16 to 18 hours a day, every day of the week with each employee potentially invited to 6 different meetings. *See* Tr. 2986: 3- 18. So in total the Employer ran approximately 25

meetings per day from February 7, 2022 until March 23, 2022 **for a total of at least 1100 meetings.**

On February 7, 2022 at approximately 11:15 a.m. Will Thurmand and Ally Miller were giving a small group presentation in the Day 1 room. *See*, Tr. 190:4 - 190:17. Chaka Donaldson testified that she observed the meeting being interrupted due to "cross-talk" by various attendees in the small group meeting. *See*, Tr. 190:18 - 191:15. The cross-talk consisted of various employees (including one identified as Connor Spence, another identified as Derrick Palmer, another identified as pro-union supporter Justine Medina and another identified as pro-union supporter Jason Anthony) asking questions and giving their opinions on the subject matter being presented. *See*, Tr. 198:6 - 198:20; 200:12 - 200:20. In addition, Ms. Donaldson noted that Jason Anthony appeared to be recording the small group meeting with his cell phone. *See*, Tr. 200:21 - 201:3. Brett Daniels, the ALU Director of Organizing, was also present in this meeting and he was noted to have been snapping his figures to signify his agreement with other statements being made during the meeting. *See*, Tr. 206:23 - 207:24. Chevalli Facey testified that the ALU entered the meeting and began chanting "Vote for the ALU " and also explained that Amazon would not permit them time to give them their viewpoint, so they were going to give it during this meeting. *See*, Tr. 1159:15 - 1159:24; Tr. 1175:6 - 1175:14.

Notwithstanding the "cross-talk" during the meeting, the 11:00 a.m. meeting ran to its conclusion and, in fact, Ms. Donaldson had to give a signal to the presenters to wrap it up as it was running overtime and they wanted to ensure the next scheduled presentation could start on time. *See*, Tr. 208:4 - 208:21; *See also*, Tr. 1181:17 - 1185:14.

After the conclusion of the 11:00 a.m. meeting and prior to the 11:45 a.m. meeting beginning, JFK8 General Manager, Felipe Santos entered the room and spoke to the associates present. Mr. Santos asked the associates who were not specifically invited to that meeting to leave the room or they would be subject to discipline. *See*, Tr. 223:25 - 225:24. Derrick Palmer, Jason Anthony, Justine Medina, Brett Daniels and Karen Ponce remained in the Day 1 room. *See*, Tr. 226:6 - 227:16. Amazon also played a video of this interaction for the record. The video clearly shows various Amazon Labor Union supporters calmly and respectfully seated in the meeting asking for the opportunity to participate and ask questions. *See*, Emp. Exs. 304 and 662. After Mr. Santos left the room, Ms. Donaldson testified she made the unilateral decision to end the meeting after approximately five (5) minutes because she was concerned about what she perceived to be disruptions. *See*, Tr. 301:10 - 302:6.

Ms. Donaldson further testified that later on February 7, the ALU's President, Christian Smalls had posted to his Twitter account words to the effect that the ALU had successfully shut down all of Amazon's captive audience meetings for the day. *See*, Tr. 275:4 - 275:18; Emp. Ex. 302. According to Ms. Donaldson's own testimony however, this tweet was wholly inaccurate inasmuch as Ms. Donaldson only canceled the next five (5) meetings, and in fact, the small group meetings started up again on that same day at approximately 4:00 p.m. *See*, Tr. 302:20 - 302:24.

After starting the small group/ captive audience meetings again at 4:00 p.m. on February 7, 2022, those meetings continued uninterrupted—with the sole exception of Derrick Palmer and another associate distributing literature during a meeting on February 8—on a daily basis from 8:00 a.m. until 4:00 p.m. and again from 7:00 p.m. until 4:00 a.m. through March 23, 2022. *See,* Tr. 492:21 - 496:16; Tr. 497:11 - 498:14; *See also*, Tr. 515:22 - 516:3.

Robert Castellano, an associate who had been present during the 11:00 a.m. meeting on February 7 testified that he went to four (4) or five (5) of these mandatory small group meetings. *See*, Tr. 1096:1 - 1096:11; Tr. 1127:14 -1127:24. Chevalli Facey, another associate present during the 11:00 a.m. meeting on February 7 testified that she went to two (2) or three (3) of these meetings. *See*, Tr. 1152:24 - 1153:7. Lori Adenji was also present in the February 7, 2022 meeting but she also attended at least one (1) other meeting in March 2022. *See*, Tr. 1486:17 - 1487:3. Xiomara Rosario testified that she attended eight mandatory small group meetings. *See* Tr. 3093 19-20. Amazon.com Services wanted to have each of its employees who were in attendance at work attend six meetings each from February 7, 2022 to March 23, 2022.

Ms. Donaldson also testified that based upon her review of internal surveillance videos she witnessed Derrick Palmer, Brett Daniels, Justine Medina, and Connor Spence each remove an Amazon poster related to their campaign in the JFK8 election. *See,* Tr. 283:18 - 284:17; Tr. 293:9 - 293:17; Tr. 295:18 - 296:3; Tr. 297:16 - 297:21. Subsequent to the posters being removed, Amazon put up more posters and hung them in frames so they could not be removed as easily. *See*, Tr. 288:18 - 289:4. In addition, Derrick Palmer, Brett Daniels, Justine Medina and Connor Spence were each issued formal disciplinary notices for destruction of company property. The conduct was not repeated. *See,* Tr. 519:8 - 519:24; Tr. 540:8 - 540:13; *See also* Employer's Exhibit 499, 500, 501, 502.

In addition to the small group meetings, between December 22, 2021 and April 1, 2022, Amazon put up between 50 - 100 posters throughout the JFK8 facility to communicate its campaign message. *See*, Tr. 498:15 - 499:7. Amazon also placed approximately 150 signs to communicate its campaign message. *See,* Tr. 499:23 - 502:2. Amazon also used approximately 300 - 400 table toppers to communicate its campaign message. *See*, Tr. 502:4 - 505:9. Amazon

also sent between 5 - 10 text messages to its associates in order to communicate its anti-union message. *See*, Tr. 505:10 - 506:19. Amazon also sent somewhere between 25 - 40 push notifications to somewhere between 6,000 - 7,000 of its JFK8 associates in order to communicate its campaign message. *See*, Tr. 506:20 - 511:20. Amazon also used a website, unpackjfk8.com, to communicate with its associates. *See,* Tr. 511:21 - 512:1. Amazon also communicated with its campaign message to employees by sending direct mailers to all of its associates; the mailers also directed associates to Amazon's campaign website, unpackjfk8.com. *See,* Tr. 537:15 - 538:8; ALU Ex. 14.

Objection 15 alleges that Union agents disrupted Amazon's captive audience meetings, solicited employees during the meetings, and destroyed Amazon's campaign literature. But in *Station Operators, Inc.*, 307 NLRB 263 (1992), the Board dismissed an objection based on similar conduct when "the Petitioner's representatives' confrontations with the Employer's officials during the employee meeting occurred 2 weeks before the election, and the results of the election were not close." *Id.* at 263. In *Station Operators, Inc. supra,* the Board in overruling an objection involving similar conduct, stated: "When considering the actions of union agents in these matters, the test to be applied is whether their conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja Place,* 268 NLRB 868 (1984). In *Station Operators, Inc,* the incidents in dispute were relatively mild and occurred two weeks prior to the election. There was no evidence that any of the employees who witnessed the incidents were threatened by Petitioner's conduct… Even assuming, arguendo, other unit employees became aware of the incidents, the hearing officer noted that they were not proximate in time to the election and that the election was determined by a wide margin."

Here, not only were the actions by several Petitioner's officers and supporters on February 7 which sought to blunt management's anti-union message unlikely to cause any fear in employees and thus interfere with an employee's free and uncoerced election, these actions occurred at least six weeks before the election. Further, the actions alleged in this objection could hardly have interfered with the Employer's ability to communicate its messages to the JFK8 associates about which Ms. Donaldson testified extensively.

As to the allegation that Union agents destroyed Amazon's campaign literature, Amazon's overwhelming ability to communicate with employees during the work day and in the workplace could not possibly have been impaired by any Union destruction of Amazon's literature.

Most tellingly, the Employer produced no evidence that the actions alleged in this objection put any voter in fear which interfered with employees' free and uncoerced choice in voting in this election.

Based on the above facts and law this Objection must be overruled.

D. The Employer's Claims In This Objection Impermissibly Go Beyond The Scope of the Objections; There Was No Basis to Arrest Mr. Smalls For Trespassing on February 23rd. The Objection Must Be Overruled

Objection 16 states as follows:

> **Objection 16:** Non-Employee Petitioner Organizers Repeatedly Trespassed on the Employer's Property.

Objection 16 alleges that non-employee Petitioner Organizers repeatedly "trespassed" on Amazon property. In Petitioner's motion to dismiss Petitioner argued that dismissal of this Objection was required because it was legally deficient as mere trespass is not coercive and is not

grounds for overturning an election under all but the most extreme circumstances. The Employer had cited *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), in its objection as one of those extreme circumstances. However, there is no comparison to the allegation of trespass at Amazon and those in *Phillips Chrysler Plymouth*. There, the trespass occurred on the same day as the election, only 75 minutes before voting began, and resulted in a significant stand off between union officials and management. The election was decided by a single vote. None of those facts exist here.

While not stated in the objection, the Employer presented evidence that on February 23, 2022 due to what it alleges were repeated "trespasses" the Staten Island police were called, with the result that two current Amazon associates and former associate and union interim president, Mr. Christian Smalls, were arrested. During the hearing, the Employer sought to expand this objection well beyond the alleged trespasses and arrest to propound a new legal theory, based on the arrests being orchestrated by Petitioner so that supporters could campaign on them. The Hearing Officer admitted evidence of the arrests. The Petitioner maintains that basing this Objection on Mr. Smalls' arrest and actions which followed it expanded the objection beyond what was contemplated by the Regional Director in his statement of this Objection. Petitioner maintains that the Hearing Officer may not consider any arguments based on the expansion of this Objection beyond the alleged trespass and issues that are reasonably encompassed therein. The Case Handling Manual Section 11424.3(b) states, "The Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. Thus, any allegations based on any new legal theory or different factual circumstances are insufficiently related to the objections set by the Regional Director for hearing and should not be considered. *See Precision Products Group, Inc.*, 319 NLRB 640 (1995);

Iowa Lamb Corp., 275 NLRB 185 (1985)." Thus, despite the Employer's argument in the record to expand the scope of Objection 16, to include a new legal theory regarding who caused Mr. Smalls' arrest and the sequelae thereto, the appropriate scope for this Hearing on Objections must be only as ordered and listed pursuant to Regional Director Overstreet's April 29, 2022 "Order Directing Hearing and Notice of Hearing on Objections".[28]

Nonetheless, Petitioner contests the allegations of trespass and as well as showing that even the Employer's expanding legal theory is not factually supported. Petitioner addresses the arguments and expounds on the reasons for overruling this objection below.

1. **Chris Smalls Should Not be Considered a Non-Employee but a Discharged Former Employee Within the Meaning of Section 2(3) of the Act and Therefore Was Not a "Trespasser"**

``Employee," as it is defined by Section 2(3) of the Act means "members of the working class generally" including "former employees of a particular employer." *See, Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977) *quoting Briggs Manufacturing Co.,* 75 NLRB 569, 570 (1947); *See also, e.g., NLRB v. Town & Country Elec. Inc.*, 516 U.S. 85 (1995) (*holding* job applicants would also be considered employees under Section 2(3) of the Act); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

Certainly, there is no dispute that Christian Smalls is a former employee of Amazon. Under current Board law (endorsed by the U.S. Supreme Court), Mr. Smalls is simply not a "non-employee" under any construction of the facts. He is an employee with section 7 rights whose

[28] *See* Board Exhibit 1a. Despite arguing that the Regional Director's Order was only a summary of the Objections set for hearing, the Employer also conceded in the record that the "Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific Objection set for hearing by the Regional Director." *See* Tr. 3178: 9-13.

actions must be considered in the light of section 7. Any references by Amazon to Mr. Smalls being a "non-employee" with respect to this or any Objection should be totally disregarded.

2. The Employer's Reliance on Its Solicitation Policy to Claim that Mr. Smalls Was Trespassing Is Misplaced.

The initial evidence submitted by Amazon to support Objection 16 was Amazon's Solicitation Policy at Exhibit 321, "to establish that Amazon doesn't permit non-employees to solicit" on Amazon's property. *See* Tr.1799: 5-7 However, when Amazon sought to introduce the solicitation policy through Mr. Joe Troy, Amazon's Area Manager for Loss Prevention, the Hearing Officer, correctly asked whether the solicitation policy said anything about trespass. *See,* Tr. 1798:13-15 and 1799:8-11. Counsel for Amazon Larkin stated: The words of the policy? No. But we're in a legal debate, I guess. But if a property owner prohibits solicitation and a person enters onto the property to solicit, that constitutes trespass. *See* Tr. 1799:12-16. On that basis the policy was accepted into evidence.

The actual wording of Amazon's solicitation policy, however, clearly shows in the first sentence that it is limited to "coordinating events for employees and using company resources such as meeting spaces and communication tools (e.g. email, bulletin boards, posters etc.), [and only in such limited instances should employees] follow the solicitation policy below." Amazon identifies prohibited solicitation as "the sale, advertising, or marketing of merchandise, products, or services (except as allowed on for-sale@ alias), soliciting for financial or other contributions, memberships, subscriptions, and signatures on petitions, or distributing advertisements or other commercial materials." *See* Employer's Exhibit 321 This policy by its terms allows for outside organizations and charities to solicit on Amazon property with the permission of Amazon. *See,* last paragraph of Ex. 321. While the policy distinguishes where associates may solicit on

company premises, and that non-employees may not solicit on company property, the definition of solicitation applies throughout.

Petitioner asserts that the solicitation policy which was produced at the hearing, does not apply to the actions of Mr. Smalls on Amazon property. That is, in order to determine if the activities of the ALU alleged non-employees on Amazon property actually constitute "solicitation" the non employees would have to be "coordinating events for employees and using company resources such as meeting spaces and communication tools" and/or engaged in prohibited acts involving "the sale, advertising, or marketing of merchandise, products, or services (except as allowed on for-sale@ alias), soliciting for financial or other contributions, memberships, subscriptions, and signatures on petitions, or distributing advertisements or other commercial materials."

The record does not support a finding that anything done by Chris Smalls falls within prohibited solicitation under Amazon's solicitation policy. Indeed when Mr. Troy claimed that Mr. Smalls entered Amazon property for the purpose of solicitation in January and February 2022, his testimony was objected to based on foundation, as Mr. Troy had not defined the word solicitation. *See*,Tr. 1865:7-15. In response to the objection, Amazon Counsel chose to rephrase and not mention solicitation, and asked Mr. Troy about the times Mr. Smalls entered onto Amazon property. *See,* Tr. 1865:22 to 1866: 4 The next time Mr. Troy mentioned the word "solicitation" was in connection with an allegation that ALU tables were set up on the front sidewalks of LDJ5 and JFK8 where Mr. Smalls was allegedly "soliciting feedback for membership in the Union". *See,* Tr. 1866:20-25 Nothing in the Solicitation policy refers to or prohibits asking associates how they feel about the union. That is, seeking feedback on how an associate feels about a union is not conduct that is "the sale, advertising, or marketing of merchandise, products, or services

(except as allowed on for-sale@ alias), or soliciting for financial or other contributions, memberships, subscriptions, and signatures on petitions, or distributing advertisements or other commercial materials."[29]

Indeed, when on cross examination Mr. Troy was asked for the definition of "solicitation" he was using, he stated: ``So soliciting, in the sense that it's defined in our policy, would be the distribution of materials on Amazon property by non-Amazon associates" *See,* Tr. 1905:21-24. However, nothing in the solicitation policy, cited above, prohibits "distribution of materials" *per se* on Amazon property by non-Amazon Associates. The policy does not refer to Petitioner's volunteers giving out free food, free t-shirts or lanyards, or educational material about the benefits of unionization. Telling Amazon associates about the benefits of unionization does not constitute "distributing advertisements or other commercial materials."

Similarly, when Mr. Zachary Marc, the Assistant General Manager of JFK8 was asked about the solicitation policy, Petitioner's counsel interposed a foundation objection as to the meaning of the term solicitation as stated in the policy. Mr. Marc's response was "My understanding is that solicitation is trying to get a group of people to engage or participate in a certain non-work-related event. And Amazon does not allow solicitation of any kind during work time, in work hours, and as mentioned, by non-Amazon employees. So, for example, something

[29] In fact, Mr. Troy misled the Hearing Officer as to his observation of what occurred at the ALU tables. This is because he was told by the hearing officer that his testimony could only be based on firsthand personal knowledge of events, *See*. Tr. 1815:20-24; 1825:12-18; 1828:19 to 1829:1, and yet on cross examination he admitted that he was not present for any of the events he testified to *See*, Tr. 1905:1-23; 1906:6-12; 1907:7-13. Despite his extensive testimony on direct of President Smalls' solicitation on Amazon's private property, on cross examination, Mr. Troy admitted that he was never actually present at JFK8 to witness any alleged "solicitation" by President Smalls. *See* Tr. 1904-1905:25-7, Tr 1907: 10-13 While he testified that he was inside the facility in the pre-petition period of December 15, 2021, he admitted that he never asked President Smalls to leave the property on that date nor did he ever ask the ALU to remove their table from the JFK8 property. See, Tr 1915:3-5

like, lobbying a group of employees to form a union is something that I would consider solicitation". *See* Tr.2386:15 to 2387:15. This description of Amazon's Solicitation policy appears to be a policy only aimed at preventing union activity, and does not conform to the language of the policy itself which says nothing about union organizing.

Indeed the policy is aimed primarily at commercial enterprises trying to sell or advertise their products to Amazon associates, and the policy provides for Amazon to permit solicitation by others with its permission. Later on cross examination when Mr. Marc was asked whether giving an interview on Amazon property—which was the alleged basis for confronting Mr. Smalls on February 9, 2022—was solicitation, Mr. Marc stated his definition of soliciting was "he [Smalls] was on private property without permission." *See,* Tr. 2442:18-20.

The Employer produced correspondence between counsel dated December 15, 16, 2021 and February 2, 2022. (Exh. 322, 323 and 325) all relating to the Employer protesting alleged violation of its solicitation policy by non associate ALU members. However, a copy of the solicitation policy was not appended to the letters, and was revealed for the first time at the hearing.[30]

[30] The first two letters of December 15, and 16 (Exhibits 322 and 323) were in the pre-petition period and referenced only non-Amazon associates being present, on Amazon property for purposes of "solicitation" In the December 16, 2021 Amazon counsel took issue with Mr. Smalls' stated position that the union was on "public property " occasioned the temporary re-routing of the public bus stop. Although the Employer disagreed with this rationale in the December 16, 2021 letter, the violation alleged was only of the solicitation policy. In neither of these letters did Amazon use the term "trespass". The December 15 letter was sent allegedly because Mr. Smalls had issued a tweet that they would be coming to Amazon on that date. See, Tr. 1818: 7-10 However, the basis for Employer's Objection 16 is not "solicitation" but actual repeated trespass by non-employees for the purposes of union activity. The February 2, 2022 letter to counsel again refers to the solicitation policy, and takes issue with the ULP which was filed in response to the December 15 and 16th letters. The February 2nd letter refers to the setting up of tables in the front of JDK8 and LDJ5 but objects only to non-employees being present at those tables. This letter does not state what actions alleged non- employee Chris Smalls was engaging in at these tables which constituted soliciting. This letter for the first time claims a violation of the solicitation policy was trespassing.

In sum, Amazon's reliance on its solicitation policy is misplaced and to the extent Amazon relies on its violation to support a claim that Mr. Smalls was trespassing, the record evidence submitted does not support a finding that Mr. Smalls violated the solicitation policy on which Amazon's allegations of trespass are based.

3. **Mr. Smalls was In the Visitor's Parking Lot (as a Visitor) Delivering Food to the JFK8 Facility and Not Soliciting or Trespassing on the Day He was Arrested**

One way that the ALU promoted interactions with workers during the critical period was through providing food to associates in the break rooms for the day and night shift. Connor Spence testified that due to the national settlement between the Board and Amazon, the union could be in the break rooms during non-working hours. As a result, the union developed a more active presence in the break rooms. He believed this happened in December 2021 or January 2022. *See*, Tr. 4339:15-22. According to Cassio Mendoza, food deliveries to JFK8 were mostly done by Chris Smalls during the critical period. *See,* Tr. 5052: 11-14. Petitioner has taken the position that because Mr. Smalls was delivering food to the JFK8 facility, he was allowed to park in the visitor's lot near the breakroom, and Amazon should have treated him like any other "visitor" who came to visit an associate, pick up or drop off an associate and that he had a right to be there. Certainly delivering food is not a form of "solicitation". Mr. Troy was asked on cross-examination if Amazon had a policy which distinguished between authorized and unauthorized visitors and/or a policy on trespassing. He stated Amazon has "a policy that dictates what a visitor is and unauthorized visitor is but we do not have a trespass policy." *See*, Tr. 1913: 19-21. No policy with respect to who is an authorized visitor was produced by Amazon, even though the Assistant General Manager, Zach Marc, who also testified, could have produced it. Indeed, Mr. Marc acknowledged that food delivery would be an authorized use of the Amazon parking lot by non-employees. *See*, Tr.2383:24-2384:2.

Amazon, in questioning Mr. Smalls, did not ask him about the solicitation policy. Nonetheless, when asked if he returned to Amazon after his arrest to solicit, he stated that he did not believe he was soliciting. Mr. Smalls, stated: " Solicit? I don't think I was soliciting, but I did return. When asked if he continued to hand out food, Mr. Smalls said he did more than that and all of the things he mentioned were also in the nature of visiting the JFK8 parking lot. He said: " I did more than that. Sometimes hand out food. Sometimes I picked up some workers. Sometimes I dropped them off at work. Sometimes I dropped off some of the equipment that they use. Sometimes I dropped off some of the literature that they used. I usually picked it up and stored it in the truck. So yeah, I visited a couple of times." *See,* Tr. 4607:21-4608:11.

Both Cassio Mendoza and Connor Spence testified about the reason why the food delivery for the ALU was not a simple drop off. Cassio Mendoza, who testified about how long he was serving food on March 25, 2022 described why it was not a simple process for Mr. Smalls to just deliver food and leave. He said, "There's usually two lunches. So it'll be like, the inbound lunch and then the outbound lunch. So that could be, like, 30 minutes, and then another 30 minutes, and then there's time before and after. So I was there for about 2 hours" . Mr. Mendoza went on to describe how when they were serving lunches for the two groups, we would meet him[Chris] in the parking lot, get the trays for the first lunch, serve them, and then meet them in the parking lot after 30 or 40 minutes and get, like, the second round for the other lunch and go back inside." He stated that Chris would wait in the parking lot for him to take in the food and bring the trays back out. *See*, Tr. 5051:25-5052:25. Of course the workers would then bring the empty trays and utensils out to the car before he left.

Mr. Spence was present on February 23, 2022, and testified that the union provided the luncheon for the second break that day. He stated: "Mr. Smalls entered Amazon, JFK8 parking

lot to drop off some food… It was shortly before the second break. So, you know, there is, like, a period between probably, 1:30 to 2:00 p.m. Because we were doing our luncheon on the second break time, which is around the time." In response to how much time Mr. Smalls was present in the parking lot, Mr. Spence stated "He was there throughout the luncheon to provide more food, and then he was there until I was ready to leave. So that was around 3:00 p.m." *See,* Tr 4464:1-20). To the extent supporters of the ALU came on Amazon property to deliver food or other supplies to union organizers, they were visitors and not engaged in solicitation as defined in the solicitation policy. Mr. Smalls was therefore not trespassing. In fact Mr. Marc admitted that if Mr. Smalls had been on the property to deliver food he would be considered a visitor. *See,* Tr. 2462:18-22, and by definition not a trespasser. This is another reason that this objection should be overruled.

4. The Record Shows No Legal Basis for Mr. Smalls' Arrest And That Only Amazon was Responsible for his Arrest

As noted above, Mr. Smalls (1) should **not** have been considered a non-employee and therefore someone allowed on Amazon property to engage in union activities; (2) the actions he was alleged to have engaged in did not come within Amazon's no-solicitation policy; and (3) on February 23, 2022 the day he was arrested he was delivering food and was legitimately a "visitor" in a parking lot for visitors. In light of the foregoing there was no legitimate reason for Amazon to have requested Mr. Smalls to leave and/or call the police on February 23, 2022. It was Amazon's decision and Amazon's decision alone to seek to remove Mr. Smalls on February 23, 2022 when he was delivering food to the ALU volunteers.

The Employer presented the testimony of Area Loss Prevention Manager Joe Troy and Assistant General Manager Zachary Marc as some of the persons involved with the February 23,

2022 call to the police which resulted in the arrest of Mr. Daniels, Mr. Anthony and Mr. Smalls. The testimony of these management employees makes clear that it was purely Amazon's decision to call the police on February 23, 2022 and the call to the police had nothing to do with Mr. Smalls engaging in "solicitation" or being in any way disruptive to Amazon's operations. The decision to involve the police was purely the result of anti-union animus and a desire to prevent Mr. Smalls from being active in the campaign, which was at that point mainly taking place in JFK8's breakrooms. Nonetheless, Amazon seeks to advance a new theory that Mr. Smalls caused his own arrest for the purpose of garnering sympathy in order to campaign on such arrest.

As stated above Amazon may not expand its theory of Objection 16, as stated *supra.* Further, given the decision of Amazon in its sole discretion to call the police to arrest Mr. Smalls, there is no factual basis for such a theory. Nor is there any legal basis for such a theory.

In *NLRB v. Springfield Hosp*.,899 F.2d 1305, 1310-12 (2d Cir. 1990) the Court rejected precisely such a theory, finding no wrongdoing by arrested union members, and finding that the arrest at the direction of the Employer constituted an unfair labor practice entitling the union to a re-run election. In circumstances similar to those here, the Court rejected the Employer's claim that the union had invited the arrests of its leaders, finding that the Hospital was solely responsible for the arrests of union members, as is Amazon here. There, off-duty pro-union employees came to the Hospital when they were not scheduled to work and sought to talk to employees who were being called into small group meetings about the union. The Hospital Administrator falsely told the Police Captain "that a group of off-duty employees were roaming in "non-designated" areas of the hospital, distributing leaflets in the intensive care unit, disturbing visitors and interfering with patient care and hospital operations." The Board found that these were misrepresentations which the police relied on which led to the arrests.

Similarly, here the arrest was based on misrepresentations. While Mr. Marc was unaware that Mr. Smalls was delivering food, in which case he stated he should properly have been deemed a visitor, Mr. Troy—who called the police—was aware that Mr. Smalls was delivering food and yet nonetheless misrepresented to the police that Mr. Smalls was trespassing.

In fact, Assistant General Manager Marc testified that before he asked President Smalls to leave he had no idea that President Smalls was present on the property to deliver food to Amazon employees and he only learned about that after the fact after watching the full surveillance video from February 23, 2022. *See*, Tr. 2461:9-16. Mr. Marc admitted he did not see "Mr. Spence either get out of the car or them going into the break room to get -- to let people know that there was food to be delivered." *See* Tr. 2463:10-13. **In fact Mr. Marc admitted that if Mr. Smalls had been on the property to deliver food he would be considered a visitor. *See,* Tr. 2462:18-22, and by definition not a trespasser.** [31]

Yet, Joe Troy testified that on February 23, 2022 he was aware of the fact that Mr. Smalls had arrived to deliver food to employees in the breakroom and that within 35 minutes of his arrival to deliver food, Mr. Troy made the decision to call the NYPD to enforce the employer's property rights. *See*, Tr. 1970:24-1974:6. Similarly, Mr. Troy misrepresented the situation to Deputy Inspector Ceprano of the 121st Precinct by failing to mention that Mr. Smalls was present in the parking lot delivering food, thus legitimately a visitor. While Mr. Troy "walked the Deputy

[31] Mr. Marc's involvement as the assistant general manager (as opposed to security or loss prevention) in seeking Mr. Smalls' removal from Amazon property is likely based on his bias against Mr. Smalls coming onto Amazon property dating back to when Mr. Smalls led the walkout over health and safety during COVID in 2020. He did not want Mr. Smalls on Amazon property then, and he expressed his deep hostility to Mr. Smalls when he described in hyperbolic terms his personal opinion that Mr. Smalls "deserved to be terminated" See, Tr. 2441:19-21, in 2020. Later, when the NYPD was arresting Amazon employees along with President Smalls, Mr. Marc admitted that he knew that the employees who were being arrested were leaders of the Amazon Labor Union and he took no steps to stop their arrests. *See* Tr. 2469:19-2470:7.

Inspector through the multiple attempts to get Mr. Smalls to respect Amazon's property rights since December" *See,* Tr. 1979:20-1980:3, he failed to tell Deputy Inspector Ceparano that he did not consider Mr. Smalls to have been a safety risk on any date prior to February 23rd, (with the possible exception of December 15) *See,* Tr. 1964:2-22.

Further Mr. Troy claimed he called the Deputy Inspector because he did not want there to be a "scene", in light of the union campaign, yet he failed to communicate that desire to the Deputy Inspector, thinking his rank was high enough that he would know not to cause a scene, and would handle the matter appropriately. *See,* Tr. 1978:14-1980:6 The only thing Deputy Inspector Ceparano asked Mr. Troy was whether the company was prepared to support trespassing charges if he was arrested, to which Mr. Troy responded yes. *See* Tr. 1980:13-19. Mr. Troy claimed Mr. Smalls was a danger to Amazon associates on February 23, 2022 not because of anything he was doing, but because Amazon called the police and Mr. Smalls was allegedly not responding to their requests to leave. *See*, Tr. 1984:24-1985:5.

A video of the arrest (Emp. Ex. 344v) establishes that Mr. Smalls informed the police that he was a visitor who should be allowed on premises. Due to the misrepresentation by Mr. Troy to the police, they did not ask any further questions of Mr. Troy, or credit Mr. Smalls' statement that he was a visitor. They merely proceeded to give Mr. Smalls two minutes to leave. The video shows that when it got close to the two-minute mark, Mr. Smalls said, "Okay I am leaving" and walked to the car. Before he could leave, the police arrested Mr. Daniels, and Mr. Anthony and then turned to Mr. Smalls who was at the door of the car while the police arrested him.

Under these circumstances, and given the misrepresentations by Mr. Troy, there was no reason for Amazon to have called the police, as admitted by Mr. Marc. In *NLRB v Springfield*

Hospital, the Board found the off-duty employees were not disrupting patient care, that they were engaging in protected conduct and that they were cited and arrested in areas which had been designated for their presence.[32] It was within this framework that the Board concluded that the Hospital was not justified in seeking police intervention and based in part its finding that the Hospital was solely responsible for the arrests. Just as in *Springfield Hospital* it should be found that Amazon and Amazon alone was responsible for the arrests of February 23, 2022.

While the Company argued that a prior interactions between Mr. Smalls and Mr. Marc on February 9, 2022 was a predicate for the February 23, 2022 arrest, wherein Marc had claimed Mr. Smalls was on company property filming an interview and he told Mr. Troy about his interactions with Mr. Smalls, the reality is that on February 9, 2022 just as on February 23, 2022 Mr. Smalls was delivering food to the Amazon facility. President Smalls posted a tweet that day stating he had delivered 36 pizzas that day to the breakroom. *See*, Tr. 4454:18 - 4454:25; and ALU exhibit 33.

From the above, it is clear that the Employer and the Employer alone made the decision to call the police to remove Mr. Smalls from the Amazon parking lot. It is also clear that Mr. Smalls believed he had a right to be in the parking lot as a visitor given his activities, as admitted by Mr. Marc.

5. **The Arrest Of Union Organizers By Management Has Been Found To Be Coercive, Instilling Fear In The Workers. Thus, The Arrests Were Just As Likely To Cause Fear In Employees Than Sympathy For Those Arrested. Whether The ALU Campaigned On The Arrests Is Irrelevant To This Objection.**

[32] In *Springfield Hospital,* the Board had also found the Hospital's no access rule to be invalid. Here Petitioner has shown that Amazon's Solicitation policy was not applicable to Mr. Smalls' conduct, and that by its terms it allowed certain approved solicitation to be allowed causing discriminatory application against unions trying to organize the workers.

In addition to trying to blame Mr. Smalls for inviting his own arrest, Amazon absurdly claimed that the Petitioner had sought the arrests in order to use them in their campaign against Amazon. These claims are absurd and not supported by any evidence. Not only would Mr. Smalls, as a Black man in Staten Island, fear being arrested, but also it is common sense that the arrests themselves are coercive and would instill fear in the rest of the workforce, and make them afraid to vote for the union, the opposite of what Amazon suggests. The coercive nature of arresting union leaders was found to be an unfair labor practice in *NLRB v Springfield Hospital, supra.* That is, in *Springfield Hospital* there were two units which had their elections on the same day. The union won one of them, and lost the other. The Board certified the unit the union won, and ordered a new election in the other based on finding the arrests to be coercive. That is, the ALJ further found that since the arrests "were likely to interfere with, restrain, and coerce [the Hospital's] employees in the exercise of their Section 7 right to engage in union activity," the Hospital had violated Section 8(a)(1) of the Act." Id. at 1310, requiring a new election. Petitioner submits that the arrests of Mr. Smalls and others on February 23, 2022 were without justification and aimed at chilling Sections 7 rights. Amazon should not be allowed now to claim its own misconduct is attributable to the Petitioner.

Further, Amazon's suggestion that the presence of a camera crew on February 23 at the time of the arrest was consistent with Mr. Small's orchestrating his arrest is equally baseless. Amazon was aware that there were film crews, and an independent documentary film crew that had been following the ALU for the previous year. Indeed, Ms. Monarrez stated "a couple of cameramen would come by the JFK8 building every single day and also follow us to some of our events away from Amazon whenever we did rallies." *See*, Tr. 4115:8-13.

It is clear that a main aspect of Amazon's campaign strategy was the vilification of Christian Smalls, who had not only led the 2020 walkout, but had come back to try to unionize JFK8. Mr. Pat Cioffi, who had decided to support the union about a week before the arrests *See,* Tr. 4930:1-6, stated that in his efforts to campaign for "yes" votes for the union he confronted this vilification of Smalls.[33] Mr. Cioffi said:

> "Okay. So at Amazon, the Union busters, they were going around. It wasn't about the Union; they were making it about Chris Smalls. So Chris Smalls was a thug. Chris Smalls is going to buy a Lamborghini with your dues [tuition] money. And Chris Smalls was this, Chris Smalls was that. All kinds of accusations against Chris Smalls. So all I did to the people that were -- I wouldn't say no, a lot of no's because of that fact and a lot of maybe because they weren't too familiar with the aspect of the Union. I made it about -- the Union is not about Chris Smalls. It's not about me. It's not about any other person. It's about the workers. This is what I explained to the people. So being that I have a lot of trust in that building, I've been there for two years, and I got along with every associate in there, as well as senior level management. And once I had a conversation with them, I made them understand that it wasn't about Chris Smalls. And it wasn't about Amazon or Chris Smalls. It was about them. It was about their job security and better wages for them. And that's how you could say, I flipped them from a yes to a no. Or to a maybe to a yes. I mean, to a no to a yes. I'm sorry. *See*, Tr. 4952:13-4953:12.

Mr. Cioffi further testified that the video of the arrests was being spread around the warehouse not by the Petitioner to garner sympathy, but rather by management. He stated that a manager showed it to him, telling him that "Chris Smalls got arrested with a bunch of other clowns. This was how it was phrased. And I looked at the video and I seen them getting arrested. *See*, Tr. 4963:23-4965:4. Petitioner asserts management showing the video of Smalls being arrested is consistent with the chill found in *Springfield Hospital*.

6. **There Is No Evidence Provided By Amazon To Support Objection 16 As A Matter Of Law.**

[33] *See*, e.g., Emp. Ex 239.

As noted, Objection 16 and the allegations of mere trespass are not coercive and cannot be grounds for overturning an election under all but the most extreme circumstances. Far from this objection being valid, Amazon cited no cases which claim that "trespass" by itself is objectionable conduct. Amazon ties the alleged trespass to the arrests of February 23, 2022, a month before the election. As noted, the purpose of the arrest was not to enforce Amazon's solicitation policy, which it equated with trespass, but rather to further vilify Mr. Smalls, who was legitimately a "visitor" on February, 23, 2022, and the arrests were an attempt to weaken the support for the Union.

Nonetheless, the Employer failed to submit any evidence as to the impact of the February 23rd arrests on the bargaining unit. Mr. Cioffi was already a supporter when the arrests happened. This situation stands in stark contrast to the one case cited by Amazon in their objections, *Phillips Chrysler Plymouth*, *supra*. This case illustrates why objection 16 is legally deficient in addition to not being factually supported. None of the *Phillips* facts are present here. The so-called trespass which gave rise to Mr. Smalls' arrest happened a month before the election, and the union won by over 500 votes. Further, the Board has distinguished *Phillips Chrysler* on precisely these grounds, which case has been affirmed in the courts of appeals. *See NLRB v. Earle Industries, Inc*., 999 F.2d 1268, 1274 (8th Cir. 1993); *Family Services Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999).

For all these reasons Objection 16 must be overruled.

E. <u>The Employer Failed to Demonstrate that Petitioner Engaged in Unlawful Polling or Interrogation</u>

Objection 17 States:

> **Objection 17:** The Petitioner unlawfully polled employee support, engaged in unlawful interrogation, and created the impression of surveillance during the critical period.

Objection 17 alleges that the Union polled employees, engaged in interrogation, and created the impression of surveillance. But, of course, a union is permitted to poll employees and ask them about their support for the union, including how they plan to vote and when. *See Springfield Discount*, 195 NLR 921, *enf'd*, 82 LRRM 2173 (7th Cir. 1972); *Keeler Die Cast v. NLRB*, 185 F.3d 535, 539 (6th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000); *Maremont Corp. v. NLRB*, 177 F.2d 573, 578 (6th Cir. 1999). Indeed, a union must poll in order to support its petition with a showing of interest.

Amazon's suggestion that asking when employees plan to vote "gave the impression that the ALU would surveil when and if they chose to vote," does not follow logically and, even if it did, it is not objectionable for a union agent to observe the polling area—the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable as explained above in relation to Objections 9, 23, and 25.

The only evidence presented in favor of this objection was some campaign materials used by the ALU. *See*, Emp. Ex. 369. This document is nothing more than a simple non-coercive form asking employees to vote yes and asking when they intend to vote. This is simply not coercive from any objective standpoint. Amazon's further suggestion that asking employees to "sign a commitment that they would vote "Yes" 'gave the impression that they could not change their mind," borders on the absurd in a secret ballot election. The same could be said about the cards unions are required to gather to support a showing of interest in every election conducted by the Board.

The case cited by Amazon, *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 365 (6th Cir. 1984), actually undermines the objection. It holds, "pre-election polling by the union is not inherently coercive." *Id*. at 364. While it continues to state that "an employer may successfully challenge a representation election if he shows that pre-election polling by the union *in fact* was coercive and *in fact* influenced the result of the election," *id*. at 365, Amazon's objection does not state any facts suggesting the polling here was coercive in any way.

On March 21, 2022, the ALU sent a text message to every member on the Voter List which stated, inter alia "Can I count on you to vote yes? (P.S. please reply Stop if you don't wanna chat.)" *See*, Tr. 4351:11 - 4356:13; *See also*, Emp. Ex. 516. There is nothing about this text which is in any way coercive.

Amazon did not carry its burden to prove Objection 17.

F. <u>The NLRB Does not Enforce the LMRDA and in Any Event Voters Understood They were Voting for the ALU</u>

> **Objection 18:** After disparaging—and celebrating its independence from—established, institutional unions for months leading up to the vote, the Petitioner's President and attorney asserted in 11th hour communications to voters that the Petitioner was backed by established unions with millions of union members, that those more-established unions were actively involved in the Petitioner's campaign, were providing funding and other services to the Petitioner, and would also be involved in contract negotiations if the Petitioners was elected. These misrepresentations are objectionable conduct because, under the circumstances, employees were unable to discern the truth of these statements regarding which labor organization would be representing them.
>
> **Objection 21** The Petitioner failed to file forms required by the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") The LMRDA requires all unions purporting to represent private sector employees to file, among other things, detailed financial reports. To date, the Petitioner has not filed any financial or other reports required

> by the LMRDA despite being under a legal obligation to do so. The Petitioner's failure to comply with the LMRDA deprived employees from access to the critical financial information about the Petitioner's operations during the critical period (i.e. whether to vote for them as thief bargaining representative)

Objections 18 and 21 relate to similar issues regarding information available to voters. Objection 18 claims that because Petitioner made claims about being an independent Union while simultaneously receiving support from established unions, voters would somehow be unable to discern the identity of the union that was actually on the ballot. Objection 21 alleges that because Petitioner failed to file reports with the Department of Labor (DOL) pursuant to the Labor Management Reporting and Disclosure Act of 1959 [LMRDA], voters were deprived of information, especially financial information, to make a free choice.

Petitioner is in fact an independent union, but that fact is not inconsistent with an independent Union also receiving support and solidarity from more established unions. The ALU does in fact have that support and the Employer failed to demonstrate otherwise. There was no misrepresentation by Petitioner in that respect. Nonetheless, even if the claims of support were not true, which is not the case, it has been clear for 40 years that campaign misrepresentations are not objectionable. *See Midland National Life Ins. Co.*, 263 NLRB 127 (1982). The only exceptions are forged documents and official Board documents that are altered to suggest the Board favors one outcome over another. Neither exception is implicated here.

Representations of support from third parties are not objectionable whether they are well founded or not. At most they are misrepresentations or mere "puffery". *See Shirlington Supermarkets,* 106 NLRB 666, 667 (1953); *Smith Co*., 192 NLRB 1098, 1101-02 (1971). It is well settled that the Board will no longer probe into the truth or falsity of the party's campaign statements.

Despite the Hearing officer specifically referencing the 40 year precedent of *Midland National Life Ins. Co.*, 263 NLRB 127 (1982) that the Board will not investigate the truth of representations made by either the employer or union, Amazon pursued this Objection with President Smalls and refused to withdraw it. See, Tr. 4613:20 -4614:19. President Smalls stated the union was independent and also had the support of other unions. **No witness** called by Petitioner testified that they were unable to discern what union they were being asked to select as their bargaining representative on the ballot. It was clear that only the ALU was on the ballot. This objection must be overruled. In fact, even raising this objection was legal error and constitutes frivolous and sanctionable conduct.

As to Objection 21, it is well settled that violations of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) do not affect Board policy, since Section 603(b) of the Act explicitly provides: "nor shall anything contained in [Titles I through VI] . . . of this Act be construed . . . to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended." An organization's (or its agent's) possible failure to comply with the LMRDA should be litigated in the appropriate forum under that Act, and not by the indirect and potentially duplicative means of the Board's consideration in the course of determining the union's status under Section 2(5) of the Act. *Caesar's Palace,* 194 NLRB 818, 818 fn. 5 (1972); see *Meijer Supermarkets, Inc.*, 142 NLRB 513, 513 fn. 3 (1963); *Harlem River Consumers Cooperative*, 191 NLRB 314, 316 (1971). A violation of the Labor-Management Relations Act of 1947 was likewise held not to disqualify a petitioner from filing a representation petition. *Chicago Pottery Co.,* 136 NLRB 1247 (1962). As stated in *Lane Wells Co.,* 79 NLRB 252, 254 (1948), "excepting only the few restrictions explicitly or implicitly present in the Act, we find nothing in Section 9, or elsewhere, which vests in the Board any general authority to subtract from the rights of employees

to select any labor organization they wish as exclusive bargaining representative." *See also, National Van Lines*, 117 NLRB 1213 (1957).

Failure to file reports with the DOL, whether required by the LMRDA or not, is not objectionable. The Board rejected an objection identical to that made here and was affirmed by the D.C. Circuit in *Family Services Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383-84 (D.C. Cir. 1999). In that case, like here, the employer argued, "the union's refusal to file was a violation of employees' Section 7 rights to know about union finances and other matters in order to make an informed election choice." *Id*. at 1383. But the Board and Court held that the LMRDA has its own enforcement mechanisms and is enforced by the DOL, not the NLRB. *Id*., at 1383-84. The NLRA gives the Board no authority to enforce the LMRDA through the objection procedure. *See also Desert Palace, Inc. v. Local 711 Union of Gaming,* 194 N.L.R.B. 818, 818 n. 5 (1972) ("The NLRB is not entrusted with the administration of the [LMRDA]. An organization's possible failure to comply with that statute should be litigated in the appropriate forum under that act, and not by the indirect and potential duplicative means of our consideration).

This Objection should be overruled as a matter of law. In fact, even raising Objection 21 was a fundamental legal error and amounts to frivolous and sanctionable conduct by Amazon.

G. <u>The Employer Completely Failed to Present ANY Evidence in Support of Objection 19</u>

Objection 19 states:

> **Objection 19:** Petitioner's supporters misled employees by telling them that they would lose their health benefits if they did not support the Petitioner Relying on language barriers and misrepresentations of the elections processes, during the critical period, Petitioner's organizers specifically targeted Amazon employees who recently

> immigrated from Africa and threatened that their continued benefits were contingent on their support of the Petitioner While the Petitioner's conduct in this regard is a deplorable scare tactic targeted at an immigrant population, these false threats also constitute objectionable conduct because they reasonably tended to coerce employees into supporting the Petitioner solely out of fear that they would lose their benefits

Petitioner is an organization that is committed to promoting the "fight" for a better world for all. Its symbol intentionally shows racially diverse fists emerging together from a box. The Employer's Objection 19 which claims the ALU would intentionally target a vulnerable community is an outrageous lie. It is contrary to the unity of the ALU's message which has always been a positive one. It is not surprising, therefore, that the Employer failed to put on any evidence that the ALU or anyone acting on its behalf took any action against a vulnerable immigrant community. By presenting no evidence to support this Objection, the Employer has utterly failed to meet its burden of proof. Objection 19 was and is clearly frivolous and the Employer should be sanctioned for having even raised it. This Objection must be overruled.

H. <u>The Light Projection Was Not Within 24 Hours of the Election Nor Was it a Captive Audience Speech or a Misrepresentation</u>

Objection 20 states:

> **Objection 20:** The Petitioner deployed a light projector outside the JFK8 facility that projected mass messaging on the façade of the JFK8 building immediately prior to the election. Late at night on March 23, 2022, and through the early morning hours, after the voting tent was in place, the ALU projected messaging on the front of JFK8 immediately over the polling area which read: "Amazon Labor Union"; "VOTE YES"; "VOTE YES! TO KEEP YOUR PHONES"; "BE THE FIRST IN HISTORY"; "THEY FIRED SOMEONE YOU KNOW"; "THEY ARRESTED YOUR COWORKERS"; and "ALU FOR THE WIN". The Petitioner's light projections are also objectionable misrepresentations inasmuch as they caused confusion about the identity of the messenger, suggested that Amazon supported the

> messaging, and misrepresented the purpose and consequences of the vote. The Petitioner's light projections also(reiterated the Petitioner's false campaign narrative that the Employer sought the arrest of employees.

Objection 20 alleges that the Union projected messages onto the face of the JFK8 facility in the 24 hours before the election and that it constituted both objectionable misrepresentations and a violation of the rule against addressing massed assemblies established in *Peerless Plywood Co*., 107 NLRB 427 (1953). Both theories are baseless.

First, of all, even if the statements were misrepresentations, which they are not, misrepresentations are not objectionable. Second, projecting images onto the Employer's facility is not a violation of the 24-hour rule established in *Peerless Plywood*. That case established a rule "that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Peerless Plywood*, at 429. Most obviously, there was no "massed assembl[y]." Equally obvious, there was no "speech[]" to anyone massed or not. Furthermore, It was undisputed that the projection occurred on March 23, 2022, ***more than 24 hours prior to the election***. *See*, Tr. 4378:15 - 4380:16; Tr. 4448:14 - 4449:6; *See also,* Emp. Exs. 385-V, 386, 2923, 2923-V, 2924, 2924-V, 2925, 2925-V, 2926, 2926-V; Tr. 4390:13 - 4390:24; Tr. 4392:16 - 4393:5. The fact that the ALU's Instagram post depicting the projection occurred on March 24 is simply evidence that the projection occurred ***before*** the posting was actually made. It is also undisputed from a review of the videos of the light projection that it was a rainy evening and very few people appeared to be outside during the time of the projection. *See*, Emp. Exs. 2923-V, 2924-V-, 2925-V, 2926-V.

The case cited by Amazon in the Objections that they presented to the Regional Director, *Bro-Tech Corp*., 330 NLRB 37 (1999), is inapposite. It involved a union blasting pro-union messages via a sound-truck to the workers amassed inside the facility. The Board explained the Hearing Officer's reasoning and concluded that:

> the *Peerless* prohibition, as interpreted in *U.S. Gypsum Co.* and *O'Brien Memorial*, included within its proscription the use of sound trucks for communicating campaign speech when those communications extended through the time the election was in progress. She found that the music, unavoidably audible to employees at their work stations, constituted "speech" within the meaning of the proscription because the songs' lyrics were more than mere *exhortations* to vote, and included campaign phrases which amounted to last minute emotional appeals designed to sway voters.

Id. at 38. Thus, in *Bro-Tech*, unlike here, there was both a massed assembly and an address to that assembly. In fact, the only cases in which the Board has applied *Peerless Plywood* to union conduct have similarly involved the use of a sound truck or loudspeaker system to reach employees assembled inside a facility. *Compare United States Gypsum Co.,* 115 NLRB 734 (1956) (setting aside the election where a union blasted campaign speeches into the employer's facility from a sound truck for more than seven hours the day before the election), and *Industrial Acoustics v. NLRB*, 912 F.2d 717 (4th Cir. 1990) (holding that the broadcast of union campaign messages from a loudspeaker within a parked car near the plant entrance violated *Peerless Plywood*), with *NLRB v. Glades Health Care Ctr.*, 257 F.3d 1317, 1320 (11th Cir. 2001) (finding no *Peerless Plywood* violation where a union held a rally across the street from the employer's facility within twenty-four hours of the election because there was no "firm purpose to use vehicles equipped with loudspeakers to intentionally broadcast campaign speeches into the employer's facility so that the employees at their work stations could not avoid hearing it").

Even when employer conduct is at issue, the Board has clearly held that "[t]he *Peerless Plywood* rule . . . does not apply to posters or other campaign literature." *Pearson Education, Inc.*, 336 NLRB 979, 0979 (2001). *See also Myrna Mills, Inc*., 133 NLRB 1740, 1743 (1961) ("since the poster does not constitute a speech to massed assemblies of employees," *Peerless Plywood* does not apply). Indeed, in *Peerless Plywood* itself, the Board made clear that "[t]his rule will not interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election." *Peerless Plywood*, at 430. The projection is analogous to literature such as a pamphlet or poster, not to a speech blasted into a facility via a sound truck. The projection clearly falls outside the *Peerless Plywood* prohibition.

For these reasons, this Objection must be overruled. Again, even having raised this objection knowing that the projection occurred on March 23, 2022 constituted frivolous and sanctionable conduct by Amazon.

I.The ALU Did Not Distribute Marijuana In Return for Support in the Election During the Critical Period

Objection 22 reads:

> **Objection 22:** The Petitioner distributed marijuana to employees in return for their support in the election. The Petitioner's distribution of marijuana was an impermissible grant of benefit and interfered with employees' free choice in the election.

Objection 22 alleges that the ALU distributed marijuana to employees "in return for their support in the election", constituting an impermissible grant of benefit. But this alleged gifting of Marijuana occurred before the representation petition was filed, *i.e.*, before the critical period, which renders this Objection baseless. Moreover, the Union denies that any sharing of marijuana that took place at any time was ever contingent on support in the election, and no witness testified

to such a *quid pro quo.* Amazon presented no evidence at the hearing regarding this Objection that would merit overturning an election with a 500+ vote margin. Accordingly, the Objection must be overruled.

"A union cannot make, or promise to make, a gift of tangible economic value as an inducement to win support in a representation election." *Jam Productions, Ltd.*, 371 NLRB No. 26, sl. op. 9 (2021). But "[n]ot every grant during an election campaign requires a 'per se finding' of objectionable conduct." *Id*. To determine whether a grant is objectionable, the Board applies an objective standard, and determines whether "the donor's conduct would reasonably have a 'tendency to influence' the outcome of the election." *Id*., *citing Gulf States Canners, Inc.*, 242 NLRB 1326, 1327 (1979). To evaluate whether a gift would have a tendency to influence the outcome of the election, the Board examines a number of factors, including: "1) the size of the benefit conferred in relation to the stated purpose for granting it; 2) the number of employees receiving it; 3) how employees reasonably would view the purpose of the benefit; and 4) the timing of the benefit." *B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991).

As stated, not every gift given in the critical period is per se objectionable conduct. Indeed, the Board has long held that certain gifts are legitimate campaign devices and non-objectionable. *See R. L. White Co.*, 262 NLRB 575, 576 (1982) ("A party to an election often gives away T-shirts as part of its campaign propaganda in an attempt to generate open support among the employees for the party. As such, the distribution of T-shirts is no different than the distribution of buttons, stickers, or other items bearing a message or insignia. A T-shirt has no intrinsic value sufficient to necessitate our treating it different than other types of campaign propaganda, which we do not find objectionable or coercive."); *Chicagoland Television News, Inc.*, 328 NLRB 367 (2000) ("absent special circumstances," parties are "legitimate campaign devices," and the Board "will

not set aside an election simply because the union or employer provided free food and drink to the employees"). As the Board explained in *Jacqueline Cochran, Inc.*,

> In NLRB elections, like political elections, parties or candidates seek through various ways to advertise their special qualities in order to appeal to the electorate. …. Thus, when the union distributes, without cost to eligibles, trinkets like balloons, plastic rain hats, rabbits' feet, combs, pens, compacts, or tickets for a chance on prizes and does not make such distribution contingent upon the outcome of the election or how particular eligible will vote, the Board does not find such advertising to constitute a gift or bribe or the bestowal of an economic benefit sufficient to impair the free choice of employees.

177 NLRB 837, 839 (1969).

Additionally, a union may confer some benefits in order to encourage attendance at meetings or other forms of union interaction, or to spread word of the union campaign, or to make itself more attractive to employees. *Gulf States Canners*, 242 NLRB at 1327-28 (finding that union's provision of free gas to two employees was not objectionable as it was made "to encourage attendance at the union meetings and to spread word of the union campaign"); *Jacqueline Cochran*, 177 NLRB at 839 (finding that union's provision of free turkeys to all employees was not objectionable as it "was to encourage eligibles to come to its meeting, to generate a kindly feeling toward the Union and to make it more attractive as the bargaining agent"). Instead, gifts are objectionable only when they have a tendency to impair employees' free choice by "subject[ing] the donees to a constraint to vote for the donor union." *Mailing Servs., Inc.*, 293 NLRB 565, 565 (1989), *quoting Wagner Elec. Co.*, 167 NLRB 532, 533 (1967). That is, the gift must be one that has such value to the recipient that the recipient would feel a sense of obligation to vote for the union.

"As a general rule, the period during which the Board will consider conduct as objectionable is the period between the filing of the petition and the date of the election." *Dolgencorp, LLC v. NLRB* 950 F.3d 540, 545 (8th Cir. 2020) (citing *Cedars-Sinai Med. Ct. & Cal.*

Nurses Assoc., 342 NLRB 596, 598 n. 13 (2004)). The Board "will not consider instances of prepetition conduct as a basis upon which to set aside an election," *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 993 (4th Cir. 2012), citing *Dresser Indus. Inc.,* 242 NLRB 74, 74 (1979), and events occurring prior to the filing of the petition are assumed not to affect the outcome of an election. *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998 (8th Cir. 1965).

Accordingly, the ban on union conferral of a tangible benefit upon employees it seeks to represent applies only during the critical period. In *Mailing Services, Inc.* 293 NLRB 565 (1989), for example, the Board explained that a union is "barred *in the critical period* . . . from conferring on potential voters a financial benefit," *id.* at 565 (emphasis added), and the D.C. Circuit emphasized in *Freund v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999) that "a union may not give voters anything of tangible economic benefit *during the critical period*" because the parties involved in a representation election are "prevented from exercising certain rights during the *brief* time when their exercise might interfere with the voters' free choice." *Id*. at 931, 934 (emphasis added). *See also Stericycle, Inc.*, 357 NLRB 582, 586 (2011) (holding that a union's financing of litigation on behalf of employees before the critical period is not objectionable even if it may be after the filing of a petition).

Indeed, in *Werthan Packaging, Inc.* v. *NLRB* 64 Fed.Appx. 476 (6th Cir. 2003), the Sixth Circuit held that a union's provision, before the critical period, of jackets, football tickets, pizza, and beer to employees at a facility it was attempting to organize "were of no moment because they did not occur during the critical period." *Id*. at 486. In the present case, ALU's supporters' alleged sharing of small amounts of marijuana similarly took place before the critical period and is therefore not objectionable.

Connor Spence credibly testified that although the ALU had gifted marijuana to JFK8 employees prior to the December 22, 2021 filing of the representation petition, marijuana was not gifted on or after December 22, 2021 due to the polarizing responses Petitioner received from the JFK8 employees. *See*, Tr. 4449:7 - 4449:20. It is presumably for this reason that a few employees mistakenly testified that Petitioner was gifting marijuana during the critical period.

Mr. Smalls, the interim President of the ALU, testified that marijuana was not gifted to associates at JFK8 during the critical period. *See,* Tr. 4561:16 - 4562:3. Mr. Smalls was questioned about statements attributed to him regarding the ALU gifting marijuana in which he testified that marijuana was only gifted before the critical period. *See, e.g.,* Tr. 4575:21-4576:1; Tr. 4576:24-4577:1.

In addition, ALU supporter Jason Anthony corroborated this testimony that no marijuana was given to associates during the critical period. *See,* Tr. 3635:16 - 3635:24 ALU Supporter Justine Medina also corroborated that no marijuana was gifted during the critical period. *See,* Tr. 3898:17 - 3898:23. When pressed on this issue by employer's counsel, Ms. Medina credibly reiterated the reasons she believed no marijuana was distributed during that time frame; if marijuana had been given away for free by the ALU, there would have been discussion in the warehouse regarding it and she was not aware of such discussions during the critical period. *See*, Tr. 3900:23 - 3901:7.

It is undisputed that up and until approximately mid- November 2021 and again after mid January 2022, the MTA maintained a bus stop for the S40 bus across the street from the JFK8 facility. See, Tr. 4451:2 - 4452:1. From mid-November 2021 to mid January 2022, the MTA temporarily relocated the S40 bus stop close to the corner of the JFK8 building in front of the recruiting office. See, Tr. 4452:2 - 4453:8; Tr. 4465:9 - 4465:16. As a result of the bus stop

move, the ALU also moved its table temporarily to the area next to the recruiting office. See, Tr. 4453:9 - 4454:8.

Witness Adina Goriva claimed she saw the ALU distributing marijuana at a table outside of the JFK8 facility to the left of the recruitment office shortly after February 17, 2022 . *See*, Tr. 936:1- 937:7. This cannot be true because the Petitioner's table had already moved back to the bus stop across the street from JFK8 by mid February 2022. In addition, on cross-examination, Ms. Goriva also admitted that she did not actually see the ALU distribute marijuana; she only saw a chalkboard that she believed had the words "Free Weed" written on it. See, Tr. 948:14 - 948:20. Ms. Goriva further admitted that she had seen the chalkboard on many days, as she walked by it every day on her way to work, and the chalkboard contained many different messages on different days all starting with the word "free." See, Tr. 949:13 - 949:13 - 951:1. Her testimony as to the date of seeing the "Free Weed" sign was further undermined by her claim that the ALU table had always been next to the recruitment office at all times since the campaign began in April of 2021. See, Tr. 955:1 - 956:21. This is also not true. Ms. Goriva's testimony should be given no weight.

Patrick Delancey testified that he saw the ALU distribute marijuana on two (2) separate occasions; once in January 2022 and again in March 2022. *See*, Tr. 1259:21 - 1260:10. However, on cross-examination it became clear that this testimony was highly unreliable. Mr. Delancey could provide no exact date for when he witnessed this allegedly occurring. He testified that he was gifted it sometime in January 2022. However he was clear that the ALU was giving away marijuana from its table at the bus stop across the street from JFK8. Additionally, Mr. Delancey failed to identify who he received this marijuana from in January 2022. This points to the fact that he most probably was confused about the timeframe and may have received marijuana prior to

December 22, 2022. *See*, Tr. 1257:4 - 1257:18; Tr. 1260:16 - 1260:25; 1266:23 - 1269:19; *See also* Tr. 4452:2 - 4453:8.

With respect to the marijuana Mr. Delancey allegedly was given in March, he testified that an individual that he identified as Tristan Dutchin, gifted him the marijuana at the bus stop across from JFK8. He noted in his testimony that President Smalls was in his car in front of the bus stop and that President Smalls was not the individual who gave him the marijuana (he also did not even testify that Mr. Smalls was even aware that Mr. Dutchin had allegedly been gifting marijuana). *See*, Tr. 1249:7 - 1249:16; Tr. 1256:13 - 1256:22. The person who allegedly gave Mr. Delancey the marijuana, Tristan Dutchin is not a stipulated agent for Petitioner. *See*, Tr. 1279:15 - 1280:23; Emp. Ex. 527. The Employer failed to call Tristan Dutchin to testify as to his agency status and in fact failed to elicit any testimony from Petitioner Officers regarding Mr. Dutchin's relationship with Petitioner Union. Mr. Delancey's testimony is not reliable and is not credible. Thus his testimony should be given no weight in support of this Objection.

Matthew Cordova's testimony is similarly suspect. Cordova testified that he saw the ALU give out marijuana between December 22, 2021 - March 30, 2022 but he could not give any more specifics as to the dates. *See*, Tr. 1297:19 - 1298:7. Mr. Cordova only believed it occurred during that time period because it was "still dark outside at the time and it was cold." *See*, Tr. 1298:8 - 1298:11. However, Mr. Cordova himself admitted on cross examination that it is also "dark and cold" in November 2021. *See*, Tr. 1306:6 - 1306:11. More importantly, Mr. Cordova did not actually see anyone give marijuana away to anybody else, all he saw was a sign that said "[F]ree [P]izza and [W]eed!" *See*, Tr. 1304:5 - 1304:12. Similarly, Moises Martinez only testified that he saw a banner "about the length of the table itself from the floor to where the table would end. I just remember reading it said, like, something to the words of get free weed if you sign up for the

Union. That's it." *See,* Tr. 3295:7 - 3295:11. He also mentioned seeing five individuals around the table. There was no testimony regarding observing anyone receiving any marijuana, nor was Mr. Martinez able to describe any of the five individuals he observed around the table. *See* 3307: 3-9. On cross examination, Mr. Martinez admitted that on the corner in front of the recruiting office where he claims to have seen the ALU giving out free weed "[t]here [are] cameras. It's right above the building. It's all over the building." *See* Tr. 3298:16-17 and ALU Exhibit 27. It should be noted that at no time in this vast record did the Employer support this Objection with surveillance footage from the cameras facing the corner outside of the recruitment office. Such an omission requires a negative inference as the only explanation for why the video was not presented by the Employer, can only be because there was no distribution of marijuana caught on tape during the critical period.

Natalie Monarrez, who made clear her antipathy and disdain for President Smalls never testified that she saw President Smalls giving out marijuana to Associates during the critical period. Instead she claimed to have seen President Smalls with a bag of marijuana. Tr. 3997:25 - 3998:9. Not once during her testimony when she was asked specifically about the critical period did she testify to seeing President Smalls gifting marijuana to any Associates. *See*, Tr. 3998:18 - 3999:2; Tr. 4000:7 - 4000:10. In fact, in contradiction to other Amazon witnesses, Ms. Monarrez claims never to have seen President Smalls with marijuana after she resigned from the ALU at the end of January 2022. *See* Tr. 4001:10-16.

Xiomara Rosado testified that there was one time somewhere between December 22, 2021 and March 30, 2022, in which President Smalls gave out marijuana "to a kid" (whose name she could not recall and whose age she was not sure of) in an outside weather enclosure at JFK8 that is used for smoking cigarettes. *See* Tr. 3073: 1-4, 3098:21 - 3099:1, 3099: 17-19. Ms. Rosado's

testimony is unreliable, not only because she was unable to testify as to a date when she allegedly witnessed President Smalls gift marijuana, but she also testified that she recognized President Smalls because a few weeks after this, she saw him distributing food ***inside*** the JFK8 break room. *See* Tr. 3074:5 - 3074:14. The employer failed to put on any evidence in support of the fact that from December 2021 to March 2022 that it ever invited President Smalls inside the breakroom to distribute food which would have been necessary to corroborate Ms. Rosado's outlandish testimony.

The employer also called Yuddelka Rosario who testified that two weeks before the election, she recalled "they were like, but we got a little bag of marijuana, we got weed, because they were celebrating that the law had passed. And I was walking there and they were like, did you sign already? Because they were looking for signatures. And I say, no. They said, if you sign, I give you a little bag. And I'm like, what, weed? I said, I don't use that. … They were trying to get a signature no matter what. They were like, we run out of pizza, we run out of t-shirt, but we still got this. They were happy because the law had passed and they could have marijuana on hand, which I believe that was not the right thing to do. … " *See* Tr. 3322:15-23, 3324:2, 3324:16-21. Not only has the Employer failed to establish the identity of the "they" she alleges spoke to her, but also administrative notice should be taken that the legalization of marijuana in New York State occurred on September 21, 2021, far in advance of the critical period.[34] *See* "All The Questions and Answers on NY Legalizing Marijuana" - The New York Times(nytimes.com) http://www.nytimes.com/article/new-york-marijuana-legalization-facts.html Thus more likely

[34] ALJs and the Board have routinely taken judicial notice of relevant federal and state statutes and regulations. See, e.g., Taylor Mfg. Co., Inc., 83 NLRB 142 n. 5 (1949) (affirming the ALJ's taking judicial notice of applicable statutes and regulations issued by the Veterans Administration); and Yellow Cab Co., 229 NLRB 1329 n. 2 (1977) (granting the charging party's request to take judicial notice of certain new Chicago regulations affecting the taxicab industry). The courts have too. See, e.g., Martinez v. Welk Group, Inc., 2011 WL 90313, at *2 (S.D. Cal. Jan. 11, 2011) ("Courts routinely take judicial notice of state or federal statutes and regulations").

than not, any celebration of the legalization of marijuana would have taken place in the fall of 2021. Moreover, the conduct Ms. Rosario describes is consistent with that of collecting authorization cards in support of the Petitioner's representation petition which it filed first on October 25, 2021, and then after withdrawal, again on December 22, 2021. Her testimony was that she remembered ALU supporters telling her, "[h]ere, you sign, we give you, it's legal. So when they tell you that it's legal, it doesn't matter because I don't use it." Furthermore, in order to establish their burden, the best evidence that the Employer could put forward for proof of the distribution of marijuana during the critical period on its property would be video from its own surveillance cameras, which surprisingly the Employer failed to produce. *See* ALU Exhibit 17. Thus there can only be a negative inference that the employer failed to produce such surveillance footage because there is no footage to support this Objection.

There is no credible evidence in the record that anyone acting as an agent of the union gave out free marijuana to any JFK8 associates during the critical period. Karen Martinez testified that while she recalls hearing another Amazon employee who supports the Amazon Labor Union announcing "free weed," when she approached the Amazon Labor Union table, she only saw T-shirts and pizza being given out by the Union. *See,* Tr. 2015:19 - 2015:25. Ms. Martinez's testimony that she heard an Amazon employee announcing "free weed" cannot be found to be credible because she was never able to provide an exact date of when she heard this announcement and her own testimony is that she never saw any marijuana. Moreover, when pressed on cross examination she admitted that she saw them offering marijuana to Associates on a prior occasion at "[t]he end of April" *See*, Tr. 2017:18 - 2017:20. But, in fact she had already testified that she never saw the ALU handing out weed "prior to the end of April." *See*, Tr. 2018:20 - 2018:22. Thus, any testimony from this witness cannot be accepted as evidence in support of Objection 22

that during the critical period, the Petitioner ``distributed marijuana to employees in return for their support in the election." As by the end of April 2022 the election tally had already been completed by Region 29.

A review of the relevant caselaw shows that the number of employees receiving the benefit must be able to affect the vote margins. *Owens-Illinois, Inc.*, 271 NLRB 1235, 1235 (1984) ("While only five or six employees received jackets before voting, the vote tally and our disposition of the challenged ballots show that five or six votes could have determined the election's results."); *see also Gulf States Canners*, 242 NLRB at 1326 (examining whether union's purchase of gas for two employees who accepted its offer to pay for gas to attend union meeting was objectionable where vote tally was 20 to 16 in favor of the union); *Revco D.S., Inc. v. NLRB*, 830 F.2d 70 (6th Cir. 1987) (finding union's offer to pay anti-union employee $100 to vote for the union objectionable because election was decided by one vote). In this election there is no conceivable way that any gifting of marijuana would affect the 523 vote margin by which Petitioner became the bargaining unite representative for Associates at JFK8.

When weighing the *B&D Plastics* factors, the Board is also more inclined to find gifts to be objectionable the closer to the election they are given. Accordingly, in *Gulf States Canners*, the Board weighed the fact that the purchase of gas for the two employees took place several weeks before the election against finding the conduct objectionable. 242 NLRB at 1328. In *Jacqueline Cochran*, the Board weighed the fact that the election was held 25 days after the provision of free turkeys to employees against finding the union's conduct objectionable. 177 NLRB at 839. In contrast, in *Owens-Illinois*, the Board found objectionable the union's distribution of jackets on election day, between voting sessions. 271 NLRB at 1235; *see also NLRB v. Labor Servs., Inc.*, 721 F.2d 13 (1st Cir. 1983) (finding objectionable the union's purchase of free drinks on election

day, between voting session), *adopted by* 274 NLRB 479 (1985). Just as with the T-shirts and food that witnesses say were also provided (and that the Employer does not object to), the Union may provide small gifts as part of its campaign propaganda, and in order to generate a kindly feeling toward the Union and to make it more attractive as the bargaining agent. *Jacqueline Cochran*, 177 NLRB at 839. Indeed, small amounts of marijuana—allegedly provided weeks before the election—has no intrinsic value that would work to constrain the donee to vote for the Union.

Lastly, the Company seems to be reaching for straws by attempting to make the argument that the Board should set aside the election because marijuana is illegal under federal law. But the status of marijuana is entirely irrelevant to the Board's role to resolve the question of representation. By making its arguments to the Board, it is clear that the Company is simply reaching for any argument it can in order to escape the representational desires of its employees'

Even if the testimony of these witnesses were to be credited, providing a small amount of marijuana long before the election places this case closer to *Gulf States Canners* and *Jacqueline Cochran*, where the benefit was provided weeks before the election and thus non-objectionable, than *Owens-Illinois*, where the benefit was provided while employees were voting.

It is clear from this review that the Company fails to meet its heavy burden to set aside the election based on its claim that the Union provided marijuana to employees "in return for their support in the election." The Company's Objection 22 must be overruled.

III. CONCLUSION

A. There Is No Misconduct Identified That Has A Tendency To Interfere With Employees' Freedom Of Choice

In challenging a representation election, the objecting party bears the entire burden of adducing prima facie facts sufficient to invalidate the election. *See NLRB v. Hood Furniture Mfg. Co., 941 F.2d 325, 328 (5th Cir. 1991)* The test—which is objective—is whether the party's misconduct "has the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); see *Hopkins Nursing Care Center*, 309 NLRB 958 (1992); *Baja's Place*, 268 NLRB 868 (1984); see also *Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (expressing test as whether conduct "could . . . reasonably have affected the results of the election"); *Safeway Inc*., 338 NLRB 525, 526 fn. 3 (2002) (same); *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 619 (4th Cir. 2013) (subjective reactions of employees irrelevant to question of whether there was, in fact, objectionable conduct).

This burden is not met by proof of misconduct, but "[r]ather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) citing *NLRB v. Bostik Div., USM Corp.,* 517 F.2d 971, 975 (6th Cir.1975), (quoting *NLRB v. White Knight Mfg. Co.,* 474 F.2d 1064, 1067 (5th Cir.1973)). (citing *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)). Specific evidence of specific events is required, showing not only that the acts occurred, but also that they "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election. *See NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Golden Age Beverage Co.,* 415 F.2d 26, 30 (5th Cir.1969).) Some assurance must be in the record to show that the election results were not reflective of employees' desires. *NLRB v. Monroe Auto Equip. Co., Hartwell Div.,* 470 F.2d 1329, 1332 (citing *NLRB v. Golden Age Beverage Co*., 415 F.2d 26, 30 (5th Cir. 1969); *Southwestern*

Portland Cement Co. v. NLRB., 407 F.2d 131, 134; *Anchor Manufacturing Co. v. NLRB*, 300 F.2d 301, 303.) For conduct to warrant setting aside an election, not only must that conduct be coercive, but it must be so related to the election as to have had a probable effect upon the employees' actions at the polls. The presumption is that ballots cast under the safeguards provided by Board procedure reflect the true desires of the participating employees. *See NLRB v. Zelrich Co.,* 344 F.2d 1011, 1015 (5th Cir. 1965) This is a burden akin to a "clear and convincing" standard and not one by a "preponderance" of the evidence. The record is clear that not only was Amazon unable to present evidence of specific unlawful acts attributed to either Petitioner or Region 29, but it also failed to connect any allegation to any material effect on the election results to overturn an election won by a margin of over 500.

B. <u>No Agent Nor Third Party Conduct in the Critical Period Is Objectionable</u>

In cases raising allegations of pre-election campaign interference, the Board may need to address as many as three major questions: (1) whether the individuals alleged to have engaged in objectionable conduct were agents of either party (i.e., whether the conduct is attributable to one of the parties); (2) whether the conduct itself is objectionable misconduct; and (3) if the conduct is deemed objectionable, whether it warrants invalidating the election because it is "more than de minimis with respect to affecting the results of the election." See, e.g., *Mercy General Hospital*, 334 NLRB 100 (2001).

Generally, the Board applies common law principles of agency, including principles of apparent and actual authority, in determining whether alleged misconduct is attributable to a party. See, e.g., *NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 113 (D.C. Cir. 2012); *Mar-Jam Supply Co.*, 337 NLRB 337 (2001); *Cooper Industries*, 328 NLRB 145 (1999); *Fieldcrest Cannon,*

Inc., 318 NLRB 470 (1995); *Culinary Foods, Inc*., 325 NLRB 664 (1998); *General Metal Products Co*., 164 NLRB 64 (1967); *Dean Industries*, 162 NLRB 1078, 1093–1094 (1967); *Colson Corp. v. NLRB*, 347 F.2d 128, 137 (8th Cir. 1965).

Agency is not established merely on the basis that employees are engaged in vocal and active petitioner support. *United Builders Supply Company*, 287 NLRB 1364, 1365 (1988). See also *Tuf-Flex Glass v. NLRB*, 715 F.2d 21 291, 296 (7th Cir. 1983), attending organizing meetings or soliciting cards on behalf of the petitioner does not, standing alone, render employees agents of a petitioner. *Health Care and Retirement Corporation of America v. NLRB*, 255 F.3d 276 (6th Cir. 2000). Employee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of petitioner. *Advance Products Corp*., 304 NLRB 436 (1991), as well as *Health Care and Retirement Corporation of America*.

The employer spent over eight hours eliciting testimony attempting to establish that Jason Anthony and Justine Medina were Petitioner's agents and failed. They called Stephanie Lopez to testify that she *believed* Jason Anthony supports the ALU but that she had never seen him sitting at the ALU table in the break room. *See* Tr. 2739. Thus Ms. Lopez's testimony did not establish Mr. Anthony to be an agent. The employer also called Lori Adenji who also *believed* that Jason Anthony was an agent because he was a part of the individuals that came into the February 7, 2022 small group meeting, wearing an ALU shirt and was speaking in support of the ALU. *See*, Tr. 1505:12 - 1505:21. Clearly this is not enough testimony to establish that Mr. Anthony played the role as the responsible representative of the union in the plant and played a central role in the election campaign. *Vickers, Inc.*, 152 NLRB 793, 795 (1965). Mr. Anthony and Ms. Medina identified themselves as volunteer worker organizers and there are no identified activities by either that fall under any of the Employer's 25 Objections.

The Organizing Committee, also known as the Workers Committee or the Stewards Committee is a body of workers that is open to anybody that wants to volunteer to spread a pro-Union message, give out information about the union, encourage workers to vote yes and help get authorization cards signed. *See*, Tr. 4307:5 - 4307:17, Tr. 4308:13 - 4308:21. At one point there were approximately 100 members on the Workers' Committee because anybody who was a vocal supporter of the ALU could consider themselves a member. *See*, Tr. 4315:4 - Tr. 4315:10. Essentially any pro-union worker had access to the ALU's campaign materials and could distribute them. *See*, Tr. 4315:25 - 4317:5.

Although the term "lead organizer" was used by several individuals that volunteered for the ALU during the critical period, "lead organizer" was just an informal title that people gave themselves if they believed they had put in more work than others or were more vocal than others. *See*, Tr. 4319:6 - 4319:15. Connor Spence, Petitioner Officer, testified that he was not even aware that Jason Anthony was using the term "lead organizer" to refer to his status with the ALU during the critical period. *See*, Tr. 4319:16 - 4321:15.

The Employer's Objections that are focused on the Petitioner's conduct are 13-25. Amazon failed to establish that any conduct of the union's agents at issue reasonably tended to interfere with the employees' free and uncoerced choice in the election. However, Objections 1-12 are focused on the Region's conduct. The Region was not a party in this election.

If alleged misconduct cannot be attributed to one of the parties, the Board will only set aside the election if the misconduct "was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803

(1984). This standard is more difficult to meet than the already not met standard applied to party conduct.

C. <u>The Election Results Are Not Narrow</u>

There is no evidence that any conduct by any witness who testified in this long trial tended to interfere with employees' freedom of choice. Thus, in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (2000), the Board, in setting the election aside, emphasized that the election might have been decided by **only one vote**, and that accordingly three instances of objectionable conduct "could well have affected the outcome of the election." The Board distinguished certain other cases, noting they did not involve a close election. *Id*. at 716 fn. 5; see also *Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (emphasizing misconduct could have affected an election decided by **one vote**). The election in the instant matter was won by 523 votes.

If the vote margin in a representation election is very narrow, minor violations should be more closely scrutinized. In other words, when the apparent degree and multitude of the violations are small and the margin of the vote is wide, the less merit inheres in a petition for overturning the Board's decision upholding an election or denying an evidentiary hearing. *See United Steelworkers of Am., AFL-CIO v. NLRB*, 496 F.2d 1342, 1347 (5th Cir. 1974). Under *NLRB v. Bancroft Mfg. Co*., 516 F.2d 436, 444 (5th Cir. 1975), in deciding if an election should be set aside due to pro-union statements made in the course of the election campaign, although material misrepresentations, the Union's adequate margin of victory (56% of the vote) convinced the court that the Board did not abuse its broad discretion in representation matters by finding that the Company had failed to show that the Union's statements so lowered the tone of the campaign that the free choice of a majority of the employees cannot be determined from the election results.

Similarly, in this election, Petitioner won with 55% of the valid votes counted and thus employees' free choice has not been interfered with.

D. Amazon's Objections Should Be Rejected In Their Entirety

Under the 2014 amendments to the Board's election procedures, the Regional Director's decision may include a certification of the results of the election, including certification of representative where appropriate, and shall be final unless a request for review is granted. Thus Petitioner requests that the Regional Director reject in whole the Employer's Objections 1-25 and certify the April 1, 2022 Tally of Results in this election issuing a Certification to the Amazon Labor Union as bargaining representative for Associates at JFK8.

Dated: August 1, 2022

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR REALTIONS BOARD
TWENTY-NINTH REGION

AMAZON.COM SERVICES LLC,

Employer

and **Case: 29-RC-288020**

AMAZON LABOR UNION,

Petitioner

CERTIFICATE OF SERVICE

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and **Case 29-RC-288020**

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I. INTRODUCTION

Throughout its history, the National Labor Relations Board (the "NLRB" or "Board") "has zealously safeguarded the integrity of its elections against irregularity and even the appearance of irregularity." *Amazon.com Servs. LLC*, Case 10-RC-269250, Decision and Direction of Second Election at 6 (Nov. 29, 2021) (not reported in Board volumes) (quoting *Pro. Transp., Inc.*, 370 NLRB No. 132, slip op. at 1 (2021)). After twenty-four days of Hearing, which included 62 Amazon witnesses and 248 admitted exhibits, the unrebutted and credible record evidence unequivocally proves that this election did not live up to the Board's high standards. The actions of both Region 29 of the NLRB (the "Region" or "Region 29") and the Amazon Labor Union (the "ALU" or "Union") destroyed the laboratory conditions required for conducting representation elections. The only way to cure this misconduct and determine the uninhibited desires of Amazon's employees "under conditions as nearly ideal as possible," *General Shoe*, 77 NLRB 124, 127 (1948), is to dismiss the tainted result and conduct a new election.

The Hearing in this matter arose out of the ALU's petition to represent a bargaining unit consisting of all Fulfillment Center Associates ("Associates") working at Amazon's JFK8 fulfillment center in Staten Island, New York. There were 8,325 eligible voters in this election. Only 32% cast ballots for the ALU. The rest voted against the Union, or did not vote at all. In fact, 3,473 eligible voters did not participate in one of the largest and most publicized NLRB elections in years, which took place over 50 voting hours in an on-site manual election. This brief summarizes the evidence Amazon marshalled during the Hearing and demonstrates that Region 29's mismanagement and the ALU's misconduct produced this tainted result.

First, we address the ALU's misconduct. At the outset, the Hearing Officer should recognize that the ALU chose not to put on a case, leaving nearly all of Amazon's evidence

unchallenged. Regional Director Overstreet already decided, in his order dated April 29, 2022, that all 25 of Amazon's objections "could be grounds for overturning the election if introduced at a hearing." BD 1(b). Over several weeks of live testimony, Amazon presented a variety of witness and documentary evidence that more than establishes the merit of its objections.

Undeniably, the ALU sought to obstruct the creation of the factual record at every turn. Once the record had been created, however, they opted to ignore most of it. The ALU simply argued before and during the Hearing that many of Amazon's objections had no legal merit and should be "dismissed," a procedural mechanism that does not exist in Board rules and procedures, and which Regional Director Overstreet ruled was not an appropriate way in which to dispose of post-election objections. (Order of Regional Director Overstreet, Case 29-RC-288020 (June 10, 2022); Larkin, 3692:5-9).

In their bravado, the ALU failed to recognize—or perhaps chose not to acknowledge—that the vast majority of Amazon's witness testimony stands undisputed in the record. For example, Amazon's witnesses described with exacting detail where certain events, such as ALU President Christian Smalls' blatant electioneering, the media presence in and around the no-electioneering area during voting periods, and repeated ALU trespassing on Amazon's private property, took place. In some cases, they even pinpointed on maps of the outside of the JFK8 facility where they saw Mr. Smalls and other ALU officers and agents engaged in the improper conduct.

By electing not to address key allegations of objectionable misconduct, the ALU has conceded that the actions described by Amazon's witnesses occurred as described. This is especially true where the ALU had Mr. Smalls (as well as other ALU officers and agents) on the stand, and failed to elicit testimony disputing pertinent allegations of misconduct.

Regardless what the ALU thinks about Regional Director Overstreet's Order calling for an Objections Hearing, it is undeniable that Amazon's evidence presented at the Hearing demonstrates many instances of ALU misconduct—each instance, on its own, sufficient grounds on which to overturn the election. For example:

- The ALU sought to improperly influence JFK8 Associates by unlawfully distributing marijuana to obtain authorization cards and curry support in the upcoming election. Numerous witnesses observed the ALU, and Mr. Smalls in particular, engage in this tactic during the critical period. (Objection 22).
- The ALU loitered and electioneered on multiple occasions in the no-electioneering zone established by Region 29. Multiple witnesses identified Mr. Smalls inside the no-electioneering zone, sometimes with a camera crew, and in some cases literally standing in line with voters (he was not eligible to vote), while the polls were open. Mr. Smalls and the ALU also published videos during the time that the polls were open depicting him standing next to the voting tent, creating the impression that he was monitoring the polls, or otherwise controlling the mechanics of the election. It is unquestionable that if the president of any other labor organization stood in line with voters during a union election, such behavior would be objectionable. As the elected President of the ALU, the same rules apply to Mr. Smalls. (Objections 23-25).
- The ALU sought to influence Associates through repeated trespassing by non-employee solicitors on Amazon's property. The ALU, primarily through its President, Mr. Smalls, ignored Amazon's lawful requests that non-employee organizers respect Amazon's solicitation policy, as well as Amazon's property rights, and confine their organizing efforts to public property. Mr. Smalls dared Amazon to "call the police"

on two separate occasions, initiated a confrontation with the NYPD when they sought to remove him from Amazon property, and then broadcasted his own unlawful trespass and violation of Amazon's solicitation policy on social media, which among other things, depicted his efforts to provoke confrontations with Amazon security personnel and ultimately the NYPD. As the election approached, news of Mr. Smalls' (self-orchestrated) arrest was "all over the plant," and clearly had the tendency to interfere with laboratory conditions. (Objection 16).

- The ALU interfered with and "shut down" Amazon's communications with its Associates about the election. The ALU did so by executing a planned scheme to intrude on and disrupt Amazon's small group meetings with Associates, removing and destroying posters displayed throughout JFK8 that explained Amazon's position on election issues and campaign messaging, and encouraging ALU supporters to destroy other Amazon information pieces. Indeed, it is undisputed that the ALU bragged about these exploits on its various social media platforms. (Objection 15).
- The ALU sought to influence voters through numerous instances of bullying, harassment, and threats. (Objection 13).
- The ALU sought to mislead voters about dues Associates would have to pay if the ALU prevailed. The ALU's messaging contained misrepresentations and numerous shifting and misleading explanations about dues, most of which plainly contradicted the ALU's own governing documents. This messaging culminated in Mr. Smalls' impermissible promise to the entire bargaining unit that Associates would not have to pay dues until the ALU secured a collective bargaining agreement with wage and benefit improvements. The ALU's failure to file any documents outlining its formal

dues and fee structures with the Department of Labor, as every union is required to do by federal law, prevented Associates from evaluating the credibility of the ALU's promises. Moreover, the ALU's misrepresentations about dues constituted an objectionable promise. (Objections 14, 21).

- The ALU sought to influence voters by misleading them about the role other unions would have in representing Associates. Multiple Associates testified that an ALU organizer said the Teamsters would take control if the ALU prevailed in the election. Moreover, ALU propaganda contained the logos of other unions, such as Unite Here, UFCW, and OPEIU, and claimed that the ALU would be supported by other major labor organizations. These ALU representations constitute objectionable behavior as they reasonably could confuse voters as to which labor organization would actually represent them after the election. (Objection 18).
- The ALU used a light projector to project inflammatory messages about Amazon on the front façade of the JFK8 building in the evenings and early morning leading up to the election. (Objection 20).

A significant portion of the evidence in the record supporting Amazon's objections comes not just from Amazon witnesses, but from Mr. Smalls himself, as well as several of the ALU's other officers and agents. In his efforts to gain attention and publicity around his organizing efforts, Mr. Smalls documented his actions on an almost daily basis. Through social media channels like Twitter, TikTok, YouTube, and Facebook live, Mr. Smalls routinely posted videos, photos, and messages, many of which Amazon introduced into the record, that constitute running admissions to much of the conduct alleged in Amazon's objections.

Amazon's evidence proves not only the ALU's misconduct, but also Region 29's objectionable conduct. Much like the ALU, the improperly appointed "representatives" for Region 29 chose first to obstruct the creation of the record, and then not to put on a case at all. The key witnesses responsible for Region 29's decisions outright refused to cooperate—declining to testify or provide any documentation relevant to Amazon's objections. The Region should suffer the same adverse consequences of that decision; namely, that much of Amazon's evidence of the Region's disastrous mishandling of the election stands unrebutted and undisputed in the record.

At the Region's insistence, the election took place in the JFK8 parking lot in a large tent, rather than inside the employer's facility, which is the Board's long-standing preference. While this arrangement facilitated a manual election, it also meant that voting took place out in the open, in an area of Amazon's property that was not access-controlled and that any member of the media or the ALU could access if they were so inclined. Region 29 required Amazon to cover all of its outside surveillance cameras and to keep its operations management personnel away from the JFK8 parking lot—effectively blinding the Company as to what was occurring in that area of its property. This left Region 29 as the only entity with any authority (or, practically, ability) to control what was going on in and around the no-electioneering zone and NLRB polling area. *See Amazon.com Servs. LLC*, Case 10-RC-269250, Decision and Direction of Second Election at 6 (Nov. 29, 2021) (not reported in Board volumes) ("Representation elections are to be conducted under the Board's exclusive direction and supervision as it is the very federal agency tasked with upholding employee rights under the Act.").

The Region, however, completely failed to do so. It allowed news media and various multimedia production personnel—including Steven Maing, the ALU President's documentary filmmaker—to encroach into Amazon's private property, roam freely in the no-electioneering

zone, photograph, film and even interrogate voters about how they intended to vote while they were standing in line at the NLRB election. Those interviews were then broadcast across the globe. Consequently, voter participation likely was chilled when Associates who did not vote on March 25th saw images of their co-workers on national television being pressured to disclose how they intended to vote.

The record additionally shows that, among other things:

- Region 29 initiated a very public and extraordinary lawsuit against Amazon less than a week before voting began, seeking the reinstatement of former JFK8 employee Gerald Bryson. Region 29 ignored all internal guidance and initiated this proceeding more than twenty-three months after Mr. Bryson's discharge and more than fourteen months after the beginning of the ULP trial in his case. It is totally implausible to think that after all that time, the Region's decision to seek an injunction on the eve of the election was a coincidence. In fact, the Region admits its intention to influence the election in its moving papers. Region 29's public efforts to obtain an injunction against Amazon just days before the start of the election painted Amazon in a false, misleading, and inflammatory light, while also advertising to voters that the Region had chosen a side. Regional Director Kathy Drew-King's public statements to the press specifically tied the 10(j) injunction to the impending election at JFK8 and deliberately intended to influence the outcome of the election. (Objection 1).
- Region 29 grossly mismanaged the first day of the election, setting in motion a series of events that undermined Associate confidence in the integrity of the voting process, and reduced voter turnout. In addition to the media frenzy described above, Associates testified about the utter chaos on the first day of the election that resulted

in voting starting late and long lines in which Associates had to wait hours to vote. (Objections 6-8).

- Region 29 failed to prevent the ALU from improperly electioneering during the election. In undisputed testimony, numerous hourly witnesses testified to seeing Mr. Smalls and other ALU leaders and agents in or within view of the no-electioneering zone during voting, which also gave the impression to voters that Mr. Smalls was monitoring who was voting. Notably, Mr. Smalls never once denied this testimony. Undisputed evidence in the record proves that: (1) at least one ALU organizer was actually electioneering inside the voting tent; (2) ALU agents and representatives stood inside and just outside the tent (obviously permitted by Board Agents) and talked to and directed voters on where to go inside the tent, a job that, by law, is exclusively within the duties of Region 29 and for which it should have properly staffed the election; (3) a group of five ALU agents held prolonged conversations with voters waiting in line to vote, without being stopped by Board Agents; and (4) the Region left four or five voting booths unused under a table the entire election instead of using them for voters. (Objection 9).
- Region 29 discriminated against voters wearing pro-company paraphernalia, while allowing many voters to wear the ALU's yellow "Vote Yes" lanyard while in the voting area. Specifically, Region 29 Board Agents told voters they had to cover up pro-company shirts and buttons but allowed pro-union paraphernalia, such as lanyards, shirts, and buttons, to be displayed in the voting tent. Indeed, an ALU observer who served at six of the ten voting sessions admitted that Region 29 Board Agents specifically told the observers to report any persons wearing "vote no" shirts

to them. The ALU observer was never told to report voters wearing "vote yes" paraphernalia to the Board Agents, which witnesses established was prevalent in the voting area. (Objections 10).

- Region 29 gave the appearance of supporting the ALU in the election by failing to follow the Board's own processes and procedures, which facilitated the ALU's narrative that Amazon was a rulebreaker and that the ALU had more Associate support than it actually did, including: (1) delay in processing the ALU's multitude of bare-bones, meritless charges; (2) allowing the ALU to proceed to election without the requisite 30% showing of interest; (3) allowing the ALU over an extra month to continue gathering late authorization signatures; and (4) unilaterally altering the scope and size of the petitioned for unit. These actions facilitated the ALU's narrative that the ALU enjoyed more Associate support than it actually did. (Objections 2-5).

Any of these actions alone entitle Amazon to a second election. The confluence of all of them necessitates a rerun election.

Like the ALU, Region 29 had every opportunity to produce evidence or testify in its defense. The Regional Director and her personnel responsible for all of the foregoing, however, refused to do so, notwithstanding Amazon's efforts to call them as witnesses, leaving all of the evidence unrebutted. Given how vocal Region 29 was with respect to Mr. Bryson's 10(j) action, their deafening silence and refusal to explain away these circumstances in the context of this proceeding speaks volumes about their lack of confidence in the conduct of this election.

Amazon opened this Hearing by quoting the NLRB's pivotal standard for safeguarding the integrity of its elections:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to

> determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

General Shoe, 77 NLRB 124, 127 (1948) (footnote omitted).

When all of the evidence is considered, the Hearing Officer has no choice but to agree that the actions of Region 29 and the ALU made a free and fair election impossible and plainly interfered with laboratory conditions. The Associates at Amazon's JFK8 facility deserve a free and fair election. Region 28 should order a second election at JFK8, so that the uncoerced desires of the Associates may be known, and respected.

II. FACTUAL BACKGROUND

A. The Petition for Election

The ALU filed its Petition for Election on December 22, 2021, with Region 29 of the National Labor Relations Board. The ALU sought to represent "[a]ll hourly full-time and regular part-time fulfillment center associates employed at the JFK8 Building located at 546 Gulf Avenue, Staten Island, NY 10314." (EMP 0138). The ALU and Amazon (collectively, the "Parties") entered into a Stipulated Election Agreement dated February 16, 2022, which governed the terms of the election (the "Agreement"). (EMP 0182). The Agreement was recommended by Board Field Examiner Ioulia Fedorova and approved by Regional Director Drew-King. (EMP 0182). The Agreement provided that a secret ballot election would take place in a large, outdoor tent to be erected in Amazon's parking lot in front of the main entrance to the JFK8 facility. The election was scheduled to occur on Friday, March 25; Saturday, March 26; Monday, March 28; Tuesday, March 29; and Wednesday, March 30 during the hours of 8:00 a.m.-1:00 p.m. ("morning voting session") and 8:00 p.m.-1:00 a.m. ("evening voting session")

(the morning voting session and evening voting session is collectively referred to as the "election period"). (Donaldson, 305:19-22, 309:17-22; EMP 0182 at § 4).

Following the election, Region 29 counted the ballots on Thursday, March 31, 2022, and Friday, April 1, 2022. (EMP 0164, EMP 0182 at § 13). Out of approximately 8,325 eligible voters, 2,654 voters cast ballots for representation by the ALU, and 2,131 voters cast ballots against representation. (EMP 0164). The Parties challenged a total of 67 ballots. (EMP 0164). There were 17 void ballots. (EMP 0164). 3,473 eligible voters did not vote in the election. (EMP 0164). Overall, voter turnout was approximately 69.6% of all eligible voters, an unusually low number for a manual election. *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 3 (2020) (noting an 85.2% turnout in manual elections between October 2019 and March 2020). (*See* EMP 0164).

On April 8, 2022, Amazon timely filed 25 objections to conduct by Region 29 and the ALU affecting the results of the election. (EMP 0656). Because Amazon's objections alleged misconduct by Region 29, Amazon requested the objections proceeding be transferred out of Region 29 and to a neutral Region for further processing. (BD 1(i) at C). On April 14, 2022, NLRB General Counsel Jennifer Abruzzo granted Amazon's request and transferred the case to Region 28. (BD 1(i) at C.). The Regional Director for Region 28 set all 25 objections for a hearing (the "Hearing"). (BD 1(a)). The Hearing took place by videoconference on various days from June 13, 2022 to July 18, 2022.

B. The Parties

1. <u>Amazon's Operations and its JFK8 Facility in Staten Island, New York</u>

Amazon.com Services LLC ("Amazon," the "Company," or "Employer") is a Delaware limited liability company engaged in the retail sale of consumer products throughout the United States. (EMP 0182 at § 2). The Company operates a large fulfillment center located at 546 Gulf

Avenue, Staten Island, New York, formally known as JFK8 ("JFK8" or "JFK8 facility"). (EMP 0182 at § 2). Amazon leases specific property in and around the JFK8 facility; and JFK8 has a distinct border around its property. (Troy, 1659:11-1676:14; EMP 0708-B). Amazon employs 6,000 to 8,000 hourly employees at the JFK8 facility, depending on the time of year.[1] The hourly employees consist of Tier 1 and Tier 3 employees, and are referred to as "Associates."[2] (Donaldson, 181:25-182:13, 182:19-183:01).[3] Amazon also has several managers who oversee JFK8, including Zachary Marc (Assistant General Manager, JFK8),[4] and Tyler Grabowski (Human Resources Manager, JFK8). (Marc, 2381:10-11; Grabowski, 2516:10). Other Amazon managers, like Chaka Donaldson (Principal, Employee Relations), Michael Spinella (Principal, Employee Relations), Joe Troy (Regional Loss Prevention Manager), Barbara Russell (Director of Employee Relations), and Ally Miller (Human Resources Business Partner) do not work day-to-day at JFK8, but provide varying levels of support to the facility, including during Amazon's

[1] Hearing Officer Dunn excluded testimony and documentary evidence from Amazon (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) proving that at the time of the ALU's petition filed on December 22, 2021, the petitioned-for bargaining unit at JFK8 included at least 7,500 hourly Associates. (Rogers, 2252:25-2258:7; Dunn, 2258:8-2259:10).

[2] Tier 1 Associates are entry level employees that are put into "path," i.e., a certain job area, such as picking products off the shelves and placing them in boxes. (Donaldson, 181:25–183:1). Tier 3 Associates are generally Process Assistants. (Donaldson, 181:25–183:1). They typically start out as Tier 1 Associates and are promoted to Tier 3 Associates, resulting in them having additional oversight responsibilities. (Donaldson, 181:25-183:1).

[3] Each of the Associates who testified during the Hearing were either Tier 1 or Tier 3 Associates and members of the bargaining unit at the time of the election. (Vaidya, 2068:7-2069:3; Laporta, 2121:8-2122:7; Nicoletti, 2191:25-2192:21; Kanzler, 2163:20-2164:8; Aluqdah, 2217:12-2218:2; Rosario, 3320:11-3321:4; Villalongo, 2787:1-10; Oyalaja, 2486:19-2487:7; Mohapeloa, 3339:17-3340:4; Martinez, M. 3282:4-3283:11; Matos, 3230:1-23; Martinez, A., 3265:15-3267:12; Momodu, 3353:2-15; Baltazar, 1445:17-1446:7; Adenji, 1485:7-1486:3; Rentas, 1509:13-1510:15; Abreu, 1370:7-1371:5; Sanchez, 1333:10-1334:18; Campbell, 1548:14-20; Lopez, 2697:20-2698:16; Christie, 2685:1-21; Litto, 2757:15-2758:7; Menelas, 3191:22-3192:25; Fray, 1577:18-1578:13; Gordon, 1630:16-1631:2; Delancey, 1226:25-1227:8; Castellano, 1091:13-1093:4; Cordova, 1283:16-1284:17; Asad, 1188:17-1189:6; Facey, 1150:17-1152:3; DeLeon, 630:22-632:21; Famiglietti, 574:14-575:5; Grajeda, 742:8-744:15; Purpura, 682:1-25; Friscia, 3113:13-3114:20; Rosado, 3060:23-3061:14; Jaramillo, 3136:12-3137:13; Martinez, K., 1997:9-1998:15; Martinez, Me., 2027:24-2028:7; Parker, 3023:9-3024:4; Monarrez, 3955:18-3956:1; Viernes, 2941:8-2942:3; Novoa, 2849:12-2850:1; Chu, 834:11-835:13; Goriva, 885:22-886:18; Tredici, 972:18-973:13; Parent, 1041:7-24).

[4] Mr. Marc is the Assistant General Manager at JFK8 and has been in that role since the end of 2020. (Marc, 2381:1-13). As the Assistant General Manager, Marc is responsible for overseeing the day to day operations of the facility, as well as enforcing Amazon's rules and policies. (Marc, 2382:9-17).

campaign at JFK8. (Donaldson, 168:16-17; Spinella, 4801:13-4803:6; Troy, 1651:20-21; Russell, 2270:8-9; Miller, 2956:6).

2. <u>The ALU, its Officers, Organizers, and its Core Organizing Efforts</u>

The ALU is a labor organization seeking to represent Associates at JFK8 related to grievances, labor disputes, wages, rates of pay, hours, and terms and conditions of work. (EMP 0182 at § 3). Christian Smalls is the Interim President of the ALU, and has held that role since November 2021 (Smalls, 4517:12-24). Since the ALU's inception and continuing up until the election, Mr. Smalls made his presence known to Associates at JFK8, often appearing on and around the property in his efforts to sign up Associates to the ALU. (Aluqdah, 2226:14-2227:11; Smalls, 4624:17-4625:14; Spinella, 4812:13-4814:5; Medina, 3714:13-19). In November of 2021, the ALU membership "democratically elected" several individuals as officers, including Mr. Smalls as Interim President, Connor Spence and Derrick Palmer as Vice Presidents, Karen Ponce as Secretary, and Madeline Wesley as Treasurer. (Smalls, 4517:12-24, 4519:14-23; Spence, 4305:8-14; Medina, 3714:13-17, 3715:19-3716:1). Mr. Smalls, Mr. Spence, Mr. Palmer, Ms. Ponce, and Ms. Wesley held these positions throughout the critical period.[5] (Spence, 4305:8-14; Medina, 3711:21–25, 3715:11–18, 3715:19-3716:6).

During the critical period, the ALU created an Organizing Committee that met weekly. (Spence, 4315:11-15). Members of the Organizing Committee would communicate with

[5] The Board has identified a "critical" time period for identifying conduct that can be reviewed in connection with representational elections. *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). The critical period generally runs from the day on which the election petition is filed until the day of the election. *See In Re Stericycle, Inc.*, 357 NLRB 582, 586 (2011); *but see Nat'l League of Pro. Baseball Clubs*, 330 NLRB 670, 676 (2000) (conduct outside critical period can be considered in some circumstances). The Board focuses on this time period because the probability that coercion or other improper influence will affect employees' choice is at its highest, justifying special scrutiny of employer and union actions. *NLRB v. Wis-Pak Foods*, 125 F.3d 518, 521 (7th Cir. 1997). Here, the ALU filed its first petition on October 25, 2021 (Case No. 29-RC-285057). The critical period for this case should run from the filing of the first petition on October 25, 2021. The same underlying considerations and concerns (e.g., that coercion or other improper influence is at its highest) exist from the timing of the October 25, 2021 petition. The ALU was a constant presence at JFK8 at that time, publicized the filing of their petition, and were actively campaigning in order to garner support from Associates for an upcoming election.

Associates on behalf of the ALU. (Spence, 4315:16–19). During the critical period, Angelika Maldonado served as the Chair of the Organizing Committee and Brett Daniels served as the Director of Organizing. (Spence, 4307:14-4308:3). Mr. Smalls, Mr. Spence, Mr. Palmer, Ms. Ponce, Ms. Wesley, Ms. Maldonado, and Mr. Daniels comprised the ALU's Executive Board.[6] (Spence, 4305:9-14, 4306:15-4308:10).

In order to campaign and communicate with Associates, the ALU set up tables outside of JFK8, as well as in the interior break areas of the facility, prior to and during the critical period. (Spence, 4323:2-7). From April 2021 until December 2021, the ALU consistently set up a tent and tables near the MTA bus stop across the street from JFK8 (off of Amazon's property) on Frank Gay Blvd. (Anthony, 3642:18-3643:9). Starting in mid-December of 2021, the ALU shifted its primary location away from the MTA bus stop and began to set up tables inside and directly outside of the JFK8 building itself (on Amazon's property) to campaign and communicate with JFK8 Associates. (Anthony, 3643:17-22). On the interior of the facility, the ALU would commandeer tables in the various break areas throughout JFK8. (Medina, 3749:16-3750:6). On the exterior, the ALU would set up tables in two locations: close to the JFK8 main entrance and on the northeast corner of JFK8 directly outside the Workforce Staffing Office. (Medina, 3830:20-3831:1). The ALU maintained a consistent presence at these locations from mid-December 2021 through the end of the critical period. (Anthony, 3443:23-3644:9).

Regardless of the location, ALU representatives at these tables distributed ALU T-shirts, lanyards, food, marijuana, and flyers, and spoke with Associates trying to convince them to sign authorization cards and/or vote for the ALU. (Monarrez, 3997:13-3998:14; Medina, 3759:21-3760:7; Fray, 1623:19-1624:2; Martinez, K., 2022:7-13; Rosario, 3329:21-25; EMP 0232-A,

[6] Counsel for ALU has stipulated that from December 22, 2021 to March 31, 2022, Chris Smalls, Connor Spence, Derrick Palmer, Karen Ponce, Madeline Wesley, Angelika Maldonado, and Brett Daniels were agents of the ALU. (4137:11-20).

EMP 0717, EMP 0860, EMP 0860-v, EMP 2805, EMP 2805-v, EMP 2923, EMP 2923-v, EMP 2926, EMP 2926-v). The ALU representatives working at the campaign tables would wear ALU paraphernalia. (Spence, 4325:14-20; Medina, 3759:21-3760:7, 3763:7-24, 3764:8-3765:17). The ALU also had a tent set up outside of JFK8 every day during the critical period in order to solicit support. (Anthony, 3600:9-12).

During the critical period, and in addition to its tables and tent, the ALU communicated with bargaining unit Associates by sending text messages, phone banking, and visiting the homes of the Associates. (Spence, 4351:11-4352:15; Anthony, 3588:6-9, 3592:18-3593:4; Medina, 3734:12-3735:5, 3746:10-12). To further disseminate its campaign messaging, the ALU created and used accounts on several social media platforms, including Twitter, Facebook, Instagram, TikTok, Slack, and Telegram. (Spence, 4375:22-24, 4377:18-22, 4389:18-20; Anthony, 3493:6-3502:13; Smalls, 4526:18-4528:14; Monarrez, 4060:8-12, 4061:19-25; Daniels, 4155:25-4156:7).

Jason Anthony served as a lead organizer for the ALU since its founding. (Anthony, 3588:6-9, 3463:19-3646:1). In this role, Mr. Anthony created the ALU's Facebook group and was an administrator of both the ALU's Facebook group and Facebook page during the critical period. (Anthony, 3493:6-3502:13). Mr. Anthony also recorded several videos on behalf of the ALU that were both provided to the media and disseminated through the ALU's multiple social media channels. (Anthony, 3523:17-3524:3, 3560:22-25; EMP 0303, EMP 0304-v, EMP 0344, EMP 0344-v, EMP 0662, EMP 0757, EMP 0757-v, EMP 0758, EMP 0758-v, EMP 3001, EMP 3002). As a lead organizer, Mr. Anthony communicated the ALU's agenda to Associates, as well as the public at large, by several different means, including phone banking, engaging voters and handing out flyers at the ALU's table in the breakroom, distributing yellow "Vote Yes" lanyards

to employees, and speaking at ALU press conferences and rallies. (Spence, 4326:21-4327:6; Anthony, 3588:6-3593:4, 3593:20-3594:1; EMP 0232-A, EMP 0725, EMP 2808, EMP 2808-v). Mr. Anthony was also a routine presence at the ALU's campaign tent located outside of JFK8. (Anthony, 3600:9-12; EMP 2808, EMP 2808-v). During the election, Mr. Anthony served as an Observer for the ALU, on March 25 and March 29, 2022. (Anthony, 3644:24-3645:3, 3464:16-19; EMP 2927).

Justine Medina is a member of the ALU's Organizing Committee. (Medina, 3700:10-3701:7). Ms. Medina communicated the ALU's agenda to Associates through several different means. For example, Ms. Medina printed out thousands of flyers to give to Associates and came in to JFK8 on her off days to campaign on behalf of the ALU. (Medina, 3716:12-16, 3742:19-24, 3743:12-3745:3). Additionally, Ms. Medina, unannounced, would show up at Associates' homes on behalf of the ALU in an effort to convince Associates to vote for the ALU. (Medina, 3745:15-3746:20; Vaidya, 2085:25-2086:14, 2092:5-18). Ms. Medina phone banked on behalf of the ALU twice a week—communicating the ALU's agenda directly to Associates. (Medina, 3746:21-3747:22, 3749:8). Ms. Medina also recruited individuals to volunteer at the ALU's phone banks. (Medina, 3919:5-10). Ms. Medina was a speaker at ALU rallies, in which ALU officers also spoke. (Medina, 3872:11-3874:3; EMP 0135-v).

As part of her role in the ALU, Ms. Medina campaigned at the ALU table in the breakroom at JFK8. (Medina, 3749:16-22). There, Ms. Medina would flag down passing Associates and attempt to garner support for the ALU by discussing with Associates the importance of having a union, as well as the details of the contract the ALU planned to negotiate with Amazon. (Medina, 3756:20-3758:3). Additionally, Ms. Medina handed out ALU pamphlets, lanyards, T-shirts, and pins with the intent of persuading Associates to support the ALU.

(Medina, 3756:20-3758:3). While working at these tables, Ms. Medina would wear her ALU shirt and other ALU paraphernalia. (Medina, 3759:21-3765:17). During the critical period, Ms. Medina assisted in writing a newsletter on behalf of the ALU, served as an administrator of the ALU's Facebook group, gave interviews to the media related to her role in the ALU, and solicited donations to the ALU. (Medina, 3768:9-24, 3769:12-16, 3780:10-13, 3894:22-24).

Cassio Mendoza was a lead organizer of the ALU during the critical period and served as an Observer on behalf of the ALU for five separate days (six voting sessions in total) of the election. (Mendoza, 5015:5-22; Anthony, 3511:24-3512:7). Mr. Mendoza was also one of the ALU officials responsible for creating campaign content to post to the ALU's TikTok page. (Anthony, 3509:23-3510:6, 3512:8-11).

C. Amazon's Informational and Communications Campaign for JFK8 Associates

1. <u>Amazon Held Small Group Meetings, Posted Signage, and Circulated Flyers around JFK8</u>

In response to the ALU's organizing activities, Amazon conducted a lawful communications campaign at JFK8. (Donaldson, 178:2-15). As part of this campaign, Amazon held small group meetings to provide Associates basic information about the then-upcoming election, their employment with Amazon, information about the ALU, and union life in general. (Donaldson, 178:2-15). These meetings were held during the working time of the Associates attending the meetings, in two JFK8 meeting rooms typically used for work-related meetings and training sessions, one of which is called the Day 1 Training Room. (Donaldson, 180:21-181:20). Associates were paid for their time attending the meetings, and those who refused to attend were neither disciplined, nor threatened with discipline. (Donaldson, 190:23-25).

Amazon's Employee Relations (ER) team typically conducted small group meetings in pairs. (Donaldson, 180:22-181:7). The meetings were carefully scripted and the presenters were

provided pre-prepared PowerPoint presentations and written talking points to discuss during the small group meetings. (Donaldson, 181:10-24). In order to ensure that every Associate had a chance to participate in these meetings, and in accordance with COVID-19 safety precautions, small groups of Associates, usually around 20-30 Associates to a group, were scheduled to attend specific meetings throughout the day. (Donaldson, 183:7-9; Miller, 2958:14-24). Associates were invited to attend a particular meeting based on their work schedule, availability, and whether or not they had previously attended that week's meeting. (Donaldson, 488:6-16; Miller, 2959:9-20). Amazon stationed Area Managers outside the meeting rooms to help with attendance. These Area Managers would scan the employee ID badges of attendees so that the Company was able to keep track of who had attended a meeting and who had not. (Miller, 2959:21-2960:10).

The meetings typically lasted 30 minutes and were scheduled approximately every 45 minutes. (Donaldson, 183:20-184:10, 491:22-23). Meetings typically began at 8:00 a.m. every morning and ran until 4:00 p.m. (Donaldson, 183:20-184:10, 491:22-493:8). There was a break in meetings for shift change, which was from 5:00 p.m. to 7:00 p.m., and meetings resumed again at 8:00 p.m. and ran until 4:00 a.m. (Donaldson, 184:2-3, 492:21-493:23). While meetings were scheduled to run continually during each day, Associates generally only attended one meeting every week or two. (Donaldson, 183:10-184:10). Thus, the imposition on each individual Associates' time was minimal.

In addition to holding small group meetings, Amazon communicated with Associates through written communications such as table toppers, installments, and posters. (Donaldson, 179:10-180:6, 282:13-23, 283:4-9). In mid-February of 2022, Amazon hung posters throughout the JFK8 building, including on the walls in the hallway near the bathrooms and the main break area. (Donaldson, 282:24-283:12, 284:19-285:7).

2. **The ALU Shut Down Amazon's Small Group Meetings and Destroyed Amazon's Campaign Materials**

Amazon began its small group meeting presentations on February 7, 2022. (Donaldson, 487:10-12). The 11:00 a.m. meeting on February 7, 2022 was facilitated by ER Jumpers Ally Miller and Will Thurmond. (Miller, 2961:6-2962:9). Just as Mr. Thurmond began his presentation in the Day 1 Training Room, a group of ALU officers and agents who had not been badged into the meeting room as attendees suddenly and loudly invaded the Day 1 Training Room through an unmonitored side door. (Donaldson, 180:21-181:9; Miller, 2965:14-2967:1; Adenji, 1487:16-23; EMP 0304-v, EMP 0581). They chanted pro-union messages, distributed ALU literature and shouted at Amazon's presenters, essentially discontinuing the presentation. (EMP 0304-v, EMP 0581). Meeting attendants were startled by the ALU's abrupt, aggressive, and threatening entrance. (Adenji, 1495:16-19; EMP 0581). Chevalli Facey testified that she "was scared. I was shocked. I didn't feel comfortable at all. I don't know what they were there for. I did not know whether they had weapons or anything. It was just different. I didn't know them." (Facey, 1155:5-9). A video from Amazon's closed-circuit television surveillance system (CCTV) captured the entire event. (Troy, 1902:15-1903:1; EMP 0581).

Among those intruders who interrupted the meeting were ALU officers and agents Connor Spence, Derrick Palmer, Justine Medina, Karen Ponce, Angelika Maldonado, Brett Daniels, and Jason Anthony. (Donaldson, 207:1-24, 208:22-215:5, 268:21-269:3; Anthony, 3526:9-17; EMP 0581). Their singing, chanting, loud snapping, handing out ALU flyers, and cross-talk over Mr. Thurmond made it impossible for him to continue with the presentation. (Donaldson, 207:17-24; Miller, 2966:10-18; Adenji, 1494:15-1495:19; Castellano, 1096:12-1097:12; EMP 0581). Mr. Anthony had his cell phone out and was recording a video throughout the invasion, which would later be posted onto several of the ALU's social media sites, as well

as exclusively provided to news media outlets by Mr. Anthony. (Donaldson, 200:22-201:11; Castellano, 1096:12-1097:12; Adenji, 1495:6-11; EMP 0304-v, EMP 3000, EMP 3001). Immediately after entering the room, Mr. Palmer closely approached Robert Castellano, aggressively pointed his finger in Mr. Castellano's face, and said, "I know you, I trained you . . . . You're just a PA. You don't know anything." (Castellano, 1105:3-23; *see also*, EMP 0304-v, EMP 0581). Associates who were in attendance at the meeting were upset that they were being filmed. (Donaldson, 200:21-201:11; Castellano, 1096:12-1097:12; EMP 0304-v).

At approximately 11:15 a.m., Ms. Donaldson, who had been alerted to the disturbance by Mr. Spence (it remains unclear why Mr. Spence sought to alert Amazon management about a disturbance he created), entered the Day 1 Training Room to assist Mr. Thurmond and Ms. Miller. (Donaldson, 187:7-8; Donaldson, 190:7-21). When Ms. Donaldson arrived, she observed the disruption and directed the uninvited ALU officers and agents to be quiet and settle down. (Donaldson, 199:12-20). They refused, and after a few more minutes of continued disruption, Ms. Donaldson signaled to Mr. Thurmond and Ms. Miller to conclude the meeting. (Donaldson, 216:2-11, 301:20-302:6; Miller, 2977:12-16). Ms. Donaldson instructed everyone in attendance to leave the room and go back to work, and despite the fact that all of the Associates who had been invited to the 11:00 a.m. meeting left the room as instructed, the ALU disruptors still refused to leave. (Donaldson, 216:2-11, 217:16-219:10, 222:2-223:7; EMP 0581). Mr. Palmer stated that they intended to stay for the 11:45 a.m. meeting. (Donaldson, 217:21-218:4). Mr. Spence, Mr. Palmer, Ms. Medina, Ms. Ponce, Ms. Maldonado, Mr. Daniels, and Mr. Anthony refused Ms. Donaldson's direction to leave and remained in the room. (Donaldson, 222:22-223:7 EMP 0581).

At 11:45 a.m., when the next meeting was scheduled to begin, the ALU disruptors remained present in the meeting room. (Donaldson, 223:3-7; EMP 0304-v, EMP 0581, EMP 0662). Mr. Anthony still had his cell phone out and continued to record events as they unfolded. (Donaldson, 227:19-22; EMP 0304-v, EMP 0581, EMP 0662). Felipe Santos, the General Manager of JFK8, entered the room and asked that everyone who had not been invited to the meeting, to please leave the Day 1 Training Room. (Donaldson, 225:9-24; EMP 0304-v, EMP 0581, EMP 0662). He repeated this directive three times, but the ALU disruptors refused each time. (EMP 0304-v, EMP 0581, EMP 0662). Amazon's ER personnel began their presentation but, shortly thereafter, were forced to end the meeting prematurely because the ALU members continued to be disruptive and refused to either leave or let Amazon proceed with its presentation; instead, the ALU members reiterated that "they are going to shut it down." (Donaldson, 301:10-302:3, 514:20-515:11; Castellano, 1104:11-15; EMP 0304-v, EMP 0581, EMP 0662; EMP 0789). The next five meetings that were scheduled to be conducted during that same shift were cancelled as well because of the concern and belief that the ALU's disruptions would continue, given the ALU's deliberate plan to stop Amazon from communicating to Associates by "shutting down" the small group meetings. (Donaldson, 302:7-19).

Following these disruptions, the ALU and its officers and agents publicly commented and posted on social media about these meetings and their success in shutting them down. (Donaldson, 274:23-275:15, 514:20-25; EMP 0662, EMP 0754, EMP 0754.1). Mr. Smalls, Mr. Daniels, Mr. Anthony, Ms. Medina, and Mr. Palmer all separately tweeted multiple times that the ALU succeeded in its plot and had "shut down Amazon's meetings" and made this a focal point of their campaign messaging. (Donaldson, 274:23-275:15, 280:22-281:5, 281:18-25; Anthony,

3530:11-20; EMP 0302, EMP 0303, EMP 0583, EMP 0583.1, EMP 0583.2, EMP 0584, EMP 0779, EMP 0791).

A few weeks after the February 7, 2022 small group meetings and less than twenty-four hours after Amazon began to hang campaign posters in the building, the ALU, through the actions of its officers and agents Derrick Palmer, Connor Spence, Justine Medina, and Brett Daniels, destroyed several of Amazon's informational posters. (Donaldson, 284:16-300:13). Their destruction of Amazon property was caught on Amazon's CCTV. (Donaldson, 283:18-284:8; EMP 0308.1, EMP 0308.2, EMP 0309, EMP 0310). Amazon's CCTV recordings of the incidents show Mr. Palmer, Mr. Spence, Ms. Medina, and Mr. Daniels each, separately, rip down, tear up, and discard Amazon's posters in different hallways inside of JFK8 and near the breakroom. (Donaldson, 284:16-18, 293:3-13, 295:22-296:3, 297:16-298:10; Daniels, 4205:15-22; Spence, 4436:16-19; Medina, 3915:3-9; EMP 0308.1, EMP 0308.2, EMP 0309, EMP 0310).

The ALU, however, did not stop there. This destructive behavior was not only endorsed by the ALU, but Mr. Smalls, Mr. Palmer, Mr. Spence, and other ALU officers and organizers all actively encouraged Associates to follow the example set by Mr. Palmer, Mr. Spence, Ms. Medina, and Mr. Daniels and engage in the same or similar destructive activities, and to then send Mr. Smalls and the ALU photos to use in interviews and for the ALU's campaign. (Monarrez, 3973:13-23, 3974:9-17, 3975:8-3976:9, 3977:3-3978:9).

The ALU and its officers encouraged Associates to post videos or photos of their acts of destruction on the Telegram app, in which case Mr. Smalls and other ALU agents would respond with messages of affirmation and encourage others to do the same. (Monarrez, 3977:3-3978:9, 3981:2-3983:19, 3988:13-3990:12). The ALU's officers, including Mr. Smalls, never instructed anyone from the ALU or the bargaining unit to stop removing and/or destroying "Amazon's

propaganda," in the name of ALU organizing; in fact, Mr. Smalls not only "encouraged it" but he told over 150 Associates that "everybody should be doing it" and they should be "aggressive and proactive." (Monarrez, 3991:5-3992:14, 3973:13-23, 3977:3-3978:9).[7]

D. The ALU Engaged in Objectionable Misconduct during the Organizing Campaign to Improperly Influence JFK8 Associates

1. <u>The ALU Unlawfully Distributed Marijuana to JFK8 Associates to Gather Authorization Cards and Influence Voters</u>

During and before the critical period, the ALU sought to buy Associates' support in the election by, among other things, offering Associates free marijuana. The ALU openly admits it distributed marijuana to JFK8 Associates to secure additional support for its second petition. Some—but not all—of the ALU officers and organizers conveniently claim to have ceased the practice upon filing the ALU's second petition on December 22, 2021.[8] However, testimony from eight Associates, as well as from both the Interim President and Vice-President of the ALU, establishes that the ALU's practice of distributing marijuana to sway voters continued in January, February, and March 2022.

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[7] Despite being ordered to produce these relevant and responsive messages to Amazon's subpoena, the ALU and its officers failed to produce any messages or other documents from Telegram for a host of self-serving and flimsy reasons – ranging from Mr. Smalls obtaining "a new device and [not] download[ing] it" all in the time period between receiving his Subpoena Duces Tecum and the day he testified, to (b) (6), (b) (7)(C) urinating on a cell phone that contained responsive documents on the very day that the ALU won the election, and thus destroying the contents of the phone and anything on it that existed before the tally of ballots. (Smalls, 4528:15-4529:3; Maldonado, 4224:22-4225:21). In any event, and despite the fact that personal cell phone data/documents are saved to the cloud/iCloud (depending on the phone), the failure to produce these messages not just should, but must result in an adverse inference to the contents contained therein.

[8] Hearing Officer Dunn excluded any and all testimony and documentary evidence offered by Amazon evidencing the ALU's persistent and well-publicized distribution of marijuana prior to December 22, 2021, including a video of Mr. Smalls giving out marijuana on December 21, 2022, hours before the petition was filed on December 22, 2021. Quizzically, Hearing Officer Dunn also refused to admit relevant statements made by Mr. Smalls *after* March 30, 2022 because, allegedly, they somehow did not relate to the critical period, even though they were statements *about* conduct during the critical period. Mr. Smalls made numerous admissions, including at the popular Labor Notes Conference on June 17, 2022, that the ALU passed out marijuana to Associates because it was legal. It is not credible that Mr. Smalls was only talking about some date certain before December 22, 2021, especially as he was specifically referencing Amazon's objection in his speech. Moreover, the ALU filed its first petition in October 25, 2021, and it is undisputed that the marijuana distribution occurred after that date. (Case No. 29-RC-285057); *see also* (Donaldson, 444:16-445:1).

For instance, ALU lead organizer Ms. Monarrez[9] witnessed "Chris [Smalls] [give] out marijuana to workers in exchange for signatures." (Monarrez, 3970:24-3971:5, 3992:15-3993:5). Ms. Monarrez witnessed these exchanges near the entrance to the JFK8 Workforce Staffing Office, almost daily, from December 22, 2021 to January 26, 2022. (Monarrez, 3992:15-3993:5, 3998:18-4001:1). As Ms. Monarrez explained, Mr. Smalls "always had a large Ziploc bag full of marijuana with him." (Monarrez, 3997:13-3998:1). Mr. Smalls' possession of marijuana and the fact that he distributed it to Associates "was not a secret" Mr. Smalls "had [the marijuana] for multiple months and would openly talk about it. The workers would also openly talk about it." (Monarrez, 3998:2-14).

Numerous Associates corroborated Ms. Monarrez's testimony that the ALU distributed marijuana from the time the second petition was filed, until as recently as March 2022 (the election started March 25). Adina Goriva witnessed the ALU handing out marijuana at a table near the Workforce Staffing Office at JFK8, approximately three to four weeks prior to the election. (Goriva, 936:1-21). Next to the ALU table, Ms. Goriva observed a chalkboard with "Free Weed" written on it. (Goriva, 937:16-20). Patrick Delancey[10] similarly witnessed the ALU handing out marijuana to Associates on two separate occasions—once in January 2022 and once in March 2022. (Delancey, 1259:11-25). On the first occasion, his co-worker took some of the marijuana from the ALU and then offered it to Mr. Delancey to smell. (Delancey, 1261:10-12). He testified that his co-worker said "smell, smell, this smells really, really good. His exact words were, it smells free." (Delancey, 1261:10-12). Mr. Delancey smelled it and confirmed that it was marijuana. (Delancey, 1261:10-12). On the second occasion, Mr. Delancey actually took some marijuana from the ALU because he "wanted to see if they were really giving out weed."

[9] Ms. Monarrez testified that she was a lead organizer with the ALU from May, 2021 through January, 2022. (Monarrez, 3962:13-3963:5).

[10] Patrick Delancey is wrongly spelled in the Transcript as "Delancy."

(Delancey, 1261:23-1262:18). He went over to the ALU's table and took "a small glass container, about yea big, opened it up, smelt it, and it smelled like Gorilla Glue."[11] (Delancey, 1261:23-1262:18). Mr. Delancey knew it was the ALU providing weed to Associates because "Chris [Smalls] was there. They were handing it out." (Delancey, 1261:1-7). During the first week of March 2022, Ms. Karen Martinez[12] witnessed ALU organizer Tristian Martinez wearing an ALU T-shirt and yelling into a megaphone "free food, free T-shirts, free weed" near the JFK8 Workforce Staffing Office on the northeast corner of the building. (Martinez, K., 2007:22-2009:10, 2016:5-21, 2022:7-13).

Matthew Cordova also observed Mr. Smalls, Mr. Palmer, Mr. Martinez, and Tristan Edwards-Dutchin, another ALU organizer, distribute marijuana and T-shirts to Associates between December 22, 2021 and March 30, 2022. (Cordova, 1296:19-1297:18, 1298:19-1299:5, 1300:14-1301:5). Mr. Cordova witnessed Mr. Smalls, Mr. Palmer, Mr. Martinez, and Mr. Edwards-Dutchin providing marijuana next to a sign that declared: "Free Weed and Pizza." (Cordova, 1297:19-1298:2). In February 2022, Xiomara Rosado witnessed Mr. Smalls give marijuana to an Associate in an exterior break area at JFK8. (Rosado, 3071:25-3073:8, 3077:2-13). At the time, Ms. Rosado was taking a smoke break in the outside break area. (Rosado, 3071:25-3073:8; EMP 0712). After Mr. Smalls handed the Associate the marijuana, he then handed the Associate a white index card. (Rosado, 3078:17-3079:16). Rosado explained that the Associate signed the card and returned it to Mr. Smalls. (Rosado, 3078:17-3079:16).

In February 2022, Moises Martinez witnessed the ALU offering free marijuana to Associates from a table with a sign that said "free weed if they sign up for the ALU" outside the JFK8 Workforce Staffing Office. (Martinez, Mo., 3293:15-3295:15). Yudelka Rosario was

[11] Gorilla Glue is a type of marijuana. (Delancey, 1262:11-18).

[12] Karen Martinez is wrongly spelling in the Transcript as "Martines."

offered marijuana in exchange for her signature a few weeks prior to the election. (Rosario, 3322:2-3325:12). ALU organizers had been handing out pizza and T-shirts from the table as well in exchange for Associates' signatures, but they told Ms. Rosario that they had run out of T-shirts so they offered her marijuana instead. (Rosario, 3322:2-3325:12).

Mr. Smalls' testimony corroborated the Associates who testified that they had witnessed the ALU hand out marijuana to Associates in January and February of 2022. While Mr. Smalls claimed that the ALU only provided marijuana to Associates before the "critical period," he clarified several times that he understood the phrase "critical period" to mean the period after the ALU "had an election date." (Smalls, 4580:5-17, 4576:46-4577:11, 4562:12-4563:11). The ALU did not have an "election date" until February 17, 2022, and the Region did not provide the Parties notice that the ALU had obtained a sufficient showing of interest to warrant further processing of the Petition until January 26, 2022. (EMP 0182). As Mr. Smalls described, "[t]he reason that we gave out food during our campaign and whatever else we gave out was to get people on board to have conversations. We didn't need to pass out anything during a critical time period because we already had an election date set." (Smalls, 4562:12-22). And once the ALU had its election date, Mr. Smalls stated, "there was no need for [the ALU] to continue distributing free anything because we already had an election date." (Smalls, 4563:5-11).

2. <u>The ALU's Trespass Campaign</u>

To ensure the safety of its Associates, products, and facility, Amazon restricts access to its property in several ways. First, Amazon limits access to the interior of its facilities to individuals who are properly "leveled." (Troy, 1654:19-1655:7). Joe Troy[13] explained that being "leveled" means "Amazon [A]ssociates[s] who [are] there to perform their job function that they

[13] Joe Troy is a Regional Loss Prevention Manager for all of Amazon's fulfillment centers in the NACF region, which includes the states of New York and Connecticut. (Troy, 1651:10-1652:4). Mr. Troy has served in this role since June 2021. (Troy, 1652:9-10).

were hired for, or a contractor that [Amazon] use[s] to perform a specific role or function in the facility." (Troy, 1654:19-1655:7). Third parties are not permitted inside Amazon facilities, like JFK8, "without proper vetting and a business reason." (Troy, 1799:1-1800:1). Accordingly, Amazon does not permit the general public to enter the interior of its facilities. (Troy, 1655:11-13).

Amazon also places limitations on who may come onto its exterior properties. As it relates to areas such as parking lots, Mr. Troy testified that "[n]on-employees are permitted to drop off visitors or to drop off employees and/or deliver food to employees that may have ordered it through a food service." (Troy, 1799:19-1800:3; Marc, 2383:8-2384:2). As such, Amazon maintains and enforces policies regarding non-employee solicitation on its property. Amazon's Solicitation Policy prohibits, among other things, "[s]oliciation of any type on company premises at any time by non-associates." (Troy, 1797:13-1798:4, 1799:19-22; Marc, 2382:18-2383:11; EMP 0321).

During the ALU's campaign at JFK8, Mr. Smalls repeatedly entered Amazon's JFK8 property without permission and/or for the purposes of soliciting on behalf of the ALU. Mr. Troy explained "there were two primary locations" of Mr. Smalls' solicitation and trespass: "his solicitation activities took place on the northeast corner of the building, on the sidewalk outside of the Workforce Staffing Office. And then his interview and camera activity occurred outside of the breakroom on one of the picnic benches that we have on the front sidewalk." (Troy 1812:3-19; EMP 0322.1, EMP 0322.2, EMP 0135, EMP 0135-v, EMP 0325, fn. 1, EMP 0325.1, EMP 0325.1-v, EMP 0325.2, EMP 0325.3, EMP 0325.4, EMP 0325.4-v, EMP 0335, EMP 0344, EMP 0344-v).

Mr. Smalls' first publicized act of trespassing and solicitation occurred on December 14, 2021, which the ALU recorded and published to its TikTok account. (Troy, 1816:19-1817:2; EMP 0322.1, EMP 0322.2). The TikTok caption announces that "Amazon rerouted the business from our bus stop so we just set up in their parking lot instead." (EMP 0322.1). As the caption suggests, the associated video shows Mr. Smalls, as well as other ALU officers and agents, on JFK8 property distributing T-shirts and pizza, while soliciting Associates' signatures on authorization cards. (EMP 0322.2).

On December 15, 2021, Amazon's attorneys sent a letter to the ALU's attorney to notify the ALU that its non-employee organizers had been trespassing the day before, in violation of Amazon's solicitation policy and in blatant disregard to Amazon's property rights. Counsel for Amazon demanded the ALU "immediately cease and desist from entering onto or soliciting on Amazon's property." (EMP 0322, EMP 0322.1, EMP 0322.2).[14]

Despite this letter, Mr. Smalls and other non-employees "showed up that night [of December 15] and set up a table to solicit on [Amazon's] property." (Troy, 1840:25-1841:4). This event was streamed live on Status Coup News. (Troy, 1840:25-1842:6; EMP 0135, EMP 0135-v). The one hour and seven minute live video shows non-employees, Mr. Smalls and Mr. Bryson, as well as other ALU officers and agents, soliciting employees to sign authorization cards, and handing out beverages, pizza, and T-shirts at the northeast corner of JFK8. (Troy, 1846:5-18, 1847:3-14, 1847:18-1848:7; EMP 0135, EMP 0135-v). The video also shows Mr. Smalls shouting ALU messaging over a bull horn as he walked back and forth between the northeast corner and main entrance of JFK8, which is located several hundred feet from the area that the MTA was temporarily using as a pick-up and drop-off point (and which the ALU

[14] The ALU undoubtedly received the letter, as Mr. Smalls posted about receiving the letter on his Twitter account on December 16, 2021. (EMP 0324). Mr. Smalls also admits Amazon notified him he should not solicit on its property. (Smalls, 4605:16-4606:9).

incorrectly contends was converted into "public property" during the time MTA was using it for that purpose). (EMP 0135-v).

This event prompted Amazon to send another cease and desist letter to the ALU's attorney. On December 16, 2021, Amazon stated in a letter to the ALU that "[i]t does not . . . permit non-employees to access its private property for the purpose of solicitation [and] . . . if non-employee ALU organizers attempt to access Amazon's private property in the future, Amazon will take legal steps to protect its property rights." (Troy, 1864:6-21; EMP 0323).

Throughout January 2022, Mr. Smalls continued to ignore these clear warnings. He repeatedly entered Amazon's JFK8 parking lot to solicit in violation of Amazon's solicitation policy (thereby trespassing), and then boasted about his actions on social media. (EMP 0325, EMP 0325 fn. 1, EMP 0325.1, EMP 0325.1-v, EMP 0325.2, EMP 0325.3, EMP 0325.4, EMP 0325.4-v, EMP 0860, EMP 0860-v, EMP 0861, EMP 0861-v, EMP 2805, EMP 2805-v, EMP 2808, EMP 2808-v). For example, the ALU staged a rally on JFK8 property on Dr. Martin Luther King, Jr. Day during the critical period. (EMP 0860, EMP 0860-v). During the rally, Mr. Smalls walked all the way to the front entrance of the JFK8 facility, hundreds of yards from where the rally began, and repeatedly chanted "Fuck Jeff Bezos" into a megaphone, encouraging the assembled crowd to chant it with him in call-and-response fashion. (Daniels 4196:25-4197:21; EMP 2805, EMP 2805-v). The ALU then posted a video of Mr. Smalls' actions to social media. (Daniels 4196:7-18; EMP 2805, EMP 2805-v).

A week later on February 9, 2022, Mr. Smalls unlawfully entered onto Amazon's JFK8 property yet again. Mr. Marc testified that on February 9, 2022, he "learned that Mr. Smalls was on [the] property, directly outside of our main break room, with a camera crew that appeared to be filming inside the break room." (Marc, 2390:9-2391:6; Troy, 1872:7-23, 1874:21-1876:1).

After learning Mr. Smalls was trespassing on JFK8's property again, Mr. Marc and Mohit Mengali, Senior Operations Manager at JFK8, "went outside to engage Mr. Smalls and ask him to leave the property." (Marc, 2391:25-2392:11). In response, Mr. Smalls stated "he knows his rights" and to "**go ahead and call the cops**" because "he wasn't leaving." (Marc, 2393:11-14; Troy, 1875:18-24) (emphasis added). Mr. Marc replied that he did not want to resort to police involvement, but Mr. Smalls again repeated to Mr. Marc "**to go ahead and call the cops**." (Marc, 2393:19-24) (emphasis added). The cameraman that was accompanying Mr. Smalls recorded the encounter between Mr. Marc and Mr. Smalls. (Marc, 2394:6:-8). The conversation ended with Mr. Marc again instructing Mr. Smalls to leave the property. (Marc, 2394:19-24). After doing so, Mr. Marc returned inside and Mr. Smalls eventually departed the property a few minutes later. (Marc, 2394:25-2395:7). Two days later on February 11, 2022, Mr. Smalls, again accompanied by a cameraman, entered Amazon's property "[o]n the front sidewalk out of the associate breakroom at JFK8" and remained on property for approximately 45 minutes. (Troy, 1878:8-19, 1879:18-20).[15]

On February 23, 2022, after months of blatantly defying Amazon's attempts to deescalate Mr. Smalls' behavior, Mr. Smalls was arrested after he once again unlawfully entered Amazon's property to film another interview in full view of hundreds of Associates and subsequently refused to vacate the property despite being given multiple opportunities to do so. Mr. Marc testified that he "learned that Mr. Smalls was back outside of the same main break area with a camera crew, once again filming what appeared to be, with a view into the main break room."

[15] It should go without saying that when the President of a labor union that has filed a petition to represent the employees of an employer shows up at that employer's private property, enters the property with a camera crew, and films an interview within view of prospective voters, the only reasonable inference to be drawn is that the President is there to advance the cause of his/her union (in other words, to solicit).

(Marc, 2395:17-21). Upon learning of Mr. Smalls' presence, Mr. Marc and Henry Carbajal, Loss Prevention Manager at JFK8, went outside to engage with Mr. Smalls. (Marc, 2396:1-4).

Mr. Marc testified that when he got outside he observed Mr. Smalls, accompanied by several cameramen, conducting an interview. (Marc, 2396:17-2397:7; EMP 0361.1, EMP 0361.1-v (6:38-6:52)). Similar to the discussion he had with Mr. Smalls merely two weeks prior, Mr. Marc again instructed Mr. Smalls that he was trespassing and needed to leave Amazon's property. (Marc, 2397:8-16). Mr. Smalls responded that he was filming an interview, and that he would leave once he was finished. (Marc, 2397:8-16). Mr. Marc repeated his instruction to Mr. Smalls that he was to leave Amazon's property. (Marc, 2398:1-8). Mr. Smalls then "invited [Mr. Marc] to call the police and said he would leave when he was ready." (Marc, 2397:25-2398:1). Mr. Marc returned inside to discuss the situation with Amazon's ER and legal team, and the collective decision was made for Amazon to call the New York Police Department ("NYPD"). (Marc, 2398:20-2399:1). At that point, Mr. Troy contacted the NYPD and asked them to assist Amazon in enforcing its property rights. (Troy 1883:7-1884:24). NYPD arrived approximately 30 minutes later, and Mr. Marc and Mr. Carbajal returned outside to meet with the Officers and inform them that Amazon wanted all individuals who were not Amazon employees to leave the property. (Marc, 2399:6-2400:14). Several Officers, Mr. Marc, and Mr. Carbajal approached Mr. Smalls, his cameramen, and a group of Associates who had joined them, including Mr. Spence, Mr. Anthony, and Mr. Daniels. (Marc, 2400:22-2401:21; EMP 0335).

The ensuing interaction and conversation between the Officers, Mr. Marc, Mr. Smalls, and several Associates who had joined him was captured on video by Mr. Anthony and published by Status Coup News. (Anthony, 3557:21-3558:6; EMP 0344, EMP 0344-v). The entire incident was also captured by Amazon's CCTV surveillance cameras. (EMP 0335). The

video reveals that Mr. Smalls entered and remained on Amazon's property for over one hour and fifteen minutes on February 23, alternately staring into the breakroom windows, talking with Associates, and filming his interview. (EMP 0335). While Mr. Smalls claims he was just there to drop off food to Associates, the CCTV video does not reflect him doing so, but does demonstrate that he remained on Amazon's property while not delivering food for over one hour and fifteen minutes.[16]

Upon approaching the group, Mr. Marc repeated his instruction for Mr. Smalls to leave Amazon's property. (Marc, 2401:22-2402:4). Despite the fact that Mr. Smalls had been filming an interview for over one hour by that point, he falsely claimed that he was merely a "visitor." (Marc, 2402:8-2402:13; EMP 0344, 0344-v). NYPD Deputy Inspector Bruce Ceparano intervened, and he repeated the instruction that Mr. Smalls was to leave Amazon's property because he was trespassing. (Marc, 2406:13-22; EMP 0344, EMP 0344-v). Mr. Smalls lied to Deputy Inspector Ceparano, claiming that he had only been on site for "a few minutes, fifteen, twenty minutes," despite Amazon's CCTV showing that, by that time, he had been on site for well over an hour. (EMP 0335, EMP 0344, EMP 0344-v).

Deputy Inspector Ceparano repeated his instruction multiple times and informed Mr. Smalls that if he did not leave, he would be arrested for trespassing. (EMP 0344, EMP 0344-v). Mr. Smalls continued to maintain that he was a visitor and was permitted to be on the property. (Marc, 2406:23-2407:3; EMP 0344, EMP 0344-v). Another Officer then instructed Mr. Smalls that he had two minutes to leave, or he would be arrested. (Marc, 2408:5-12; EMP 0344,

[16] At the Hearing, the ALU leaned heavily into the notion that Mr. Smalls' only purpose in "visiting" Amazon's property was to help feed Associates. While this is clearly false, as the CCTV video of the events of February 23 demonstrates, it is quizzical for the ALU to so freely admit that this was Mr. Smalls' purpose. Doing so all but admits to Amazon's allegation that Mr. Smalls was visiting Amazon's property for the purpose of solicitation (how else could one reasonably characterize the act of a Union President dropping off free food to eligible voters during the critical period before an election), and therefore that he was in violation of Amazon's Solicitation Policy every time he came to the facility for that purpose.

EMP 0344-v). Mr. Smalls did not leave, and the Officer again warned him that he had thirty seconds to comply with the direction to leave, or he would be arrested. (EMP 0344, EMP 0344-v). The Officer repeated the instruction, informing Mr. Smalls that he now only had ten seconds to vacate the premises. (EMP 0344, EMP 0344-v).

During the exchange, Mr. Anthony and Mr. Daniels, who had joined Mr. Smalls, began berating the Officers and confronting them physically, all while Mr. Anthony was recording their interactions. (EMP 3002). Mr. Daniels and Mr. Anthony placed themselves between Mr. Smalls and the four Officers just as the Officers were indicating to Mr. Smalls that he was about to be detained for refusing their directives. (Marc, 2409:22-2410:5, 2410:11-18; EMP 0344, EMP 0344-v). Amazon's CCTV shows that Mr. Anthony then moved aggressively towards the Officers and made physical contact with one of the Officers. (EMP 0335). At that point, Mr. Anthony was taken into police custody. (EMP 0335). Mr. Daniels then made physical contact with two Officers yelling at them not to touch Mr. Anthony. (EMP 0335). He was then placed in police custody. (EMP 0335). Shortly thereafter, Mr. Smalls, who had still failed to heed the Officers' instructions to vacate the premises, was also arrested. (EMP 0335).[17] The NYPD charged Mr. Smalls with resisting arrest, obstructing governmental administration, and trespass. (EMP 0570-Redacted).

Despite his arrest, Mr. Smalls continued to unlawfully enter Amazon's property and solicit Associates, at the objection of Amazon. Mr. Smalls explained he would solicit Associates, as well as hand out food, pick up workers, and drop off ALU literature. (Smalls, 4608:2-11).

[17] Following the arrest, Mr. Smalls tweeted out a demonstrably false recitation of the events leading to his arrest, suggesting he was nothing more than an "UberEats [driver] dropping off food." (EMP 0339; Smalls, 4722:24-4724:4. Other ALU officers similarly made false public statements regarding the arrest. (EMP 0341 ("Despite having the right to be a visitor, Union President @Shut_downAmazon complied w/ the NYPD, then an officer put hands on an ALU organizer, used excessive force to arrest all 3 @amazonlabor organizers & charged them w/ 'trespassing' & 'obstructing governmental administration.'"), EMP 0342 (same)).

Indeed, the same day Mr. Smalls was arrested, he posted to social media that "@amazonlabor waited over 6 hours for us to get out and we went right back to JFK8 to feed the night shift!" (Smalls, 4609:4-4610:8; EMP 3230).

The ALU utilized the arrest of Mr. Smalls, Mr. Anthony, and Mr. Daniels as campaign propaganda, making it a focal point of its campaign. For example, on February 23, 2022, the ALU posted a TikTok that falsely claimed "Amazon called the NYPD to arrest our Union President Chris Smalls and two workers for 'trespassing' even tho they work at the building." (EMP 0326, EMP 0326-v; EMP 0757, EMP 0757-v (ALU TikTok with caption "more video of Amazon arresting ALU President Chris Smalls for 'trespassing' while handing out free food to workers at lunch."), EMP 0758, EMP 0758-v (ALU TikTok with caption "more disturbing footage of NYPD arresting worker-organizers at Amazon)). That same day, the ALU tweeted "#Amazon managers called NYPD to arrest ALU worker organizers for 'trespassing' as we held a union luncheon in the break room **as part of organizing efforts for the upcoming election**." (EMP 0327) (emphasis added).[18]

Days before the election, Mr. Anthony posted on Amazon's internal Voice of Associate's Board ("VOA Board") that "We need a UNION because Amazon mistreats their associates with disabilities. I need my apologies from Felipe Santos Davalos & Zack Marc for arresting me. That's a shame #VoteALUYES #VoteALUYES #VOTEYES #VOTEYES." (EMP 0355). On March 24, 2022, the day before the election began, ALU officer Mr. Daniels posted to Instagram a picture of a light projection on the façade of JFK8 that read "THEY ARRESTED YOUR COWORKERS." (EMP 2007). The ALU also circulated flyers to JFK8 Associates following the arrest, making false claims regarding the events leading up to Mr. Smalls', Mr. Daniels', and

[18] Again, the ALU's social media posts essentially admit that the purpose of their free food giveaways was to generate support for the ALU's organizing drive, and that Mr. Smalls' therefore was on private property to engage in solicitation in violation of Amazon's Solicitation Policy.

Mr. Anthony's arrest and directing Associates to a link to watch a video of the arrest. (Spence, 4365:23-4366:11; EMP 2914). The ALU's campaign to inform workers of the incident succeeded, as ALU lead organizer Pasquale Cioffi indicated that the video "was all over Amazon. Even management was watching it." (Cioffi, 4963:12-4964:4).

3. <u>The ALU's Harassment of Associates</u>

a) *Natalie Monarrez*

Throughout the election period, the ALU harassed, bullied, and threatened Ms. Monarrez—a former highly visible core ALU organizer—because she publicly voiced that she had changed her opinion about the ALU and intended to vote against the ALU in the election.[19]

After Ms. Monarrez voted in the election on the morning of March 25, 2022, she returned to the main JFK8 breakroom and encountered ALU organizers Mr. Mendoza, Mr. Anthony, and Michelle Valentin-Nieves at the ALU table. (Monarrez, 4009:19-4010:24). Other Associates were also in the breakroom at this time. (Mendoza, 5033:18-5034:7). Ms. Monarrez first spoke with Mr. Mendoza regarding an Associate with whom they were helping to resolve a disability leave issue, and then Ms. Monarrez greeted Mr. Anthony. (Monarrez, 4011:6-18). In response, Mr. Anthony yelled and cursed at Ms. Monarrez for having publicly announced she was voting no. (Monarrez, 4011:6-4012:14). As Ms. Monarrez described, "[a]t first, [Mr. Anthony] told me that I was telling people to vote no, and how could I do that?" (Monarrez, 4011:19-4012:14). Ms. Monarrez explained to Mr. Anthony that "[she] never told anybody to vote no. [She] told people [she] was voting no, and [she] would never tell another worker how to vote." (Monarrez, 4011:25-4012:4). Mr. Anthony then called Ms. Monarrez a "fucking bitch" and screamed,

[19] As highlighted herein, Ms. Monarrez resigned her position from the ALU "mid January 2022" and made clear her opposition to the ALU leading up to and during the election. (Monarrez 3956:13-23, 3957:12-23, 4044:16-4046:12).

"You're a fucking traitor. You fucking turned your back on Chris. You fucking turned your back on the ALU. You're a fucking traitor." (Monarrez, 4012:20-4013:2). As Mr. Anthony cursed and yelled at Ms. Monarrez, he positioned himself so close to Ms. Monarrez that she was forced to take a couple of steps back to prevent him from making contact with her. (Monarrez, 4013:3-14). Knowing she could not reason with Mr. Anthony, Ms. Monarrez left the breakroom. (Monarrez, 4013:15-25).[20]

After this interaction with Mr. Anthony, Ms. Monarrez went to the JFK8 Human Resources ("HR") office to discuss the Associate she and Mr. Mendoza were assisting, and also mentioned her interaction with Mr. Anthony. (Monarrez, 4013:15-25). Ms. Monarrez did not complete an official HR complaint at that time. (Monarrez, 4014:1-16).

Later that afternoon, Ms. Monarrez returned to the main JFK8 breakroom and displayed a sign declaring that she did not support the ALU. (Monarrez, 4044:16-4046:12). The main JFK8 breakroom was full of Associates. (Monarrez, 4044:16-4046:12). ALU officers Mr. Palmer, Ms. Maldonado, and Mr. Daniels entered the breakroom and, upon seeing Ms. Monarrez's sign, "they immediately ran up to [her] and started screaming and cursing at [her], trying to grab [her] sign, telling [her] that [she] needed to put it away, telling [her] that [she] needed to leave the break room." (Monarrez, 4044:16-4046:12, 4048:2-16, 4049:11-16). As they screamed at Ms. Monarrez and demanded her to take her sign down, Mr. Palmer, Ms. Maldonado, and Mr. Daniels called Ms. Monarrez a "traitor," "bitch," and told her she had "no fucking right to hold the sign." (Monarrez, 4044:16-4046:12, 4048:2-16, 4048:22-4049:10). Mr. Palmer, Ms.

[20] Mr. Anthony's recitation of these events is unbelievable. Mr. Anthony claims he was "polite" to Ms. Monarrez, but also admits to telling Ms. Monarrez she betrayed the ALU. (Anthony, 3679:12-3680:3). He also claims Ms. Monarrez made negative comments regarding his sexual orientation. (Anthony, 3679:12-3680:3). However, ALU Organizer Mr. Mendoza, who witnessed the interaction, did not corroborate this testimony from Mr. Anthony. (Mendoza, 5039:5-24). Ms. Monarrez's account that Mr. Anthony was angry, called her a traitor and a bitch is more credible as other female Associates reported that they have been called a "bitch" by Mr. Anthony (Goriva, 917:8-918:19; Lopez, 2739:19-2740:24), and Mr. Anthony publicly accused Ms. Monarrez of turning her back on the ALU and being a racist and "pure evil." (EMP 0240- EMP 0241).

Maldonado, and Mr. Daniels positioned themselves so close to Ms. Monarrez as to be "in [her] face," which required Ms. Monarrez to back away from them. (Monarrez, 4049:17-24). At this point, several Associates witnessing Mr. Palmer, Ms. Maldonado, and Mr. Daniels' attack on Ms. Monarrez stepped in-between the three ALU officers and Ms. Monarrez, and attempted to deescalate the situation. (Monarrez, 4044:16-4046:12). The intervening Associates told Mr. Daniels, Ms. Maldonado, and Mr. Palmer to back up from Ms. Monarrez and to leave her alone and were eventually able to put an end to the ALU's attack on Ms. Monarrez. (Monarrez, 4044:16-4046:12, 4046:18-4047:9). Shortly thereafter, Mr. Daniels and Mr. Palmer left the breakroom. (Monarrez, 4044:16-4046:12).

However, Ms. Maldonado remained in the breakroom and further escalated the confrontation by threatening physical violence against Ms. Monarrez. (Monarrez, 4046:18-4047:9). After Mr. Daniels and Mr. Palmer left the breakroom, Ms. Maldonado stepped away from where Ms. Monarrez was standing and called Mr. Smalls on her cell phone. (Monarrez, 4044:16-4046:12, 4051:10-4052:19). During the phone call, Ms. Monarrez could hear Ms. Maldonado say to Mr. Smalls, "[S]he's in here holding a sign. The sign says, 'I'm voting no.' What should I do?" (Monarrez, 4046:18-4047:9, 4051:10-4052:19). After Ms. Maldonado finished her call with Mr. Smalls, Ms. Maldonado took photos and videos of Ms. Monarrez holding her sign. (Monarrez, 4046:18-4047:9). Ms. Maldonado then approached Ms. Monarrez, saying "that [Ms. Monarrez] didn't know who [she] was dealing with because [Ms. Maldonado] was the head of the Workers Committee, she was in the ALU. [Ms. Monarrez] didn't know who [she] was messing with. She was going to kick [Ms. Monarrez's] ass in the parking lot. She was going to take [Ms. Monarrez] outside. She was going to beat [Ms. Monarrez] up." (Monarrez,

4046:18-4047:9, 4051:10-4052:19). Ms. Maldonado remained in the breakroom for several more minutes "mouthing off" to Ms. Monarrez and then left. (Monarrez, 4053:2-15).[21]

That same evening, at 5:24 p.m., Ms. Monarrez posted on Amazon's VOA Board about the ALU's harassment and bullying from earlier in the day, reporting "[i]n the past week, I have been on the receiving end of 3 ALU boys laughing at me, giving me attitude, & yelling at me (on the premises)." (Monarrez, 4014:20-4015:1; EMP 0494.5).[22] In response, Mr. Anthony verbally attacked Ms. Monarrez again, this time on the VOA Board, stating "Natalie (nmmonar) why is that you putting everyone against ALU when you are being ungrateful for the things that they did for you that they get $2,500. But with what money did you when [sic] to see Dolores Huertas in Los Angeles. Are you trying to be like Scamazon pure evil." (Monarrez, 4015:14-21; EMP 0241). In another post, Mr. Anthony accused Ms. Monarrez of "putting all women against the union" and being "the most racist person that [he has] ever known." (Anthony, 3680:12-25; EMP 0240).

At 6:24 p.m. on March 25, 2022, Mr. Mendoza sent Ms. Monarrez a text message instructing her to "stop with the sign" and notified her that the ALU intended to retaliate against her by using the photos and videos Ms. Maldonado had taken of Ms. Monarrez holding her sign in the breakroom hours earlier. (Monarrez, 4025:11-4026:8, 4028:17-4031:11; EMP 0905). In his text, Mr. Mendoza explained, "[u]nfortunately they want to send the video of you holding up the anti-union sign to Britney Ramos and let her know what you do when you feel you're not in

[21] Attempting to cast doubt on Ms. Monarrez's telling of events, Ms. Maldonado says that she was initially "kind" to Ms. Monarrez. (Maldonado, 4247:7-24). She went on to explain that she "was concerned that [Ms. Monarrez] standing there was going to . . . sway the votes of people that we connected with." (Maldonado, 4247:7-24). Despite trying to cast her actions toward Ms. Monarrez as "kind," Ms. Maldonado conceded she proceeded to curse and yell at Ms. Monarrez, and call her a racist. (Maldonado, 4257:16-4258:21).

[22] After the event, Ms. Monarrez made several other posts on the VOA Board describing the events on March 25, 2022. (EMP 0243 ("Jason [Anthony] screamed & lunged at me . . . in the break room yesterday."), EMP 0242 ("[M]ultiple ALU members have taken . . . actions against me (in public & private).")).

control. I'm telling them not to send it but it's hard to defend you when I already asked you to put the sign away." (EMP 0905; Monarrez, 4028:17-4031:11). Ms. Monarrez explained that Ms. Ramos is a congressional candidate for whom she had been working at that time. (Monarrez, 4025:11-4026:8, 4028:17-4031:11). After Ms. Monarrez continued to defend her position to Mr. Mendoza via text, Mr. Mendoza stated "Ok Nat they're going to call Britney [Ramos] unfortunately because this is way way too much it's not right and it's cruel." (Monarrez, 4028:17-4031:11; EMP 0905). After this event, Ms. Monarrez was no longer a part of Ms. Ramos's campaign. (Monarrez, 4025:11-4026:8).

On Sunday, March 27, 2022, Ms. Monarrez completed and submitted to Amazon a Written Statement Form, Amazon's HR complaint form, that detailed the ALU's bullying, harassment, and threats that took place on March 25, 2022. (Monarrez, 4021:18-4022:5; EMP 0244).[23]

b) *ALU Harassment of Other Amazon Associates*

Throughout the campaign, the ALU also bullied, harassed, and threatened other Associates who did not support their cause. For example, Nakeesha Fray obtained a free ALU T-shirt but then covered the ALU logo with tape because she no longer supported the ALU. (Fray, 1582:16-1583:8, 1602:3-1603:6). Upon learning that Ms. Fray was wearing this covered T-shirt at the JFK8 facility, Mr. Spence and another ALU organizer approached Ms. Fray and interrogated her as to why she had taped over the ALU logo. (Fray, 1602:3-1603:6). Ms. Fray explained to them she did so because she no longer supported the ALU. (Fray, 1602:3-1603:6). Mr. Spence angrily asked Ms. Fray if an Amazon manager had instructed her to cover the ALU logo, and she answered, "No." (Fray, 1602:3-1603:6, 1603:16-20, 1603:25-1604:2). Despite this

[23] Though her statement is dated March 26, 2022, Ms. Monarrez explained she wrote the incorrect date on the form. (Monarrez, 4022:6-18).

answer, Mr. Spence continued to badger Ms. Fray, asking if a manger instructed her to cover up the logo, but her answer remained the same. (Fray, 1602:3-1603:6). During this seven to ten-minute conversation, Mr. Spence was visibly angry towards Ms. Fray. (Fray, 1603:16-20, 1603:25-1604:2, 1604:12-14, 1604:24-25). Approximately 30 other Associates witnessed this confrontation. (Fray, 1605:10-17).

In February of 2022, Lori'l Adenji overheard Mr. Daniels and Mr. Anthony on the phone saying that "they needed to get Felipe [Santos] or they had to do something with Felipe" and that this made her feel unsafe for herself and Mr. Santos. (Adenji, 1499:14-23, 1502:10-21, 1504:3-10). So concerned with what she heard, Ms. Adenji immediately reported the incident to Mr. Santos, Mr. Marc, and HR. (Adenji, 1506:16-22).

The ALU also harassed and bullied Andrea Baltazar for expressing her intention to vote "no" in the election. On Wednesday, March 23, 2022, Ms. Baltazar wore a pink "Vote No" T-shirt to work. (Baltazar, 1447:18-1448:3). Ms. Baltazar passed ALU officer Mr. Palmer, who "laugh[ed] in [Ms. Baltazar's] face" for wearing her "Vote No" shirt. (Baltazar, 1447:7-1448:14; EMP 0545). That same day at work, ALU Organizer Samuel Bowman approached Ms. Baltazar as he was distributing yellow ALU lanyards to Associates in the AFE2 area of JFK8. (Baltazar, 1455:15-1456:9, 1457:5-17). When Mr. Bowman approached Ms. Baltazar offering her a lanyard and saw her shirt, Mr. Bowman asked, "Who will protect you?" (Baltazar, 1458:3-12; EMP 0494.6).

ALU lead organizer Mr. Anthony harassed and bullied Ms. Goriva and Stephanie Lopez because they did not support the ALU. During the election, Mr. Anthony approached Ms. Goriva with an ALU flyer in the main JFK8 breakroom. (Goriva, 911:25-912:21, 917:8-918:19). When Ms. Goriva declined to take the flyer, Mr. Anthony called Ms. Goriva a "bitch." (Goriva, 911:25-

912:21, 917:8-918:19). A few months prior to the start of election in 2022, Mr. Anthony also called Ms. Lopez a "bitch" and used profanities in comments on a Facebook group whenever she posted about her opposition to the ALU. (Lopez, 2738:16-2739:4, 2739:19-2740:25, 2747:2-21). Ms. Lopez posted about Mr. Anthony's treatment of her on the VOA Board, stating "[w]hat's up with these ALU members bullying and being so rude[?]" (Lopez, 2723:23-2724:1; EMP 0497).

c) *SGM Attendees*

As described fully above, the ALU also intimidated many of the Associates in attendance at the February 7, 2022 small group meetings, when they intruded into the Day 1 Training Room yelling and chanting.[24] *See supra* Section II(C)(2).

4. <u>The ALU's Shifting Promises to Associates Regarding the Payment of Union Dues</u>

Since its founding, the ALU's position on the amount of union dues, and the circumstances under which the ALU would charge union dues, was inconsistent and ever changing. The ALU's Constitution and Bylaws, first published in 2021, provided that dues in the immediate period preceding the election would be $5.00 every two weeks, while no set amount of dues was given for the period thereafter. (EMP 0298 at 18). Instead, the ALU indicated in its Constitution and Bylaws that the amount of dues would be decided "democratically." (EMP 0298 at 18 ("Within sixty (60) days following a successful election, the President will appoint a committee to reassess the dues structure and propose a new amount and frequency to be voted upon by the membership.")).

After the ALU filed its second petition on December 22, 2021, Amazon circulated messaging in January addressing the ALU's inconsistent and vague representations on the Associates' obligation to pay dues. (Donaldson, 446:17-447:11; EMP 0285). In direct response,

[24] *See* (Donaldson, 180:21-181:9; Miller, 2965:14-2967:1; Adenji, 1487:16-23; Castellano, 1103:15-1104:15, 1114:11-18; EMP 0581).

Mr. Smalls declared in a January 23, 2022 tweet that union dues would be decided "democratically," but he added a new caveat that the "[ALU] will not collect a single penny until we're paid more." (Donaldson, 446:17-447:11; EMP 0285).

Just a few days following this tweet, the ALU made another new, and conflicting, declaration on its website regarding dues stating that "after a successful vote, every worker in the facility becomes a member of the bargaining unit. Union dues will be taken from each paycheck, the cost of which will be decided democratically by union members, but will roughly **equal a few dollars each week**." (EMP 0286) (emphasis added). A few weeks later, the ALU's representations on its website concerning dues was—once again—different. (EMP 0287 (Regarding dues, "[t]he ALU constitution and board are serving on an interim basis, and everything is up to members to decide.")). During the month of January 2022, the ALU's officers also provided non-specific details to Associates regarding the amount they would be obligated to pay in union dues, should the ALU be elected as their bargaining representative, and stated that dues could be as much as 10% of an Associate's pay. (Rosado, 3065:1-14, 3067:16-3068:10).

In the weeks leading up to the March election, the ALU again changed the representations it was making to potential voters on the topic of union dues. In March 2022, the ALU distributed campaign flyers to Associates claiming that dues were not a foregone certainty and that, in the event they were assessed, they would be much less than what the ALU previously stated. (EMP 0288 (stating dues would be $5 per week for full-time tier 1 associates, $2.50 for part-time associates, and $6.50 for tier 3 associates "pending voting, approval, and authorization of all members."), EMP 0491 ("No dues until contract. We don't pay a dollar in dues until we vote to approve a contract . . . . We will not start paying dues of $5/week until we have voted to approve a union contract."), EMP 0571 ("the dues have always been $5/paycheck but we only

start paying dues once we have voted to APPROVE a new union contract"); Donaldson, 461:11-462:6). During this same time period, ALU organizers represented to Associates in one-on-one conversations that the ALU would not assess dues until Associates received pay raises. (Friscia, 3119:2-23). During that same time period, and during unannounced visits to Associates' homes, the ALU told Associates that dues would be 1-2% of their paychecks. (Vaidya, 2085:5-16, 2103:25-2105:12).

Days before the election, the ALU reverted to its old campaign messaging on dues that was previously promoted by Mr. Smalls in his January 23, 2022 tweet. In a March 22, 2022 letter from Mr. Smalls, delivered by the ALU to all eligible voters, Mr. Smalls stated "[m]any of you may have questions about dues. Let me clear that up: as Interim President and a former Amazon employee, I promise not one single payment of dues will be taken until we have a contract with higher wages signed." (EMP 0290; EMP 0291, EMP 0529). The ALU also repeated this "promise" in text messages to voters. (EMP 0297.1, EMP 0297.2, EMP 0297.3, EMP 0297.4) ("If we can't win an increase in our wages no dues will be taken from us."), EMP 0295 ("NO DUES UNTIL CONTRACT. We will only agree to a contract where we are better off, and if we never settle on a contract with Amazon, you will have never paid a dollar in dues."); Martinez, Me., 2031:9-23; Martinez, Mo., 3270:3-3272:5). While Mr. Smalls and the ALU were notifying Associates of the ALU's new promise regarding union dues just days before the election, the ALU's representations on its website regarding dues did not corroborate this new "higher wage" carve-out. (EMP 0294 ("The proposed dues are $2.50 per paycheck for Part-Time Associates, $5.00 for Full-Time, and $6.50 for Tier 3s.")).

5. <u>The ALU's Representations Regarding Outside Union Support</u>

During the campaign, the ALU "wanted to assure bargaining unit members that despite the fact that the ALU was newly formed, [the ALU] had been receiving donations of advice and

expertise and other kinds of resources from established unions as an act of solidarity." (Spence, 4371:11-23). Mr. Spence explained that the ALU deployed this campaign messaging "in response to [Amazon's] repeated claims that the ALU was an organization with no experience." (Spence, 4371:11-23).

The ALU communicated this outside union "support" to Associates in various ways. Less than two weeks before the election, the ALU distributed flyers to Associates that stated "[t]he Amazon Labor Union is backed by established unions such as the UFCW (1.3 Million Members) and Unite Here (300,000 Members). They help us with lawyers, advisors, and expertise." (Spence, 4371:11-23; EMP 2916). On this flyer, the ALU included the logos of the UFCW, UNITEHERE, and the Coalition of Black Trade Unionists. (Spence, 4371:11-23; *see also*, EMP 2916). The ALU had previously circulated another, unrelated flyer at JFK8 during the campaign that included the same logos of the UFCW, UNITEHERE, and the Coalition of Black Trade Unionists. (Spence, 4368:18-4369:6; EMP 2917). In other campaign materials regarding dues circulated during the critical period the ALU again included the logos of other unions next to its own. (Spence, 4374:5-4375:4; EMP 0491, EMP 0571 (boasting support from Unite Here, UFCW, and OPEIU)).

The ALU told a different story to Associates during one-on-one conversations as to what it meant by having the "backing" of other more-experienced unions. For example, on the last day of the election, ALU lead organizer Mr. Cioffi spoke to Moises Martinez about Mr. Martinez's concerns with the ALU's lack of experience. (Martinez, Mo., 3287:11-3288:15). When Mr. Cioffi asked Mr. Martinez how he planned to vote, Mr. Martinez explained to Mr. Cioffi that "[he] was not actually going to support the ALU because [he] didn't really know who they really were." (Martinez, Mo., 3287:11-3288:15). In response, Mr. Cioffi encouraged Mr. Martinez to

vote "yes" because their intent was to have the Teamsters take over the ALU following the election. (Martinez, Mo., 3287:11-3288:15).

6. <u>The ALU's Light Projection of Propaganda on the Eve of the Election</u>

The night just prior to the election, the ALU projected messaging on the front façade of JFK8. (Spence, 4448:14-4449:6).[25] Mr. Smalls coordinated this projection with the Illuminator, a NYC-based political projection collective. (Daniels, 4173:22-4174:3; Spence, 4380:9-14).

While the night shift Associates were outside on their break, the Illuminator utilized a light projector to project the following ALU propaganda onto the JFK8 building: "BE THE FIRST IN HISTORY," "THEY FIRED SOMEONE YOU KNOW," "VOTE YES!", "VOTE YES! FOR THE ALU," "ALU FOR THE WIN," "VOTE FOR JOB SECURITY," "THEY ARRESTED YOUR COWORKERS," "BEZOS FLEW TO SPACE OFF YOUR LABOR." (EMP 0381-83, EMP 0385-v, EMP 0386, EMP 0388-95, EMP 2923-26, EMP 2923v-26v). The ALU posted photos and videos depicting these projections on social media following the events. (EMP 0385-v, EMP 0386, EMP 0388-95, EMP 2923-26, EMP 2923v-26v).

7. <u>The ALU Polled Associates to Monitor Associates' Voting Behavior</u>

Approximately one week before the election, the ALU circulated a form in the main JFK8 breakroom that asked Associates to publicly commit to voting "Yes" in the election. (Donaldson, 435:6-19; Anthony, 3611:12-3612:12; EMP 0369). The form stated: "I [insert name] COMMIT TO VOTE YES!" (EMP 0369). The form also asked Associates to provide their phone number, home address, and state the date they intended to vote in the election. (EMP 0369). The ALU utilized the form to contact Associates "to remind them to vote . . . . And for any reason, if the worker [could not] reach the facility, the ALU would provide them with

[25] Finding the evidence not to be relevant to an objection, Hearing Officer Dunn did not permit Amazon to present its evidence that the projections occurred within 24 hours of the polls opening on March 25, 2022.

transportation." (Anthony, 3613:4-8). Using this information, the ALU did in fact provide Associates with transportation to and from the polls during the election. (Anthony, 3613:4-12).[26]

E. The ALU and Region 29's Litigation Strategy

1. <u>With the Express Intent to Influence the Outcome of the Election, Region 29 Filed a 10(j) Injunction against Amazon Eight Days before the Election</u>

Just eight days before the polls were set to open, Region 29 directly involved itself in the election campaign. On March 17, 2022, the Region initiated a Section 10(j) proceeding against Amazon, seeking injunctive relief for the immediate reinstatement of former Amazon Associate (and ALU founding member) Gerald Bryson who had been terminated almost two years earlier. (EMP 1501).[27] The Region's 10(j) proceeding emanates from an unfair labor practice charge filed by Mr. Bryson on June 17, 2020, long before the formation of the ALU. (EMP 1501 at ¶ 3). In that charge, Mr. Bryson alleged that "[Amazon] suspended and subsequently discharged [him] in violation of Section 8(a)(1) of the Act." (EMP 1501 at ¶ 3). Specifically, he claimed that Amazon unlawfully suspended, then terminated, his employment after he protested Amazon's response to the COVID-19 pandemic in late March and early April of 2020. (EMP 1501 at ¶ 6(e)-(g)). More than six months after Bryson filed his charge, Region 29 issued a Complaint and Notice of Hearing, on December 22, 2020. (EMP 1501 at ¶ 4). The unfair labor practice hearing began approximately three months later on March 29, 2021, and continued thereafter on May 4-5, May 10-11, May 13-14, May 17, and May 24-27, 2021. (EMP 1501 at ¶ 5(a)).

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[26] Hearing Officer Dunn prohibited Amazon from eliciting any evidence regarding who provided the transportation services, who paid for the transportation services, and the costs associated with the transportation services. (3613:13-3623:24).

[27] Hearing Officer Dunn only permitted Amazon to introduce pleadings in the 10(j) proceeding filed on or before March 30, 2022. Hearing Officer Dunn excluded any and all testimony and documentary evidence offered by Amazon evidencing (i) filings made by Amazon and Region 29 after March 30, 2022, in the 10(j) proceeding, (ii) statements made by the ALU, its officers, and organizers regarding the 10(j) proceedings, and (iii) admissions of Region 29's support for the ALU. Nor did Hearing Officer Dunn permit Amazon to elicit testimony from the ALU regarding related inquiries. Finally, Amazon was not permitted to question Region 29 and its employees regarding the 10(j) proceedings—as well as review documents related to the same—because General Counsel Abruzzo denied Amazon's request to Region 29 to produce documents and for Region 29 employees to appear as witnesses.

A significant amount of time passed between the Region's issuance of the Complaint on December 22, 2020, and its 10(j) filing on March 17, 2022, and even more time lapsed between the termination of Mr. Bryson's employment on April 17, 2020 and the 10(j) filing. In the interim, several events occurred: Region 29 and Amazon participated in a multi-week hearing and submitted post-hearing briefs in the Bryson unfair labor practice proceeding; the ALU filed its first petition for election on October 25, 2021; the ALU withdrew its first petition for election on November 12, 2021; the ALU filed its second petition for election on December 22, 2021; Region 29 determined the ALU submitted a sufficient showing of interest to warrant further processing of the second petition for election; and the ALU, Amazon, and Region 29 executed a stipulated election agreement on February 17, 2022 in which the election was set to be held on March 25-26, and 28-30, 2022. (EMP 1501 at ¶ 7(c)-(d)). Not once during the 23 months of investigation and litigation did Region 29 suggest that an injunction was necessary to protect employee rights–or for any other reason.

Despite the significant passage of time between Mr. Bryson's termination and the impending union election set to begin at JFK8 on March 25, 2022, Region 29 filed a 10(j) complaint against Amazon on March 17, 2022. (EMP 1501). While the Region's mere act of initiating the proceeding a little more than a week prior to the election is, in and of itself, notable, Region 29 admits in its initial filings that the intended purpose in seeking 10(j) relief was to impact the then-ongoing organizing campaign and the outcome of the election. (EMP 1507 at 2 ("Despite occurring almost two years ago, the knowledge of Bryson's termination looms large in the collective memory of warehouse employees who, in the interim, formed the Amazon Labor Union (ALU or the Union) and recently filed a petition for a Board election that is scheduled for the near future. Although enough employees signed cards to support the required showing of

interest for an election, numerous employees are afraid to openly support the ALU, citing Bryson's termination as a primary reason."), EMP 1507 at 41 ("Even if the Union wins the upcoming election, Bryson is a key figure and his reinstatement will help with first contract bargaining and further protected concerted activity in support of the Union's bargaining goals. If the Union loses, Bryson's reinstatement helps with a potential renewed campaign and any continued protected concerted activity. His reinstatement will also aid the ongoing campaigns at the Employer's other Staten Island facilities.")). Region 29 further alleged that a free and fair election could not happen unless Mr. Bryson was reinstated prior to the election, stating that "in order to ensure a free and fair election be held on March 25, 2022, Petitioner filed the instant Petition as soon as practicable on March 17, 2022, a month after the election was scheduled." (EMP 1521 at 9; EMP 1512 at 2 ("Petitioner seeks injunctive relief in this case in order to reinforce employees' right to engage in protected concerted activity and union activity in advance of this election so that Respondent does not benefit in the election from the coercive effects of its unfair labor practices at issue in this case."), EMP 1521 at 3 ("Thus, because of Respondent's unlawful discharge of Bryson, the Union is not entering the election with its *legitimate* level of support . . . . Absent immediate interim reinstatement, Amazon will profit from the illegal discharge.")). Region 29's reasoning behind the timing of its filing prior to the election is particularly remarkable given that the ALU formed on April 20, 2021, which was: (i) over a year after Mr. Bryson's termination, (ii) approximately 10 months after Mr. Bryson filed his unfair labor practice charge against Amazon, and (iii) approximately one month after Mr. Bryson's unfair labor practice hearing began. (Anthony, 3463:23-3464:4; EMP 1501 at ¶¶ 3, 5(a), 6(i)).

After Regional Director Drew-King filed the 10(j) complaint, she publicly declared in various press statements that the Region's motive in seeking injunctive relief was to impact the results of the election. (EMP 0030, EMP 0030.1, EMP 0033-A). In her statement published by widely-read news sources like VICE and the New York Times, Regional Director Drew-King stated "[i]t is important for workers to know their rights—particularly during a union election—and that the NLRB will vociferously defend them." (EMP 0030, EMP 0030.1, EMP 0033-A). Regional Director Drew-King also referenced the size of Amazon's business as an apparent justification for the 10(j) complaint. (EMP 0030, EMP 0030.1, EMP 0033-A (Regional Director Drew-King noting she sought injunctive relief against Amazon "no matter how large the employer.")).

In its 10(j) filings, Region 29 used inflammatory language that cast Amazon in a negative light. Indeed, Region 29 alleged that Amazon was—at the very moment of the filings and approximately one week before the election—placing the health and safety of JFK8 employees at risk. (EMP 1507 at 38-39 ("Given the upcoming election, the employees' organizing effort, including demands for crucial COVID-19 pandemic safety protocols, will suffer unless Bryson is immediately reinstated under the protection of an interim injunction. Indeed, the Employer recently rolled back COVID-19 safety protocols put in place because of Bryson and other employees' collective efforts, even as the pandemic marched on with more contagious viral variants.")).

The Region also incorporated in its 10(j) filings unverified, uncorroborated, and hearsay statements from officers and organizers of the ALU that disparage Amazon. To support its request for extraordinary relief, Region 29 relied on hearsay statements from numerous unidentified alleged JFK8 employees who claim they are afraid to support the ALU out of fear

that Amazon will retaliate against them. (EMP 1505, Bryson Affidavit at ¶¶ 7-8; EMP 1505, Palmer Affidavit at ¶¶ 9, 21; EMP 1505, Martinez Affidavit at ¶ 13; EMP 1505, Smalls Affidavit at ¶ 4).

On March 30, 2022 (*i.e.*, the last day of the JFK8 election), Magistrate Judge Sanket J. Bulsara presided over a status conference between Amazon and Region 29 regarding discovery issues in the 10(j) proceeding. At the opening of the hearing, Judge Bulsara took notice of the fact that the 10(j) evidenced that Region 29 maintained a general hostility towards Amazon, stating "it's quite clear to me just from reading the papers generally there's a lot of enmity between the parties and their lawyers and allegations of impropriety and the like." (EMP 1531.1 at 2).

Ultimately, the Court did not grant Region 29's request for reinstatement of Mr. Bryson prior to the election. As of the date of this filing, the Court still has not made a determination regarding Region 29's request for a preliminary injunction to reinstate Mr. Bryson, rendering the supposed urgency around the Region's March 17, 2022 filing date all the more questionable. (*See, e.g.*, EMP 1500).

2. <u>Region 29 Entertained and Failed to Promptly Dispose of Baseless Unfair Labor Practice Charges Filed by the ALU during the Critical Period</u>

While not permitted to introduce relevant documents regarding Region 29's processing of charges or question any witnesses regarding the same, the charges filed by the ALU and Region 29's dispositional documents concerning those charges demonstrate that the Region significantly delayed investigating charges and waited until the election was completed to solicit withdrawals. (EMP 0728-0738). For Charges 29-CA-280386 and 29-CA-287940, the Region apparently waited nine months and five months, respectively, and for the election to conclude to solicit withdrawals from the ALU. (EMP 0728, EMP 0730). Presumably knowing Region 29 would not

promptly investigate charges and instead would allow them to linger unresolved, the ALU serially filed baseless unfair labor practice charges throughout the critical period. (EMP 0731-0738).

F. Pre-Election Inspection Conducted by Region 29

On Tuesday, March 22, 2022, per the Agreement, Region 29 personnel met with representatives from both Amazon and the ALU for a pre-election inspection. (Donaldson, 310:7-11; Russell, 2272:16-2273:24; EMP 0182 at § 4). The purpose of the inspection was for the Region to ensure that the voting area was set up in accordance with the Board's CHM, the General Counsel's Memo, and in compliance with the Agreement. (EMP 0182 at § 4). Present for Amazon was Ms. Donaldson, Ms. Russell, Felipe Santos, JFK8 General Manager, Sara Kalis, in-house corporate counsel for Amazon, and Amber Rogers and Kurt Larkin, outside counsel for Amazon. (Donaldson, 310:14-23; Russell, 2272:16-2273:24). Ms. Fedorova and Board Agent Kate Anderson attended on behalf of Region 29. (Donaldson, 311:14-20; Russell, 2273:20-24). Mr. Smalls and ALU outside counsel Eric Milner attended on behalf of the ALU. (Donaldson, 311:11-20; Russell, 2272:16-2273:2).

The group started by walking outside of the tent to inspect the exterior of the tent and to discuss Amazon's property lines. (Russell, 2291:14-2292:4). The tent was set up in the JFK8 parking lot in the second of three drive lanes that run parallel to the JFK8 building. (Russell, 2276:23-2277:14; EMP 0695-E). Amazon had erected orange barriers to both the left and to the right of the tent in both the middle drive lane and in the drive lane closest to the JFK8 building so that vehicles could not access the area of the parking lot near the tent. (Russell, 2276:23-2277:14, 2294:22-2295:10, 2300:8-14). Ms. Fedorova and Ms. Anderson asked general questions regarding the boundaries of Amazon's property. (Russell, 2276:23-2277:4). The Parties discussed, and Ms. Fedorova agreed, that the orange barriers provided a reasonable line by which

the Board could establish the no-electioneering zone. (Russell, 2276:23-2277:14). Ms. Anderson "was gesturing to the barricades" and reiterated that the area up to the barricades would be the area that the Board would establish as the no-electioneering zone. (Russell, 2292:8-15). Amazon then raised concerns regarding the potential for media interference with the voting sessions. (Russell, 1195:11-1196:5). Ms. Russell testified: "We had already seen a lot of media coverage and we were concerned and we expressed concern about media coming into the parking lot, coming near the tent, interfering with voters." (Russell, 1195:17-20). Ms. Anderson stated that she "understood" but that it was "physically impossible for [the Board] to police the entire parking lot, but that they could reasonably see and police the conduct between the barricades on the left and the barricades on the right and the two drive lanes that we had blocked. And she indicated that those would be considered the no-electioneering zone and that the Region would do its best to police." (Russell, 1195:21-1196:5, 2296:16-2298:12). Amazon also noted that, per the ALU's and Region 29's request, the Company had covered all of the surveillance cameras that were outside of the JFK8 building that faced the parking lot. (Donaldson, 323:20-25).

During her testimony, Ms. Russell made markings on a map of the JFK8 parking lot to visually convey the location of the tent and the exact boundaries of the no-electioneering zone that the Board had established during the inspection. (Russell, 1195:21-1196:5, 2296:16-2298:12, 2298:16-2298:25, 2291:14-2302:22, 2307:21-2316:1; EMP 0204.3, EMP 0695-E, EMP 0712). Ms. Russell drew a large green rectangle to denote the no-electioneering zone, which included the sidewalk in front of the JFK8 building, the first two drive lanes closest to the building, and the second sidewalk adjacent to the second drive lane. (Russell, 1195:21-1196:5, 2296:16-2298:12, 2298:16-25, 2291:14-2302:22, 2307:21-2316:1; EMP 0204.3, EMP 0695(E), EMP 0712). On the shorter ends of the rectangle, she placed "XXX"s to denote the location of

the barriers that Ms. Fedorova and Ms. Anderson relied upon in setting the no-electioneering zone. (Russell, 1195:21-1196:5, 2296:16-2298:12, 2298:16-25, 2291:14-2302:22, 2307:21-2316:1; EMP 0204.3, EMP 0695(E), EMP 0712). The no-electioneering zone extended about five car lengths (or four parking spots and a median) past the exit of the voting tent. (Russell, 1195:21-1196:5, 2296:16-2298:12, 2298:16-25, 2291:14-2302:22, 2307:21-2316:1; EMP 0204.3, EMP 0695(E), EMP 0712). Ms. Russell then drew a smaller green rectangle within the larger green no-electioneering rectangle to mark where the voting tent and the awning were located. (Russell, 1195:21-1196:5, 2296:16-2298:12, 2298:16-25, 2291:14-2302:22, 2307:21-2316:1; EMP 0204.3, EMP 0695(E), EMP 0712). She also drew an arrow perpendicular to the tent and awning to illustrate the direction from which the voters lined up to get into the queue under the awning. (Russell, 1195:21-1196:5, 2296:16-2298:12, 2298:16-25, 2291:14-2302:22, 2307:21-2316:1; EMP 0204.3, EMP 0695(E), EMP 0712). Ms. Russell drew a second arrow inside the smaller green rectangle, which was perpendicular to the first arrow, to denote the entrance to the voting tent, and drew a third arrow at the far left end of the smaller green rectangle to denote the exit of the voting tent. (Russell, 1195:21-1196:5, 2296:16-2298:12, 2298:16-25, 2291:14-2302:22, 2307:21-2316:1; EMP 0204.3, EMP 0695(E), EMP 0712). The two circles just past the exit and within the no-electioneering zone were placed to mark the location of the bathroom and the generator, respectively. (Russell, 1195:21-1196:5, 2296:16-2298:12, 2298:16-25, 2291:14-2302:22, 2307:21-2316:1; EMP 0204.3, EMP 0695(E), EMP 0712).[28]

Region 29 personnel then inspected the inside of the tent, including the check-in tables, the ballot tables, and the area in which the voters would line up. (Donaldson, 314:14-315:4,

[28] Ms. Russell's description of the no-electioneering zone is not only unrebutted in the record, but corroborated by the actions of Board Agents during the election. For example, when Ms. Monarrez carried a sign evidencing her intent to vote no in the voting area, a Board Agent instructed her "to stand on the other side of those orange cones where the reporters and journalists were." (Monarrez, 4004:20-4005:23; EMP 0901).

316:6-10; Russell, 2278:5-18). Stanchions (little poles with ropes that are typically used to make a queue) were placed at the entrance to the tent that zig-zagged their way up to where the first voting table was placed. (Donaldson, 314:14-315:4; EMP 0185, EMP 0672 pp. 1-4). Region 29 personnel made only one change during the entirety of the inspection, which was to push the ballot table up against the tent wall, but otherwise approved the set up. (Donaldson, 312:25-313:15; Russell, 2278:5-18; EMP 0185). The ALU raised no issues with the set up. (Donaldson, 313:16-18).

While the Region was inspecting the inside of the tent, Amazon told Ms. Fedorova that the tent had room for more voting tables, but Ms. Fedorova responded "no," that the number of tables she had planned "was more than sufficient." (Russell, 2278:19-2279:1). Ms. Fedorova repeatedly indicated that things looked "great" and "fine." (Russell, 2279:1-2280:10). Ms. Fedorova asked Ms. Anderson if they had covered everything, and, after consulting a checklist, Ms. Anderson replied that they had covered everything. (Russell, 2279:8-13). Ms. Fedorova then stated that she would be the first Board Agent to arrive on Friday, March 25, 2022, and that she intended to arrive sometime between 6:00 a.m. and 7:00 a.m. (Russell, 2279:8-2280:1). The entire pre-election inspection lasted somewhere between 10-20 minutes. (Donaldson, 315:9-12; Russell, 2279:13-2280:5). Other than adding an awning to the outside of the tent to provide cover from the elements in the queue leading up to the voting tent entrance, an addition of which the Region was aware, Amazon did not make any other changes to the tent after Region 29 personnel approved the set up. (Donaldson, 322:4-323:10).

G. The Election at JFK8

1. <u>Pre-Election Conference on March 25, 2022</u>

On Friday, March 25, the first day of voting, Ms. Donaldson arrived at the voting area at 5:00 a.m. to open the tent and begin to set up. (Donaldson, 329:22-330:8, 331:1-8). Ms.

Fedorova and Ms. Anderson arrived at "a little bit before 7:00 (a.m.)." (Donaldson, 331:6-8). Ms. Federova and Ms. Anderson unpacked their minivan and began setting up. (Donaldson, 331:9-332:16). Sometime after 7:00 a.m., the next Board Agent, a white male with curly hair, arrived. (Donaldson, 332:19-22). He hung up some signs and then began tabbing what appeared to be the voter list. (Donaldson, 332:14-18). Over the course of the next thirty-five to forty minutes, three more Board Agents arrived: an Asian female, another white male with dark curly hair, and an African-American female. (Donaldson, 332:23-334:8). Ms. Donaldson testified that she recalls this latter agent arriving around 7:40 a.m.-7:45 a.m. because she was the only Board Agent to enter through the exit door of the tent and, for a moment, Ms. Donaldson thought she may have been a voter. (Donaldson, 334:16-335:8). At some point thereafter, two more Board Agents, both white females, arrived at the tent. (Donaldson, 336:2-15).

During this time, the Board Agents put up a variety of different signs and also set up the voting booths. (Donaldson, 336:16-337:24). The Board Agents left four or five extra voting booths unassembled underneath the tables, where they remained unused for the duration of the election. (Donaldson, 384:8-385:19, 387:4-14; Spinella, 4809:2-8; EMP 0912).

Sometime around 7:35 a.m.-7:45 a.m., Amazon's Observers arrived at the tent and waited outside for the Board Agents to instruct them to enter into the tent. (Famiglietti, 578:3-7; DeLeon 638:1-25). It was approximately 7:50 a.m. when Amazon's Observers entered the tent and the Board Agents were still "rushing around" and setting up. (Famiglietti, 578:3-7, 582:17-23; DeLeon 638:1-7). The Observers stood in the tent for a "little bit," until approximately 7:50 a.m.-7:55 a.m., before Ms. Fedorova called together representatives for both the ALU and Amazon, the three ALU Observers and the three Amazon Observers. (Donaldson, 338:14-16; DeLeon, 641:19-642:3). Ms. Fedorova hastily gave instructions to the Observers, such as telling

them they couldn't use their cell phones, to direct any questions or comments to the Board Agent that would be sitting at their respective tables, and gave the general instructions about the observer process. (Donaldson, 339:17-25; DeLeon, 644:24-645:11). Amazon's lawyers informed Ms. Fedorova that they wanted to be present for the closing and the signing of the ballot box. (Donaldson, 382:12-21). At no point during this meeting, or at any time before the election started, did the Board Agent set the official time piece for the election. (DeLeon, 649:11-15). This meeting lasted approximately four or five minutes. (Donaldson, 340:17-20). At 7:59 a.m., Ms. Fedorova asked management and union representatives to leave the tent. (Donaldson, 344:24-345:10; Russell, 2280:16-2281:13, 2282:15-2283:1). Ms. Donaldson testified that she remembers it was 7:59 a.m. when she left the tent because she turned around to close the tent door and, as she was walking away, her watch alerted her to her daily notification, which is set for 8:00 a.m. every day to remind her to take her medication. (Donaldson, 344:24-345:10). As of 7:59 a.m., when Amazon representatives left the tent, the ballot box and the challenge box had yet to be built, the Observers and Board Agents were still standing in the middle of the tent and no-one was sitting at any of the three check-in tables. (Donaldson, 345:11-346:15).

Sometime after Amazon and the ALU representatives left the tent, Ms. Fedorova began to set up the two ballot boxes, one for the regular ballots and one for the challenged ballots. (Famiglietti, 589:3-20, 591:17-592:4; DeLeon, 646:3-22, 647:13-22, 648:15-18; Sanchez, 1339:5-12). These boxes were flat, and Ms. Fedorova had to construct and tape them. (Famiglietti, 589:3-20, 591:17-592:4). She constructed the ballot boxes one at a time on her own, with no help from any of the other Board Agents. (DeLeon, 647:23-648:2). Once the boxes were constructed, she showed the inside of the boxes to the Observers, who were still standing in the middle of the tent, to confirm that they were empty. (DeLeon, 648:19-23). This process of setting

up the ballot boxes took approximately five to ten minutes. (Famiglietti, 592:5-8; DeLeon, 648:4-10; Sanchez, 1343:19-1344:2). After setting up the ballot boxes, Ms. Fedorova then directed the Observers to their respective tables. (DeLeon, 648:24-649:10). At approximately 8:10 a.m.-8:12 a.m., the Board opened up the tent door and allowed the election to begin. (Sanchez, 1344:10-14; LaPorta, 2140:13-2141:2).

As all of this was going on, sometime between 7:30 a.m. and 8:00 a.m. Ms. Russell, confronted an individual with a camera near the voting tent. (Russell, 2353:21-2355:1, 2355:13-19, 2356:3-18). This man identified himself to Ms. Russell as a documentary filmmaker making a documentary about Mr. Smalls and the ALU. (Russell, 2354:3-2355:16). After Ms. Russell engaged the filmmaker, Mr. Smalls approached him and the two had a conversation. (Russell, 2354:23-2355:5). Other witnesses—including an ALU agent—corroborated Ms. Russell's testimony, admitting that the ALU was working with a documentarian named Steve Maing[29] to make a documentary about the ALU. (Anthony, 3657:15-3658:15-3659:3)

2. <u>The Line to Vote on the Morning of March 25th was Extremely Long and Disorganized and Caused Confusion among the Voters</u>

The voting line during the morning voting session on Friday, March 25 was extremely long, disorganized, and caused confusion among the voters. (Grajeda, 745:6-747:2, 749:18-750:20). The line continued from the tent through the parking lot and then turned perpendicular onto the sidewalk in front of the JFK8 building. (Chu, 836:16-837:2; Troy, 1705:16-1707:8; EMP 0695-C). By noon, four hours after the polls were scheduled to have opened, the line was still wrapped back through the parking lot onto the sidewalk on the far end of the building. (Asad, 1209:10-1210:7; EMP 0695-A). Some voters got out of line. (Asad, 1223:11-17). One

[29] While Mr. Anthony testified that his name is Maaing (Anthony, 3658:18-24), the actual spelling is Maing, and, for purposes of this brief, we have spelled it the correct way, *i.e.*, Maing. *See* https://fieldofvision.org/untitled-labor-union-documentary.

potential voter testified that he walked outside at 11:00 a.m. to vote during his break, saw that the line was so long that it had wrapped around to the building, and was dissuaded from getting into the line altogether. (Chu, 836:16-837:2). Devlin Parent testified that when he had finally been allowed to enter the voting tent, he still had to wait another 30-45 minutes to get to the check-in table. (Parent, 1051:7-13). Mr. Parent also testified that when he had finally made it up to the check-in table, Ms. Fedorova told him he could not vote and that he would have to go wait in a different line to check-in. (Parent, 1051:7-1052:24, 1065:10-21; EMP 0698). One of the Board Agents even commented to Associate Naomi Abreu that the voting line was unorganized and that the Board Agents were still trying to figure out a way to make the voting process more fluid and asked that the voters have patience. (Abreu, 1387:15-1388:14).

Many Associates stood in line for hours waiting to vote. (Grajeda, 745:6-746:1, 750:10-22; Asad, 1189:25-1190:10). Mr. Delancey described the voting line as "very long and very annoying" and compared it to the Great Adventure theme park. (Delancey, 1227:18-1228:15). He further testified that the line was "unorganized" and that they waited in one line even though it eventually broke out into four lines inside the tent. (Delancey, 1228:16-1229:3). Mr. Delancey suggested to a Board Agent that the Board let voters know that there was actually four separate lines, so that the voters could move quicker, but the Board Agent dismissed his suggestion and told him "not to worry about it." (Delancey, 1246:22-1247:4). Mr. Parent testified that he stood in line for at least an hour and a half; he remembers waiting in line outside of the tent for over an hour because he had to text his co-worker at the one hour mark to ask him to make sure his computer did not automatically log him out of his work station, and he texted his co-worker again when he was leaving the tent. (Parent, 1042:12-1043:3, 1057:18-1058:7).

Board Agents standing outside of the voting tent began asking for voters whose last name began with certain letters to move to the front of the line and into the voting tent. (Grajeda, 746:7-748:17; Jaramillo, 3145:20-3148:2). This process resulted in some Associates skipping ahead of and cutting voters in line, which caused an even longer wait for the Associates who had been skipped. (Grajeda, 746:7-748:17; Jaramillo, 3138:8-19, 3145:20-3148:2). Some Associates who had gotten into line together, finished voting at different times. For instance, co-workers Natasha Grajeda, Noemi Abreu, and Guillermo Rentas all left their workstations together at approximately 8:30 a.m.-9:00 a.m. on Monday, March 25 and got into the voting line at the same time. (Grajeda, 745:2-746:2; Abreu, 1372:7-15, 1378:5-14; Rentas, 1510:24-1511:4; EMP 0198-A, EMP 0198-B, EMP 0198-C). Board Agents quickly moved Ms. Abreu to the front of the line because her last name began with the letter "A" and, as a result, it took her only 20 minutes to vote. (Abreu, 1378:5-1379:5, 1382:13-1383:7). Ms. Grajeda was called sometime thereafter and it took her approximately two to two and a half hours to vote. (Grajeda, 745:6-746:1).

About a half hour into the voting session, the Board Agents stopped the election and reconfigured the lines by dividing the one original line into three separate lines grouped by letters, *i.e.* A-F, G-N and O-Z. (Famiglietti, 603:8-24; Parent, 1053:24-1055:25). Mr. Parent testified that while he was inside the tent waiting to vote, Ms. Fedorova told another Board Agent to close the tent door and the Board stopped sending voters into the tent. (Parent, 1053:24-1056:13). The two Board Agents spent several minutes reconfiguring the voting line inside of the tent. (Parent, 1053:24-1056:13; Asad, 1190:14-22; Famiglietti, 607:2-22). Mr. Parent testified that other voters "were getting mad because we were just standing around waiting." (Parent, 1054:13-14).

3. <u>The Board Failed to Police the No-Electioneering Zone</u>

a) *The Media Entered the No-Electioneering Zone and Recorded and Widely Published Associates Exercising Their Section 7 Rights, and Region 29 Failed to Prevent or Stop Them from Doing So*

While all of this was going on, the media's prolific presence both in and within view of the no-electioneering zone added to the chaotic nature of the morning voting session. Throughout the morning voting session on March 25, members of the media repeatedly and relentlessly photographed, videoed, and interviewed Associates while they were standing in line waiting to exercise their Section 7 rights. Both Ms. Grajeda and Ms. Abreu testified that while they were standing in the voting line, they observed individuals with professional looking cameras positioned immediately to their left within the no-electioneering zone, just 9-12 feet, or "two to three car lengths" away from the voting line at the entrance of the tent. (Grajeda, 754:23-756:22, 803:17-804:2, 804:16-805:6; Abreu, 1389:1-13, 1390:5-16, 1406:26-1410:21; EMP 0701-A). Ms. Grajeda also observed another cameraman positioned near the weather station on the sidewalk in front of the JFK8 building, which was approximately ten feet from where she was standing in the voting line and squarely within the no-electioneering zone. (Grajeda, 755:5-17, 756:23-758:20, 806:4-8; EMP 0672 p.1). He too was holding a professional looking camera with a long lens. (Grajeda, 756:23-758:20). All of these cameramen were still present when Ms. Grajeda exited the voting tent approximately two hours later. (Grajeda, 756:13-17). Mr. Cordova gave similar testimony that when he was standing in the voting line during this same timeframe, he observed a man holding a professional looking camera with a long lens standing approximately 15 to 20 feet from the tent, and about 25 feet from the entrance to the tent. (Cordova, 1288:1-1289:8, 1310:10-22).

Pictures of Ms. Grajeda, Ms. Abreu, and Mr. Rentas standing in the voting line were posted on the internet later that same day by well-known media outlets such as Apple News, Reuters, and the New York Post. (Grajeda, 759:7-761:14; Abreu, 1390:20-1391:25; EMP 0196, EMP 0198-A, EMP 0198-B, EMP 0198-C, EMP 0223-B, EMP 0704-B). At the time of the vote, Ms. Grajeda was pregnant and had not informed her co-workers of her news. (Grajeda, 759:7-761:4). But later that same day she started to received "congratulations" notifications from coworkers with a picture attached of her standing in the voting line earlier that morning with an angle that clearly showed that she was pregnant. (Grajeda, 759:7-761:4).

Mr. Parent testified that between 8:30 a.m.-10:00 a.m., while he stood in the voting line, he saw three members of the media at various locations within the no-electioneering area. (Parent,1042:8-25, 1044:23-1045:4, 1049:5-22; EMP 0672). One person holding a camera with a long lens was "about a car length away" from the tent and another person with a similar camera was set up in the parking lot about "three car lengths" away from where Mr. Parent was standing in the voting line. (Parent, 1046:6-1047:3). Mr. Parent observed a third person with a video camera and a microphone standing on the sidewalk in front of the JFK8 building between the main entrance and the cafeteria. (Parent, 1044:23-1045:5, 1047:4-14). When Mr. Parent finally exited the voting tent at 10:05 a.m., the man with the video camera was still in the same location. (Parent, 1056:17-1057:5).

Another Associate, Mian Asad, testified that on Friday, March 25, while he was waiting in line to vote and standing close to the tent's entrance, he saw two men he believed to be associated with the media. (Asad, 1189:25-1191:11, 1191:23-1192:10, 1204:3-18). One man had a large camera on his shoulder pointed at another man who was holding a microphone and wearing a badge hanging around his neck. (Asad, 1189:25-1191:11, 1191:23-1192:10). These

two men were initially at the voting tent but began walking down the voting line, filming and speaking with Associates who were standing in line. (Asad, 1191:7-11, 1192:8-19, 1193:5-17). Mr. Asad observed the men interview an Associate in a white vest who was standing directly in front of him, and overheard him asking the Associate about his vote. (Asad, 1199:25-1201:13, 1203:17-1204:9). These two men then approached Mr. Asad and asked him questions, including how he voted and, after he answered, why he voted no. (Asad, 1193:18-23, 1195:15-21). During this time, a Board Agent stood just a few feet from the voting line and in view of the cameraman, but at no time did Mr. Asad see or hear a Board Agent approach the cameraman. (Asad, 1208:18-24; EMP 0201.3). The interview of the Associate in the white vest and the questioning of Mr. Asad was posted to YouTube by the Associated Press. (Asad, 1199:25-1201:13, 1203:17-1204:18).

Mr. Delancey testified that while waiting outside of the tent in the voting line, he saw members of the media in and around the no-electioneering zone taking pictures and speaking with voters in line. Mr. Delancey was outside at the "smoke shack" (the structure Amazon refers to as the "weather shelter"), a few feet away from the tent. He had observed one woman in a purple/blue jacket walking within the no-electioneering zone unfettered: she walked from the weather shelter to the back of the tent, and then around the back of the tent to the exit of the tent and then back up to the main entrance of the JFK8 building taking pictures and speaking with voters in line as she roamed about the parking lot. (Delancey, 1233:11-25). This woman eventually approached Mr. Delancey and identified herself as being with News 12. Another man, who identified himself to Mr. Delancey as being from The Post, was taking pictures as he walked around the parking lot on the left side of the tent. He eventually approached Mr. Delancey, who was standing in the voting line close to the weather shelter (aka "bus stop" or "smoke shack")

and to the left of the voting tent. (Delancey, 1230:2-1232:15; EMP 0672). Mr. Delancey also observed a third person from the media who was about 60 feet away from the voting tent exit but visible to the Associates standing in the voting line. (Delancey, 1233:11-1234:16). Associates testified that they found the media's presence to be intrusive and unwelcome. (Grajeda, 760:11-761:4; Parent, 1019:13-1059:17, 1060:8-17; Kanzler,[30] 2717:12-14). When Ms. Grajeda noticed one of the cameramen pointing his camera at her, she moved her body sideways in an attempt to avoid the shot. (Grajeda, 760:11-761:4). But the cameraman was persistent and tracked her movements in what appeared to be an attempt to get her back into the frame. (Grajeda, 760:11-761:4). He was in fact able to capture her picture as several photographs of both Ms. Grajeda and her co-workers at that same angle were posted on the internet just several hours later. (Grajeda, 759:7-761:4, 790:10-25; Abreu, 1390:20-1391:25, 1396:13-22; EMP 0198-A, EMP 0198-C, EMP 0704-A, EMP 0704-D). Like Ms. Grajeda, Mr. Parent testified repeatedly that he did not want his picture taken but that a picture of him standing in the voting line was in fact taken without his consent. (Parent, 1049:13-1059:17, 1060:8-17).

The media was in direct view of the multiple Board Agents who stood outside of the voting tent throughout the morning voting session. (Donaldson, 391:9-22, 407:5-19, 422:13-18; Grajeda, 807:1-18; Parent, 1070:17-1071:12; Abreu, 1390:17-18; Delancey, 1234:17-1236:21; EMP 0672, EMP 0673-A). Indeed, the Region's failure to control the media's presence around the voting area was so catastrophic that Amazon submitted evidence at the hearing of freeze frame images of a video taken by one media member from inside or near the no-electioneering zone that unequivocally shows Region 29 Board Agents standing in the same frame as another member of the media (in this case, the ALU's documentary filmmaker) who was simultaneously

[30] Jean Kanzler is incorrectly spelled in the Transcript as "Jeanne Cancellor."

filming employees standing in line to vote, inside the no-electioneering zone. (EMP 0201.3) In another video posted online, three Board Agents are shown to be in direct view of, and just a few feet away from, the member of the media who was filming. (Donaldson, 391:9-22, 407:5-19, 422:13-18; EMP 0672). Each and every one of the above Associates who testified that they saw the media in and around the no-electioneering zone also testified that Board Agents were outside and within view of the media. At no time did these Associates see or hear anyone from the Board approach any of the media. (Grajeda, 807:1-18; Parent, 1070:17-1071:12; Abreu, 1390:17-18; Delancey, 1234:17-1236:21). The Region thus allowed the media to have unfettered access to the no-electioneering zone and, more importantly, to the Associates who were attempting to exercise their Section 7 rights, throughout the first voting session. (Parent, 1042:15-25; Asad, 1189:25-1190:10; Delancey, 1227:18-1228:7).

While the media was photographing, recording, and interviewing Associates, reports of their on-site presence began to make their way to Amazon management. News articles with pictures and videos of Associates in the voting line popped up on the internet,[31] and Associates returning from voting began to complain to their managers. (Donaldson, 362:4-17, 364:8-22; Troy, 1929:5-17). As such, Mr. Troy and Verena Gross, a member of Amazon's Public Relations team, went outside to respond to the unauthorized intrusions. (Troy, 1681:18-1682:4, 1683:3-11, 1704:14-19, 1929:5-17). Ms. Gross and Mr. Troy confronted several groups of media, all of whom were in the no-electioneering zone and within feet of voters. (Troy, 1692:2-7; EMP 0695-C). Courtney Gross, a reporter from New York 1, a local media outlet, was standing on one of the grass islands within the no-electioneering zone speaking into a microphone while being filmed by a cameraman. (Troy, 1692:8-12, 1692:21-1693:4, 1695:14-1696:9, 1705:16-1707:8;

[31] Hearing Officer Dunn excluded Amazon's attempts to demonstrate the location of the media in the voting area through press photos and videos. (Donaldson, 426:14-428:13).

EMP 0695-C). Ms. Verena Gross asked Courtney Gross to leave Amazon's property, which she did shortly thereafter. (Troy, 1698:20-24). Ms. Verena Gross and Mr. Troy also observed a man with a video camera on his shoulder recording an Associate who was speaking to the video camera. (Troy, 1698:25-1700:19). Mr. Troy recognized this man as someone who had been on JFK8 property at least five previous times interviewing Mr. Smalls and recording the on-site trespassing and solicitation activities of the ALU. (Troy, 1698:25-1700:19, 1751:3-1752:8; EMP 0364.1).[32] This cameraman was within feet of the voting line that had extended onto the sidewalk immediately in front of the building and within the no-electioneering zone. (Troy, 1705:16-1707:8; EMP 0695-C). Ms. Gross instructed the cameraman to leave and, while at first he appeared as if he was leaving, Ms. Gross and Mr. Troy saw him a few minutes later speaking with Mr. Smalls and Mr. Bryson. (Troy, 1709:18-1710:19, 1717:24-1718:20). Mr. Smalls and Mr. Bryson were parked in a white sedan next to the weather shelter located across from the parking garage. Mr. Troy reiterated Ms. Gross's prior instructions to the cameraman and asked him to leave Amazon's property. (Troy, 1710:16-19, 1717:24-1718:17). Ms. Gross and Mr. Troy also approached a third cameraman who was standing where the voting line crossed the parking lot towards the building and turned perpendicular onto the sidewalk. (Troy, 1704:13-23, 1705:16-24; EMP 0695-C). Ms. Gross instructed this cameraman to leave Amazon's property as well. (Troy, 1704:13-23). During all of these confrontations, Board Agents were outside of the voting tent and within view of the media, but appeared to do nothing to curtail the media's intrusive presence. (Troy, 1708:10-1709:4).

[32] As noted above, ALU lead organizer Jason Anthony later identified this person as Stephen Maing. Mr. Anthony admitted Mr. Maing was shooting a documentary on Mr. Smalls and the ALU. (Anthony 3657:15-3659:3). This is consistent with how he introduced himself to Ms. Russell on the morning of March 25. (Russell, 2354:3-2355:16). Mr. Maing can be seen with Mr. Smalls and other ALU agents on or around JFK8 in numerous photos and videos admitted in the record, including on February 23, 2022 (EMP 0335-v, EMP 0344-v at 2:27, EMP 0361.1-v at 7:13) as well as inside the no-electioneering zone on March 25, 2022 (EMP 0201.3) and at the vote count on April 1, 2022 (EMP 0364.1).

Despite the morning voting session having been scheduled to end at 1:00 p.m., it did not end until 2:45 p.m.–2:50 p.m. (Donaldson, 361:14-20; Russell, 2283:6-12). By the time the Board notified Amazon that they could return to the tent, the Observers had already left and the Board Agents were packing up. (Donaldson, 363:5-25, 381:13-23; Russell, 2283:6-12). Despite having confirmed with the Board Agents that Amazon wanted to be present for the sealing of the ballot boxes, the Board Agents had already sealed the ballot boxes and placed them on the dolly before Amazon arrived at the tent. (Donaldson, 382:12-21, 552:23-554:4; Russell, 2322:19-2323:1).

Ms. Donaldson testified that when Amazon arrived at the voting tent at 2:45 p.m.–2:50 p.m. it was a "mess." (Donaldson, 381:13-382:10). The stanchions had been moved and were scattered "all over the place," and some were even broken. (Donaldson, 382:22-383:23). Ms. Donaldson asked Ms. Fedorova if she could reorganize the lines because it was unclear as to what the Board was trying to do when they reconfigured the lines. (Donaldson, 387:25-388:20). With Ms. Fedorova's approval, Ms. Donaldson re-organized the stanchions so that, instead of forming one big snake, the stanchions now formed three separate lines. (Donaldson, 387:21-402:8; EMP 0672, pp. 5-8). For example, the O to Z line outside now led to an O to Z line inside the tent and that line would lead voters to the O to Z check-in table. (EMP 0672, pp. 5-8; Donaldson, 387:21-402:8). Also with Board Agent approval, Amazon erected a mesh tent approximately 6 ½ feet tall to block the media's access to, and view of, the voters in line. (Donaldson, 391:23-393:6).

Amazon representatives also raised concerns to Ms. Fedorova about reports of (i) the Board being rude to the voters, (ii) the long lines, and (iii) the media presence around the tent. (Donaldson, 364:1-22, 391:9-22; Russell, 2323:23-2324:7). Ms. Rogers and Ms. Russell asked

Ms. Fedorova what steps the Region could take to reduce the voting lines and specifically suggested that the Board set up the additional voting booths that the Board had brought with them but remained unassembled under the tables. (Donaldson, 387:8-14; Russell, 2324:19-2325:16; Spinella, 4806:23-4807:22; EMP 0912). Ms. Fedorova declined to do so and said that the number of voting booths was sufficient. (Donaldson, 387:8-14; Russell, 2324:19-2325:16). Ms. Fedorova dismissively stated that the problem with the lines was that the "[A]ssociates did not know their last names." (Donaldson, 389:14-20).

Amazon also expressed concern with the media presence around the tent because it was clear from the media reports popping up on-line that news personnel were coming inside of the no-electioneering zone and videoing, photographing, and interviewing voters who were standing in line. (Russell, 2328:9-16). Ms. Fedorova replied "we can't see everything but we're doing the best we can." (Russell, 2331:19-23). Amazon then asked Ms. Fedorova to send additional Board Agents to help expedite the voting process and to better monitor the no-electioneering zone. (Russell, 2324:19-2325:16). Ms. Fedorova refused to do this as well. (Russell, 2324:19-2325:16). Ms. Fedorova repeatedly dismissed Amazon's concerns and stated that things were "fine" and that she just needed to go back to her hotel room to get something to eat and charge her computer. (Russell, 2324:19-2325:16; ALU Exhibit 6).

b) *The ALU Electioneered in and/or within View of the No-Electioneering Zone, and Region 29 Failed to Prevent or Stop Them from Doing So*

Region 29 permitted the ALU to electioneer in the no-electioneering area during voting sessions. Mr. Smalls was repeatedly in, or within view of, the no-electioneering zone during the morning voting session on Friday, March 25. At approximately 9:30 a.m.-10:00 a.m., Mr. Smalls was observed standing within 15-20 feet from the entrance of the voting tent. (Martinez, K., 1999:2-2002:24; EMP 0227, EMP 0227-v). Ms. Martinez testified that she saw Mr. Smalls, who

was wearing a bright red ALU shirt, standing near the entrance of the voting tent just minutes before she entered the tent to vote. (Martinez, 2006:17-22). At 11:00 a.m., Mr. Smalls was still standing near the entrance of the tent and within the no-electioneering zone. (Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). Ms. Kanzler testified that while in the voting line, she saw Mr. Smalls accompanied by a cameraman standing close to the entrance of the tent. (Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). Initially, Ms. Kanzler saw Mr. Smalls standing about 20 feet away from her, as she stood in the voting line. (Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). As Ms. Kanzler progressed through the voting line, she approached the entrance to the tent; at this point, Mr. Smalls and the cameraman accompanying him were only about 5 feet away from Ms. Kanzler. (Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). Ms. Kanzler testified that the cameraman took her picture even though she did not want it taken. (Kanzler, 2171:12-14).[33]

Later that same morning, Mr. Smalls was near the weather shelter located across the street from the parking garage. (Troy, 1709:18-1710:19, 1717:24-1718:20; Chu, 843:20-844:17). Mr. Troy observed Mr. Smalls and Mr. Bryson parked in a white sedan. (Troy, 1709:18-1710:19, 1717:24-1718:20). They were speaking with the ALU documentarian whom Mr. Troy and Ms. Gross had instructed to leave Amazon's property earlier that morning. (Troy, 1709:18-1710:19, 1717:24-1718:20). Then, between 2:30 p.m.–2:45 p.m., while the polls were still open, Mr. Smalls was parked in his black four door SUV in the first car lane right in front of the JFK8 building, within the no-electioneering zone. (Aluqdah, 2219:25-2220:24; EMP 0695-D). Ms. Aluqdah testified that this black SUV was well known by Associates at JFK8 as belonging to

[33] Given the fact that ALU documentarian Steve Maing can be seen in the no-electioneering zone around the same time that Ms. Kanzler was standing in line, (EMP 0201.3), and that Mr. Troy also testified that Mr. Maing was in the area at that time, (Troy 1698:25-1700:19, 1751:3-1752:8), the weight of the evidence strongly suggests that Mr. Maing was the cameraman standing in the voting line with Mr. Smalls and taking pictures of Associates, including Ms. Kanzler.

Mr. Smalls because Mr. Smalls drove this SUV around Amazon property and regularly conducted organizing activities outside of, or nearby, this SUV. (Aluqdah, 2226:14-2227:11). On this occasion, a cameraman was filming Mr. Smalls from the passenger seat of Mr. Smalls' SUV. (Aluqdah, 2227:12-25). After about five minutes, Mr. Smalls pulled away in his SUV and circled the building. (Aluqdah, 2228:1-14).[34]

On Monday, March 28 around 9:00 a.m., Connor Spence was loitering immediately outside of the exit of the voting tent and within the no-electioneering zone. (Cordova, 1304:19-24). That same morning, Amarilis Villalongo walked outside of JFK8 during her 10:00 a.m. break and saw five members of the ALU – Mr. Smalls, Mr. Daniels, Mr. Anthony, Mr. Tristian Martinez, and Mr. Flowers – standing between the entrance to JFK8 and the voting tent. (Villalongo, 2791:13-2792:21). They were speaking with Associates who were in line to vote while one of the ALU members recorded them. (Villalongo, 2791:13-2792:21, 2794:17-2795:11; EMP 0527).

During the evening voting sessions on March 28 and March 29, ALU Observer Cassio Mendoza was observed electioneering inside of the voting tent. (Novoa, 2880:23-2881:18, 2884:18-2885:24, 2886:9-:15). Charlene Novoa, who was serving as an Observer for Amazon during the same voting sessions as Mr. Mendoza, testified that Mr. Mendoza was giving the "thumbs up"[35] accompanied by a "big smile" towards certain voters who were inside the tent, many of whom were wearing ALU lanyards. (Novoa, 2880:23-2881:18, 2884:18-2885:24). At no point did any Board Agent, including the Board Agent sitting at the table with Mr. Mendoza,

[34] The ALU publicized Mr. Smalls' presence in the voting area, retweeting a post of Mr. Smalls showing him standing at the exit of the voting tent. (EMP 0229).

[35] Mr. Mendoza admits he would give a "thumbs up" to voters in the voting tent, but claims he did so to inform voters they were in the right spot in the tent. (Mendoza, 5025:2-11). Nevertheless, this type of communication with voters was specifically prohibited by the Board in its observer instructions. Mr. Mendoza admits that no Board Agent stopped him from engaging and speaking to voters in this manner. (Mendoza, 5065:8-10).

stop Mr. Mendoza's interactions with these voters. (Novoa, 2886:16-2887:22; Mendoza, 5025:2-22).

During the evening voting session on March 29, Ms. Maldonado and Mr. Smalls were observed within the no-electioneering area. (Spinella, 4811:21-4815:3). At approximately 12:20 a.m., Mr. Spinella was notified that the generator had shut off, and with it the lights in the tent, so he went outside to fix it upon the request of the Board Agent. (Spinella, 4809:21-4815:3). As he was fixing the generator, he saw Ms. Maldonado standing within the no-electioneering zone, right near the generator and the restroom at the exit of the voting tent. (Spinella, 4809:21-4815:3). As Mr. Spinella was walking back to the building from fixing the generator, he saw Mr. Smalls' black SUV drive up past the exit to the voting tent and park where the orange cones were located. (Spinella, 4809:21-4815:3).

On Wednesday, March 30 around noon, Mr. Spence was again loitering to the right of the exit of the voting tent, within the no-electioneering zone. (Lopez, 2701:12-2704:5; EMP 0695-E).

4. Region 29 Allowed ALU Supporters to Wear Pro-ALU Paraphernalia inside the Voting Tent, but Made Voters Cover All Pro-Company Paraphernalia

Throughout the election, Board Agents vigorously policed the voting area for any "Vote No" messaging. For example, on Friday, March 25, Ms. Monarrez carried her sign that read "I JOINED ALU," "I LEFT ALU," "I'M VOTING NO," and "We need a national union, not the ALU" into the no-electioneering zone. (Monarrez, 4002:1-19, 4004:20-4005:11; EMP 0901). As Ms. Monarrez approached the entrance to the tent, a Board Agent made an announcement that "nobody was allowed to have any signs or any T-shirts that said anything at all about the election." (Monarrez, 4003:8-17).

On Tuesday, March 29, Mr. Purpura attempted to vote wearing three anti-ALU buttons pinned to his t-shirt. (Purpura, 704:20-706:14; EMP 0524). The three buttons were ALU buttons that depicted three fists punching out of a box; Mr. Purpura had altered these three buttons by writing, in black magic marker, the phrases "Vote No," "Fuck No" and "No" over the original image. (Purpura, 705:4-706:14; EMP 0524). When Mr. Purpura approached the tent, a Board Agent told him he could not enter the voting tent until he covered his T-shirt. (Purpura, 706:24-707:9, 736:6-12). When asked why, the Board Agent told Mr. Purpura that he was "not allowed to politick in the tent." (Purpura, 706:24-707:9). Mr. Purpura closed his flannel shirt over the buttons on his T-shirt and the Board Agent then allowed him to enter the voting tent. (Purpura, 706:24-707:9). On that same day during the morning session, a Board Agent approached a voter wearing a "VOTE NO" shirt. (Tredici, 977:12-25; EMP 0545). In the presence of other voters, the Board Agent told this voter that she was not allowed inside the voting tent with the "VOTE NO" shirt on, and that she would not be allowed to vote until she covered up her shirt. (Tredici, 983:13-984:8, 985:12-25). When Jasmine Gordon attempted to vote at around 10:30 a.m. on Wednesday, March 30, 2022, she was wearing a "Vote No" shirt and, a female Board Agent approached her in the tent and told her "if you have on that shirt, you can't vote, so cover it up." (Gordon, 1631:23-1633:6).[36] When Ms. Gordon asked why, the Board Agent responded, "You can't vote if you have on that shirt." (Gordon, 1631:21-1633:6).

John Christie also attempted to cast a ballot in the election wearing a "Vote No" shirt. (Christie, 2686:7-2687:12). Before entering the tent, a Board Agent told him, in front of other voters, that "nobody going into the tent was allowed to wear any shirt stating pro or con." (Christie, 2687:16-2688:9).

[36] Ms. Grajeda testified that while she had been wearing a "VOTE NO" shirt while standing in the voting line outside, it began to get chilly so she zipped up her sweater, which covered her shirt, before she got to the entrance of the voting tent. (Grajeda, 801:12-25).

The credibility of all this testimony was confirmed, if not enhanced, by the testimony of Mr. Mendoza. He admitted that while serving as an ALU Observer for six voting sessions, Board Agents specifically told the Observers to notify them if they saw anyone wearing a "Vote No" shirt. Mr. Mendoza "was instructed that if we see someone wearing a vote no shirt, we should just tell the Board Agent." (Mendoza, 5021:17-5022:2).

Conversely, Board Agents not only permitted ALU supporters to enter the voting tent while wearing pro-ALU "Vote Yes" paraphernalia, but Board Agents also permitted voters to remain in the tent to cast their vote while wearing pro-ALU paraphernalia. Even more remarkably, Board Agents permitted ALU observers to display "Vote Yes" messaging and pro-ALU buttons to voters as voters received their ballots. Over the course of the election, the Region permitted voters wearing the ALU's yellow "Vote Yes" lanyard to enter into and remain in the voting tent hundreds of times. (Tredici, 984:9-985:7; Cordova, 1292:9-1293:3; Rosado, 3081:1-10, 3085:1-17, 3089:21-3040:2; Matos, 3235:15-3236:15, Novoa, 2861:1-24, 2862:14-25, 2867:24-2869:14, 2872:1-20; Litto, 2758:20-2760:11; EMP 0725). These yellow ALU lanyards conveyed pro-ALU messaging and depicted alternating images of a fist punching through a box with the phrase "amazon LABOR UNION" written next to it, and the words "VOTE YES" placed next to a check mark in a box. (Rosado, 3081:1-10, 3085:1-17; EMP 0232-A, EMP 0725, EMP 2817). These images covered the entire length of the lanyard. (EMP 0232-A, EMP 0725, EMP 2817). At no point did Board Agents require these Associates to remove their lanyards while they were in the voting tent or before they were permitted to cast their vote. (Tredici, 984:9-985:7; Cordova, 1293:7-11; Rosado, 3090:9-24; Matos, 3236:16-19; Novoa, 2864:7-12, 2869:15-2870:1, 2872:21-25; Litto, 2760:12-15).[37]

[37] The ALU's attempt to rebut the overwhelming evidence regarding the presence of yellow ALU "Vote Yes" lanyards in the voting tent, as well as Board Agent's discriminatory treatment of "Vote Yes" and "Vote No"

While serving as an Observer during the evening voting session on March 26, 2022, Megan Matos saw approximately ten Associates wearing the yellow ALU lanyards inside the voting tent. (Matos, 3235:15-3236:15). Ms. Matos never saw a Board Agent instruct a voter to remove the yellow lanyard while inside the tent. (Matos, 3236:16-19). On Monday, March 28, Tuesday, March 29, and Wednesday, March 30 during the evening voting sessions, Observer Charlene Novoa witnessed approximately 125 voters enter the voting tent wearing the yellow ALU lanyards. (Novoa, 2861:1-24, 2862:14-25, 2867:24-2869:14, 2872:1-20). Over the course of the three voting sessions, Observer Novoa only witnessed one Board Agent instruct one voter out of the approximately 125 wearing the yellow ALU lanyards to put the ALU lanyard away. (Novoa, 2864:7-:12, 2869:15-2870:1, 2872:21-:25). When she voted on Saturday, March 26, Catherine Litto witnessed three to four Associates wearing a yellow ALU lanyard inside the voting tent. (Litto, 2758:20-2760:11). Ms. Litto never observed any Board Agent instruct these voters that they were not permitted to wear the lanyards while voting. (Litto, 2760:12-15). Other Associates were permitted to wear pro-ALU shirts inside the voting tent without being made to cover them up. (Rosado, 3086:1-3089:6, 3090:9-24; EMP 0527).

Even ALU Observers, who spent 5 hours sitting at the same table with their respective Board Agent, were permitted to wear pro-ALU and "vote yes" messaging while in the voting tent

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messaging in the voting area, was feeble at best. Five ALU Observers testified over the course of the Hearing. (EMP 2927). Out of those five Observers, the ALU only elicited testimony from Mr. Mendoza on the subject, who testified he saw Board Agent Ms. Fedorova instruct voters to remove their lanyard only "seven or eight times." (Mendoza, 5019:8-23). Given the overwhelming evidence to the contrary, as well as the ALU's failure to call any witness to corroborate Mr. Mendoza's testimony, Mr. Mendoza's testimony is not credible. And even if Mr. Mendoza's testimony that Board Agents instructed voters to remove "Vote Yes" lanyards on 7 or 8 occasions is credited, that indicates Board Agents were generally aware they should not be allowing the display of pro-union insignia inside the tent if they were requiring anti-union insignia to be covered up or removed (even though they clearly failed to adequately enforce such a standard). And of course, Mr. Mendoza was not present for every voting session and thus was not present to have observed much of the disparate treatment addressed by Amazon's witnesses. (Medina, 3763:14-24; Mendoza, 5056:22-24). Regardless, voters wearing the ALU's yellow lanyard would have had to remove it from their pocket to show their ID badges at the check-in tables if they were using the lanyard as intended (i.e., to hold their employee ID). (EMP 0182, at § 12; *see also*, Mendoza, 5082:7-20).

serving as an Observer and thus engaging with voters. When Ms. Goriva voted on the evening of Tuesday, March 29, she saw one of the ALU Observers wearing the yellow ALU "Vote Yes" lanyard inside the tent while interacting with voters. (Goriva, 906:5-908:15). Mr. Cordova testified that when he went to check in to vote on Monday, March 28, ALU Observer Mr. Daniels was wearing a pink ALU shirt. (Cordova, 1285:3-11, 1293:18-1295:1). Mr. Castellano testified that when he went to check-in to vote on Wednesday, March 30 right when the polls opened, he observed ALU Observer Mr. Daniels at the check-in table wearing pro-ALU buttons on his sweater. (Castellano, 1093:22-1095:22). ALU Observer Cassio Mendoza admitted that he also wore these pro-ALU buttons while he served as an Observer, stating that "I didn't wear any of my Union shirts or my lanyard. But we did have a pin that had the logo for the ALU, and I had my observer, but not with the ALU written, just the actual fist coming out of the box. And then I had my observer pin that the Board agent gave me. But besides that, no." (Mendoza, 5016:17-24). These ALU buttons were the same ALU buttons that Mr. Purpura had altered with a black magic marker and which the Board prohibited him from openly wearing in the voting tent. (EMP 0524).

5. <u>The Board Solicited Unfair Labor Practices from Voters in the Voting Area</u>

Robert Nicoletti served as an Amazon Observer during the morning voting session on Monday, March 28, 2022, at the O to Z voting table. (Nicoletti, 2199:11-2200:4). The Board Agent assigned to the O to Z table with Mr. Nicoletti was a young, white male. (Nicoletti, 2205:9-21). Approximately two hours into the voting session, an Associate entered the voting tent and started complaining that "Amazon has no right to publish things of like, we recommend you vote no, to holding meetings, and whatnot, that he was part of a Union and it's not right that this is happening." (Nicoletti, 2203:22-2204:24). In response, the Board Agent attempted to

assuage the man and told the individual "if you want to file a complaint with the NLRB, feel free to do so." (Nicoletti, 2204:17-18).

III. LEGAL STANDARDS

A. General Standard for Objectionable Conduct

The test for objectionable conduct, which is an objective one, is whether the party's misconduct "has the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995); *see Hopkins Nursing Care Ctr.*, 309 NLRB 958, 958 (1992); *Baja's Place*, 268 NLRB 868, 868 (1984); *see also Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (expressing test as whether conduct "could . . . reasonably have affected the results of the election") (internal quotation marks omitted); *Safeway Inc.*, 338 NLRB 525, 526 fn. 3 (2002) (same); *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609, 619 (4th Cir. 2013) (subjective reactions of employees irrelevant to question of whether there was, in fact, objectionable conduct).

In determining whether misconduct has the tendency to interfere with freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the temporal proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent the misconduct was disseminated among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the margin of victory of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Div.*, 336 NLRB 157, 158 (2001) (citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986)); *see Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004); *Phillips Chrysler Plymouth*, 304 NLRB 16, 16 (1991)).

Because the standard is an objective one, the Board will not consider the subjective effect the underlying conduct had on bargaining unit employees when determining whether the challenging party has met their burden of proving coercive or objectionable conduct. *Janler Plastic Mold Corp.*, 186 NLRB 540, 540 (1970); *see also Underwriters Lab'ys*, 323 NLRB 300, 300 fn. 2 (1997) (declining to rely on judge's finding there was no evidence that any employee felt intimidated or coerced by statement).[38]

B. General Standard for Adverse Inferences

1. <u>Legal Standard</u>

Board precedent is clear that the relevant inquiry when determining whether an adverse inference may be drawn from a party's failure to call a potential witness is whether the witness may reasonably be assumed to be favorably disposed to that party. *Elec. Workers Local 3 (Teknion, Inc.)*, 329 NLRB 337, 338-339 (1999). Instead, the Board has held that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *Avondale Indus.*, 329 NLRB 1064, 1158 (1999)*; cf. Queen of the Valley Hosp.*, 316 NLRB 721, 721 fn. 1 (1995) (adverse inference is inappropriate where a witness is equally available to multiple parties and is not predisposed to testify favorably for one side over the another).

An adverse inference is also warranted by the unexplained failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. *See Martin Luther King, Sr., Nursing Ctr.*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate

[38] To the extent that different or more fact-specific precedent applies to individual objections, Amazon will address those precedents in turn below. Herein, each objection section will explain the associated standard for objectionable conduct and detail how the ALU and the Region's conduct satisfied the standard, which necessitates overturning the election.

where no explanation as to why supervisors did not testify); *Flexsteel Indus.*, 316 NLRB 745, 757-58 (1995) (affirming finding that party's failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

2. <u>Application of the Standard to Region 29's Failure to Call Any Witnesses</u>

Regional Director Overstreet's June 10 Order denying Amazon's motion to exclude Region 29 from participating in the Hearing explicitly stated that, "Regional Director Drew-King is entitled to have a representative appear at the hearing . . . ***Prohibiting parties from defending themselves is not the purpose of the Board's procedures.***" (BD 1(p))(emphasis added).

By his own words, Regional Director Overstreet accorded Region 29 party status for the post-election objections hearing so that it could "defend and explain" the alleged objectionable conduct. Amazon does not believe Mr. Overstreet's interpretation accords with Board rules and procedure, but nevertheless Section 102.66(a) of the Board's Rules and Regulations makes clear that parties at a hearing have the right to "call, examine, and cross-examine witnesses." 29 C.F.R. § 102.66(a). Even a cursory review of the Hearing transcript show that the Region 29 representatives made extensive use of Rule 102.66(a) in frequently cross-examining Amazon witnesses. Additionally, on the very first day of the Hearing, Region 29 Representative Lisa Friedheim-Weis contended that it was her "job and…primary function as the RD rep to see that all relevant evidence adduced during the Region's administrative review becomes part of the record[.]" (Friedheim-Weis, 22:19-23).

Yet, Ms. Friedheim-Weis' actions belied this statement when later that same day she argued that "the Regional Director rep concurs entirely with the Petitioner's motion to dismiss as to objections 1 through 9 and 12[.]" (Friedheim-Weis, 59:24-60:2). Ms. Friedheim-Weis' request for the Hearing Officer to dismiss objections that had been set for hearing by Regional Director

Overstreet, before any evidence had been admitted into the record, was entirely incompatible and incongruous with her alleged role to "see that all relevant evidence…becomes part of the record." In doing so, the representative for Regional Director 29 made clear that her role was just as contemplated by Regional Director Overstreet in his June 10 Order, akin to "a union representative accused of conduct interfering with the results of the election…defending themselves." (BD 1(p) at 3).

After making extensive efforts throughout the Hearing to limit the introduction of relevant evidence, the representatives for the Regional Director for Region 29, as a party to the Hearing, should not be allowed to now benefit from their repeated attempts to artificially limit the evidentiary record. Any other party in a typical Board hearing would be expected to put on evidence to support its positions, and a failure to do would compel findings of adverse inferences. *See Int'l Automated Mach.*, 285 NLRB at 1122-1123.[39]

C. Credibility Determinations

When making a credibility determination, the finder of fact may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence; established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Const. Grp.*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Auto. Dealership Grp.*, 321 NLRB 586, 589 (1996)), *enfd. sub nom. Caikichi Corp. v. NLRB*, 56 Fed. Appx. 516 (D.C. Cir. 2003). When an attorney asks leading questions of his party's witnesses, the Board "accord[s]

[39] Any reliance on *Indep. Stations Co.*, 284 NLRB 394 (1987), the ALU may offer in its post-hearing brief to oppose such an adverse inference would be misplaced. *Indep. Stations Co.* was a CA case, and therefore the agents in that case were not factual witnesses to any relevant dispute in that matter. *Id.* In the present matter, the Region's actions are directly in dispute and form the basis of many of Amazon's objections.

minimal weight to them and view[s] them as little more than [that party's] attorney's testimony in favor of his client's position." *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977).

D. Agency

The Board uses common law agency principles in determining agency. *Serv. Employees Local 87 (West Bay Maint.)*, 291 NLRB 82, 82-83 (1988). "The determination of whether this burden has been met rests on an analysis of the facts under common law agency principles." *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1336 (2004). In *Bio-Med. Applications of Puerto Rico, Inc.*, 269 NLRB 827 (1984), the Board explained:

> A principal is responsible for its agent's conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent…it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.

Id. at 828. If a principal is aware of a purported agent's potentially objectionable conduct and ratifies the conduct by not repudiating it, that is evidence of agency. *See In re Cornell Forge Co.*, 339 NLRB 733, 734 (2003); *see also Hampton Merchs. Ass'n.*, 151 NLRB 1307, 1308 (1965). "Moreover, under the common law of agency, a principal may be responsible for its agent's actions if the agent reasonably believed from the principal's manifestations to the agent that the principal wished the agent to undertake those actions." *Wal-Mart Stores, Inc.*, 350 NLRB 879, 884 (2007), citing Restatement 2d, Agency, § 33.

Board cases distinguish between being acting as a "special agent" and a "general agent" of a union. *Compare Advance Prods. Corp.* 304 NLRB 436 (1991) (determining general agent status), with *Davlan Eng'g*, 283 NLRB 803 (1987) (determining special agent status). In *Davlan* the Board stated,

> in the absence of extraordinary circumstances, employees who solicit authorization cards should be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting.

283 NLRB at 804.

Individuals are "general agents" when they have an actual agency relationship or apparent authority to act on behalf of the union. *Richard Fitzs Local 147, Laborers Int'l Union of N. Am.*, 370 NLRB No. 30 (Oct. 2, 2020).

Circuit courts have held that "[a] union may create an agency relationship either by directly designating someone to be its agent (*i.e.* granting 'actual authority') or by taking steps that lead third persons to reasonably believe that the putative agent was authorized to take certain actions (*i.e.* allowing 'apparent authority' to exist)." *Overnite Transp. Co. v. NLRB*, 104 F.3d 109, 113 (7th Cir. 1997) (alteration in original) (citing *Tuf-Flex Glass*, 715 F.2d 291, 296 (7th Cir. 1983)); *see also NLRB v. Truck Drivers Local Union No. 449*, 728 F.2d 80, 86 (2d Cir. 1984); *NLRB v. L & J Equip. Co., Inc.*, 745 F.2d 224, 232-33 (3rd Cir.1984); *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976). The Board has held that an individual holding elected union office constitutes "persuasive and substantial evidence" of agency status which is "decisive in the absence of compelling contrary evidence."; *see also IBEW Local 453*, 258 NLRB 1427, 1428 (1981), *enf. granted sub nom. NLRB v. IBEW*, 696 F.2d 999 (8th Cir. 1982) (finding that executive board member's inactive status did not obviate his authority and status as an agent of the union). Where an individual is held out, or holds themselves out, as someone who can act on behalf of the union, they are cloaked in apparent authority. *See e.g., Elec. Workers Local 45*, 345 NLRB 7, 7 (2005) (finding a shop steward had apparent authority to act on Union's behalf while running meeting together with union business representative); *Auto. & Allied Indus. Local 618 (Sears, Roebuck & Co.)*, 324 NLRB 865, 865-66 (1997) (finding a daughter of union's chief executive officer who "routinely" responded to

members' questions regarding dues had apparent authority to speak for the union with respect to such issues).

1. <u>Jason Anthony is an Agent of the ALU</u>

Mr. Anthony, a highly visible and active member of the ALU, is undoubtedly one of its agents. *See supra,* II(B)(2). Mr. Anthony has been a lead organizer since the ALU's founding and played an integral role in the creation and administration of the ALU's Facebook. (Anthony, 3493:6-3502:13). In fact, Mr. Anthony ran the ALU's Facebook page during the critical period. (Anthony, 3493:6-3502:13). Mr. Anthony was given actual authority from ALU Vice President Connor Spence to disseminate the ALU's campaign messaging through Facebook. (Anthony, 3502:9-23). In that role, Mr. Anthony actively advocated on behalf of the ALU to other Associates. (2748:15-2749:7).

As a lead organizer, Mr. Anthony further communicated the ALU's agenda to Associates through several different means, including phone banking, engaging voters and handing out flyers and lanyards at the ALU's table in the JFK8 breakroom. (Spence, 4326:21-4327:6; Anthony, 3588:6-3593:4; 3593:20-3594:1). Moreover, Mr. Anthony recorded several videos on behalf of ALU that were both provided to the media and disseminated through the ALU's multiple social media channels. (Anthony, 3523:17-3524:3, 3560:22-25; EMP 0303, EMP 0304-v, EMP 344, EMP 344-v, EMP 0662, EMP 0757, EMP 757-v, EMP 0758, EMP 758-v, EMP 3001, EMP 3002). Mr. Anthony was authorized by the ALU to engage in these activities. (Spence, 4319:16-4320:2, 4406:13-4407:16.). The breadth of Mr. Anthony's activities with the ALU, as well as the authority granted to him by the ALU makes him an agent of the ALU. *See Tyson Fresh Meats, Inc.*, 343 NLRB at 1336-37 (quoting *Commc'n Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, fn. 4 (1991)).

Notwithstanding Mr. Anthony's actual authority to serve as an agent for the ALU, the record demonstrates that the ALU also cloaked him in apparent authority as well. Given the ALU's authorization of Mr. Anthony's extensive campaigning on behalf of the ALU, the ALU knew or should have known that third parties, including Associates, were reasonable to believe he was acting on behalf of the ALU. This fact was confirmed by the testimony of associate Lori'l Adenji who testified that she believed that Mr. Anthony was an officer of the ALU. (Adenji, 1499:3-9, 1505:12-21).

2. <u>Justine Medina is an Agent of the ALU</u>

Justine Medina, a member of the ALU's Organizing Committee, is likewise an agent of the ALU. Ms. Medina was extremely active and visible in communicating the ALU's agenda to the Associates. *See supra,* II(B)(2). For example, Ms. Medina printed out thousands of flyers to disseminate to Associates and came into JFK8 on her days off from work to campaign on behalf of the ALU. (Medina, 3716:12-16). Ms. Medina communicated the ALU's agenda to Associates through several different means. For example, Ms. Medina phone banked on behalf of the ALU twice a week—communicating the ALU's agenda directly with Associates with the knowledge and permission of the ALU. (Medina, 3746:21-3747:22, 3749:8-8). Ms. Medina also recruited individuals to volunteer at the ALU's phone banks. (Medina, 3919:5-10). There, Ms. Medina would flag down passing Associates and attempt to garner their support for the ALU by advocating the importance of union representation and explaining the contract the ALU planned to negotiate with Amazon. (Medina, 3756:20-3758:3). Additionally, Ms. Medina handed out ALU pamphlets, lanyards, t-shirts, and pins with the intent of persuading Associates to support the ALU. (Medina, 3756:20-3758:3). While working at these tables with other ALU Agents, Ms. Medina would wear her ALU shirt and other ALU paraphernalia. (Medina, 3759:21-3761:22). During the critical period, Ms. Medina assisted in writing a newsletter on behalf of the ALU,

served as an administrator of the ALU's Facebook group, gave interviews to the media related to her role in the ALU, and solicited donations to the ALU. (Medina, 3768:9-24, 3769:12-16, 3780:10-13, 3894:22-24).

Finally, Ms. Medina would visit Associates homes on behalf of the ALU, unannounced, in an effort to persuade Associates to vote for the ALU. (Medina, 3734:12-3735:5; Vaidya, 2085:25-2086:14; 2092:5-18). For example, Associate, Gopi Vaidya, testified that Ms. Medina showed up at her home, identified herself as a member of the ALU, and began to question Ms. Vaidya as to her support of the ALU. (Vaidya, 2085:5-2104:23).

Ms. Medina served as one of the primary conduits for communication between the ALU and Associates. Ms. Medina undertook such extensive and wide-spread campaigning on behalf of, and with full authorization from, the ALU. In totality, the ALU should be held liable for the actions of Ms. Medina because it cloaked her in the robe of apparent authority. *See Elec. Workers Local 45*, 345 NLRB at 7; *Auto. & Allied Indus. Local 618 (Sears, Roebuck & Co.)*, 324 NLRB at 865-66.

3. <u>Cassio Mendoza is an Agent of the ALU</u>

Mr. Mendoza is a lead organizer and active supporter of the ALU who served as an Observer for the ALU during six of the ten voting sessions. (Mendoza, 5015:3-5015:10). Mr. Mendoza was also in charge of creating the content that the ALU posted to its TikTok page. (Anthony, 3509:23-3510:5, 3512:8-11). Mr. Mendoza served food to Associates in the breakroom on behalf of the ALU. (Mendoza, 5033:21-25). He was known to other organizers as a "representative" of the ALU. (Monarrez, 4008:5-18).

It is well-settled that the Board treats union observers as agents of the union while they are serving as an observer. *See, e.g., Brinks Inc.*, 331 NLRB 46 (2000) (setting aside an election because a union observer gave voters a "thumbs up"), *see also Mod. Hard Chrome Serv. Co.*,

187 NLRB 82, 83 (1970) (setting aside an election where a petitioner observer engaged in conversations "beyond a mere hello" with voters). Accordingly, any actions Mr. Mendoza took while serving as an ALU Observer are automatically imputed to the ALU.

Beyond his actions as an Observer, Mr. Mendoza was also acting as a "general agent" of the ALU when he sent the threatening text messages to Ms. Monarrez on March 25, 2022. By the plain language of the text messages, Mr. Mendoza was communicating with Ms. Monarrez on behalf of the ALU, acting as a mouthpiece for the ALU with respect to their efforts to coerce Ms. Monarrez to cooperate with the ALU. Mr. Mendoza testified that he "was trying to warn Nat that her actions would be seen by other people that she cares about…trying to warn her, as a friend, just be aware that…how you're acting could really affect other people's campaigns…everybody [from the ALU] was upset that she was acting in such a volatile way." (Mendoza, 5072:11-5073:6). *See Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB at 828 (discussing a principal is responsible for an agent's conduct in furtherance of the principals' interest).

Mr. Mendoza's self-serving testimony based on leading questions from the ALU's counsel should be discredited. (Mendoza, 5082:21-5083:7). *See H.C. Thomson*, 230 NLRB at 809 fn. 2. Additionally Mr. Mendoza's testimony is belied by the plain language of his text messages to Ms. Monarrez that he was communicating on behalf of the ALU, not himself: "Unfortunately they want to send the video of you holding up the anti-union sign to Britney Ramos and let her know what you do when you feel you're not in control. I'm telling them not to send it but it's hard to defend you when I already ask you to put the ["Vote No"] sign away" (EMP 0905). His text messages also indicate that he was speaking with Mr. Spence, Vice-President of the ALU, and relaying Mr. Spence's feedback, during his text exchange with Ms. Monarrez. (EMP 0905, "Connor has no idea what you are talking about," "So you are doing all

this because you think Connor laughed at you when he literally has no idea what you are talking about?"). Towards the end of the text string, Mr. Mendoza warned Ms. Monarrez that the ALU would make good on its threats when Ms. Monarrez did not respond in the manner that satisfied the ALU. Throughout this entire text string, Mr. Mendoza held himself out as speaking on behalf of the ALU, that he was communicating with Mr. Spence as he was sending these text messages, and made demands and warnings on behalf of the ALU. Therefore, any reasonable third party would have believed that Mr. Mendoza was authorized to speak on behalf of the ALU. *See Overnite Transp. Co. v. NLRB*, 104 F.3d at 113.

4. <u>Tristian Martinez is an Agent of the ALU</u>

Mr. Martinez engaged in many acts in which he spoke on behalf of the ALU, acted alongside other ALU agents, and held himself out as an ALU agent. During the first week of March 2022, Ms. Karen Martinez witnessed ALU organizer Mr. Tristian Martinez wearing an ALU T-shirt and yelling into a megaphone "free food, free T-shirts, free weed" near the JFK8 Workforce Staffing Office on the northeast corner of the building. (Martinez, K., 2007:22-2009:10; 2016:5-21; 2022:7-13). Matthew Cordova also observed Mr. Martinez distributing marijuana and ALU t-shirts to Associates alongside of Mr. Smalls, Mr. Palmer, and Mr. Tristan Edwards-Dutchin, another ALU organizer, between December 22, 2021 and March 30, 2022. (Cordova, 1296:19-1297:18; 1298:19-1299:5; 1300:14-1301:5). Mr. Cordova witnessed Mr. Smalls, Mr. Palmer, Mr. Martinez, and Mr. Dutchin providing marijuana next to a sign that declared "Free Weed and Pizza." (Cordova, 1297:19-1298:2).

Additionally, on March 28, 2022 Amarilis Villalongo walked outside of JFK8 during her 10:00 a.m. break and saw five members of the ALU – Mr. Smalls, Mr. Daniels, Mr. Anthony, Mr. Martinez, and Mr. Flowers – standing between the entrance to JFK8 and the voting tent.

(Villalongo, 2791:13-2792:21). They were speaking with Associates who were in line to vote while one of the ALU members recorded them. (Villalongo, 2791:13-2792:21, 2794:17-2795:11; EMP 0527).

Finally, per Mr. Martinez's own words, Mr. Martinez engaged in many acts in which he spoke on behalf of the ALU, acted alongside other ALU agents, and held himself out as an ALU agent. (EMP 1505). For example, Mr. Martinez identified himself as an "organizer for the ALU" (*Id*. at ¶9) who helped collect union "authorization cards on behalf of the ALU" (*Id*. at ¶11), and even "collected cards at the ALU tent." (*Id*. at ¶11). Moreover, Mr. Martinez distributed ALU literature in the employee breakroom and spoke to Associates regarding the ALU. (*Id*. at ¶¶17, 21). It's also important to note that Mr. Martinez is one of four ALU Agents (in addition to Mr. Palmer, Mr. Smalls, and Mr. Bryson) that signed affidavits pertaining to Region 29's Petition for Injunctive Relief. (EMP 0025-0029).

The fact that Mr. Martinez collected authorization cards and distributed marijuana flanked by other ALU Agents, Mr. Smalls and Mr. Palmer, further evidences that the ALU was not only aware of Mr. Martinez's objectionable conduct, but also ratified it by not repudiating it and instead engaging in the same conduct alongside of Mr. Martinez. Such ratification compels a finding of agency. *See In re Cornell Forge Co.*, 339 NLRB at 734 (2003); *see also Hampton Merchs. Ass'n*, 151 NLRB at 1308.

5. <u>Gerald Bryson is an Agent of the ALU</u>

Mr. Bryson is a highly visible founding member of the ALU, who is an active organizer and vocal supporter. Mr. Bryson admittedly spoke on behalf of the ALU, acted alongside other ALU agents, and held himself out as an ALU agent. (EMP 1505). For example, Mr. Bryson was an original founder of the ALU. (*Id.* ¶ 2). Mr. Bryson was an active organizer, who set up and

manned tables to pass out literature, talk with Associates, and collected signed authorization cards. (*Id.* ¶ 2). He was a mainstay at that ALU organizing table, where from April through September 2021, he tabled from morning to night 6 to 7 days per week. (*Id.* ¶ 4). After September, he continued and would table 3 times per week from the afternoon through the evening, and sometimes even overnight. (*Id.* ¶ 4). Video footage even depicted Mr. Bryson trespassing on Amazon's property to solicit with ALU leaders in December of 2021. (Troy, 1846:5-18, 1847:3-14, 1847:18-1847:7; EMP 0135-v, *see also*, EMP 0135). During the election, Mr. Bryson was observed with ALU President, Mr. Smalls, parked outside of the no-electioneering zone in a white sedan speaking with the ALU's cameraman. (Troy, 1709:18-1710:19, 1717:20-24).

Mr. Bryson even admitted that he is, at a bare minimum, an agent of the ALU based on his media presence, he stated, "I feel like many people know that I am one of the leaders of the Union because of this . . . . [referring to his appearance in news articles]" (Id. ¶ 14). Region 29 even argued as much in its Petition for Section 10(j) relief, that Bryson was so critical to the ALU that a free and fair election could not be run without his reinstatement. (EMP 1521 at 9). The Region wrote, "[e]ven if the Union wins the upcoming election, Bryson is a key figure and his reinstatement will help with first contract bargaining and further protected concerted activity in support of the Union's bargaining goals." (EMP 1521 at 41). The Region obviously sees Mr. Bryson as an agent of the ALU. Further, Mr. Bryson currently serves as the Sergeant at Arms for the ALU.[40] Spence, 4305:15-4306:9.

Mr. Bryson not only founded the ALU, but served as a highly visible conduit for communication between the ALU and Associates. He undertook extensive campaigning on

[40] Mr. Spence's self-serving testimony that the position was created after the election, and that it doesn't confer any authority has no impact on the analysis. (4305:15-4306:9). Regardless of the title conferred to Mr. Bryson, he is clearly an agent of the ALU.

behalf the ALU, with full support of the ALU. He has been an agent of the ALU from its inception to the present, and if not, he is certainly cloaked in apparent authority. *See Richard Fitzs Local 147, Laborers Int'l Union of N. Am.*, 370 NLRB No. 30; *Elec. Workers Local 45*, 345 NLRB at 7. The ALU should be liable for Mr. Bryson's actions.

IV. ARGUMENT ON OBJECTIONS

A. Objection 1

1. Amazon's Objection[41]

The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the ALU when it sought a 10(j) injunction in *Drew-King v. Amazon.com Servs. LLC, E.D.N.Y.*, No. 22-01479, on March 17, 2022. The Region sought this injunction 23 months after the alleged discriminatee (Gerald Bryson) was discharged, 18 months after the charge was filed, and 14 months after the complaint was issued in Case 29-CA-261755. Delaying the filing of this lawsuit until the eve of the election improperly influenced employees' perception of Amazon mere days before they were to vote. The Regional Director admitted as much in a statement to multiple press outlets, specifically referencing the imminent election in Case 29-RC-288020, stating the Board's support for the ALU and alleging Amazon was a lawbreaker. Specifically, the Regional Director said:

> We are seeking an injunction in District Court to immediately reinstate a worker that Amazon illegally fired for exercising his Section 7 rights. We are also asking the Court to order a mandatory meeting at JFK8 with all employees at which Amazon will read a notice of employees' rights under the National Labor Relations Act. No matter how large the employer, it is important for workers to know their rights—particularly during a union election—and that the NLRB will vociferously defend them.[42]

[41] The recitation of each objection herein is incorporated expressly from Amazon's April 8, 2022 Objections filed with Region 29. (EMP 0656).

[42] *See* Mitchell Clark, The NLRB is suing Amazon to get a fired activist his job back, THE VERGE (Mar. 17, 2022), https://www.theverge.com/2022/3/17/22983692/nlrb-amazon-labor-activism-gerald-bryson-jfk8-warehouse-

Mr. Bryson was discharged in May of 2020 for verbally berating a female co-worker. This video of the incident, which the Region attempted to conceal from Amazon throughout the investigation and trial, revealed that Mr. Bryson called his female co-worker, amongst other names, "gutter bitch," "crack ho," "queen of the slums," and "crack-head" over a bullhorn in front of their workplace because she exercised her Section 7 rights to disagree with him. Yet, on the eve of the election, the Region pursued this injunction suggesting that only ALU supporters' Section 7 rights matter, and that Amazon's decision to discharge him was worthy of an extraordinary remedy.

2. <u>Legal Standard</u>

Board conduct that undermines its appearance of neutrality is objectionable and necessitates a new election. "The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election." *Athbro Precision Eng'g Corp.*, 166 NLRB 966, 966 (1967) *vacated on other grounds*, 171 NLRB 21 (1968), *enfd. sub nom. NLRB v. Athbro Precision Eng'g Corp.*, 423 F.2d 573 (1st Cir. 1970). The Board will set aside an election based on a single instance of Board Agent misconduct. *Id*. In *Athbro*, an employee who already voted witnessed a Board Agent conducting the election drinking beer with a union representative at a café during a break in polling sessions. *Id.* The Board found this misconduct sufficient to warrant a second election notwithstanding its finding that "the Board Agent's conduct did not affect the votes of employees." *Id*. This is because the Board "will not…countenance[]…any

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injunction; *see also* Karen Weise, N.L.R.B sues Amazon over labor practices at a Staten Island Facility, NY TIMES (Mar. 17, 2022), https://www nytimes.com/2022/03/17/business/amazon-staten-island-facility.html.

statement which even implies Board bias in favor of a party to an election, and…such activities are, and will be, sufficient grounds for setting aside an election." *N.L. Atlas Bradford*, 240 NLRB 517, 518 (1979) (footnote omitted).

The Board set forth a similar standard in *Glacier Packing Co., Inc.*, 210 NLRB 571 (1974) stating:

> Board Agents in conducting elections in [sic] behalf of the Board must endeavor to maintain and protect the integrity and neutrality of its procedures. Therefore, while taking all practicable measures to implement the prohibition against electioneering at or near the polls, they must take care that their actions do not tend to foster in the minds of the voters the impression that the Board is not neutral with regard to the choices on the ballot. For, the Board's role in conducting elections must not be open to question. Thus, actions by a Board Agent conducting an election, which could reasonably be interpreted as impugning the election standards we seek to maintain, are sufficient grounds for setting aside the election.

Id. at 573.

In *Glacier Packing*, the election was set aside on the basis of two individual instances of conduct by the Board Agent conducting the election. *Id.* at 572. The first instance involved the Board Agent "yank[ing] off" campaign insignia worn by employer observers which repeated the employer's campaign message of "Vote Neither" and saying "shame on you" to the employer's observers. *Id.* The second instance was the same Board Agent approaching an employer official standing 200 feet from the polling place while the polls were open. *Id.* The employer official was distributing campaign literature and the Board Agent spoke to him in a very disrespectful manner in the presence of 15-20 voters and told the employer official he could not distribute the literature in that location. The 15-20 voters who witnesses the incident laughed and made catcalls at the employer official. *Id.* The Board set aside the election in *Glacier Packing* because "employees witnessing the two incidents involved could reasonably have interpreted [the Board

Agent's] remarks and actions as indicative that the Board was opposed to the [e]mployer's position in the election." *Id.* at 573.

The standard articulated in *Glacier Packing* is an objective one. The Board has noted that the election in *Glacier Packing* was set aside "because a Board Agent's conduct reasonably suggested that the Board opposed the employer." *Goffstown Truck Ctr., Inc.*, 356 NLRB 157, 158 fn. 6 (2010). Indeed, the Board applied these standards to overturn an election in *Hudson Aviation Servs.*, 288 NLRB 870 (1988). In that case, a Board Agent entered a dispatcher's office, where four employees *who had already voted* were present, and got into a verbal argument with an assistant manager and threatened to stop the election if the manager stayed in the office. *Id.* at 870. The majority in *Hudson Aviation* relied on both *Athbro* and *Glacier Packing* to conclude that the Board Agent's conduct "impermissibly put into question the Board's neutrality in the election and, therefore, the election must be set aside." *Id.* at 870-871.

The margin of the results of an election when objections question the appearance of Board neutrality does not have any bearing on whether an election is set aside. *See e.g., Archer Servs, Inc.*, 298 NLRB 312, 312 (1990) (election set aside, vote 382 to 41); *Hudson Aviation Servs*, 288 NLRB at 870 (election set aside, vote 26 to 5); *N.L. Atlas Bradford*, 240 NLRB at 517 (election set aside, vote 119 to 93); *Columbia Tanning*, 238 NLRB 899, 899 (1978) (election set aside, vote 44 to 34); *Westside Hosp., 218 NLRB 96, 99-100 (1975)* (election set aside, vote 58 to 35); *J. Ray McDermott & Co.*, 215 NLRB 570, 570 (1974) (election set aside, vote 40 to 33); *Glacier Packing*, 210 NLRB at 571 fn. 2 (election set aside, vote 230 to 107 to 44); *Thoikol Chemical Corp.*, 202 NLRB 434, 434 (1973) (election set aside, vote 23 to 10).

3. <u>The Board Failed to Maintain the Integrity and Neutrality of the Election by Filing its Petition for Injunction and Making Press Statements Immediately before the Election</u>

Region 29 destroyed confidence in the election process and impugned the appearance of neutrality by filing its petition for a 10(j) injunction against Amazon a mere eight days before the election. The timing and content of Region 29's filing portrayed Amazon in a negative light to voters and suggested the Region disfavored Amazon in the coming election. *See Hudson Aviation Servs.*, 288 NLRB at 870. Further, Regional Director for Region 29, Drew-King made clear in press that Region 29's purpose in seeking injunctive relief was to impact the results of the election in support of the ALU. Based on this conduct, the Board must set aside the election.[43]

a) ***The Region's Delay in Filing the Petition for Injunction Impermissibly Gave the Appearance that the Region Favored the ALU in the Upcoming Election***

Region 29's delay in filing its petition for injunction negatively influenced voters' perception of Amazon immediately before the election. Region 29 initiated its 10(j) proceeding against Amazon on March 17, 2022, seeking immediate reinstatement of former Amazon Associate Gerald Bryson. (EMP 1501). Region 29 did not press Mr. Bryson's case with urgency until the immediate runup to the election.[44]

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[43] An adverse inference should be drawn against Region 29 for its failure to call Regional Director Drew-King to testify regarding the timing of Region 29's petition. *See Avondale Indus.*, 329 NLRB 1064, 1158 (1999); *Queen of the Valley Hosp.* 316 NLRB at 721 fn. 1; *Martin Luther King, Sr., Nursing Ctr.*, 231 NLRB at 15 fn. 1; *Flexsteel Indus.*, 316 NLRB at 757-58.

[44] Any argument that Amazon is somehow responsible for the Region's extreme filing delay is disingenuous. Under the Board's own internal guidance, the Board can file for injunctive relief as soon as it issues a Complaint in the underlying case. *See* NLRB Section 10(j) Manual Sec. 5.1. Region 29 filed for injunction an extraordinary 14 months after it issued Complaint. It defies logic that any of Amazon's conduct could have contributed to that delay. Moreover, the Board specifically directs Regions not to allow the investigation of ancillary, even potentially related, charges to stall its 10(j) filings. *Id.* Indeed, the entire purpose of Section 10(j) injunctive relief is to provide a mechanism for the Board to obtain immediate, albeit temporary, relief in extraordinary circumstances, while the Board's often protracted administrative process runs its course. *Id.* at Sec. 1.1.

Amazon suspended and discharged Mr. Bryson in late March and early April of 2020 for verbally berating a female coworker. On June 17, 2020, Mr. Bryson filed his unfair labor practice charge in Case 29-CA-261755, alleging that he was discharged for engaging in protected activity regarding COVID-19 protocols. The Region then waited six months to issue the Complaint, finally doing so on December 22, 2020. The hearing on the Complaint before the Administrative Law Judge commenced in late March of 2021 and, after a hiatus, finished on May 27, 2021. At no point during this period did the Region find Mr. Bryson's reinstatement so pressing – either to Mr. Bryson or the rights of any other Associates – as to even raise the suggestion of filing for extraordinary injunctive relief.[45] Incredibly, on March 10, 2022, fifteen days before the election, Region 29 informed Amazon of its intent to file for injunction. (EMP 1512). The Region then contravened its own internal mandates and delayed an additional week before actually filing the Petition. *See* NLRB Section 10(j) Manual Sec. 5.5. ("The Region must file the Section 10(j) petition within 48 hours after notice by the ILB that the Board has authorized the use of Section 10(j)."). All told, the Region filed for injunction 23 months after Mr. Bryson's discharge, 18 months after he filed his Charge, and 14 months after Complaint issued. After waiting all of that time, the idea that the filing of Region 29's complaint on March 17, 2022 was not timed to coincide with the election is simply unbelievable.

b) *Regional Director Drew-King's Statements to the Press and in the Section 10(j) Filings Depict Region 29 as Biased Against Amazon*

The content of the statements and Section 10(j) filings depicted Region 29 as biased against Amazon immediately prior to the election. Filing the petition eight days before the

[45] This is contrary to the NLRB's Representation Casehandling Manual. *See* NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, Sec. 10310.1 ("Whenever the issues in a charge reveal that interim relief may be warranted, the Regional Office should notify all parties that it will examine possible 10(j) relief *as part of the investigation of the charge and should invite the parties to submit evidence and argument* relevant to the 10(j) consideration."); *see also*, NLRB Section 10(j) Manual Sec. 3.0; NLRB GC Memorandum 22-02 ("As General Counsel, I believe it is incumbent upon the Agency to consider seeking 10(j) injunctions immediately after determining that workers have been subject to threats or other coercive conduct during an organizing campaign.").

election after such a significant delay would be inexplicable, except that Regional Director Drew-King clearly explained her reasoning to widely read press-outlets — to influence the election in the ALU's favor. Regarding her injunction proceedings against Amazon, Regional Director Drew-King stated:

> We are seeking an injunction in District Court to immediately reinstate a worker that Amazon illegally fired for exercising his Section 7 rights. We are also asking the Court to order a mandatory meeting at JFK8 with all employees at which Amazon will read a notice of employees' rights under the National Labor Relations Act. ***No matter how large the employer***, it is important for workers to know their rights—***particularly during a union election***—and that the NLRB will vociferously defend them.

(EMP 0030 at 3) (emphasis added).

There is no basis in fact for Regional Director Drew-King's polarizing statements about the need to reinstate Mr. Bryson before the election. In fact, there was no reason for Regional Director Drew-King to make a public statement at all, as it is not required by any Board procedure. Rather, her intention was clear—to influence the impending election. Neither Mr. Bryson nor the Region ever alleged that he was discharged for engaging in union activity. In fact, the ALU was not even formed until approximately one year <u>after</u> Mr. Bryson was discharged. Despite this, the Region used the petition to baselessly claim that Amazon was interfering with the possibility of a free and fair election. (*See* EMP 1512 at 2) (petitioning for injunction to "reinforce employees' right to engage in protected concerted activity and union activity in advance of this election so that [Amazon] does not benefit in the election from the coercive effects of its unfair labor practices at issue in this case"); (EMP 1521 at 3) ("the Union is not entering the election with its legitimate level of support . . . . Absent immediate interim reinstatement, Amazon will profit from the illegal discharge.").

The Region's bias is further exemplified by its baseless claims Amazon was actively, and presently, putting voters' health and safety at risk—even though that allegation is patently false, and Mr. Bryson's underlying unfair labor practice charge did not even include recent allegations of such conduct. The Regional Director wrote:

> Indeed, the Employer recently rolled back COVID-19 safety protocols put in place because of Bryson and other employees' collective efforts, even as the pandemic marched on with more contagious viral variants.

(EMP 1507 at 38-39).

The Region also filed its 10(j) filings with unverified, uncorroborated, and hearsay statements relayed by officers and organizers of the ALU that disparage Amazon by making it appear that Associates are afraid to support the ALU due to fear of retaliation. (*See e.g*., EMP 1505; Bryson Affidavit at ¶¶ 7-8; EMP 1505; Palmer Affidavit at ¶¶ 9, 21; EMP 1505; Martinez Affidavit at ¶ 13; EMP 1505; Smalls Affidavit at ¶ 4). By acting as a conduit for the ALU's false messaging against Amazon, the Region legitimized the ALU's statements and added the stamp of Federal Agency approval, which is particularly troubling given the timing of Region 29's filings.

Even the Judge presiding over a status conference regarding discovery in the Section 10(j) proceeding was taken aback by the open animosity between the Region and Amazon as depicted in the 10(j) papers. He felt obligated to comment on the record: "it's quite clear to me just from reading the papers generally there's a lot of enmity between the parties and their lawyers and allegations of impropriety and the like." (EMP 1531.1 at 2). The 10(j) proceeding is, by its nature, an adversarial one. However, to maintain the requisite laboratory conditions for an election, Board precedent is clear that the Region cannot show any bias, let alone open hostility, toward either party to the election. *See e.g.*, *Athbro Precision Eng'g Corp.*, 166 NLRB at 966; *Hudson Aviation Servs.*, 288 NLRB at 870.

Given the timing and content of the Region's filing, coupled with Regional Director Drew-King's public negative statements about Amazon, the election must be set aside under current Board precedent. Region 29 gave the impression that it was displeased with Amazon regarding the election, accused Amazon of violating the Act, unnecessarily stated that no matter Amazon's size the NLRB would fight it, and that it favored the ALU over Amazon. This is exactly the conduct the Board proscribes because it reasonably interprets the Region's neutrality is compromised.[46] *See Glacier Packing*, 210 NLRB at 573.

Any argument that Region 29 is absolved because of the Board's underlying involvement in approving a Region's request to seek Section 10(j) relief must be disregarded. A voter would read the filing, which is under Regional Director Drew-King's name, and understand it to mean the petition was brought about by Regional Director Drew-King—the same Regional Director who would be running the election in eight days and had signed the election agreement. Moreover, Regional Director Drew-King, not the Board, made the public statements at issue here. The Region favored the ALU in the pending election, abused its power to inappropriately seek injunctive relief immediately before the election, and broadcast its obvious bias against Amazon to the media. Region 29's conduct defied the Board's standards requiring integrity and

[46] Regional Director Drew-King's statements to the press and in Region 29's 10(j) filings are far more severe and entirely distinguishable from the Board Attorney's statement to the press in *S. Lichtenberg & Co.*, 296 NLRB 1302 (1989) where the Board Attorney commented to the press on an allegation against an employer in a Complaint prior to the election. *See id.* at 1302-03. The Board found that the attorney's comments did not rise to the level of impugning the Board's neutrality because the article also included quotes from the respondent-employer, it consistently referred to the conduct set forth in the Complaint as "allegations," accurately explained the allegations set forth in the complaint, and any confusion from employees would stem from the Board's dual role as prosecutors and in running elections. *Id.* In stark contrast, Regional Director Drew-King 's statements do not merely address the underlying unfair labor practice charge for Mr. Bryson. Instead, Region 29 took its commentary beyond the underlying unfair labor practice Complaint and presented untrue, inflammatory hearsay and conjecture against Amazon as *fact*. Moreover, as head of the Region, Regional Director Drew-King's comments necessarily carry more weight than those of a Board Attorney. Accordingly, Regional Director Drew-King's comments are far more destructive of laboratory conditions.

neutrality of its representation elections. *See Athbro Precision Eng'g Corp.*, 166 NLRB at 966. Accordingly, Objection 1 should be sustained, and the election set aside.

B. Objection 2

1. <u>Amazon's Objection</u>

The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the ALU when it delayed investigating numerous unmeritorious and frivolous unfair labor practice charges that were pending during the critical period rather than properly dismissing them or soliciting withdrawals. The Region's inaction enabled the ALU to perpetuate its false campaign narrative that Amazon was a recidivist violator of the National Labor Relations Act ("Act"), when in fact there has not been a single NLRB order finding that Amazon has violated the Act. The ALU exploited the Region's inaction by continuing to file numerous baseless unfair labor practice charges throughout the critical period. Many of these charges challenge conduct that is lawful under extant Board precedent (*e.g.*, charges about Weingarten rights and captive audience meetings). Some were later withdrawn by the ALU while others were withdrawn and then refiled to create the appearance of a greater volume of charges.

2. <u>Legal Standard</u>

a) ***The Board's Procedures Require Prompt Processing of Unfair Labor Practice Charges***

The NLRB's Casehandling Manual for Unfair Labor Practice Proceedings encourages prompt investigation of a charge and recognizes that prompt resolution is "beneficial to all parties and the public interest." *Id*. Sec. 10052.5. Regarding non-meritorious cases, swift determination "ends the dispute in a cost effective and efficient manner, without the need for a

protracted investigation." *Id.* The Unfair Labor Practice Casehandling Manual also demands Regional expediency when a charging party submits a request to withdraw. *Id*. Sec. 10120.

b) *Conduct That Undermines the Board's Appearance of Neutrality is Objectionable*

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2).

3. <u>Amazon was Thwarted from Introducing Evidence Critical to Support Objection 2</u>

As a threshold matter, Amazon was severely prejudiced by the Hearing Officer's erroneous evidentiary rulings regarding Objection 2. Despite being ordered to receive evidence related to all of Amazon's Objections, the Hearing Officer precluded development of the record with respect to Objection 2 by barring all testimony regarding case processing and the ALU's strategy in relation to Objection 2. (*See e.g., Dunn*, 145; 1839). For example, regarding the testimony of Chaka Donaldson (Amazon's Principal, Employee Relations), the Hearing Officer stated:

> Those documents that are public records, such as the charges and the disposition date. So the letters that the party received regarding the disposition of the case, there's no need for witness testimony with respect to those. That's just a case processing issue. So I don't see the need for the witness to testify about that. And then with respect to ALU's strategy, this Objection 2 is with respect to the Region; there's no conduct alleged in Objection 2 with respect to ALU. So I don't see the need for witness testimony regarding Objection 2. (145:8-21).

The Hearing Officer further limited Amazon from producing any documents regarding Objection 2, except for certain charges and the Region's associated disposition letters. (*See e.g., Dunn*, 1003; 2572-73; 3445-4639; 4122-24; 4169; 4470-72; 4663; 4674-77; 4682; 4694; 4701). Because the Hearing Officer refused to permit Amazon to enter testimony and certain documentary evidence into the record regarding Objection 2, in contravention of Regional Director Overstreet's April 29 Order Directing Hearing and Notice of Hearing on Objections, a

complete record could not be made regarding this Objection. Nevertheless, as detailed below, a simple review of the filing dates and deadlines evidences that the Region failed to follow its procedures regarding processing unfair labor practices.

4. <u>The Region Deviated from its Procedures to Bolster Petitioner's Campaign</u>

The Region's protracted investigation into the ALU's charges empowered the ALU to file excessive, bare-bones, non-meritorious charges which, in turn, allowed the ALU to promote the false impression that Amazon was a serial violator of Associates' Section 7 rights. The Region contravened its own processes by significantly delaying its processing of ALU charges against Amazon that were ultimately withdrawn, assuredly because the charges were frivolous and without merit. In doing so, the Region failed to protect the standards of neutrality to which it must adhere under *Athbro* and its progeny, and engaged in the very type of bias that the *Athbro* Board warned would be sufficient grounds for setting aside an election. *Athbro Precision Eng'g Corp.*, 166 NLRB at 966.

The chart below lists ten charges filed by the ALU or its affiliates against Amazon. None of these charges resulted in a meritorious filing by the Region, and each were ultimately withdrawn by the charging party with the Region's approval. All were permitted to languish during some or all of the critical period.

Charge No.	Date Filed	Allegations	Date of Region 29's Letter Approving Withdrawal Request
Case 29-CA-280386 (EMP 0728)	7/23/2021	8(a)(1) alleged unlawful work rules	4/19/22
Case 29-CA-286682 (EMP 0729)	11/19/2021	8(a)(1), (3) and (4) alleged retaliatory police complaint regarding Brett Daniels on 11/15/21	2/7/22
Case 29-CA-287940 (EMP 0730)	12/16/2021	8(a)(1) alleged threats and unlawful work rules	5/18/22
Case 29-CA-289893	1/27/2022	8(a)(1) and (3) alleged	3/25/22

Charge No.	Date Filed	Allegations	Date of Region 29's Letter Approving Withdrawal Request
(EMP 0731)		retaliatory police complaint regarding Brett Daniels on 11/15/21	
Case 29-CA-290046 (EMP 0732)	2/4/2022	8(a)(1) and (4) alleged failure to investigate hostile work environment claims	2/15/22
Case 29-CA-291182 (EMP 0733)	2/24/2022	8(a)(1) and (3) alleged retaliatory police complaint regarding Brett Daniels and Jason Anthony on 2/23/22; and alleged threats	4/25/22
Case 29-CA-291424 (EMP 0734)	2/28/2022	8(a)(1) alleged retaliatory discipline and denial of request for union representation during disciplinary investigation	3/29/22
Case 29-CA-292004 (EMP 0735)	3/9/2022	8(a)(3) alleged retaliatory discipline, including requiring an Associate to wear safety shoes, threats, and refusal to recognize the ALU as the bargaining representative for Associates	3/29/22
Case 29-CA-292013 (EMP 0736)	3/10/2022	8(a)(1) alleged threat	3/21/22
Case 29-CA-293152 (EMP 0738)	3/28/2022	8(a)(1) alleged threat	4/15/22

A review of the chart establishes that the Region took nearly nine months to dispose of Charge 29-CA-280386 and five months to dispose of Charge 29-CA-287940. Notably, both charges were open during the entire critical period and not withdrawn until after the election. This gave Associates the false perception throughout the critical period that Amazon engaged in

unlawful activity. Similarly, Charge 29-CA-286682 languished for three months before the Region eventually approved its withdrawal during the critical period.

Emboldened by the Region's delay, the ALU then filed seven non-meritorious charges during the critical period. Two of the charges, 29-CA-286682 and 29-CA-289893, alleged identical unlawful conduct. Notably, most of these charges were not withdrawn until during or *after* the election. This delay, created by the Region's failure to timely investigate the charges, allowed the ALU to continue with its false narrative that Amazon was a serial violator of Associates' Section 7 rights during a crucially important time. Because Region 29 failed to put on any evidence regarding the cause of its significant delays in processing these charges, the Hearing Officer should take an adverse inference against Region 29 on this issue.

Region 29's significant processing delays directly contributed to the ALU's ability to falsely paint Amazon as a lawbreaker and to continue this messaging to Associates while the Region sat on and failed to dismiss what were obviously frivolous allegations. Accordingly, Objection 2 should be sustained, and the election should be overturned.

C. Objections 3, 4 and 5

1. Amazon's Objections

Objection 3 - The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the ALU when it allowed the ALU's petition in Case 29-RC-288020 to proceed to election knowing that the Union did not have the required 30% showing of interest in the petitioned-for unit. It did so after public threats by the ALU to expose "concerning issues" about the Region, including public comments from ALU officials that urged the Board to "work with" and help the ALU through the process, and to relax its rules. The Board's validation of the ALU's insufficient petition in response to and after these public threats and comments reasonably suggested to employees that the ALU had more

support in the petitioned-for unit than it did and/or that the Region favored the ALU in its case processing.

Objection 4 - The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the ALU when it impermissibly allowed the ALU for more than a month (from December 22, 2021 to January 25, 2022) to continue gathering and submitting late signatures to bolster its insufficient showing of interest. This is contrary to Board procedure for verifying a petitioner's showing of interest. *See* NLRB, CASEHANDLING MANUAL-PART TWO, REPRESENTATION PROCEEDINGS § 1103.1(a) (Sept. 2020) (CASEHANDLING MANUAL) (requiring a petitioner to file evidence in support of the showing of interest at the time the petition is filed or, when the petition is e-filed or faxed, within two days of filing).

Objection 5 - The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the ALU when it unilaterally altered the scope and size of the petitioned-for unit for the purpose of investigating the ALU's showing of interest. These unilateral modifications to the scope of the petitioned-for unit, which neither party endorsed, were used by the Region solely to support its flawed conclusion that the ALU purportedly met the minimum requirement of a 30% showing of interest. The petition and Stipulated Election Agreement reflect identical unit descriptions. However, in completing the public record NLRB FORM-4069, Region 29 altered the description, changing it from "All hourly full-time and regular-part time fulfillment center employees employed at the JFK8 Building located at 546 Gulf Avenue, Staten Island, NY 10314," as requested by the ALU, to "FC Employee I, working at JFK8 building," thereby reducing the size of the unit and excluding other petitioned-for classifications of employees. Region 29 also concluded that only 6,038

employees worked in that unit, while Amazon provided the Region with extensive payroll documentation and additional evidence that the petitioned-for unit was comprised of approximately 7,500 employees at the time of the filing of the petition. Soon after recording these manipulated and inaccurate facts, and approving the further processing of the petition, Region 29 reverted to the broader unit definition included in the ALU's petition and did not question Amazon's submission of a voter list containing 8,325 employees. The Region's manipulated and inaccurate conclusion regarding the contested showing of interest perpetuated the false impression that the ALU had sufficient support to proceed forward with an election when it clearly did not have sufficient support.

2. <u>Legal Standard</u>

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2).

Objections 3, 4 and 5 are all based on the underlying allegations that Region 29 gave the appearance that the Board and/or Region supported the ALU in its Petition when it failed to follow the Board's own processes and procedures. Specifically, the Region (1) allowed the ALU to proceed to election without the requisite 30% showing of interest, (2) allowed the ALU over an extra month to continue gathering late authorization signatures, and (3) unilaterally altered the scope and size of the petitioned-for unit. These actions facilitated the ALU's narrative that the ALU enjoyed more support in the bargaining unit than it actually did.

As the Hearing Officer, Region 29 Representatives, and the ALU incorrectly asserted during the Hearing, these objections do not in fact seek to litigate the ALU's showing of interest. Rather, these three objections challenge the *Region's actions in processing the Petition*. Indeed, Regional Director Overstreet's April 29 Order directed the Hearing Officer to receive evidence regarding the Region's "failure to protect the integrity and neutrality of its procedures."

Accordingly, evidence that Amazon attempted to introduce during the Hearing through witness testimony and, documentary evidence, including that which was laid out in its Offer of Proof, was probative of its allegations that the Region "fail[ed] to protect the integrity and neutrality of its procedures."[47]

The Board's Rules and Regulations provide that a petitioner must include "a statement that a substantial number of employees in the described unit wish to be represented by the petitioner[]" with any RC petition filed with the Board. 29 C.F.R. § 102.61(a)(7). Additionally, "[e]vidence supporting the statement shall be filed with the petition." *Id*. "Under the 2014 amendments to the Board's election procedures, the showing must be submitted with the petition." NLRB: An Outline of Law and Procedure in Representation Cases Sec. 5-100 (emphasis added). In crafting the 2014 amendments to the Board's election procedures, the Board expressly confirmed that the 30% standard was still the Board's established requirement. *See* 79 FR 74308-01, 2014 WL 7007229, at *74421 (Dec. 15, 2014). When the filing is made electronically or by facsimile, the Board's Rules and Regulations require a petitioner to provide evidence of original signatures, as set forth in Section 102.67(a)(7), no later than 2 business days after the filing of the RC petition. *See* 29 C.F.R. § 102.61(f). "When it is readily apparent that . . . the showing of interest is inadequate . . . the petitioner is requested to withdraw the petition. If this is not done within a reasonable time, the petition is dismissed." NLRB: An Outline of Law and Procedure in Representation Cases Sec. 3-500.

The Representation Casehandling Manual provides clear guidance dictating how a Region must process representation petitions in compliance with Section 102.61 of the Board's

[47] Contrary to the April 29, 2022 Order directing the Hearing Officer to receive evidence related to Objections 3, 4 and 5, the Hearing Officer precluded development of the record with respect to these objections by incorrectly interpreting these objections to challenge the underlying showing of interest. (*See, e.g.*, Dunn, 3695:3-9; 4134:8-20; 4278:9-4279:17).

Rules and Regulations. When addressing the showing of interest requirement, the Representation Casehandling Manual notes that

> it is essential that a check of the adequacy of the showing of interest (Sec. 11030) be performed in every case shortly after the filing of the petition, in order that issues concerning the showing of interest will be resolved before the case progresses beyond the initial stages. A record of the results of that check should be placed in the file.

NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11020. "A petitioner, in order to justify further proceedings, must demonstrate designation by at least 30 percent of the employees in the unit it claims appropriate." *Id*. Sec. 11023.1.[48] Additionally, a "petitioner must file its showing of interest <u>at the time it files the petition</u>." *Id.* Sec. 11024.1 (emphasis added); *see also* 29 C.F.R. § 102.61.

"The valid evidence of interest of an individual petitioner and of each labor organization should be checked against a payroll list (Sec. 11025.1), if one is timely submitted by the employer." NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11030.1. "If no payroll list has been submitted timely by the employer, the estimate made by the affected union should be used as the number of employees involved." *Id.* Sec. 11030.2. Accordingly if an employer, as Amazon did here, timely submits a payroll list, that payroll list should be the basis for determining how many employees are in the petitioned-for unit. In other words, a petitioner's estimate of the unit size is a method of last resort.[49]

The Board's decision in *Excelsior Underwear*, 156 NLRB 1236 (1966), reinforces that the Agency cannot deviate from this longstanding threshold requirement. *Excelsior* and the line of cases and advice interpreting it establish that a respondent is not required to provide the

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[48] "The 30-percent figure may be lowered where there are 'special factors.' Such situations are exceedingly rare; in the event the Regional Director believes special factors apply, clearance must be obtained from the Executive Secretary prior to any relaxation of the 30-percent rule." *Id*.

[49] Compare EMP 0138 (Petition alleging 6,000 employees in the unit) and EMP 0164 (Tally of Ballots reflecting 8,325 eligible voters).

petitioner with a voter eligibility list until the petitioner has demonstrated a 30% showing of interest required for the processing of an election petition. *See Local 3, Intern. Broth. of Elec. Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1181 (2nd Cir. 1988) ("Pursuant to [the *Excelsior*] Rule, after a union has shown sufficient employee interest (30%) and the Board has ordered an election, the employer is required to file a list of its employees' names and addresses") (emphasis added); *see also Subject: Teamsters Local Union No. 261 (First Student)*, NLRB Div. of Advice, Case No. 06-CB-097248, 2013 WL 3488561, at *4 (June 28, 2013) (applying principles from *Local 3* case).

3. The Board Impermissibly Deviated from its Rules and Procedures

The Petition was filed and docketed on December 22, 2021. (EMP 0138). But the ALU failed to include any evidence to support "its statement that [30%] of the employees in the described unit wish to be represented by the [ALU]." *See* 29 C.F.R. § 102.61 (a)(7). Per Rule 102.61 and the Board's own Outline of Law and Procedure in Representation cases, as soon as it was determined that the ALU did not have a sufficient showing of interest, the Region should have requested the ALU withdraw the Petition. And if the ALU did not withdraw the Petition within a reasonable time, the Region should have dismissed the Petition.

The Region took over a month to determine that the Petition was allegedly adequate to continue processing. This delay evidences that the Board deviated from its own rules that require "a check of the adequacy of the showing of interest (Sec. 11030) be performed in every case shortly after the filing of the petition." *See* NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11020. The delay allowed the ALU to continue to gather and submit late signatures to bolster its insufficient showing of interest, which in turn violated yet another Board Rule requiring that the 30% showing of interest was to be made at the time the ALU filed the Petition. *See id.* Sec. 11024.1; *see also* 29 C.F.R. § 102.61(f). And the Region did

not present evidence at the Hearing that it sought any "clearance" from the Executive Secretary beforehand that would have permitted it to deviate from the 30% requirement. *See* NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11023.1. The Region's actions in processing the Petition ignored the Board's Rules and Regulations and the procedures set out in the Representation Casehandling Manual. The Board's Rules are not optional and the Region had no discretion under Rule 102.61 regarding docketing and processing the Petition when it lacked the requisite showing of interest. By allowing the ALU weeks of additional time to collect authorization cards to cure its clearly insufficient showing of interest, the Region created the impression that it was assisting and supporting the ALU in its quest to be the bargaining agent for the Associates at JFK8.

The Region's actions in enabling the ALU to paint a "false portrait" of employee support is similar to actions challenged in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). In *Savair*, the employer refused to bargain with the union on the grounds that, prior to the election, the union offered to waive the union initiation fee for those employees who signed a recognition slip prior to the election. *Id.* at 272-73. The union filed a ULP, which the Board sustained, ordering the employer to bargain with the union. *Id.* at 272. Disagreeing with the Board, the Court held that "[b]y permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign." *Id.* at 277.

Like the Board in *Savair*, the Region's actions painted "a false portrait" of Associate support during the ALU's election campaign and furthered the ALU's messaging that it had more Associate support than it actually did. *See id.* With respect to the present case, the Region's actions went well beyond the passive actions of the *Savair* Board as Region 29 took affirmative

steps to advance the ALU's narrative that it had a 30% showing of interest when it (1) processed the petition without a 30% showing of interest, and (2) allowed the ALU more time to collect more signatures. These actions were taken without regard for the Board's established Rules & Regulations and the Representation Casehandling Manual. As a result, Region 29 compromised the Board's appearance of integrity and neutrality.

D. Objection 6

1. Amazon's Objection

The Region failed to protect the integrity of its procedures when it deviated from the Casehandling Manual on Representation Proceedings by failing to staff the election adequately. Among other things, the Region provided an insufficient number of Board Agents for check-in and failed to provide adequate equipment for the election, supplying only three voting booths for an election with more than 8,000 potential voters. CASEHANDLING MANUAL § 11316. The Region was well aware of the size of the petitioned-for unit and potential number of voters. *See* Voter List, filed on February 22, 2022 (including 8,325 employees in the petitioned-for unit). These inactions caused extraordinarily long lines during the first voting session, widely publicized in the news media, and discouraged many employees from voting in subsequent polling sessions, particularly as the temperatures dropped to 20 degrees during two nights of polling. The Board's actions had a reasonable tendency to disenfranchise voters (as evidenced by extremely low voter turnout), and contributed to the Board's ineffective policing of the polling area, as further described in objections below.

2. Legal Standard

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2).

The results of a Board election must be set aside where the Board's conduct "tends to destroy confidence in the Board's election process," or otherwise could reasonably be interpreted as impugning the Board's neutrality in the election. *See Athbro Precision Eng'g Corp.*, 166 NLRB at 966; *Glacier Packing*, 210 NLRB at 573. "The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question." *New York Tel. Co.*, 109 NLRB 788, 790 (1959) (cited approvingly by *Nyack Hosp.*, 238 NLRB 257, 259 fn. 11 (1978)); *see also Whatcom Sec.*, 258 NLRB 985, 985 (1981). While there is no per-se rule that requires an election be set aside based on any procedural irregularity, the cumulative effect of numerous procedural irregularities may establish a need to set aside an election. *Fresenius USA Mfg. Inc.*, 352 NLRB 679, 680 (2008) (second election directed because procedural irregularities "raise[d] a reasonable doubt as to the fairness and validity of the election"). The Board will set aside an election only if the irregularities are sufficient to raise a reasonable doubt as to its fairness and validity. *Id*. Further, a Board Agent's inability to control the voting area by inadequately staffing the election impugns the Board's election standards, warranting setting the election aside. *See Ecology Servs., Inc.*, Case 5-RC-16235, 2008 WL 5244872 (2008) (not reported in Board volumes) (recommending setting aside election where election was understaffed because it resulted in an impression that the Board could not control the voting area, impugning the Board's election standards).

3. <u>The Board Must Set Aside the Election Because Region 29 Failed to Provide Adequate Staffing and Equipment</u>

The Region's failure to adequately staff and prepare for what it knew would be one of the largest elections in Region 29's history, grossly undermined the integrity of the Board's procedures. The combination of the Region's egregious failures resulted in a late start on the opening of the polls, a failure to notice that at least one voter entered the tent early,

extraordinarily long lines and wait times to vote, an abrupt election stoppage where no Associates were allowed to vote, using the ALU's observers to manage and direct the voting line, and a late close of the polls. Most of this occurred on the first morning of the election, within the first couple of hours. The Region cannot beat about the bush – its mishandling of the first voting session was a calamity that poisoned the well for all of the others that followed. Under these circumstances, the cumulative effect of these irregularities destroyed confidence in the Board's election process. Therefore, the Board must set aside the election.

Here, the cumulative effect of Region 29's failure to provide adequate staffing and equipment tended to destroy confidence in the Board's election process. First, there is no record evidence that Region 29 used more than eight Board Agents or three voting booths, at any given time, in an election with over 8,000 potential voters. Simply put, that is grossly inadequate. (Donaldson, 336:16-337:13; Famiglietti, 643:1-3).

Second, the procedural irregularities contributed to the late opening of the polls on the first day of the election. Although the Hearing Officer prohibited testimony regarding the start time of the election, the record demonstrates that the election did not start on time on the first day of the election.[50] An Observer from the first voting period credibly testified that the Region opened up the tent door and allowed the election to begin around 8:10-8:12 a.m., 10-12 minutes

[50] Regional Director Overstreet cannot learn about objectionable conduct during the objections hearing and ignore it. *See White Plains Lincoln Mercury*, 288 NLRB 1133, 1136 (1988) (if the Regional Director receives or discovers evidence during the investigation that shows that the election has been tainted, he should not ignore such conduct even if it was not specifically alleged); *see also Gen. Signal Corp.*, 234 NLRB 914, 914 fn. 1 (1978) (noting that in two decisions issued subsequent to the Administrative Law Judge's Decision, the Board has restated and reaffirmed its policy permitting a Regional Director to set aside an election because of objectionable conduct discovered during his investigation, even though that conduct was not the subject of a specific objection); *Labriola Baking Co.*, 361 NLRB 412, 412 (2014) (explaining, "the Board may consider conduct that does not exactly coincide with the precise wording of the objections where, as here, that conduct is sufficiently related to the filed objections.") (internal quotation marks omitted); *Am. Safety Equip. Corp.*, 234 NLRB 501, 501 (1978). ("The Regional Director is not required to, nor can he[/she] properly, ignore evidence relevant to the conduct of the election . . . simply because [a party] may not have specifically mentioned such conduct in its objections.") (internal quotation marks omitted).

after the polls were scheduled to open.[51] (Sanchez, 1344:10-14). Moreover, the testimony of several witnesses corroborates that the polls opened late, anywhere between 5-12 minutes after the scheduled 8:00 a.m. starting time. (Famiglietti, 589:3-20;, 591:17-592:8; DeLeon, 646:3-22, 647:13-22, 648:4-10, 648:15-18; Sanchez, 1339:5-12, 1343:19-1344:2; Donaldson, 338:14-16; 344:24-345:10). Ms. Donaldson testified that Amazon representatives attended the pre-election conference inside the tent where the polls were located, and left the voting tent at approximately 7:59 a.m. (Donaldson, 344:24-345:10, 338:14-16). Three other hourly witnesses testified that once representatives for each party left the tent, the Region took approximately 5-10 more minutes to start and complete the regular and challenge ballot box set up. (Famiglietti, 589:3-20; 591:17-592:8; DeLeon, 646:3-22, 647:13-22, 648:4-10, 648:15-18; Sanchez, 1339:5-12, 1343:19-1344:2). Together, the testimony establishes that the polls opened 5-12 minutes late, between 8:05-8:12 a.m. The late opening of the polls undoubtedly tends to destroy confidence in the Board's election process. Therefore, the late start of the polls alone merits setting aside the election. *See Pea Ridge Iron Ore Co.*, 335 NLRB 161, 161 (2001) (ordering a rerun election because the Region opened the polls seven minutes late); *see also Refresco Beverages US Inc.*, No. 22-RC-276628, 2022 WL 1046078, at *1-2 (NLRB Apr. 5, 2022) (citing *Pea Ridge Iron Ore Co.* and ordering a rerun election due to the Region opening the polls five minutes late); *Bronx Lobster Place, LLC*, No. 02-RC-191753, 2018 WL 721396, at *1-2 (Feb. 2, 2018) (citing *Pea Ridge Iron Ore Co.*, 335 NLRB at 161 and ordering a rerun election due to the Region opening the polls seven minutes late).

Third, it is undisputed that the Board Agents were so ill-prepared that they temporarily and abruptly stopped the election on the first voting session of the election. Several hourly

[51] The first day of the election was on March 25, 2022, and set to start at 8:00 a.m. (EMP 0182 at § 4; Donaldson, 305:19-22, 309:17-22).

witnesses testified that the Region stopped the election during the first half hour of the voting session to reconfigure the lines. (Famiglietti, 603:8-24; Parent, 1053:24-1055:25; Asad, 1190:14-22). During this time, the Region even closed the tent door and stopped allowing voters inside the tent. (Parent, 1053:24-1056:13; Asad, 1190:14-22). Consequently, many voters were left standing around waiting, and voters were visibly "mad." (Parent, 1054:13-1054:14). At that point, the Board Agents appeared to be overwhelmed and lost control of the election. Indeed, one Board Agent conceded that the voting line was unorganized and that the Region was still trying to figure out a way to make the voting process more fluid, and asked that voters have patience. (Abreu, 1387:15-1388:14). There is no Board rule that permits a Board Agent to unilaterally decide to stop an election during the scheduled and agreed upon voting times. The election stoppage itself suggests that the Board Agents lost control of the voting area and needed to completely shut down to regain some control. In the end, this extremely unusual maneuver was futile, as the disorganization and long lines persisted for the remainder of the first voting session. (Grajeda, 745:6-747:2, 749:18-750:20; Chu, 836:16-837:2; EMP 0695-C; Troy, 1705:16-1707:8; EMP 0695-A; Asad, 1209:10-1210:7). Under these circumstances, it is apparent there was an insufficient number of Board personnel and equipment to control the polling area. Such conduct tends to destroy confidence in the Board's election process. *See Ecology Servs., Inc., supra*.

Fourth, the lack of personnel and equipment induced extraordinarily long lines and wait times, particularly on the first morning of the election. Voters waited hours to vote—some 1.5 hours and others 2 hours. (*See, e.g.*, Parent, 1042:12-1043:3, 1057:18-1058:7; Grajeda, 745:6-747:2, 749:18-750:22; Asad, 1189:25-1190:10; Jaramillo, 3138:8-19, 3145:20-3148:2). For context, the length of the line on the morning of March 25 stretched from the tent through the parking lot and then turned perpendicular onto the sidewalk in front of the JFK8 building,

stretching for hundreds of feet. (Chu, 836:16-837:2; EMP 0695-C; Troy, 1705:16-1707:8; Asad, 1209:10-1210:7; EMP 0695-A).[52] Ultimately, this had a negative impact on voters' willingness to vote and palpably destroyed confidence in the Board's election process. For instance, some Associates got out of line and left the polling area; another Associate was dissuaded from getting in line altogether; and other Associates were mad and annoyed. (Asad, 1223:11-17; Chu, 836:16-837:2; Parent, 1054:13-14; Delancey, 1227:18-1228:15).[53]

Fifth, the Region's gross mismanagement during the first four hours of the election compelled the Region to deviate from the schedule and extend the voting session for approximately two hours. (Donaldson, 361:14-24; Russell, 2283:6-12). The two hour voting extension suggests that there were hundreds, if not thousands, of Associates waiting to vote and that the Region was simply unprepared to handle the number of voters. Additionally, the Region plainly lacked the personnel and equipment to control the voting area, especially since it could not stay on schedule.

The cumulative effect of the Region's failure to provide adequate staffing or equipment, when conflated with other procedural irregularities, together destroyed confidence in the Board's election process. For example, throughout the election, Board Agents did not sit at/man the check-in tables during the entire time the polls were open. (Famiglietti, 608:2-20). Notably, during these times some voters could not be processed because there was no Board Agent at the check-in table. Indeed, one hourly witness testified that Board Agent Kate Anderson left the check-in table while the polls were open, and Board Agents did not replace her, so voters could

[52] Throughout the Hearing, the Hearing Officer repeatedly refused to permit Amazon from introducing pictures and videos of the long voting lines published by media outlets.

[53] Given the low voter turnout in this election, it is not difficult to imagine Region 29's gross mismanagement of the first polling period impacted the decision of other Associates to vote. However, the Hearing Officer severely limited Amazon's ability to show the impact of Region 29's impact, as she prematurely deemed cumulative any testimony regarding the long and chaotic lines during the first voting session.

not be processed during that period. (Famiglietti, 607:23-608:20). Additionally, at some point during the election, observers—not Board Agents—handed out ballots to voters. (Cordova, 1307:16-1308:9). Moreover, throughout the entire election, Board Agents used no official timepiece to keep track of schedule nor is there evidence that an official timepiece was ever selected or identified. (DeLeon, 649:11-15); *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11320. Several observers also testified that Board Agents provided no copy of the written instructions. (Mendoza, 5065:2-7; DeLeon 621:8-20, 622:11-15; Matos, 3253:16-3254:8); *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11318.2. All of this demonstrates that the Region's conduct was grossly inadequate. As such, the Region's innumerable procedural deviations destroyed confidence in the Board's election process.

Even prior to the start of the election and opening of the polls, the Region's sloppy and careless conduct also destroyed confidence in the election process. Several observers testified that the Board Agents did not all assemble 30-45 minutes prior to the opening of the polls, as required by the Representation Casehandling Manual. (Famiglietti, 578:3-7, 582:17-23; DeLeon 638:1-7; Donaldson, 334:16-335:15, 415:5-16); *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings Sec.11318. In fact, one Board Agent did not arrive until 15 minutes before the polls were scheduled to open. (Donaldson, 334:16-335:15, 415:5-16). Furthermore, when the observers entered the tent at around 7:50 a.m., the Observers noticed that the Board Agents were still "rushing around" and setting up. (Famiglietti, 578:3-7, 582:17-23; DeLeon 638:1-7). A few witnesses also observed that Ms. Fedorova hastily give instructions to the Observers. (Donaldson, 339:17-25; DeLeon, 644:24-645:11). The Region also failed to

notice that at least one voter entered the tent early. (Donaldson, 349:1-17). Here, the Region clearly scrambled through the election process even prior to starting the election.

The cumulative effect of these irregularities tends to destroy confidence in the Board's election process.[54] The election therefore must be set aside.

4. **Board Agents were Responsible for Determining the Adequacy of (1) Personnel and Equipment, and (2) Size and Arrangement of the Polling Place, and its Failure to Do So Obliterated the Laboratory Conditions**

The Region is responsible for protecting the integrity of its procedures and assuring proper conduct of election. *Wald Sound, Inc*., 203 NLRB 366, 367 (1973); *New York Tel. Co*., 109 NLRB at 790. Any attempt to shift blame toward Amazon is completely disingenuous. It is the Region's responsibility to determine the adequate size and arrangement of the polling place, not Amazon's. (*See supra* fn. 51, EMP 0182 at § 4(vii)). Specifically, the Region must "scale[] up or down according to the given election" and prepare for "peak load." (*See supra* fn. 51). The Region is also responsible for providing adequate personnel and equipment. (*See supra* fn. 51). Notably, the Region must plan for "all potential emergencies." (*See supra* fn. 51). In addition, the Region, not Amazon, inspected and approved the polling place arrangements (Donaldson, 312:25-313:15; Russell, 2278:5-18; EMP 0185). Notably, Ms. Fedorova stated that the tables the Region planned to use were "sufficient" and that the polling place looked "great" and "fine." (Russell, 2278:19-2280:10). During the inspection, the Region requested one change to the location of a table, which Amazon immediately completed in the presence of the Region.

[54] The Region's decision not to deploy additional staff and equipment also runs contrary to the guidance in the Casehandling Manual. NLRB Case-handling Manual (Part Two) Representation Proceedings Sec. 11308, 11316. The Board's Casehandling Manual (while not binding authority) states that "[p]reparations should be made for the peak load. With a well-prepared voter list (i.e., one that is prepared in such form that names can easily be found and one that contains a minimum of mistakes) and where there is a minimum of challenges, one checking table can process 250–400 voters per hour … With these guides in mind, election needs may be scaled up or down according to the given election." *Id.* Sec. 11316. The Casehandling Manual also states that the "Board agent in charge of an election, with his/her supervisor, should anticipate the need for sufficient Board personnel to run the election … the Board agent should plan, not with respect to the routine aspects of an uneventful election, but with due regard for all potential emergencies." *Id*. Sec. 11308.

(Donaldson, 312:25-313:15; Russell, 2278:5-18; EMP 0185). After the first voting session, Amazon effectuated additional changes at the Region's request. (*See supra* Section II(G)(3)(a)).

The Region had four to five unassembled voting booths available underneath its tables inside the polling place, but did not use them at any time during the election. (Donaldson, 384:7-385:14; Spinella, 4809:2-8, EMP 0912). In light of the extreme delays experienced on the first morning of the election, this is unfathomable. The tent had plenty of room for more voting tables. (Russell, 2278:19-2279:1). To ameliorate the irregularities during the first couple hours of opening the polls, the Board Agents could have assembled the tables within seconds, or called Region 29 for additional personnel support. After the first voting session, Amazon representatives requested the Board Agents set up additional voting booths that the Region had brought with them to proactively reduce the voting lines, but Ms. Fedorova dismissively declined and stated the number of booths was sufficient. (Donaldson, 387:8-14; Russell, 2324:19-2325:16; Spinella, 4806:23-4807:22; EMP 0912). The Region clearly did not plan or prepare for peak load and all potential emergencies, and did not scale up. (*see supra* fn. 51). Ultimately, the Region's failure to adequately staff and bring and use the proper equipment had a reasonable tendency to discourage Associates from participating in the other nine voting sessions and clearly obliterated the laboratory conditions necessary for a fair election.

E. Objection 7

1. <u>Amazon's Objection</u>

The Region failed to protect the integrity of its procedures when it turned away voters as they attempted to vote during open polling sessions, and told voters they were only being allowed to vote in alphabetical order. The parties' Stipulated Election Agreement provided that "the Board Agent will allow any voter who is in line during the polling period to vote." These

actions disenfranchised those voters who were turned away, but also other voters who learned that their colleagues were turned away from the polls and chose not to participate in the election.

2. <u>Legal Standard</u>

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2). Additionally, Amazon incorporates by reference the legal standards set forth in Objection 6. *See* Section IV(D)(2).

3. <u>The Board's Administration of the Election Process Led At Least One Voter to be Turned Away from the Polls</u>

At the Hearing, Amazon Associate Amarillis Villalongo testified that on Tuesday, March 29, she chose not to vote after speaking to a Board Agent inside of the voting tent. (Villalongo, 2804:18-2806:21). She had every intention of casting her ballot that day, but elected not to do so after the Board Agent was rude to her. (Villalongo, 2804:20-2806:21). This is objectionable conduct.

Ms. Villalongo testified that she went inside of the voting tent to the check-in tables where she spoke to a female Board Agent, with black hair, of mixed race who, in Ms. Villalongo's approximation, was in her thirties. (Villalongo, 2805:4-9). After speaking to the Board Agent about the check in procedure, Ms. Villalongo's disposition changed because "the way they said it was like an attitude and felt discouraging." (Villalongo, 2805:19-24). Significantly, Ms. Villalongo testified that "the way she said it felt like as if she already knew that the ALU had won…so I felt kind of discouraged." (Villalongo, 2806:2-6). As a result, Ms. Villalongo felt dejected that her vote would not count, and decided not to move forward with voting, despite having waited in line and being in the tent. (Villalongo, 2806:13-21).

Ms. Villalongo had previously attempted to vote on March 25, but was discouraged by the long lines and noted the presence of five members of the ALU electioneering by the voting

line. (Villalongo, 2791:13-2792:21; 2794:17-2795:11; EMP 0527, EMP 0695-H). As such, the record evidence shows that the Region's handling of the election prevented Ms. Villalongo from casting a ballot, despite two attempts to do so.

4. **<u>The Region's Handling of the Lines Led to Substantial Voter Confusion, Causing Cumulative Irregularities That Warrant a Rerun Election</u>**

It is undisputed that the Region approved and decided on the configuration of the line set-up inside and outside of the tent on March 22, 2022. (Donaldson, 322:25-323:19; Russell, 2279:5-2280:13). The election was "under the auspices and control of the Board," yet at the pre-election inspection, none of the three officials present from Region 29 suggested or required any changes to the set-up of the inside or outside of the voting tent, except for requesting that one table be moved against the wall of the tent. *Colonial Lincoln Mercery Sales, Inc.*, 197 NLRB 54, 68 (1972); (Donaldson, 312:25-313:15; EMP 0185; Russell, 2278:5-18). Indeed, Ms. Donaldson testified that the entire pre-election inspection process was very quick and took no more than 15 minutes. (Russell, 2280:2-5; Donaldson, 315:9-12).

Amazon presented a plethora of witnesses who confirmed that on the first day of voting, the Region mishandled the lines and caused significant irregularities. Their testimony was unchallenged and is undisputed. After beginning the voting day with one single-file line, the Region stopped the election at least twice to change the configuration by dividing the original line into at least three separate lines. (Famiglietti, 603:8-24; Parent, 1053:24-1055:25). This caused substantial confusion and anger among voters. As explained, *supra (see* Section II(G)(2)), Associates waited for hours to vote and several Associates testified that they witnessed voters leaving the line in frustration. (Asad, 1223:9-17; Vaidya, 2078:16-22). Mr. Parent testified that voters "were getting mad because we were just standing around waiting." (Parent, 1054:13-14). At one point during the morning session on March 25, Board Agents standing outside of the

voting tent began asking for voters whose last name began with certain letters to move to the front of the line and into the voting tent. (Grajeda, 746:7-748:17; Jaramillo, 3145:20-3148:2; *see* Dunn, 3338:4-7 (rejecting evidence that Board Agents moved voters whose last names began with certain letters to the front of the line as "cumulative and duplicative.")). This process resulted in some Associates skipping ahead of voters in line, which caused an even longer wait for the Associates who had been skipped. (Grajeda, 746:7-748:17; Jaramillo, 3138:8-19, 3145:20-3148:2). Some Associates who had gotten into line together finished voting at different times. (Grajeda, 745:2-746:2; EMP 0198-A, EMP 0198-B; Abreu, 1372:7-15, 1378:5-:14; EMP 0198-C; Rentas, 1510:24-1511:4).

In undisputed testimony, Ms. Donaldson testified that at the post-election conference Ms. Fedorova dismissively stated that the problem with the lines was that the "[A]ssociates did not know their last names." (Donaldson, 389:14-20). Ms. Donaldson further testified that upon arriving at the post-election conference after the first voting period, the lines were in disarray and it was unclear what the Region had attempted to change during the voting period. (Donaldson, 381:13-382:10). Ms. Donaldson suggested how the lines could be reconfigured to Ms. Federova, who agreed with Ms. Donaldson's suggestions. (Donaldson, 387:21-402:8; EMP 0672, pp. 5-8; Spinella, 4806:23-4807:22).

These irregularities cannot be condoned as mere inconveniences. Mr. Parent testified that after reaching the front of the line, he was turned away and told to report to the back of a different line. (Parent, 1051:7-1052:24, 1065:10-21; EMP 0698). Although Mr. Parent decided to remain in line, it is entirely feasible that other voters (1) received similar conflicting messages, and (2) because of those conflicting messages, decided to leave the voting process altogether. Indeed, several witnesses confirmed that voters left the lines. (Asad, 1223:9-17; Vaidya,

2078:16-22). This was not limited to the first day; voters confirmed similar frustration during subsequent voting sessions. (Oyalaja, 2488:8-22).

Under the totality of the circumstances, a rerun should be held because of significant procedural irregularities. *Fresenius USA Mfg. Inc.*, 352 NLRB at 680 (setting aside election where procedural irregularities raised "a reasonable doubt as to the fairness and validity of the election."). These irregularities were so widespread that the Hearing Officer eventually precluded Amazon from entering in any additional evidence of voter confusion experienced on March 25 because she found the testimony cumulative. (Dunn, 3189:19-21, 3133:3-6, 3186:13-19). While this evidentiary ruling was in error, it nevertheless confirms that the Region's failures did not have a *de minimus* effect on the election. Rather, Region 29's mismanagement led to widespread voter confusion and outrage. Indeed, the overall low turnout confirms that voters lacked confidence in the Region's process. (EMP 0164); *see Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 3 (noting a 85.2 percent turnout in manual elections between October 2019 and March 2020). As a result, Objection 7 should be sustained, and a rerun election must be ordered.

F. Objection 8

1. <u>Amazon's Objection</u>

The Region failed to protect the integrity of its procedures when it failed to control media presence in and around the voting area. Amazon specifically raised concerns to the Region about media interference in the voting process prior to the start of the election. Yet during the first polling session, numerous media members—including a documentary film crew retained by Mr. Smalls—entered Amazon's private property, filmed and recorded employees who were in line to vote, and even asked voters how they planned to vote, within feet of Board Agents. Photographs and quotes of these employees were then publicly broadcast across the nation. All of this media filming, recording, and broadcasting took place within the same zone around the polling place

where the Region required Amazon to disable its security cameras during voting. The Board's failure to stop the media from surveilling and interrogating voters standing in line to vote had a reasonable tendency to discourage other employees from voting in subsequent polling sessions (as evidenced by extremely low voter turnout).

2. <u>Legal Standard</u>

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2). Additionally, Amazon incorporates by reference the legal standards set forth in Objection 6. *See* Section IV(D)(2). Moreover, third party conduct need not be attributable to a particular party in order to be objectionable. *Al Long, Inc*., 173 NLRB 447, 448 (1968) (explaining, "[i]t is not material that fear and disorder may have been created by individual employees or nonemployees and that their conduct cannot probatively [sic] be attributed either to the Employer or to the Union.").

3. <u>It is Undisputed That Region 29 Failed to Control the Media Presence</u>

The Region failed to control media presence in and around the voting area, as evidenced by (1) the media standing next to voters in line in full view of Board Agents, who appear in multiple pictures; (2) numerous pictures of voters being taken while in view of Board Agents; (3) numerous voters being interviewed by journalists, while in view of Board Agents; and (4) voters' pictures (while in line) and the moment they left the voting tent being broadcast around the country. It is undisputed that the Board Agents did nothing to stop the media's aggressive incursions into the no-electioneering zone during the election. Numerous voters—so many that the Hearing Officer decided that the evidence was cumulative, which under extant Board law means the issue was decided—credibly testified that the media was present in the no-electioneering area during polling, and that Board Agents **never** asked them to leave. (Dunn, 1517:10-13, 1996:5-9, 2695:11-14, 2784:10-2785:21, 3133:3-6). Not a single Board Agent or

ALU witness testified to the contrary. As a result, what was supposed to be a sacrosanct and secret process became a public spectacle. This destroyed confidence in the Board's election process and warrants a rerun election.

Neither the ALU nor the Region disputed that on the first day of the election, voters encountered a hornets' nest of media members stationed within and around the no-electioneering zone. The voters' right to a private, secret ballot vote was completely destroyed, as reporters and camera crews took photographs, videos, and interviews of voters in line and then published that content for the entire world to see. *See* Statement of Facts, Sec. III.G.3(a), *supra*. Disappointingly, the Board Agents present that day took no action to quell such media interference. *Id.* The end result was an election with an uncharacteristically low turnout, a clear sign that voters lacked confidence in the Board's election process. (*See* EMP 0164 (showing a 69.6% voter turnout)).

Tellingly, the Hearing Officer's rulings on the presentation of evidence underscore just how poorly the Region handled the media presence. The Hearing Officer precluded Amazon from entering into evidence publicly accessible news articles of the election unless Amazon completely redacted the photographs, videos, and interviews of Associates waiting in line, or entering or exiting the voting tent. The Hearing Officer was concerned that entering such photographs and videos into the record would violate the Associates' "sacrosanct" right to vote in a secret ballot election:

> HEARING OFFICER DUNN: Yes. And it is a secret ballot vote; that is sacrosanct. And part of voting is queueing up to vote when the polls are open. And I have severe concerns about entering into the record any exhibit that shows a voter who -- during the polling times. So for that reason, I am not going to admit Employer's Exhibits[.]

(Hearing Officer Dunn 426:14-20).

Ironically, the Region 29 representative agreed, stating

> MS. FRIEDHEIM WEIS: Yeah. It's inappropriate to have photos and videos, especially ones that are not authenticated, being added to the record, clearly showing, in some instances -- in some instances we see backs of heads, but in some instances, we see full faces of voters who are engaging in their right to participate in a secret ballot election.

(Friedheim-Weis, 426:4-11).

That. Is. The. Entire. Point.

Individual Amazon Associates' private and sacrosanct participation in a secret ballot election should not be in the public domain. But Region 29 did not care about that at all from March 25 through March 30, when it allowed news reporters, cameramen and photographers to freely patrol the no-electioneering zone and the voting line; photographing, recording and broadcasting individual voters' faces to the world. (EMP 0196, EMP 0198-A, EMP 0198-B, EMP 0198-C, EMP 0201.3, EMP 0204.2, EMP 0204.3, EMP 0223-B, EMP 0673-A, EMP 0704-A, EMP 0704-B, EMP 0704-D, EMP 0721.1, EMP 0901). Amazon did not commit that violation of Associates' Section 7 rights and the sanctity of the election—Region 29 did. All Amazon did was attempt to introduce the *publicly available* news accounts to prove the Region's failure. If the Region had done its job and policed the voting area, there would not have been any pictures to enter into evidence. The Hearing Officer's insistence that such evidence be heavily redacted (or disallowed entirely) illustrates the significance of the Region's failure and itself proves Amazon's objection.[55]

Moreover, the Hearing Officer's decision to preclude Amazon from eliciting further testimony about presence of the media results in two factual consequences: 1) the testimony about media presence in and around the electioneering area is well-corroborated and undisputed; and 2) the media presence on March 25 was well-known throughout the bargaining unit.

[55] These unnecessary and erroneous redactions and rejections also obstructed Amazon's ability to prove the Region's dereliction of its duties as outlined in its objection. But the Region's efforts in the Hearing to save the agency well-deserved embarrassment at the expense of Amazon's case fools no one.

The full recitation of testimony concerning media presence is detailed in Sec. III.G.3(a), *supra*. What such undisputed testimony demonstrates is that voters found the media's presence to be intrusive. For example, Ms. Grajeda testified that a cameraman took her photograph and then tracked her movements to turn away from the camera in what appeared to be an attempt to get her back into the frame. (Grajeda, 760:11-761:4). He was in fact able to capture her picture, as several photographs of both Ms. Grajeda and her co-workers at that same angle were posted on the internet just several hours later. (Grajeda, 759:7-761:14). This was particularly troublesome for Ms. Grajeda, who had just begun a high-risk pregnancy at the time of the vote and had not even informed her co-workers and some family members that she was pregnant. (Grajeda, 759:7-761:4). But later that same day, she started to receive "congratulations" notifications from coworkers with a picture attached of her standing in the voting line earlier that morning, clearly showing that she was pregnant. (Grajeda, 759:7-761:4). This is an outrageous and deeply concerning violation of Ms. Grajeda's privacy, that should never have happened while she was standing in line to vote in an NLRB-sanctioned and supervised election.

Another Associate, Mian Asad, testified that on Friday, March 25, while he was waiting in line to vote and standing close to the tent's entrance, two men with a video camera approached and asked him questions, including asking how he planned to vote and, after he answered, asking why he was planning to vote no. (Asad, 1193:18-23, 1195:15-21). During this time, a Board Agent stood just a few feet from the voting line and in view of the cameraman, but at no time did Mr. Asad see or hear any Board Agents approach the cameraman. (Asad, 1208:18-24). The interview of Mr. Asad and other Associates was posted to YouTube by the Associated Press, which has over 1.93 million YouTube followers. (Asad, 1199:25-1201:13, 1203:17-1204:18).

Each and every one of the Associates who testified that they saw the media in and around the no-electioneering zone also testified that Board Agents were around and within view of the media. At no time did these Associates see or hear anyone from the Region approach any of the media. (Grajeda, 807:1-18; Parent, 1070:17-1071:12; Abreu, 1390:17-18; Delancey, 1234:17-1236:21). The ALU and the Region never produced any evidence (documentary or testimonial) to contradict these witnesses' testimony.

4. <u>Region 29, Not Amazon, Had the Responsibility to Police the Polling Area</u>

During the Hearing, the Region and the ALU appeared to advance the laughable contention that it was Amazon's responsibility to control the media presence in the no-electioneering zone, not Region 29's. In support, they introduced a March 24, 2022 email from counsel for Amazon in which they claim that Amazon assumed the responsibility for policing the anticipated media presence. (*See* ALU Exhibit 6). This argument is nonsensical and must be rejected for several reasons.

First, the idea that the Board can yield its responsibility to police a representation election to a private party is contrary to fundamental principles of free and fair elections. Neither employers nor unions can police or monitor an NLRB election. "[A] party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001). The election taking place on Amazon's property changes nothing about the Region's duties to police the polling area and keep the media out, and holding an election (inside or outside) on a company's property is not a novel occurrence. The Board's position is clear:

> Whenever an election is held on company property, the employer by volunteering the use of his premises assumes special obligations. The election is conducted by

> the Board. **It is under the auspices and control of the Board**. The employer must not intrude in the election process. The employees should not gain the impression that the election process is subject to the direction of the employer rather than of the Board. **In effect, the employer is under an obligation to surrender control of his property to the Board for a limited time and to the limited extent required for the conduct of the election**."

Colonial Lincoln Mercery Sales, Inc., 197 NLRB at 68 (emphasis added) (setting aside election because the employer hired a uniformed policeman to be present during the polling period).

If the Region actually tasked Amazon with this responsibility (on March 25, or any other day), that alone would be a reason to set aside the election as it would mean that the Region agreed to have an interested party monitor and police the polls. Surely, neither Region 29 nor the Board wishes to legalize employer surveillance over elections. As the Board has long held, "representation elections are to be conducted under the Board's exclusive direction and supervision as it is the very federal agency tasked with upholding employee rights under the Act." *Amazon.com Servs. LLC*, 10-RC-269250, Decision and Direction of Second Election at 11.

The irony of the Region's and the ALU's contention that it was Amazon's responsibility to police media presence in the voting area is not lost on Amazon—on November 29, 2021, the Regional Director for Region 10 directed a second election at Amazon's Bessemer, Alabama, facility because she determined that the mere presence of a mailbox on Amazon's property (in a mail ballot election) created the impression that Amazon had control over and oversaw the election. *See Amazon.com Servs. LLC*, No. 10-RC-269250, Decision and Direction of Second Election, at 11-12, 11 fn. 13. The Region's and the ALU's contention evidences either a concerted attempt at self-preservation, or a fundamental misunderstanding of the most basic Board law—"Representation elections are to be conducted *under the Board's exclusive direction and supervision* as it is the very federal agency tasked with upholding employee rights under the Act…Neither an employer nor a union is permitted to control any aspect of the election process

or convey the impression to eligible voters that it possesses such control." *Id*. at 11 (emphasis added) (holding that the U.S. Postal Service's [a third-party] installation of a mailbox on Amazon's property should result in a rerun election); *see also Alco Iron & Metal Co.*, 269 NLRB 590, 591-92 (1984) (Board Agent's misconduct made it appear that the petitioner was running the election); *Ceva Logistics U.S., Inc*., 357 NLRB 628, 628-29 (2011). (recognizing that the impression of an employer-controlled election process is objectionable). Indeed, "the Board does not allow interference with its laboratory conditions and any appearance that a non-Board party is in control of the election process constitutes such interference." *Amazon.com Servs. LLC*, No. 10-RC-269250, Decision and Direction of Second Election, at 11 fn. 13. Region 29 permitting the media to be present and unchecked in the voting area undoubtedly interfered with voters' freedom of choice.[56]

[56] Even assuming that the Region could lawfully cede the policing role to Amazon, which it cannot, ALU Exhibit 6 does not show that Amazon assumed any such responsibility. The document speaks for itself: in anticipation of an election that had garnered national media attention, after discussing media concerns numerous times with the Region, Amazon counsel Kurt Larkin expressed concern about the presence of the media on election day and suggested that Amazon's Public Relations team would be present to engage with media members if any were trespassing on Amazon property. (*See generally* ALU Ex. 6). As reflected in the exhibit, and by the ALU's and Region's failure to put on any contrary evidence, the Region nor the ALU ever expressed acceptance or even responded to the email. *Id.* To the contrary, as Ms. Russell testified, in unrebutted testimony, the Region **never** agreed that Amazon could or would "police" the polling area. Rather, Ms. Poor stated to Ms. Russell, counsel for Amazon, and counsel for the ALU that she **could not agree that such conduct would not be objectionable.** (Russell, 2337:14-21) ("[S]he acknowledged that the media presence was a concern. She also, however, noted that we should not construe her statements as the Board's agreement that the company had permission to take those steps and she noted that any such steps could be considered objectionable conduct. So she could not guarantee that either of the two steps would not generate Objections."). Ms. Rogers' March 25, 2022 follow-up email, sent after the Region had failed to control the media presence during the morning voting session, notes that "[w]e are requesting that the NLRB take a *firmer* stance in monitoring this situation, particularly in the voting line." (ALU Exhibit 6) (emphasis added). The word choice "firmer" is revealing—the Region was clearly tasked with controlling the media presence, but it was failing to do so—because it chose to understaff the election.

Importantly, when Mr. Troy was asked what steps, if any, Amazon took in response to reports about media presence on the JFK8 property, the Region 29 representative objected to relevance, stating, "[w]hatever Mr. Troy or anyone at Amazon did or did not do, does not speak to actions that the Region allegedly took or failed to take, which is irrelevant to Objection 8. So it's irrelevant." (Friedheim-Weis, 1684:14-25). The Hearing Officer sustained this objection, concurring, "I agree, Mr. Larkin, for the same reason I just stated that Objection 8 focused on the Region's alleged conduct." (Hearing Officer Dunn, 1685:1-5). Accordingly, the Hearing Officer cannot rule that Amazon maintained responsibility for controlling the media's presence in the no-electioneering zone when the Region 29 representative does not even believe that Amazon's actions that day were relevant.

5. **<u>The Hearing Officer Should Not Take an Adverse Inference Related to ALU Exhibit 6</u>**

Finally, the Hearing Officer asked the parties to address whether an adverse inference should be taken against Amazon related to the testimony of Mr. Larkin, who the ALU called as a witness to authenticate ALU Exhibit 6. The ALU's request for such an inference is baseless.

Counsel for the ALU, Retu Singla, asked Mr. Larkin whether it was "the purpose in writing this email to let…Region 29…know that Amazon will be using members of its public relations team to engage with press members during the election?" (Singla, 5105:4-10). Because the document speaks for itself, Mr. Larkin responded to repetitive questioning from ALU's counsel that his "intention in writing the email was to convey what is in the email." (Larkin, 5105:17-18, 5105:19-5106:10, 5106:11-13, 5108:2-4, 5108:2-5109:20, 5109:22-25, 5111:13-5112:5). Dissatisfied with Mr. Larkin's responses, Ms. Singla then requested that a "negative inference" be taken against Amazon based upon the witness and counsel "not understanding the questions as related to truth and accuracy." (Larkin, 5112:6-18).

No adverse inference can be taken because Ms. Singla's questions were of dubious relevance or validity. The question, asked twice, called for a fact witness to opine upon a legal conclusion. Further, Ms. Singla's inquiry probed into attorney-client privileged communications. Under such circumstances, an adverse inference against Amazon is improper. Regardless, Mr. Larkin answered the question. He confirmed that his intention was to convey the statements reflected in the email. No adverse inference can be drawn from Ms. Singla's argumentative and churlish approach to questioning Mr. Larkin, when all she was purportedly trying to do was authenticate a document.

G. Objection 9

1. Amazon's Objection

The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the ALU when it allowed non-employee ALU President Smalls to loiter around the polling location and within the "no-electioneering zone" established by the Region on multiple occasions during polling times, where he was able to observe who participated in the election. Mr. Smalls' presence in and around the "no-electioneering zone" during polling times reasonably tended to intimidate, coerce, and create the impression of surveillance among voters and prospective voters.

2. Legal Standard

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2).

a) *Conduct That Undermines the Board's Appearance of Neutrality is Objectionable*

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2).

b) *The Board is Responsible for Policing the No-Electioneering Zone*

The NLRB's Casehandling Manual strictly prohibits electioneering:

> No electioneering will be permitted at or near the polling place during the hours of voting, nor should any conversation be allowed between an agent of the parties and the voters in the polling area or in the line of employees waiting to vote. Indeed, agents of the parties (other than observers) should not be allowed in the polling area during election hours.

NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11326.

The Board is authorized to establish a no-electioneering zone around the polls where electioneering is strictly forbidden. *Id.* Sec. 11326.4. As the Board is responsible for policing the

area, "[t]he Board agent should not undertake to set up an area that cannot be policed." *Id.* Indeed, in this election the Region placed signs on the tent that stated: "NATIONAL LABOR RELATIONS BOARD, AN AGENCY OF THE UNITED STATES GOVERNMENT VOTING PLACE NO ELECTIONEERING OR LOITERING."[57] (EMP 0673-A).

c) *The Board Prohibits Electioneering at or near the Polls*

It is well-settled that the Board prohibits electioneering at or near the polls. *Claussen Baking Co*., 134 NLRB 111, 112 (1961); *see also Amazon.com Servs. LLC*, No. 10-RC-269250, Decision and Direction of Second Election, at 11 (citing *Claussen Baking, Co.*, 134 NLRB 111, 112 (1964) ("The Board has specifically prohibited electioneering 'at or near the polls.'")). "The final minutes before an employee casts his vote should be his own, as free from interference as possible." *Milchem, Inc.*, 170 NLRB 362, 362 (1968). The Board's evaluation of whether to set aside an election due to a party's electioneering is fact-specific. *Boston Insulated Wire*, 259 NLRB 1118, 1118-119 (1982). The Board views electioneering as highly fact specific and considers (1) the nature and extent of electioneering; (2) whether the electioneering was conducted by a party or employees; (3) whether the conduct occurred in a designated no-electioneering area; and (4) whether the conduct contravened instructions of a Board agent. *See id.* at 1119. For example, applying the general no-electioneering standard, the Board has found objectionable a union observer who, in the polling place and acting contrary to the Board agent's instructions, told four employees how to vote and gave others a "thumbs up." *Brinks Inc*., 331 NLRB 46, 46-47 (2000).

[57] Several times during the Hearing, Petitioner argued that accusing Mr. Smalls of loitering is racist. As noted, the NLRB's signs expressly use the word "loitering." We know well the Board had no ill intent in this choice of words, just as we presume the Board knows counsel means no ill in simply using the Board's signs' express language in its objections. The Petitioner's histrionic showboating suggesting otherwise should be disregarded.

d) *Party Representatives are Strictly Forbidden from Engaging in Prolonged Conversations with Voters Waiting in Line*

A representative of a party to an election is strictly prohibited from engaging in "prolonged conversations" with "voters waiting to cast ballots . . . ." *Milchem, Inc.*, 170 NLRB at 362. The Board's bright-line rule is meant to protect the voter from last minute electioneering, pressure, and to avoid unfair advantage. *Id.* Critically, the Board applies the *Milchem* rule "without inquiry into the nature of the conversations." *Id.* at 363. (finding a union official's five-minute conversation with approximately 15 voters waiting to vote voided the election without considering the content of the conversation); *Volt Technical Corp.*, 176 NLRB 832, 836-37 (1969) (finding a company supervisor's multiple short conversations with voters along the voting line for almost the entirety of the voting period was sufficient to void an election particularly because the supervisor previously asked employees not to vote for the union).

e) *The Mere Presence of a Party's Representative at the Polling Place May Necessitate Overturning the Election*

The Board has found that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote. *See Performance Measurements Co.*, 148 NLRB 1657, 1659 (1964). In *Performance Measurements*, for example, the Board found that the employer's president's continuous presence by the election area, either sitting at a table six feet from the doorway to the election area, or by standing by the door, requiring voters to pass within two feet of him, interfered with the employees' free choice and warranted setting aside the election. *Id.* Similar conduct is equally objectionable if committed by a union's agent. *See Bio-Med. Applications of Puerto Rico*, 269 NLRB at 829-30 (Board ordering rerun election because union agent remained in a waiting room adjacent to polling area for the entire voting period and spoke to four

employees); *Star Expansion Indus. Corp.*, 170 NLRB 364, 365 (1968) (Board ordered rerun when union agent "was engaged in electioneering activities in close proximity to the polls during a substantial part of the voting period.").

Similarly, it is objectionable for a party's representative to surveil voters or give the impression of surveillance to voters, regardless of whether they communicate with the voters. In *Elec. Hose & Rubber Co.*, 262 NLRB 186 (1982), a supervisor was "stationed" within 10-15 feet from the polling area. Critically, he never testified to explain his presence near the voting area while the polls were open. *Id.* at 216. Without an explanation, the only conclusion the Board could draw was that "his purpose in observing the even[t] was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched." *Id.* In a similar vein, the DC Circuit Court of Appeals found that two union agents stationed inside a car <u>outside</u> of the no-electioneering zone, even without speaking to voters, constituted conduct of such a nature that substantially impaired the employees' exercise of free choice and warranted the election to be set aside. *Nathan Katz Realty LLC*, 251 F.3d at 992-93. The Court reasoned the agent was positioned in a location where voters had to walk by them in order to enter the polling area. This "constitute[ed] conduct of such a nature that it substantially impaired the [] employees' exercise of free choice." *Id.* at 993.

3. <u>Region 29's Failure to Eject ALU President Smalls from the No-Electioneering Zone during the Election Necessitates Overturning the Election</u>

It is undisputed that Mr. Smalls attended the pre-election conference on March 25, 2022, and that all of the Board Agents were also present. (Donaldson, 343:17-344:10; Russell, 2322:9-12; Famiglietti, 588:14-589:1). Thus, the Board Agents unequivocally knew who he was. Neither Region 29 nor the ALU presented any contrary testimony. It is also undisputed that a Board Agent for Region 29, Ms. Anderson, established the no-electioneering zone and specifically

stated it was an area the Region would police. (Russell, 2295:11-2296:5, 2296:16-2298:12; EMP 0695-E). It is undisputed that Mr. Smalls and counsel for ALU were present when the no-electioneering zone was established. (Russell, 2291:14-2292:15). Furthermore, it is undisputed that Ms. Fedorova emailed the parties and told them that electioneering would not be permitted in the polling area, and that all party representatives needed to leave the polling area while voting occurred and could not return until voters were gone. *See* NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11326 (Electioneering: "No electioneering will be permitted at or near the polling place during the hours of voting, nor should any conversation be allowed between an agent of the parties and the voters in the polling area or in the line of employees waiting to vote. Indeed, agents of the parties (other than observers) should not be allowed in the polling area during election hours.").

It is uncontroverted that on the morning of March 25, 2022, the first polling session, and during other voting sessions, ALU President Mr. Smalls regularly stationed himself in the no-electioneering zone for extended periods. Indeed, Amarilis Villalongo, Kevin Chu, Jean Kanzler, Joe Troy, Michael Spinella, and Taheera Aluqdah credibly, and in undisputed testimony, stated that they saw Mr. Smalls standing inside the no-electioneering zone while the polls were open. (Villalongo, 2790:3-2792:21; 2794:17-2798:20; Chu, 843:20-844:17, 850:9-15; Troy, 1717:24-1718:6; Martinez, K., 2000:13-2001:18, 2006:17-2007:3; Kanzler, 2168:9-2171:14, 2173:5-2174:4; Aluqdah, 2219:25-2220:24, 2226:14-2228:14, 2250:21-2251:17; Spinella, 4809:21-4815:3; EMP 0227, EMP 0227-v, EMP 0695, EMP 0695-B, EMP 0695-D, EMP 0695-E, EMP 0695-G, EMP 0695-H). Between 9:30 a.m. and 10:00 a.m. he stood 15 - 20 feet from the entrance of the voting tent. (Martinez, K., 1999:2-2002:24; EMP 0227, EMP 0227-v). At 11:00 a.m., he was still standing near the entrance of the tent and within the no-electioneering zone.

(Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). Voters had to walk directly past Mr. Smalls, who was also accompanied by a cameraman, in order to vote. (Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). Each witness credibly testified to the time they saw Mr. Smalls, the location, described him (including the hat he wore),[58] described what he was doing, and marked his location on a map of the polling area. (Villalongo, 2790:3-2792:21; 2794:17-2798:20; Chu, 843:20-844:17, 850:9-15; Troy, 1717:24-1718:6; Martinez, K., 2000:13-2001:18, 2006:17- 2007:3; Kanzler, 2168:12-2171:14, 2171:19-2172:11, 2173:5-2174:4; Aluqdah, 2219:25-2220:24, 2226:14-2228:14, 2250:21-2251:17; Spinella, 4809:21-4815:3; EMP 0227, EMP 0227-v, EMP 0695, EMP 0695-B, EMP 0695-D, EMP 0695-E, EMP 0695-G, EMP 0695-H).

Further supporting Mr. Smalls' presence in the polling area and inside the no-electioneering area while the polls were open is the ALU's and Region's failure to contradict the testimony of Amazon's witnesses, or even ask Mr. Smalls about his presence. Neither the ALU nor the Region offered any explanation for Mr. Smalls' consistent presence in the polling area **during** the voting sessions. The Region and the ALU avoided the issue of Mr. Smalls' presence in the no-electioneering area—because Mr. Smalls engaged in all of the conduct of which he was accused as established by the undisputed evidence cited in the preceding paragraph. Additionally, an adverse inference must be drawn regarding Mr. Smalls' electioneering and loitering in the no-electioneering area, as described herein. *See Flexsteel Indus.*, 316 NLRB at 757-58 (failure to examine a favorable witness regarding a factual issue upon which that witness

[58] Ms. Martinez credibly described Mr. Smalls as wearing "a Yankees cap" and a "red ALU shirt" when she saw him. (Martinez, K., 2000:18-2001:1). Moreover, on cross-examination, she also testified that while she identified him from a video he posted that morning (EMP 227, EMP 227-v), she had never seen the video before she testified. (Martinez, K., 2011:8-16).

would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

The Board Agents tasked with policing the polls assuredly witnessed Mr. Smalls—the public face of the ALU who donned a well-known bright red ALU sweatshirt, with the ALU's logo (three fists coming out of a box) at the polls—and yet did nothing to remove him from the polling area. (Martinez, K., 2006:17-22; EMP 0201.3, EMP 0673-A).[59] The ALU and the Region entered no evidence into the record to establish that the Region even attempted to police the area and remove the ALU's President from the polling and no-electioneering zone—an area in which party representatives are flatly prohibited from electioneering. *See e.g.,* NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11326.4; *Claussen Baking Co.*, 134 NLRB at 112. An adverse inference must be drawn against the Region for failing to present any testimony or evidence regarding this point. *See Flexsteel Indus.*, 316 NLRB at 757-58.

Mr. Smalls' brazen conduct continued unfettered later in the afternoon on Monday, March 25th. Between 2:30 p.m. and 2:45 p.m., while the polls were still open, Mr. Smalls was parked in his well-known black SUV directly in front of the JFK8 building, within the no-electioneering zone. (Aluqdah, 2219:25-2220:24; EMP 0695-D). Again, there is no evidence anyone from the Region sought to remove Mr. Smalls from the no-electioneering area.

On March 29th, during the evening session while voting was occurring, Mr. Smalls returned to the no-electioneering area yet again, this time with Ms. Maldonado. (Spinella, 4809:21-4815:3). Later, Mr. Smalls' black SUV drove past the exit to the voting tent and parked where the orange cones were located. (Spinella, 4809:21-4815:3; EMP 0712). Again, there is no

[59] Board Agents were obviously stationed outside, as at least three different Board Agents can be seen outside of the voting tent and in the voting area in pictures taken by the media. (EMP 0673-A). Moreover, Mr. Mendoza, who served as an ALU Observer during six of the ten voting sessions, testified that at least two Board Agents were stationed outside during each polling session. (Mendoza, 5030:6-22).

evidence that the Board Agents responsible for ensuring a fair and neutral election did anything to stop Mr. Smalls.

By failing to stop the ALU's impermissible conduct, and allowing it to continue in the Board Agents' presence, the Region gave its tacit approval of Mr. Smalls' presence. This approval "reasonably suggested" that the Board favored the ALU in the election. *See e.g. Glacier Packing,* 210 NLRB at 573; *Goffstown Truck Ctr., Inc.*, 356 NLRB at 158, fn. 6. The Board is responsible for protecting and maintaining the integrity and neutrality of its representation elections, yet failed to do so by permitting the President and public face of the ALU to loiter around the polls in the no-electioneering area on multiple occasions. *See Athbro Precision Eng'g Corp.*, 166 NLRB at 966; *see also Amazon.com Servs. LLC*, No. 10-RC-269250, Decision and Direction of Second Election, at 11 ("Representation elections are to be conducted under the Board's exclusive direction and supervision.").

The Region's conduct in allowing the ALU President to flout the rules and electioneer in the no-electioneering zone was objectionable. Any contrary decision will have ramifications that go far beyond this particular case. Such a decision will move well-established guideposts as to what parties can and cannot do in the no-electioneering zone while the polls are open, and will set a precedent that allows senior leadership of all other employers and unions to engage in the same conduct as Mr. Smalls in future elections. Thus, Objection 9 should be sustained and a rerun election should be ordered.

H. Objection 10

1. <u>Amazon's Objection</u>

The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the ALU when it directed voters to cover up "Vote NO" shirts, but allowed other voters to wear ALU shirts and other ALU paraphernalia in the

polling area. There was no basis for this direction as the Board has consistently held that wearing stickers, buttons, and similar campaign insignia by participants and observers at an election is, without more, not prejudicial. *R. H. Osbrink Mfg. Co*., 114 NLRB 940, 941-43 (1955); *see also Furniture City Upholstery Co*., 115 NLRB 1433, 1434–1435 (1956). The Board has held that the impact on voters is not materially different "whether the observers wear prounion or antiunion insignia of this kind." *Larkwood Farms*, 178 NLRB 226, 226 (1969) (observer wearing "Vote No" hat not objectionable). The Region's discriminatory directions toward ALU opponents created the impression for all voters present, as well as all potential voters who learned of these incidents, that the Board appeared to favor the ALU over Amazon in the outcome of the election. "No participant in a Board election should be permitted to suggest to the voters that this Government agency, or any of its officials, endorses a particular choice." *Am-O-Krome Co.*, 92 NLRB 893, 894 (1950).

2. <u>Legal Standard</u>

Amazon incorporates by reference its earlier discussion of the legal standard applicable to the Region's failure to protect the integrity and neutrality of its procedures. *See infra*, Objection 1, Section IV(A)(2). Regarding Objection 10, *Glacier Packing* is directly on point. In *Glacier Packing*, a Board agent required observers to remove "Vote Neither" pins in the presence of other voters. *Glacier Packing*, 210 NLRB at 572. The Board set aside the election because "employees witnessing the two incidents involved could reasonably have interpreted [the Board agent's] remarks and actions as indicative that the Board was opposed to the [e]mployer's position in the election." *Id.* at 573. The dissent in *Hudson Aviation* is additionally instructive regarding the applicability of *Glacier Packing* to the instant case. The dissent in *Hudson Aviation* noted that the conduct in *Glacier Packing* was objectionable because:

> [t]he critical conduct…was directly focused at the employer's position in the election (as evidenced through the campaign buttons being worn and the literature being distributed) and took place in front of employees who had not yet voted.

Hudson Aviation Servs., 288 NLRB at 871 (Johansen, M., dissenting).

The Board's Casehandling Manual reinforces this notion, stating that "[v]oters need not remove insignia, even though they constitute electioneering material." NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11326.3.

3. <u>Region 29 Committed Objectionable Conduct When it Required Voters to Cover Up "Vote No" Messaging Before They were Permitted to Vote</u>

a) ***Board Law is Clear that Region 29 Engaged in Objectionable Conduct When Board Agents Required Voters to Cover Shirts and Paraphernalia with "Vote No" Messaging***

The Board Agents conducting the election between March 25 and March 30 violated both Board law and the Casehandling Manual when they required Associates to remove or cover up campaign messaging, in the presence of other potential voters, while the polls were open. Accordingly, both factors that were present in *Glacier Packing*, and which the *Hudson Aviation* dissent noted were the key differentiating factors between objectionable and non-objectionable conduct, were present in the instant case.

Five Associates testified during the Hearing that they were informed by Board Agents that they were not permitted to display "Vote No" messaging either in the tent or in the area outside of the tent where potential voters were lining up to vote. These directives were given by Board Agents on multiple occasions in the presence of other voters who had not yet voted. (Purpura, 729:6-730:5; Tredici, 983:2-984:8; Gordon, 1645:14-1646:2; Christie, 2686:7-2687:12; Monarrez, 4003:8-17). Mr. Mendoza even testified that he was instructed, while serving as an Observer for the ALU, to inform a Board Agent if he saw any voters wearing a

"Vote No" shirt. (Mendoza, 5021:17-5022:2). There is no record evidence challenging these witnesses' testimony regarding the Region's directives to cover up "Vote No" messaging.

At the same time, the record is replete with evidence that the Region did permit ALU supporters, including its observers, to display "Vote Yes" messaging[60] in the polling area.[61] (*See, e.g.*, Goriva, 906:3-13; Tredici, 984:9-985:7; Cordova, 1292:9-1293:11; Oyalaja, 2498:10-2500:3; Litto, 2759:15-2760:14; Novoa, 2861:9-2864:12, 2867:24-2869:23; Rosado, 3083:11-17, 3086:1-3090:21; Matos, 3236:3-19).

Any claims by the ALU that Associates were allowed to vote while wearing clothing and paraphernalia with "Amazon" written on them are wholly irrelevant to Objection 10. The applicable Board law specifically contemplates Board agents taking actions that are "directly focused at [an] employer's position in [an] election." *Hudson Aviation Servs.*, 288 NLRB at 871 (Johansen, M., dissenting). The Board noted in *Glacier Packing* that employees witnessing the Board agent's conduct at issue there, just like the significant number of Associates who witnessed the conduct related to Objection 10, "could reasonably have interpreted [the Board [A]gents'] remarks and actions as indicative that the Board was opposed to [Amazon's] position in the election." 210 NLRB at 573. Just like the "Vote Neither" messaging was the employer's campaign messaging in *Glacier Packing*,[62] "Vote No" was Amazon's campaign message during the critical period of the instant case. (*See e.g.*, Donaldson, 476:3-18; EMP 0545; Spinella, 4830:12-15; 4835:8-14). Whether other voters were allowed to wear shirts or lanyards that

[60] The ALU only distributed one type of lanyard during the campaign, the yellow "Vote Yes" lanyard. (Anthony, 3599:24-3600:25).

[61] Further illustrating the Region's favoritism toward the ALU, it allowed the ALU's President to openly flout its rules and electioneer in the no-electioneering zone. *See supra*, Section IV(G)(3).

[62] The campaign message was "Vote Neither" rather than "Vote No" because there were two participating unions. *See Glacier Packing*, 210 NLRB at 571 fn. 2.

simply said "Amazon," the place where Associates work, is irrelevant.[63] The objectionable conduct at issue in this case is the Board Agents targeting Amazon's position in the election—Amazon's "Vote No" messaging—particularly in light of the fact that they permitted ALU supporters to wear the union's yellow "Vote Yes" lanyards in the polling area during the election. Just as in *Glacier Packing*, the Region here improperly told Associates to cover up insignia and clothing that illustrated a pro-Amazon message. The same result, a rerun, is thus warranted.

Each instance that Associates identified wherein a Board agent told him or her to cover up Amazon's campaign message, standing on its own, would be sufficient to require a rerun election as they are communications that "impugned the Board's neutrality" under the *Athbro* standard. Indeed, all it took was one instance in *Glacier Packing*, 210 NLRB at 572. Here, there are no less than five such occurrences. (Purpura, 729:6-730:5; Tredici, 983:2-984:8; Gordon, 1645:14-1646:2; Christie, 2686:7-2687:12; Monarrez, 4003:8-17). In addition, it is difficult to imagine more compelling evidence of a Board Agent's appearance of bias against a company than his or her instruction to an ALU Observer to specifically police voters for "Vote No" shirts during the election. (Mendoza, 5021:17-5022:2). But that is precisely what happened here as well. Altogether, the Region, in conducting the election, gave the impression of Board opposition to Amazon's position in the election. This is plainly objectionable.[64]

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[63] Indeed, a shirt that simply says "Amazon," is ambiguous and could just as easily be worn by a pro or anti-union supporter. The message "Vote No" or "Vote Yes" leaves no room for ambiguity. Thus, the Region's instruction to cover up "Vote No" shirts is not mitigated or affected by the alleged allowance of "Amazon" shirts.

[64] The margin of the results of the election is irrelevant when the objectionable conduct is related to the impugning of the Board's neutrality. *See, e.g., Archer Sers., Inc.*, 298 NLRB at 312 (election set aside, vote 382 to 41); *Hudson Aviation Servs*., 288 NLRB at 870 (election set aside, vote 26 to 5); *N.L. Atlas Bradford*, 240 NLRB at 517 (election set aside, vote 119 to 93); *Columbia Tanning*, 238 NLRB at 899 (election set aside, vote 44 to 34); *Westside Hosp.*, 218 NLRB 96, 99-100 (1975) (election set aside, vote 58 to 35); *J. Ray McDermott & Co.*, 215 NLRB at 570 (election set aside, vote 40 to 33); *Glacier Packing*, 210 NLRB at 571 fn.2 (election set aside, vote 230 to 107 to 44); *Thoikol Chemical Corp.*, 202 NLRB at 434 (election set aside, vote 23 to 10). The margin in the

For the Hearing Officer to decline to set aside the results of the election based on the undisputed record evidence of Board Agent bias would require the Hearing Officer to ignore relevant and controlling Board precedent. *See e.g.*, *Glacier Packing*, 210 NLRB at 571. Moreover, it would require the Hearing Officer to ratify Board Agents' expression of preference for one party over another in the presence of other voters moments before they cast their votes. Again, this is particularly so given the Region's passive approach to the wearing of ALU "Vote Yes" lanyards in the polling area throughout the election. Any conclusion that the Region's conduct here is not objectionable would run afoul of the Board's mandate for Board Agents to remain neutral and uphold the integrity of the representation process. *See e.g.*, *Athbro Precision Eng'g Corp.*, 166 NLRB at 966.

b) *The Self-Serving Testimony of Cassio Mendoza, Even if Improperly Credited, is Further Evidence of Objectionable Conduct by the Board*

Five ALU Observers testified during the Hearing: Connor Spence, Cassio Mendoza, Angelika Maldonado, Brett Daniels, and Jason Anthony. (EMP 2927). Of those, Mr. Mendoza was the only witness who was asked by ALU's attorneys about the ALU's claim that Board Agents instructed voters to cover up their yellow "Vote Yes" ALU lanyards while voting. Although Mr. Spence, Ms. Maldonado, Mr. Daniels, and Mr. Anthony were all available to corroborate Mr. Mendoza's testimony regarding the Region's disparate treatment of the yellow "Vote Yes" lanyards and the "Vote No" shirts, counsel for the ALU declined to question them on this issue.

The ALU's failure to examine four out of the five ALU Observers who testified, gives rise to the "strongest possible adverse inference" regarding any alleged instructions that the ALU now claims the Board Agents gave to Associates who were wearing yellow "Vote Yes" lanyards.

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instant case was 10.8% of votes cast, well below the margin in some of the cases identified above, including, notably, *Glacier Packing* and *Hudson Aviation.*

See Flexsteel Industries, 316 NLRB at 757-58. This includes the ALU failing to examine Mr. Daniels about whether he wore the "Vote Yes" lanyard in the voting area while serving as an Observer, leading to the inference that Mr. Daniels wore the lanyard exactly as testified to by Mr. Oyalaja. (Oyalaja, 2498:10-2500:3). Furthermore, given the extent to which counsel for the ALU was leading[65] Mr. Mendoza in his testimony on the issue, his testimony should not be credited because the leading questions amounted to "[the ALU's] attorney's testimony in favor of [her] client's position." *H.C. Thomson*, 230 NLRB at 809 fn. 2 (1977). Finally, Mr. Mendoza admitted on cross-examination that the voters who were allegedly told they had to hide their lanyards before the Board Agent would allow them to vote were required to pull out their "Vote Yes" lanyards in order to show their badges to check in to vote. (Mendoza, 5082:7-20). Accordingly, no credible record evidence exists that voters were required to hide their "Vote Yes" lanyards in order to vote. Instead, the record is filled with testimony from multiple witnesses that voters were able to vote while wearing yellow "Vote Yes" lanyards, but not while wearing "Vote No" shirts. The weight of the testimonial evidence, coupled with the ALU's failure to examine any of their witnesses other than Mr. Mendoza about the treatment of yellow lanyards, compels the Hearing Officer to discredit Mr. Mendoza's testimony on the subject.

Even if the Board Agents did consistently require voters to hide their yellow ALU lanyards—as the weight of the record shows, they did not—this would not mitigate the Region's objectionable conduct related to the Associates who chose to wear "Vote No" shirts and paraphernalia while voting. Unlike with "Vote No" shirts, there is no record evidence that Board Agents required voters to hide their "Vote Yes" lanyards in the presence of Associates who had not yet voted. (Tredici, 984:9-985:7; EMP 0232-A, EMP 0725; Cordova, 1292:9-1293:3; EMP

[65] HEARING OFFICER DUNN: If you start your question with "did," chances are it's going to suggest the answer and be leading. So I just suggest to you that you rephrase the question and do not suggest the answer. (1382:8-12).

0725; Rosado, 3081:1-10, 3085:1-17, 3089:21-3040:2; Matos, 3235:15-3236:15; Novoa, 2861:1-24, 2862:14-25, 2867:24-2869:14, 2872:1-20; Litto, 2758:20-2760:11).

Additionally, counsel for the ALU and the Regional Director's Representative asked many questions throughout the Hearing about voters wearing "Amazon" lanyards and clothing while voting.[66] Yet, these questions are simply red-herrings; it is the Board Agents' conduct directly opposing Amazon's position in the election—that Associates should "vote no"—that is the objectionable conduct. *See Glacier Packing*, 210 NLRB at 573; *see also Athbro Precision Eng'g Corp.*, 166 NLRB at 966.

c) *An Adverse Inference should be Drawn Based on the Failure of Region 29 to Call Any Witnesses to Testify with respect to Objection 10*

Amazon incorporates by reference its discussion regarding the legal standard for adverse inferences. *Supra* Section III(B). Region 29, as a party in this Hearing before Region 28, failed to call any witnesses to dispute or defend their actions in connection with Objection 10. As such, it is proper for the Hearing Officer to draw an adverse inference as to why these Region 29 employees did not testify, namely, that (1) they would have corroborated testimony regarding the Region's own disparate treatment of "Vote No" messaging in front of voters who had not yet voted; and (2) Cassio Mendoza was given the same standard observer instructions that was given to all Observers—to inform a Board Agent if any voters were observed wearing a "Vote No" shirt.[67] *See Elec. Workers Local 3 (Teknion, Inc.)*, 329 NLRB at 337 fn. 1 (confirming that the

[66] Importantly, there is no record evidence that any of the "Amazon" lanyards or clothing contained any campaign messaging. Moreover, there is nothing unusual, and neither the Region nor the ALU can cite any Board law that prohibits a voter from wearing clothing that has the employer's name on it while voting, as no such precedent exists.

[67] Throughout the Hearing the Representative for the Regional Director asked Associates who served as observers detailed questions about the instructions they received from Board agents. (*See e.g.*, Matos, 3253:24-3256:14). Curiously, the Representative for the Regional Director asked no such questions of Mr. Mendoza. (*See* Mendoza, 5076:11-5081:18). Thus, it can be inferred that Mr. Mendoza would have given negative and damaging testimony about the Board Agent's instruction to notify them when a voter was wearing Amazon's campaign message, "Vote No."

relevant inquiry for entry of an adverse inference based upon a party's failure to call a witness is "whether the witness may reasonably be assumed to be favorably disposed to that party.").

Thus, Objection 10 should be sustained, and a rerun election should be ordered.

I. Objection 11

1. Amazon's Objection

The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the ALU when it repeatedly allowed an ALU observer to audio/video record the check-in tables and voting area on his mobile phone while serving as an observer during multiple voting sessions. CASEHANDLING MANUAL §§ 11318.2(b) and 11326.2. The Region permitted this individual to continue serving as an ALU election observer following his conspicuous recording of the voting area while the polls were open. These actions further constitute objectionable list keeping of voters, objectionable surveillance of voters, and also created the impression for voters and potential voters that the ALU was surveilling them.

2. Legal Standard

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2).

3. The Board Agent's Inaction Over the ALU Observers' Cell-Phone Use during the Polling Period Impugned the Region's Appearance of Neutrality

The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the ALU when it allowed two ALU Observers to use and display their mobile phones while serving as observers during the voting sessions. *See* NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11318.2(b) (observer instructions regarding prohibition of cell phone use); 11326.2 ("Observers also should not

ordinarily be permitted to use or display their cell phones during the election."); *see also Allied Acoustics*, 300 NLRB 1181, 1181 (1990) ("[T]he Board seeks to maintain high standards of integrity and neutrality in its conduct of representation elections").

Two instances involving ALU observers during the polling period impugn the Board's neutrality. The first involves ALU Observer Mr. Mendoza. Ms. Novoa,[68] an observer for Amazon on March 29, 2022, testified that Mr. Mendoza was on his cell-phone during the polling period and while he was serving as an observer. (Anthony, 3511:24-3512:7; Novoa, 2873:1-21). None of the Board Agents asked him to put his phone away, not even the Board Agent that was sitting next to him. (Novoa, 2873:1-21, 2903:19-21). The fact that the Board Agents said nothing to Mr. Mendoza calls into question the Board's neutrality. Such leniency toward the ALU's observer impugns the Board's neutrality. (Donaldson, 336:16-337:13) (indicating that the Region erected signs warning people "not to have their cell phones.").

Second, the Region created the impression of Board assistance or support for the ALU when it allowed ALU lead organizer Mr. Anthony to display and use his cell-phone. Mr. DeLeon, an observer for Amazon during the morning of March 25, 2022, testified that ALU Observer Mr. Anthony used his cell-phone during the polling period. (DeLeon, 666:7-20). Additionally, Mr. Momodu, an observer for Amazon during the night of March 25, 2022, testified that Mr. Anthony had his cell-phone out for about 20 minutes despite the fact that they were instructed to put their phones in their pockets or in a bag. (Momodu, 3357:24-3358:7). During those 20 minutes, Mr. Anthony had placed his cell-phone on the table and sometimes had it in his hand. (Momodu, 3357:24-3358:7). Additionally, Mr. Momodu testified that Mr. Anthony kept using his smartwatch during the polling period. (Momodu, 3366:2-13). Contrary to

[68] Ms. Novoa was a credible witness, and critically, neither the ALU nor the Board adduced any evidence to contradict Ms. Novoa's account.

the Casehandling Manual, Board Agents allowed Mr. Anthony to use his phone and have it on display on the table for a period of approximately 20 minutes. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11318.2(b) (observer instructions regarding prohibition of cell phone use), 11326.2 ("Observers also should not ordinarily be permitted to use or display their cell phones during the election."). Such leniency toward the ALU's observer impugns the neutrality of the Board.

As such, separately and taken together, the Board's handling of Mr. Mendoza's and Mr. Anthony's conduct necessitates setting aside the election. *Athbro Precision Eng'g Corp.*, 166 NLRB at 966 (noting that the Board will set aside an election based on a single instance of Board Agent misconduct "which could reasonably be interpreted as impugning the election standards . . . is a sufficient basis for setting aside that election"); *Am. Baptist Homes of the W.*, 364 NLRB No. 13 (2016) (holding cell phone use in voting area was a violation of the Act because "photographing and videotaping . . . clearly constitute more than mere observation . . . because such pictorial recordkeeping tends to create fear among employees of future reprisals.") (alteration in original) (internal quotation marks omitted).

J. Objection 12

1. <u>Amazon's Objection</u>

Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the ALU when it solicited unfair labor practice charges against Amazon in the presence of voters in the polling area while the polls were open. During the election, an employee entered the polling area and complained about Amazon's actions during the campaign. Rather than tell the employee that they could discuss the matter privately, the Board Agent, within earshot of voters, stated to the employee that the employee could file unfair labor practice charges against Amazon with the NLRB.

2. Legal Standard

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2).

3. The Board Agent's Solicitation of a Charge from a Voter in Line to Vote during the Election Impugned the Region's Appearance of Neutrality

a) *Uncontroverted Testimony Establishes the Board Agent's Inappropriate Conduct during the Election*

One of Amazon's election Observers, Robert Nicoletti, testified that approximately two hours into the morning voting session on Monday, March 28, 2022, while in the voting tent at the voting table designated for voters with last names beginning from O through Z, he witnessed the following exchange between a Board Agent and a voter: the voter complained that "Amazon has no right to publish things of like, we recommend you vote no, to holding meetings, and whatnot, that he was part of a Union and it's not right that this is happening." (Nicoletti, 2204:2-6). After attempting to appease the voter for a time, the Board Agent ultimately advised the voter, "**if you want to file a complaint with the NLRB, feel free to do so**." (Nicoletti, 2204:17-18). The Board Agent's comment occurred in front of voters. (Nicoletti, 2202:2-3). Mr. Nicoletti was a credible witness, and critically, neither the Petitioner nor the Region adduced any evidence to contradict Mr. Nicoletti's testimony.[69]

b) *The Board Agent's Conduct Necessitates Overturning the Election Results*

A Board Agent's solicitation of charges or "complaints" against a party to the election *during* the election itself is objectionable conduct. The Board Agent's comment lends perceived validity to the complaint made by the voter against Amazon in the polling area. The voter

[69] An adverse inference should be drawn against the Region for its failure to call the requisite Board Agent to testify. Mr. Nicoletti described the Board Agent's appearance, and the Region would know which Board Agent was assigned to the "O through Z" table during the session in question. Accordingly, it should be presumed the Agent would testify in a manner consistent with Amazon's witnesses and adverse to the Region. *See Flexsteel Indus.*, 316 NLRB at 757-58.

expressed that he was part of the ALU and apparently disliked Amazon's alleged campaign messaging regarding the election. Accordingly, the Board Agent's message would be perceived as supporting the ALU over Amazon in regard to the election itself. This messaging is precisely what the Board proscribes because it calls into question the Board's neutrality. *See Hudson Aviation Servs.*, 288 NLRB at 870; *Glacier Packing*, 210 NLRB at 573. The Board has, for example, found an interpreter's comment to a voter waiting in line to vote, "[d]o you know where to put your yes vote?" necessitated overturning the election because it sufficiently called the Region's neutrality into question. *Renco Elecs., Inc*., 330 NLRB 368, 368 (1999). Further, the Board Agent's comment could be readily interpreted as the Region expressing displeasure toward Amazon for engaging in the acts the voter claimed to observe, which is impermissible during an ongoing representation election. *See Hudson Aviation Serv.*, 288 NLRB at 870 (a Board Agent communicating displeasure with the employer during the election undermines the perception of Board neutrality).

The Board Agent's conduct impugned the perceived neutrality of the Region, even in the absence of other procedural irregularities and if directed to a limited audience. *See Sonoma Health Care Ctr.*, 342 NLRB 933, 933 (2004) (stating a Board Agent's comment "may be sufficiently partisan to warrant setting aside an election even if made to a limited audience and even if unaccompanied by procedural irregularities or other actions that reasonably create the appearance that the election procedures will not be fairly administered"). As described throughout this filing, the record reflects multiple procedural irregularities which together call the Region's neutrality into question.

Notably, this Board Agent's conduct during an active election in front of voters is improper because this Agent's conversation occurred during a public election where the Board's

entire purpose was to run an unbiased election. Advising a voter that they can file a charge *during an active election* is not appropriate. Merely telling the voter that he could contact the Regional Office with his concern would have provided the voter with the information he needed to vet his concern without impugning the Agent's, and thereby the Region's, neutrality in the election.

The Board Agent's advice to an openly pro-ALU voter to file a complaint against *Amazon* while in line to vote clearly impugns the Board's neutrality and the integrity of its election procedures. Accordingly, Objection 12 should be sustained.

K. Objection 13

1. Amazon's Objection

During the critical period and while the polls were open, the ALU's members and agents harassed and threatened physical violence and other reprisals against employees who were not supportive of the ALU's cause.

2. Legal Standard

"Threats by union agents warrant the setting aside of an election where they 'reasonably tend[] to interfere with the employees' free and uncoerced choice in the election.'" *Robert Orr-Sysco Food Servs. LLC*, 338 NLRB 614, 615 (2002) (quoting *Baja's Place*, 268 NLRB at 868). Generally, the test is whether the remark can reasonably be interpreted by an employee as a threat. *Smithers Tire & Auto. Testing of Tex., Inc.*, 308 NLRB 72, 72 (1992). In assessing whether union statements constitute threats, the subjective reactions of employees are not relevant. *Van Leer Containers*, 298 NLRB 600, 600 fn. 2 (1990). Amazon incorporates by reference its previous discussion setting forth the factors the Board considers when evaluating whether party conduct impacts employees' free and fair choice in an election. *See* Section III(A).

The Board finds union conduct objectionable if "tied to an employee's anti-union stance or activities…[which would] tend to cause the employees who had heard them to reasonably assume that the [union] was willing to physically harm any employee…who opposed it or voted against it in the election." *Cedars-Sinai Med. Ctr.*, 342 NLRB at 597-98. The Board will not countenance conduct by a union supporter, even one who is not an agent, which "would…reasonably be[] viewed by employees as a…threat of violence against employees who failed to support the union." *Advanced Disposal Servs. E., Inc.*, No. 04-RC-123739, 2014 WL 7188952 at *1 (Dec. 16, 2014).

In *Baja's Place*, the Board ordered a second election after a union agent sent a letter to an employee, and when asked by the employee about what the letter meant, the union agent responded the employee "knew what it was for," and the union agent also indicated he "would get him" and "would get [the employee's] job." *Baja's Place*, 268 NLRB at 868. The Board ordered the election to be set aside because the union agent's "statements … were related to the election campaign," and the union agent "was an official of the [union] conducting the election campaign." *Id.* In finding the threat objectionable, the Board noted the union agent who made the threat admitted that he made the threat based on his belief that the employee "had been involved in effecting the discharge of a pro-union employee." *Id.*

Another example of statements by a union agent found objectionable by the Board is *Bellagio, LLC*, 359 NLRB 1116 (2013), where two days before the election, a union agent said to a perceived anti-union employee "if this vote goes through you're toast," and "[t]he vote is going to go through...you better not vote." *Id.* at 1117-18. In finding this conduct objectionable, the Board noted the union "threatened [a unit employee] with an unspecified reprisal, attributable to

the [u]nion, which would reasonably tend to interfere with the employees' free choice in the election." *Id.* (*citing Baja's Place*, 268 NLRB at 868-69).

3. <u>The ALU Engaged in Objectionable Conduct When it Harassed, Threatened, and Intimidated Associates in Response to Their Opposition to the ALU</u>

The ALU and its agents' frequent harassment, threats, and intimidation of Associates who opposed them reasonably tended to interfere with Associates' free and uncoerced exercise of their Section 7 rights in the election. *See Baja's Place*, 268 NLRB at 868-69. As set forth below, the record reflects numerous incidents directly attributable to the ALU that occurred during the critical period, including up to the first day of the election. Given the ALU's propensity to post on social media, the effect of the ALU's conduct was not limited to direct eyewitnesses, but instead its threatening behavior was frequently disseminated to all Associates. Finally, the ALU almost always targeted its conduct at Associates who were opposed to the ALU. This pattern of behavior by the ALU and its agents constitutes objectionable conduct that had the tendency to interfere with employees' freedom of choice.

a) *Natalie Monarrez*

Ms. Monarrez credibly testified about how the ALU, through its agents, harassed, bullied, and threatened her because of her decision not to support the ALU in the election.

i. Incident with Lead Organizer Jason Anthony

After she voted on the morning of March 25, 2022, Ms. Monarrez went into the breakroom while the polls were still open and was confronted by Mr. Anthony. (Monarrez, 4009:19-4010:14). Mr. Anthony yelled and cursed at Ms. Monarrez, questioned her about how she could tell people to vote no, called Ms. Monarrez a "fucking bitch," a "fucking traitor," and accused Ms. Monarrez of "fucking turn[ing] [her] back on the ALU." (Monarrez, 4011:25-4012:25). At the same time as he was screaming at Ms. Monarrez and using profanities, "[h]e

kept getting closer to" Ms. Monarrez and "putting his fingers in [her] face." (Monarrez, 4012:5-4013:1). Mr. Anthony got so close to Ms. Monarrez that she "had to take a couple of steps back, otherwise [Mr. Anthony] would have made contact." (Monarrez, 4013:3-12). Later that same day, Mr. Anthony publicly accused Ms. Monarrez of being "the most racist person" he has ever known and referenced that he would "never betray [his] ALU family." (EMP 0240).[70]

These events reflect egregious behavior by the ALU. Mr. Anthony's conduct constituted an implicit threat of physical violence, as Ms. Monarrez had to move out of the way to avoid Mr. Anthony assaulting her. Associates who viewed Mr. Anthony's VOA post also reasonably could have perceived his post as a threat to all Associates that opposing the ALU would result in similar targeting as that directed at Ms. Monarrez. By tying their behavior towards Ms. Monarrez directly to her public anti-ALU stance, the ALU and its agent's conduct was objectionable under *Cedars-Sinai* 342 NLRB at 597-98. Moreover, the dissemination of the ALU's behavior was plant-wide as a result of Ms. Monarrez's and Mr. Anthony's public VOA posts. (*See, e.g.*, Anthony, 3653:24-3654:17).

ii. Incident with Angelika Maldonado, Brett Daniels, and Derrick Palmer

Ms. Monarrez next had an interaction with ALU officers and agents Ms. Maldonado, Mr. Daniels, and Mr. Palmer on the afternoon of March 25, 2022. (Monarrez, 4044:17-4045:4). In the main JFK8 breakroom, Ms. Monarrez was holding up a sign that encouraged Associates to vote against the ALU in the election when she was approached by the three ALU officers who screamed and cursed at her and attempted to assault her by grabbing the sign she was holding.

[70] Ms. Monarrez's version of facts was largely undisputed by both Mr. Anthony and Mr. Mendoza, both of whom testified at the Hearing. The Hearing Officer should draw the "strongest possible adverse inference" as a result of the ALU not examining either Mr. Anthony or Mr. Mendoza about this incident or the specific allegations raised by Ms. Monarrez. *Flexsteel Indus.*, 316 NLRB at 757-58. The appropriate inference is that the incident occurred exactly as it was testified to by Ms. Monarrez. Drawing an adverse inference is not even necessary as no witnesses disputed Ms. Monarrez's version of events. Accordingly, Ms. Monarrez's recounting is the only version of events in the record. The Hearing Officer therefore has no choice but to credit Ms. Monarrez's testimony.

(Monarrez, 4045:3-10). Mr. Daniels and Mr. Palmer called Ms. Monarrez a "fucking bitch" and "fucking traitor," and said she "had no fucking right to hold the sign." (Monarrez, 4048:6-16). Other Associates were present while this occurred. (Monarrez, 4045:16-18; Baltazar, 1460:14-1464:13). Ms. Maldonado directly connected the conflict to Ms. Monarrez's opposition to the ALU as she told the Associates who were present and witnessing the conflict that Ms. Monarrez had no right to vote no. (Monarrez, 4045:23-4046:2). Ms. Maldonado also videotaped Ms. Monarrez holding her sign[71] and stated, amongst other explicit threats of physical violence, that she "was going to kick [Ms. Monarrez's] ass in the parking lot." (Monarrez, 4046:10-23, 4047:2-7).

Like the hostile interaction with Mr. Anthony hours earlier, this interaction again involved ALU officers and agents attacking an Associate, Ms. Monarrez, because she took a position opposed to the ALU in the election. This behavior is particularly troublesome given that it occurred on the first election day, when nine voting sessions remained. Here again, the ALU's opposition to, and harassment of Ms. Monarrez was "tied to an employee's anti-union stance or activities…[which would] tend to cause the employees who had heard them to reasonably assume that the [union] was willing to physically harm any employee…who opposed it or voted against it in the election." *See Cedars-Sinai Med. Ctr.*, 342 NLRB at 597-98. This hostile encounter went even further than the incident with Mr. Anthony because Ms. Maldonado actually threatened Ms. Monarrez with physical violence multiple times, in front of other Associates. Such conduct clearly "would…reasonably be[] viewed by employees as a…threat of

[71] It is worth noting that Ms. Maldonado's video recording of Ms. Monarrez during this encounter adds to the objectionable nature of the conduct. The Board has held "that in the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer." *Randell II*, 347 NLRB at 591. There is no legitimate justification for the ALU recording this encounter with Ms. Monarrez and there is certainly no testimony that the ALU sought Ms. Monarrez's authorization to record her as she was exercising her Section 7 rights.

violence against employees who failed to support the union." *See Advanced Disposal Servs. E., Inc.*, 2014 WL 7188952 at *1. In *Advanced Disposal Servs. E., Inc.*, the Board set aside an election based on a threat of violence made by a *third party union supporter*, which is even less egregious than a threat made by a *union officer*, like Ms. Maldonado. *Id.*

In her self-serving testimony, Ms. Maldonado denied engaging in the objectionable conduct Ms. Monarrez testified to, though Ms. Maldonado did admit to raising her voice and using curse words with Ms. Monarrez. (Maldonado, 4257:11-4258:16). However, Amazon notes that much of Ms. Maldonado's testimony was in response to leading questions[72] from the ALU's counsel, and should be accorded minimal, if any, weight on that basis. *H.C. Thomson*, 230 NLRB at 809 fn. 2.

Any credibility analysis of Ms. Monarrez' and Ms. Maldonado's testimony should be resolved in favor of Ms. Monarrez. Several other witnesses to this particular event testified and their versions accord with the one provided by Ms. Monarrez. Ms. Baltazar testified that she observed some of this interaction, and corroborated Ms. Monarrez's testimony for the small portion of the event that Ms. Baltazar witnessed, and certainly contradicted Ms. Maldonado's testimony that she was "kind" or "polite." (Baltazar, 1460:14-1464:13). More critically, there were two ALU officer witnesses to this event, Mr. Daniels and Mr. Palmer. Mr. Daniels testified immediately after Ms. Monarrez and was not examined at all on the subject of this interaction by the ALU's counsel, leading to the "strongest possible adverse inference." *Flexsteel Indus.*, 316 NLRB at 757-58. Additionally, the ALU's failure to call Mr. Palmer as a witness represents a failure to call a favorably disposed witness with knowledge related to the factual questions

[72] *See, e.g.*, BY MS. MIRER: And – so I think you were telling us that you asked her politely to leave; is that correct?

A: Yes. (4248:19-22).

related to the alleged interaction with Ms. Monarrez, making an adverse inference over the failure to call Mr. Palmer appropriate. *Int'l Automated Mach.*, 285 NLRB at 1122-23.

Between the "strongest possible adverse inference" created by the ALU's decision not to examine Mr. Daniels about the incident, even though he testified immediately after Ms. Monarrez, along with the adverse inference created by the ALU's decision to not attempt to corroborate Ms. Maldonado's self-serving testimony with Mr. Palmer's testimony, the Hearing Officer should credit Ms. Monarrez's version of the incident.

iii. Incident with Cassio Mendoza

Ms. Monarrez also received a series of threatening text messages from Mr. Mendoza on March 25, 2022. This text exchange corroborates that Ms. Maldonado recorded Ms. Monarrez holding her sign, as well as evidences that the ALU threatened to blackmail, and in fact blackmailed, Ms. Monarrez for opposing the ALU. (EMP 0905). While this particular text message was not disseminated to the rest of the bargaining unit like the prior hostile encounters with the ALU on March 25, 2022, it represents the ALU retaliating against an Associate for taking an anti-union position.[73] Using the pictures and video of Ms. Monarrez engaged in Section

[73] This conduct regarding illicit recording of employees engaged in Section 7 activity as objectionable under *Randell II* is sufficiently related to Objections 13, 24, and 25 to be considered by the Hearing Officer. The Board will consider allegations of objectionable conduct that do not exactly coincide with the precise wording of the objections so long as the allegations are "sufficiently related" to the objections. *See, e.g.*, *Labriola Baking Co.*, 361 NLRB at 412; *Fred Meyer Stores*, 355 NLRB 541, 543 fn. 7 (2010); *Fiber Indus.*, 267 NLRB 840, 840 fn. 2 (1983). The video recording and photos made by Ms. Maldonado were made in the context of Ms. Maldonado intimidating and threatening Ms. Monarrez in the context of Objection 13, and were in fact an indistinguishable part of the objectionable conduct in which Ms. Maldonado engaged. As well, the ALU used the photos and video recording as part of the retaliation against Ms. Monarrez as a result of her public position against the ALU in the election. Moreover, according to relevant and controlling Board precedent, Regional Director Overstreet cannot learn about objectionable conduct during the objections hearing and ignore it. *See White Plains Lincoln Mercury*, 288 NLRB 1133 (1988) (if the Regional Director receives or discovers evidence during the investigation that shows that the election has been tainted, he should not ignore such conduct even if it was not specifically alleged); *see also Gen. Signal Corp.*, 234 NLRB 914, 914 fn. 1 (1978) (citing *Am. Safety Equip. Corp.*, 234 NLRB 501 (1978), and *Dayton Tire & Rubber Co.*, 234 NLRB 504 (1978)) (noting that in two decisions issued subsequent to the Administrative Law Judge's Decision, the Board has restated and reaffirmed its policy permitting a Regional Director to set aside an election because of objectionable conduct discovered during his investigation, even though that conduct was not the subject of a specific objection).

7 activity, illicitly obtained by Ms. Maldonado to retaliate against her for engaging in that Section 7 activity is objectionable. *See Randell Warehouse of Arizona*, 347 NLRB 591, 591 (2006) (*Randell II*) ("In the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer."). Additionally, it represents the ALU threatening reprisals because of an Associate's opposition to the ALU and following through with those reprisals—conduct the Board finds objectionable. *See Bellagio, LLC*, 359 NLRB at 1117-18 (*citing Baja's Place*, 268 NLRB at 868-69).

b) *Nakeesha Fray*

Ms. Fray and Mr. Spence both testified that Mr. Spence interrogated Ms. Fray about her wearing an ALU shirt with "ALU" crossed out on the shirt in 2022, prior to the election. (Fray, 1602:3-1603:6; Spence, 4443:4-4447:23). Mr. Spence became angry[74] when Ms. Fray explained that she no longer supported the ALU. (Fray, 1602:3-1603:6, 1603:16-20, 1603:25-1604:2). The conversation lasted seven to ten minutes and approximately 30 Associates were present. (Fray, 1603:16-20, 1603:25-1604:2, 1604:12-14, 1604:24-25, 1605:10-17). Mr. Spence was in Ms. Fray's face during the conversation, and another ALU supporter was standing with Mr. Spence while he interrogated Ms. Fray. (Fray, 1592:10-17).[75]

Ms. Fray was targeted by Mr. Spence because of her opposition to the ALU. He publicly and angrily interrogated Ms. Fray about her decision not to support the ALU in the presence of approximately 30 other Associates. Associates witnessing this event reasonably could have perceived it as a threat from an ALU officer that the ALU would not tolerate those who openly

[74] Mr. Spence did not rebut this testimony when he testified about interrogating Ms. Fray regarding the shirt, and merely, generically denied ever threatening her. (Spence, 4447:24-25). Accordingly, the unrebutted testimony is that Mr. Spence was angry during the interaction.

[75] Ms. Tredici testified that she observed two ALU members intimidating Ms. Fray, and that Ms. Fray told Ms. Tredici that she felt intimidated by the ALU. (Tredici, 989:14-992:11).

expressed opposition to the ALU. Mr. Spence's confrontation of Ms. Fray is objectionable under *Cedars-Sinai*, 342 NLRB at 597-98.

c) *Andrea Baltazar*

Ms. Baltazar testified credibly to two incidents of threats and intimidation involving the ALU.

i. Incident with Derrick Palmer

Ms. Baltazar testified that on March 23, 2022, she was wearing a pink "Vote No" shirt on the work floor when Mr. Palmer looked over her entire body and began laughing in her face. (Baltazar, 1447:7-1448:14). Mr. Palmer was less than one foot from Ms. Baltazar when he gratuitously laughed at her. (Baltazar, 1450:13-15). Ms. Baltazar discussed the interaction with Mr. Palmer that day with another Associate. (Baltazar, 1458:21-23).

The action of Mr. Palmer laughing in Ms. Baltazar's face, less than one foot from her and immediately before the election started, was clearly intended to intimidate her and any other employees who witnessed the interaction. His behavior was tied to Ms. Baltazar's anti-ALU shirt choice. Notably, the ALU chose to not call Mr. Palmer, a witness with knowledge of the incident, who would reasonably be expected to be favorably disposed to the ALU, which calls for an adverse inference. *See Int'l Automated Mach.*, 285 NLRB at 1122-23.

ii. Incident with Samuel Bowman

Ms. Baltazar also testified that on March 23, 2022, Mr. Bowman, an agent for the ALU,[76] walked into her area while she was working and began handing out yellow "Vote Yes" lanyards on behalf of the ALU. When Mr. Bowman saw Ms. Baltazar's shirt he made the threatening

[76] Mr. Bowman's agency is established by the fact that the ALU provided Mr. Bowman with a significant number of the lanyards the ALU was handing out during the campaign so that Mr. Bowman could distribute them to more Associates on behalf of the ALU. Mr. Bowman was a special agent of the ALU while handing out its lanyards under common law agency principles. The ALU manifested to everyone who saw Mr. Bowman distributing ALU lanyards that it had given him authority to do so when it gave Mr. Bowman a distribution-level supply of lanyards.

statement "who will protect you?" (Baltazar, 1458:3-12; EMP 0494.6). These threats of unspecified reprisals are objectionable conduct under *Baja's Place*, where the Board found objectionable statements which "could reasonably be viewed as a threat of physical harm and of other unspecified reprisals." 268 NLRB at 868. In assessing union statements the subjective reactions of employees are not relevant. *Van Leer Containers*, 298 NLRB at 600 fn. 2.

d) *Lori'l Adenji*

Ms. Adenji overheard Mr. Anthony and Mr. Daniels in February 2022, while in the breakroom, say "they need to get Felipe [Santos] or they had to do something with Felipe." (Adenji, 1499:14-23, 1502:10-21, 1504:3-10). This made her feel unsafe for herself and for Mr. Santos. (Adenji, 1499:14-23, 1502:10-21, 1504:3-10). Ms. Adenji's testimony was unrebutted by either Mr. Anthony or Mr. Daniels, both of whom testified. Their failure to be asked about this factual allegation by ALU counsel while they were on the stand should lead to the "strongest possible adverse inference." *Flexsteel Indus.*, 316 NLRB at 757-58.

These threats of unspecified reprisals are objectionable conduct under *Baja's Place*, where the Board found objectionable statements which "could reasonably be viewed as a threat of physical harm and of other unspecified reprisals." 268 NLRB at 868. Ms. Adenji reasonably felt concerned for her safety and the safety of others given the vaguely threatening statements made by ALU officers and agents.

e) *Adina Goriva*

It is unrebutted that Mr. Anthony called Ms. Goriva a "bitch" during the election when she declined to take an ALU flyer Mr. Anthony was distributing on behalf of the ALU in the main breakroom. (Goriva, 911:25-912:21, 917:8-19). Mr. Anthony was standing at the table the ALU used to communicate with Associates during the critical period when he was distributing on behalf of the ALU and called Ms. Goriva a "bitch." (Goriva, 918:14-919:6). Approximately

25-50 Associates were present in the breakroom at the time Mr. Anthony made this derogatory and obscene comment to Ms. Goriva. (Goriva, 919:7-13).

Using gratuitous obscenities directed toward an Associate who refused to receive ALU literature, in the presence of other Associates, is plainly coercive as it is directed towards a bargaining unit employee as a result of their anti-union position, making it objectionable under *Cedars-Sinai*, 342 NLRB at 597-98.

f) *Stephanie Lopez*

It is unrebutted that in 2022, a few months prior to the election, Mr. Anthony called Ms. Lopez a "bitch"[77] and used profanities in comments on a Facebook group whenever she posted about her opposition to the ALU. (Lopez, 2738:16-2739:4, 2739:19-2740:25, 2747:2-21). Ms. Lopez posted about Mr. Anthony's treatment of her on the VOA board, stating "[w]hat's up with these ALU members bullying and being so rude[?]" (Lopez, 2723:23-2724:1; EMP 0497). This conduct is plainly coercive and objectionable under *Cedars-Sinai Med. Ctr, 3*42 NLRB at 597-98.

g) *Small Group Meeting Interruption*

The ALU's orchestrated "shut down" of Amazon's small group meeting on February 7, 2022, aside from constituting objectionable misconduct as described more fully in Objection 15, also constituted harassment under Objection 13. Attendees of the meeting felt shocked and scared by the ALU's intrusion, and some, like Mr. Castellano, were specifically targeted by the ALU when he spoke out against the intrusion. (Adenji, 1495:16-19; Facey, 1155:5-9; Castellano, 1105:3-23; EMP 0581). Mr. Anthony had his cell phone out and was recording a video throughout the invasion, which would later be posted onto ALU social media sites, as well as

[77] There is clearly a pattern of misogyny revealed by Mr. Anthony repeatedly calling female Associates who did not support the ALU "bitch" or "fucking bitch."

news media outlets. (Donaldson, 200:12-201:11; Castellano, 1096:12-1097:12; Adenji, 1495:6-11).

The ALU's behavior during this meeting, in particular its targeting of Mr. Castellano when he objected to their intrusion, was objectionable under *Cedars-Sinai*, 342 NLRB at 597-98. All of the Associates present saw how the ALU treated any opposition to its message, including that the ALU was willing to record such opposition and post it on the internet for the world to see. It was unquestionably intended to have a chilling effect on speech.

L. Objection 14

1. <u>Amazon's Objection</u>

The ALU improperly promised employees in the final days of the campaign that it would not charge them dues unless and until the ALU secured a raise for employees during collective bargaining. Prior to and during the critical period, the ALU was clear that it would charge employees dues immediately following a successful vote. After employees expressed reluctance to pay dues, the ALU directly contradicted its earlier statements and asserted for the first time, late in the campaign, that it would not charge dues unless and until it secured higher wages in contract negotiations with Amazon. The ALU made these promises to employees during employee meetings, on social media, and in a letter from the ALU's President to all eligible voters two days before the polls opened. The ALU's failure to file any foundational documents and LM filings with the Department of Labor, as required by the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), coupled with its late-hour promise of free union representation, allowed it to make promises regarding its dues structure in a way that deprived Amazon of the ability to effectively respond, and denied employees the opportunity to assess the credibility of the promise. Additionally, the ALU's promises of free union representation is an objectionable grant of a benefit because this benefit is within the ALU's power to effectuate. *See*,

e.g., *Alyeska Pipeline Serv. Co.*, 261 NLRB 125, 126-27 (1982) (union controlled all access to construction jobs in Alaska for employees participating in election, and thus union's suggesting only way to get union card was by voting for union in upcoming election was objectionable as union was clearly promising to grant members advantage over nonmembers and had power to do that); *see also Go Ahead N. Am., LLC*, 357 NLRB 77, 78 (2011) (finding objectionable union's offer to waive back dues).

2. <u>Legal Standard</u>

A pre-election benefit granted by either party is objectionable when the benefit would reasonably have been viewed by employees as "intended to influence" the outcome of an election. *B & D Plastics, Inc.*, 302 NLRB 245, 245 (1991). Normally, in evaluating whether the benefit is "intended to influence" the outcome of the election, the Board applies a totality of the circumstances test in which it considers the following factors: (i) the size of the benefit in relation to the stated purpose for granting it; (ii) the timing of the benefit vis-à-vis the election; (iii) the number of employees receiving it; and (iv) how employees would reasonably view the purpose of the benefit. *Id.*

In the context of a union's promise to waive dues, the Board considers whether a union's contract or constitution provides for an obligation to pay dues, or whether it has been the union's practice to collect dues. *Mcallister Towing & Transp. Co., Inc.*, 341 NLRB 394, 418-19 (2004) (a waiver of union dues will constitute an objectionable financial benefit if the employees already have an enforceable obligation to pay dues); *Andal Shoe, Inc.*, 197 NLRB 1183, 1183 (1972) (the question is whether the union's constitution or bylaws require the collection of dues, or whether it has been the union's practice to collect them). When determining whether a party's statement is subject to this pre-election benefit standard, as opposed to the *Midland* standard governing misrepresentations or "puffery," the Board will determine whether the party making

the statement has the power to effectuate the promise. *See, e.g., Alyeska Pipeline Serv. Co.*, 261 NLRB at 126-27; *Comcast Cablevision-Taylor*, 338 NLRB 1089, 1089 (2000) (on remand, election set aside based on the promise of trip to Chicago worth $50); *Wagner Elec. Corp.*, 167 NLRB 532, 533 (1967) (order setting aside election based on gift of life insurance by petitioner union); *Mailing Servs.*, 293 NLRB 565 565-66 (1989) (election set aside as a result of union offering free medical screenings as an inducement to vote yes).

3. <u>The ALU's Promise to Waive Dues for Associates is Objectionable Conduct</u>

During the critical period, the ALU made a promise to waive union dues until it negotiated a higher wage for Associates in an attempt to influence the outcome of the election. The ALU made this promise despite the fact that the ALU's 2021 Constitution and Bylaws provide for the collection of dues of at least $5 every two weeks prior to an election, with the amount thereafter to be proposed by a committee appointed by the President and voted on by membership (EMP 0298 at 18). Similarly, the ALU's website during the pre-petition period provided for the collection of dues from each paycheck. The ALU decided to forego its Constitution and Bylaws, and promise something different, in an attempt to influence the outcome of the election. Indeed, the ALU repeatedly and consistently repeated its intent to waive dues during the three days immediately preceding the election. The ALU's actions constitute objectionable conduct, and therefore the election must be set aside.

a) ***The ALU's Promise to Waive Dues is Objectionable Because the ALU was Obligated to Collect Dues Per its Constitution and Bylaws***

The prohibition against a union's waiver of dues is based on the same legal reasoning that bars an employer, during the critical period, from conferring on potential voters a financial benefit to which they would not otherwise be entitled. *Mailing Servs*., 293 NLRB at 565 (1989). Here, the ALU had an obligation to collect dues, and to refrain from changing its dues structure

absent a committee recommendation and democratic vote of the membership, pursuant to its Constitution and Bylaws. None of these procedures were followed. Instead, Mr. Smalls simply declared that no dues would be charged until after the ALU secured raises in a contract. The ALU's brazen disregard of its own Constitution and Bylaws unlawfully conferred a financial benefit to which voters were not otherwise entitled. *See id*. Moreover, and discussed *infra* at Section IV(R)(3), the ALU intentionally did not file required LMRDA forms which would have provided Associates critical information regarding dues. Specifically, Associates would have seen that while the ALU was promising no dues until a bargaining agreement, the ALU's Constitution and Bylaws contemplated no such notion, and in fact, mandated dues.

Relevant Board precedent compels the finding that under these circumstances the ALU's promise to waive dues until the ALU negotiated a higher wage raise constitutes objectionable conduct. In *McCarty Processors*, 286 NLRB 703 (1987), the Board found that the union's waiver of the collection of dues already incurred by union members constituted the granting of a financial benefit and warranted setting aside a decertification election. *Id.* at 703. There, the employees were obligated to pay dues pursuant to the contract. Despite the contractual obligation to pay dues, the union in *McCarty Processors* distributed a leaflet a week to ten days before the election that informed employees that they would pay "NO BACKPAY DUES and that NO DUES will be deducted" until a contract had been negotiated by the parties and approved by the employees. *Id*. The Board reasoned that even though the collective bargaining agreement had ended, the employees' obligation to pay dues did not, and the "union was still entitled to collect membership dues, and its promise not to do so during the election campaign provided employee-members with a substantial financial benefit to which they were otherwise not entitled." *Id*.

Likewise, in *Loubella Extendables, Inc*., 206 NLRB 183 (1973), the Board found the union's promise to forgive the obligation to pay the initiation fee or back dues if the union won the election constituted an objectionable grant of financial benefit warranting setting aside the election. *Id.* at 183-84. There, three days before a decertification election, the union held two meetings with eligible employees in which the union informed the newly hired employees that they would not have to pay the initiation fee or back dues if the union won the election. *Id*. Prior to the meeting, newly hired employees were contractually obligated to pay their initiation fees and delinquent dues, and the employees had a reasonable expectation that the union would demand such payment. *Id*. The Board held that the union's waiver constituted a promise of financial benefit by the union to secure votes and was objectionable. *Id*.

Moreover, in *Go Ahead N. Am.*, the Board found that a union's offer of a back-dues waiver after the filing of a petition to decertify constituted an objectionable grant of a tangible financial benefit warranting setting aside the election because "employees reasonably would infer that the purpose of the Union's expressed willingness to forgive the obligation was to induce them to support the Union." 357 NLRB at 78. In making that determination, the Board relied on the union's constitution, which provided that members "shall be deemed suspended by the [u]nion without notice if their monthly dues are not paid on or before the last day of the following month." *Id*. at 77. (internal quotes omitted)*; cf. Andal Shoe, Inc*., 197 NLRB at 1183 (finding union's pre-election promise to waive delinquent dues for suspended member was not a promise of a financial benefit because the constitution and bylaws did not compel the payment of delinquent dues and the union typically did not seek to collect them).

The facts here are similar to those in *Go Ahead N. Am.*, *Loubella Extendables*, and *McCarty Processors*. Similar to the unions in those cases, the ALU was obligated to collect dues

based on its Constitution and Bylaws. Indeed, the ALU's Constitution and Bylaws, which were in place during the entirety of the critical period, specifically stated that the ALU would charge dues. (EMP 0298 at 18 ("Dues amounts and payment frequency will be democratically voted upon by the membership [but in] the period preceding the initial election, dues will amount to five (5) dollars every two (2) weeks [and within] sixty (60) days following a successful election, the President will appoint a committee to reassess the dues structure and propose a new amount and frequency to be voted upon by the membership.")). Nothing in the ALU's Constitution and Bylaws suggests that the ALU would not be obligated to charge dues or delay the collection of dues while the ALU attempts to negotiate for a higher wage. (*See* EMP 0298 at 18). And the ALU introduced no evidence into the record to dispute Amazon's evidence on this issue.

Second, similar to the cases above, prior to the election, the ALU promised not to charge dues unless and until the ALU secured a raise for Associates during collective bargaining. Although during the critical period the messaging regarding dues payments vacillated, Mr. Smalls and the ALU were unequivocal with their promise that they would not charge dues across various communication mediums (social media, letter, texts, flyers) in the days before the election. (EMP 0290 ("[m]any of you may have questions about dues. Let me clear that up: as Interim President and a former Amazon employee, I promise not one single payment of dues will be taken until we have a contract with higher wages signed."); EMP 0297 at 1-4 ("If we can't win an increase in our wages no dues will be taken from us."); EMP 0295 ("NO DUES UNTIL CONTRACT. We will only agree to a contract where we are better off, and if we never settle on a contract with Amazon, you will have never paid a dollar in dues."); EMP 0491 ("No dues until contract. We don't pay a dollar in dues until we vote to approve a contract . . . . We will not start paying dues of $5/week until we have voted to approve a union contract.")). Testimony from

several hourly witnesses also corroborate that the ALU promised not to charge dues until the ALU negotiated a wage raise for Associates several days prior to the election. (Friscia, 3115:20-3116:2, 3119:2-23 (ALU organizers represented to Amazon Associates in one-on-one conversations that dues would not be charged until they received pay raises.); Martinez, Me., 2031:9-23 (received a text message from ALU on March 24, 2022, stating, "If we can't win an increase in our wages no dues will be taken from us."); Martinez, Mo., 3270:3-3272:5 (received a text message form the ALU on March 22, 2022, stating that "NO DUES UNTIL CONTRACT. We will only agree to a contract where we are better off, and if we never settle on a contract with Amazon, you will have never paid a dollar in dues.")). Ms. Donaldson also corroborated the same as she saw the ALU's flyer with similar messaging in the breakroom/cafeteria in the month of the election. (Donaldson, 461:11-462:6; (EMP 0288, "[n]o dues until contract. We don't pay a dollar in dues until we vote to approve a contract . . . . We will not start paying dues of $5/week until we have voted to approve a union contract.")). The ALU provided no witnesses or evidence to dispute that the ALU made a promise to not charge dues until it negotiated higher pay.

In totality, the ALU had an obligation via their 2021 Constitution and Bylaws, which was their governing document during the critical period, to collect dues, but waived that obligation during the critical period, and communicated that waiver repeatedly and in widespread fashion during the three days leading up to the election. (EMP 0298). Under these circumstances, the Board must hold that the ALU's promise to waive dues prior to an election is objectionable and warrants setting aside the election.

M. Objection 15

1. <u>Amazon's Objection</u>

The ALU engaged in repeated and deliberate attempts to interfere with and "shut down" Amazon's small group meetings, solicited employees during Amazon's educational meetings in

violation of Amazon's policies, and destroyed Amazon's campaign materials. The ALU's actions intentionally created hostile confrontations in front of eligible voters and hindered Amazon's lawful right to communicate its views to employees during the campaign. *See, e.g.*, *Livingston Shirt Corp.*, 107 NLRB 400, 406-07, 409 (1953) (union has no right to campaign or solicit during employer's lawful small group meetings); *United Steelworkers of Am. v. NLRB*, 646 F.2d 616, 627 (D.C. Cir. 1981) (same, unless an employer has a broad rule prohibiting solicitation during nonworking time [Amazon has no such policy]).

2. <u>Legal Standard</u>

Employers and unions generally cannot destroy or hinder the dissemination of each other's campaign materials and messages. *See, e.g.*, *Livingston Shirt Corp.*, 107 NLRB at 406-09. It has long been the policy of the Board that an employer may communicate its campaign messaging on its premises in mandatory meeting sessions. *Id; see also United Steelworkers of Am. v. NLRB*, 646 F.2d at 627. Moreover, an imbalance in communications does not justify union interference with an employer's lawful messaging. *Lockheed Martin Skunk Works*, 331 NLRB 852, 855 (2000) (rejecting the union's argument that the employer "encouraged and took advantage of" an "imbalance in communications").

In this case, the ALU destroyed laboratory conditions by purposefully shutting down Amazon's lawful small group meetings and by impermissibly removing Amazon's campaign literature and materials.

3. <u>The ALU Unlawfully Interfered with and Shut Down Amazon's Small Group Meetings</u>

An employer may communicate its campaign messaging on its premises in mandatory meeting sessions. *Livingston Shirt Corp.*, 107 NLRB at 406-09; *United Steelworkers of Am. v. NLRB*, 646 F.2d at 627. Indeed, the Act and the First Amendment protect employers' rights to

express views, argument, and opinion, so long as they do not contain unlawful threats of reprisal or force, promises of benefits, or solicitations of grievances. *See, e.g.*, 29 U.S.C. § 158 (c); *NLRB v. Gissel Packing*, 395 U.S. 575, 617 (1969); *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), *enf. granted sub nom. Amptech, Inc. v. NLRB*, 165 F. App'x. 435 (6th Cir. 2006); *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1427-28 (2d Cir. 1996). Section 8(c) of the Act expressly protects an employer's right to "express[] . . . any views, arguments, or opinion." 29 U.S.C. § 158(c). This right extends to views, argument, and opinion expressed during captive audience meetings. *See Livingston Shirt Corp.*, 107 NLRB at 409. In *Livingston*, the Board confirmed the rule that mandatory so-called "captive audience" meetings, held for the purpose of expressing an employer's antiunion position, and held on the employer's time and premises, are lawful. *Id*. The lawfulness of captive audience meetings is rooted in employers' right to free speech. *See id.* at 405-06. Moreover, because employers compensate employees during working time, they are entitled to "control[] the manner in which the employees . . . occupy their time" within the bounds of the law, which includes the right to "require[] [employees] to listen to . . . speeches . . . during working hours." *Clark Bros. Co., Inc.*, 70 NLRB 802, 804 (1946); *cf.* Sen. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947) (repudiating *Clark Bros.* to the extent it prohibited compulsory captive audience meetings); *Livingston Shirt Corp.*, 107 NLRB at 414 (recognizing that the *Clark Bros.* doctrine was "short lived" and that "Congress specifically repudiated it . . . when it enacted Section 8(c) of the Act", which "was intended to overrule the 'compulsory audience' doctrine [] set forth in . . . Clark Bros[.]"). Employers are also afforded broad latitude at captive audience meetings to "persuade employees not to unionize while refusing to allow others to express their opposing, prounion viewpoints during the meeting." *Electrolux Home Products, Inc.*, 368 NLRB No. 34, slip op. at *5 (Aug. 2, 2019); *see also Kinney Drugs, Inc.*, 74

F.3d at 1428 (employer communications not only affirm the employer's free speech rights, but also "aids the workers by allowing them to make informed decisions."); *Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335, 357 (1998) (same).

Moreover, the Act does not condone a union's effort to infringe on this right of employers. *See also Howell Metal Co.*, 243 NLRB 1136, 1137 (1979) (noting that employee disruptions are not protected and that employers may accordingly discipline such employees when "there is a scheme or plan to disrupt the meeting."); *Roadway Package Sys., Inc.*, 302 NLRB 961, 977 (1991) (explaining that employees are not engaged in concerted activity when acting "pursuant to a scheme or plan to disrupt the meeting.") (quoting *F. W. Woolworth Co. v. NLRB*, 655 F.2d 152 (8th Cir. 1981). And though a union may ultimately have campaign messaging that differs from an employer's messaging, an employer has no legal duty to permit a union to use the employer's premise or employees' work time to communicate the union's message. *See Livingston Shirt Corp.*, 107 NLRB at 406-09 ("[N]or have we been able to find[] any support in the statutory language or legislative history for holding that the employer who exercises his own admitted rights under the statute thereby incurs an affirmative obligation to donate his premises and working time to the union for the purpose of propagandizing the employees."); *Lockheed Martin Skunk Works*, 331 NLRB at 855 (rejecting the union's objection that there was an "imbalance of communications").

Here, the ALU admittedly desired to shut down Amazon's meetings, put together a plan to do so, and then successfully executed that plan. Victorious, ALU agents then bragged about it on social media. As the caselaw makes clear, such misconduct is not protected concerted activity. Rather, it was nothing more than a deliberate effort to disturb laboratory conditions, and the misconduct is therefore objectionable.

Importantly, these disruptions were not spontaneous. Instead, they were the product of a deliberate union plan. (Anthony, 3528:5-14, 3529:19-3530:20, 3531:19-3532:7; EMP 0302, EMP 0303, EMP 0779). Mr. Anthony indicated that the planning for the meetings occurred several days prior to February 7. (Anthony 3528:5-14, 3529:19-3530:20, 3531:19-3532:7). In these meetings, the group discussed "that [the ALU] deserved opportunity to be in that meeting because we understand that the message in that meeting was biased that the company was giving to the employees." (Anthony, 3530:17-20). And perhaps most revealing, Ms. Medina tweeted after the event a screenshot of a text exchange stating "YES lol we planned it." (EMP 0583, EMP 0583.1, EMP 0583.2). It is beyond doubt that the ALU planned to disrupt the February 7 meetings.

As explained in detail in the Factual Background, Sec. II.C.2, *supra*, Associates provided unrebutted testimony that seven ALU officers and agents barged into the 11:00 a.m. meeting on February 7, 2022, unannounced, and began singing, chanting, snapping and cross-talking over the presenters. (Donaldson, 207:17-24; Miller, 2966:10-18; Adenji, 1494:15-1495:19; Castellano, 1096:12-1097:12; EMP 0581). One of the ALU disrupters, lead organizer Mr. Anthony, was recording the entire invasion. He later posted it to social media sites and provided it to news media sites. (Donaldson, 200:21-201:11; Castellano, 1096:12-1097:12; Adenji, 1495:6-11). Mr. Palmer, the ALU Vice President, aggressively approached one Amazon Associate, and while flanked by another ALU agent, pointed his finger in Mr. Castellano's face and said: "I know you, I trained you…You're just a PA. You don't know anything." (Castellano, 1105:3-23; *see also*, EMP 0581).

Critically, the ALU disrupters refused Amazon's repeated requests to be polite and respectful, leading to the early termination of the meeting. (Facey, 1154:11-18). The ALU's

actions caused Amazon to cancel the next five meetings scheduled that day due to fear of continued disruptions. (Donaldson, 302:1-24).

The ALU leveraged this hostile confrontation on its social media platform, tweeting that the ALU *succeeded* and had "shut down Amazon's meetings." (EMP 0583, EMP 0583.1, EMP 0583.2, EMP 0791). This became a focal point of the ALU's campaign message—the deliberate shutdown of Amazon's effort to communicate. During the Hearing, Ms. Medina tried to walk back the ALU's intentions, stating that their use of the term "shut down" was just "a bit of a flourish." (Medina, 3813:12-14). This recharacterization is unbelievable and calls into question Ms. Medina's credibility. Right after the meetings, Ms. Medina herself retweeted a text conversation from a private ALU chatroom stating, "YES! Lol we planned it." (EMP 0583). ALU President Mr. Smalls tweeted on February 7, "UPDATE!! Amazon Labor *successfully* shut all captive audiences down for today." (EMP 0302) (emphasis added). Nearly every ALU agent who testified also repeatedly used the term "success" on social media to describe their efforts that day. (Donaldson, 280:22-281:5, 281:18-25; EMP 0302, EMP 0303, EMP 0583, EMP 0583.1, EMP 0583.2, EMP 0584, EMP 0791). If the ALU did not *intend* to shut down the February 7 meetings, then there would be no reason to call their efforts that day a *success*. To conclude otherwise is to engage in willful blindness.

The ALU erroneously claimed that the shutdown of Amazon meetings was warranted because the ALU deserved equal time to speak to Associates on site at the facility. This is a fundamental misreading of the law. No case stands for the proposition that the union must be afforded equal access to voters on the employer's premises. To the contrary, the case law holds the opposite. *Livingston Shirt Corp.*, 107 NLRB at 406-09 ; *Lockheed Martin Skunk Works*, 331 NLRB at 855. Amazon unequivocally maintained the right to communicate its views to

Associates during its small group meetings. *See Livingston Shirt Corp.*, 107 NLRB at 409. The ALU sought to infringe upon this right, as well as the rights of other Associates to listen to Amazon's campaign messaging, and engaged in a concerted and planned effort to prevent these meetings from occurring. The Act does not sanction such disruptive conduct. *See Howell Metal Co.*, 243 NLRB at 1137; *Roadway Package Sys., Inc.*, 302 NLRB at 977.

Regardless of the precise motive, the record evidence is clear that the ALU *wanted* to shut down Amazon's meetings, *created* a plan to do so, and *successfully* executed that plan. Their actions are not shielded as protected concerted activity, nor by the mistaken notion that they deserved equal time to speak on company property. The ALU's unprotected actions are therefore objectionable misconduct.[78]

4. <u>The ALU Destroyed Amazon's Campaign Materials</u>

The ALU also interfered with Amazon's campaign communications by destroying campaign materials.

Under the circumstances, the ALU's actions constitute objectionable conduct. In *Long, Inc.*, 173 NLRB 447 (1968), the Board ordered the election be set aside, in part, due to several instances of property destruction during the critical period that destroyed the conditions necessary for a fair and free election. *Id*. at 448-49; *see also Miklin Enterprises, Inc.*, 361 NLRB 283, 290, 306 (2014) (finding that encouraging others to take down a party's campaign posters is

[78] Ironically, during the last several months, the General Counsel has authorized or issued numerous Complaints against employers, including at least two against Amazon, alleging that an employer's efforts to communicate with employees about union representation violates employees' Section 7 rights. The General Counsel bases this completely novel theory on the notion, discredited 70 years ago that employees have a "right to listen as well as [a] right to refrain from listening to employer speech concerning the exercise of their Section 7 rights." NLRB GC Memorandum 22-04. The General Counsel is incorrect that this purported "right," rejected long ago, still exists. If the GC continues attempts to revive it, however, then clearly the ALU's conduct in "shutting down" Amazon's small group meetings for discussion of Amazon's messaging violated the "right to listen" of every voter in those rooms and all those whose meetings were cancelled as a result of the ALU's ongoing scheme. They left these voters absolutely no choice – a complete denial of their supposed right to listen to the employer's message about Section 7 rights in those meetings. The election should be rerun on these grounds alone.

a violation of the Act). Here, there are multiple confirmed instances of the ALU shutting down Amazon's meetings and unrebutted testimony that the ALU destroyed Amazon's campaign messaging, celebrating such actions.

Specifically, Amazon caught Mr. Daniels, Ms. Medina, and Mr. Palmer on CCTV surveillance video removing Amazon posters from the facility. (EMP 0308-v, EMP 0309-v, EMP 0310-v). Ms. Monarrez also confirmed that, while a lead organizer for the ALU, she likewise frequently removed Amazon campaign materials. (Monarrez, 3977:3-3978:9). Ms. Monarrez confirmed that the ALU and its officers encouraged Associates to post videos or photos of their acts of destruction on the Telegram app, in which case Mr. Smalls and other ALU agents would respond with messages of affirmation and encourage others to do the same. (Monarrez, 3977:3-3978:9, 3981:2-3983:19, 3988:13-3990:12). Critically, no ALU agent disputed any of this testimony.[79]

As precedent makes clear, the Board should condemn such interference and order a new election. To allow such destruction and deliberate campaign interference to stand would set a dangerous new precedent that would sanction a party's deliberate effort to disrupt or terminate the opposing party's campaign messages.

N. Objection 16

1. <u>Amazon's Objection</u>

Non-employee ALU organizers repeatedly trespassed on Amazon's property. Over the course of many months, Amazon informed non-employee ALU organizers on several occasions that they had no right to solicit on Amazon's property and that their presence on Amazon's

[79] To the contrary, the ALU failed to produce any of the requested Telegram app messages for a variety of self-serving and questionable reasons. For example, Mr. Smalls claimed he got a new device after he received the subpoena and Ms. Maldonado claimed that her (b) (6), (b) (7)(C) urinated on her cell phone, destroying its contents. (Smalls, 4528:15-4529:3; Maldonado, 4224:22-4225:21). This warrants an adverse inference.

property constituted unlawful trespass. Nevertheless, Mr. Smalls and other non-employee ALU organizers continued to trespass on Amazon's property for the purpose of soliciting employee support during the critical period. On February 23, 2022, during the critical period, Mr. Smalls and two ALU organizers initiated a confrontation with the New York Police Department after Mr. Smalls repeatedly refused to leave Amazon's property, which resulted in their arrests. After his arrest, Mr. Smalls and the ALU consistently misrepresented what had occurred, claiming that he merely dropping off food for employees and was akin to an Uber Eats driver, and that Amazon "called the cops on employees." Mr. Smalls consistently failed, however, to mention in his social media posts and interviews on the subject that on the date of his arrest, he brought a film crew[80] onto Amazon's property without authorization, conducted an interview (that can be seen on social media), and then proceeded to trespass and loiter for over one hour. The ALU also filed ULP charges—which the Region has yet to investigate—and falsely alleged that Amazon had "violated its national settlement" with the NLRB. The ALU then amplified these misrepresentations and the pendency of the charge in the media. All of these actions had a reasonable tendency to interfere with laboratory conditions. *See Phillips Chrysler Plymouth*, 304 NLRB at 16 (Board set aside election when union agents invaded the employer's premises without permission and refused to leave when asked, engaging in a confrontation with company management).

2. <u>Legal Standard</u>

In evaluating whether a union agent's trespass is grounds to invalidate the election, the Board has held that a union may interfere with employees' free and uncoerced choice when its trespass creates the impression that an employer is not in control of its property. *Phillips*

[80] *See* Addison Post, *Amazon Did Everything it Could to Bust Staten Island Union*, THE INTERCEPT (Apr. 2, 2022), https://theintercept.com/2022/04/02/amazon-union-staten-island/.

Chrysler Plymouth, Inc., 304 NLRB at 16. That is precisely what happened here. Not only did Mr. Smalls' repeated trespass reasonably tend to interfere with the employees' free choice in the election, the record establishes it actually did.

3. <u>The ALU's and Mr. Smalls' Trespass are Objectionable and Warrant Setting Aside the Election</u>

a) ***The Avis Factors Favor Finding the ALU's and Mr. Smalls' Trespass is Objectionable Conduct Because It Created the Impression That Amazon Had No Control over the Premises, and Tended to Interfere with Associates' Free Choice in the Election***

The Board's decision in *Phillips* is directly applicable to this case and compels a finding that the ALU's conduct here was objectionable. In *Phillips*, the Board found that the union's trespass onto the employer's property to purportedly speak to bargaining unit employees 75 minutes prior to the election warranted a second election. *Phillips Chrysler-Plymouth*, 304 NLRB at 16. The employer in *Phillips* repeatedly asked union organizers to leave its property, but the union organizers refused to leave and started a "shouting match" in front of employees. *Id*. Even after the employer called the police to remove the organizer from the property, they still refused to leave. *Id*. In finding a rerun appropriate under these facts, the Board reasoned that although brief and isolated, the incident took place in front of other employees, the incident occurred 75 minutes prior to the vote, and the election was decided by one singular vote. *Id*. This, the Board found, created the impression to employees that the employer had no control over its premises and destroyed the laboratory conditions of the election. *Id*.

The United States Court of Appeals for the District of Columbia's decision in *N. of Mkt. Senior Servs., Inc. v. NLRB*, 204 F.3d 1163 (D.C. Cir. 2000) is also instructive. In that case, the Court denied the Board's request for enforcement, and the case was remanded to the Board, because the Court found that the union's conduct, particularly its trespass of the employer's facility, could be worthy of setting aside the election. *Id.* at 1169-70. There, the union's agents, at

the direction of the Board Agent conducting the election, walked through the employer's facilities and told employees that they had been sent by the Board to tell them when the polls were open. *Id*. at 1165-66. This conduct occurred on the day of the election. *Id*. at 1169. In finding that the employer was entitled to an objections hearing at the very least, the Court noted that the union walked around the employer's facilities without the authorization of the employer giving incorrect information, creating the illusion that the employer had no control over its facilities. *Id*. at 1169-70.

In determining whether the trespass creates the objectionable impression, the Board looks to the factors set forth in *Avis Rent-A-Car Sys*. *Phillips Chrysler-Plymouth*, 304 NLRB at 16. Here, seven out of the nine *Avis* factors weigh in favor of a finding that the ALU's repeated trespass reasonably tended to interfere with employees' free choice. First, unlike the typical trespass cases that generally involve few and isolated incidents, here the trespass incidents were numerous and abundant (factor #1). (*See supra* pp. 26-35); *Phillips Chrysler-Plymouth*, 304 NLRB at 16 (discussing one incident of trespass); *N. of Mkt. Senior Servs.*, 204 F.3d at 1165 (same); *NLRB v. Earle Indus., Inc.*, 999 F.2d 1268, 1269 (8th Cir.1993) (discussing two incidents of trespass); *Champaign Residential Servs., Inc*., 325 NLRB 687 (1998) (same); *Station Operators, Inc., Emp.*, 307 NLRB 263, 263 (1992) (discussing three incidents of trespass). Mr. Smalls' solicitation and trespass also continued for over three months, beginning around December 14, 2021 and going beyond February 23, 2022. (*See* supra pp. 26-35). Taken together, factor one favors finding objectionable conduct.

Second, the severity of the misconduct (factor #2) was amplified by the fact that the trespass here involved the ALU President himself, and not simply organizers. *Phillips Chrysler-Plymouth*, 304 NLRB at 16; *Earle Indus*., 999 F.2d at 1273-74; *Champaign Residential*, 325

NLRB at 687; *N. of Mkt. Senior Servs., Inc.*, 204 F.3d at 1166. Mr. Smalls repeatedly invited the arrest, going so far as telling Mr. Marc to "call the police" on both February 9, 2022 and February 23, 2022. (Marc, 2393:11-2394:2, 2398:6-8).

Had a president from any other union, such as General President Sean O'Brien from the International Brotherhood of Teamsters, trespassed in the same way Mr. Smalls did—*i.e.*, enter private property to put up tables to solicit, hand out Teamsters' t-shirts and other union paraphernalia, obtain authorization cards, and create a scene leading to his arrest—this would unquestionably constitute objectionable misconduct warranting setting aside the election. Mr. Smalls is subject to the same standard. Certainly, having a union's president engage in trespass at an employer's property magnifies the severity of the misconduct, and tilts in favor of a finding of objectionable conduct. In this case, Mr. Smalls created this conflict and went to extreme measures to ensure it escalated to the point of his arrest for the express purpose of growing support for the ALU. The ALU had been campaigning off its messaging that Amazon was a law breaker. Mr. Smalls orchestrated his dispute with Mr. Marc on February 23, 2022, while camera crews were present, so the ALU could ratchet up its rhetoric against Amazon by lying to Associates about the reason Mr. Smalls (along with Mr. Daniels and Mr. Anthony) was arrested – *i.e.*, he was arrested for simply delivering food to Associates as opposed to what he was actually doing, repeatedly trespassing on Amazon's property and refusing multiple warnings to leave. The ALU campaigned on this arrest throughout the campaign and in the final moments leading up to the election.[81]

Third, though the last trespass occurred several weeks prior to the election (factor #4), the ALU acted to keep the incident fresh in Associates' minds in the lead up to the election. (*See*

[81] Any contention by the Union that Mr. Maing's presence at JFK8 on February 23rd was coincidental is beyond tenuous.

supra pp. 33-35) (EMP 0326, EMP 0326-v, EMP 0327, EMP 0355, EMP 0381-83, EMP 0385-v, EMP 0386, EMP 0388-95, EMP 2007, EMP 2923-26, EMP 2923v-26v, EMP 2914, (light projector read "THEY ARRESTED YOUR COWORKERS.")); *see also* (EMP 0757 and EMP 0757-v) (ALU TikTok with caption "more video of Amazon arresting ALU President Chris Smalls for 'trespassing' while handing out free food to workers at lunch."), (EMP 0758 and 0758-v) (ALU TikTok with caption "more disturbing footage of NYPD arresting worker-organizers at Amazon)). The effect of the ALU's constant reminders and references to Mr. Smalls' own misconduct produced the same effect as if the misconduct occurred nearer the election date. As such, the misconduct here was more likely to have a tendency to interfere with Associates' free choice because the ALU continually reminded voters of it.

Fourth, social media undoubtedly played a role in disseminating the misconduct to a significant number of Associates (factors #5, 6, and 7). (*See* supra pp. 33-35). Moreover, the combination of the trespass spanning multiple occasions over three months (December-February) and references on social media to the trespass spanning over fourth months (December-March), heightened the degree and appearance of persistence of the ALU's trespass among the Associates. In other words, the ALU created the impression that their trespass was even more abundant and ubiquitous.

Fifth, Mr. Smalls' misconduct must be attributed to the ALU because the ALU elected him President (factor #9). Moreover, Mr. Smalls invited the confrontation with Amazon and the police through his repeated trespass onto Amazon's private property, despite Amazon's repeated instructions to leave the premises. (*see supra* pp. 29-33). On two separate occasions, Mr. Smalls told Assistant General Manager Mr. Marc to call the police after being asked to leave the premises. (Marc, 2397:25-2398:8, 2393:11-14; *see also*, Troy, 1875:18-24). Additionally, Mr.

Smalls appeared to have staged the trespass because almost every time he came on site, he either had a camera crew or an Associate recording him. (*See supra* pp. 26-33). In other words, Mr. Smalls not only created the conflict with Amazon and the police, but intended to use it as propaganda to gain support for the ALU and did in fact use it as propaganda for just such a purpose. Lastly, Mr. Smalls created the conflict because he had already been made aware that he was not allowed to be on Amazon's premises since December 16, 2021. (Smalls, 4605:16-4606:9; EMP 0324).

When the *Avis* factors are weighed here, the totality of the circumstances favors a finding that the ALU's repeated trespass interfered with employees' free choice, and therefore, warrants setting aside the election.

b) ***Mr. Smalls' February 23, 2022 Trespass Incident Not Only Reasonably Tended to Interfere with Employees' Free Choice in the Election, but Actually Interfered with Associates' Free Choice in the Election and Materially Affected the Result of the Election***

Although the aim of the *Avis* factors is to discern whether the ALU's actions "reasonably tended to interfere with the employees' free and uncoerced choice in the election," here the record actually establishes that the ALU's actions materially affected the result of the election. ALU lead organizer Mr. Cioffi made it clear that "management's treatment of Mr. Smalls" during the incident was the "cherry on the cake" that "tipped" him over to support the ALU. (Cioffi, 4955:5 - 4955:14). The incident had a significant impact on Mr. Cioffi, so much so that it prompted Mr. Cioffi to take action. (Cioffi, 4949:12-24; 4955:5-14). Notably, Mr. Cioffi testified he personally flipped 400-500 Associates' votes during the election. (Cioffi, 4949:12-24). Mr. Cioffi explained that "flipped" means he convinced Associates voting "no" (against the ALU) to vote "yes" (for the ALU). (Cioffi, 4951:10-4953:12). In other words, the incident not only personally influenced Cioffi, but changed the votes of hundreds of other Associates.

If Mr. Smalls' arrest motivated Mr. Cioffi to take such action, the Hearing Officer may reasonably infer Mr. Smalls' trespass and arrest, and the resulting publication of that event by the ALU across multiple social media channels, flyers, and texts and emails to Associates, tended to interfere with Associates' free choice. This was in fact the entire point of the orchestrated arrest and subsequent related campaign lies to Associates repeated by the ALU. And though Mr. Smalls' arrest occurred one month prior to voting, the ALU's continued dissemination and publication of the incident across different communication channels up to the election, further suggests that the incident continued to interfere with Associates' free choice up to the election. (Goriva, 920:1-13; EMP 0355, EMP 0381-83, EMP 0385-v, EMP 0386, EMP 0388-95, EMP 2007, EMP 2923-26, EMP 2923v-26v). As Mr. Cioffi explained, the news of Mr. Smalls' arrest was "everywhere at Amazon." (Cioffi, 4963:12–4964:4). Therefore, the impact of the incident is especially significant in this case, because it actually interfered with the Associates' free choice in the election.

c) *Additional Factors Weigh in Favor of Finding That the Trespass is Objectionable and Warrants Setting Aside the Election*

Unique circumstances surrounding Mr. Smalls' repeated trespass created the impression that Amazon had no control over its premises. Unlike all the cases above, Mr. Smalls' actions are far more egregious here because he defied three different levels of authority. First, Mr. Smalls repeatedly ignored Amazon's counsel's requests that he cease and desist from trespassing and soliciting on Amazon's property. (Troy, 1840:25-1842:6; *see* EMP 0135, EMP 0135-v, EMP 0322, EMP 0323, EMP 0325). Even after receiving the December 15, 2021 letter from counsel, Mr. Smalls tweeted that he would continue to solicit on Amazon's property. (EMP 0324). Second, Mr. Smalls ignored Amazon management's order to leave the property on several other occasions. (*See supra* pp. 29-31). Third, Mr. Smalls ignored law enforcement by refusing to

leave on February 23, 2022, and continued to trespass even after he was arrested and charged, as he returned to Amazon's property moments after he was released from jail and tweeted about it. (Smalls, 4608:2-11, 4609:4-4610:8; EMP 3230). Further exacerbating this conduct, Mr. Smalls' publicized his actions on social media up to a day or two prior to the election. In other words, many Associates observed Mr. Smalls both repeatedly trespassing and ignoring management, law enforcement, and legal demands. Under these circumstances, Mr. Smalls undoubtedly created the impression amongst Associates that Amazon had no control over its premises.

Amazon takes numerous security measures so that Associates feel safe and secure while at work. (Troy, 1654:19-1655:7). For example, it restricts access to its property inside (via leveled access) and outside (placing limitations on non-employees) through its robust policies. (Troy, 1654:19-1655:13, 1797:13-1798:4, 1799:19-1800:3; Marc, 2382:18-2384:2; EMP 0321). In other words, Amazon ensures the safety of its Associates by limiting and controlling non-employee access to its premises. Mr. Smalls' repeated disregard for Amazon's policies for a period of three months, further created the impression that Amazon had no control over its premises.

d) *Mr. Smalls' Actions Clearly Constitute Solicitation, and Trespassing on Amazon's Property*

The record establishes that Mr. Smalls and other non-employee organizers continually solicited and trespassed on Amazon's property both before and during the critical period. (*See supra* Section II(D)(2)). Although the ALU will likely contend Mr. Smalls and others did not trespass, the evidence shows otherwise.

First and most obviously, he was cited by the NYPD for trespassing. (EMP 0570-Redacted). Any contention that the MTA moving the "bus stop" to the JFK8 parking lot weather enclosure meant that Mr. Smalls and other non-employee organizers could enter Amazon's

property to solicit is misplaced. (*See* EMP 0324). The regular MTA bus stop, near where the ALU previously solicited, sits directly along Gulf Avenue in an area of the Matrix Corporate Park beyond the boundaries of Amazon's property. (EMP 0323). The weather enclosure, on the other hand, sits deep inside of Amazon's private property, along an access lane between the JFK8 parking lot and the covered parking structure. (EMP 0323). The MTA's temporary use of that space as a passenger pickup and drop-off point does not grant non-employees the right to access that area for the purpose of solicitation. (EMP 0323). Furthermore, ALU's non-employee organizers staged their solicitation efforts in areas well beyond the area of the weather enclosure. Sometimes, Mr. Smalls' organizing efforts took place hundreds of yards from the weather enclosure. (EMP 0135, EMP 0135v, EMP 0322.1, EMP 0322.2, EMP 0323, EMP 0325.1, EMP 0325.1v, EMP 0325.4, EMP 0325.4v).

Mr. Smalls' claim he was a visitor during the trespass incident on February 23, 2022, is similarly baseless. Amazon places limitations on who may come onto its property, which includes the JFK8 parking lot, and only grants non-employees permission to drop-off visitors or employees, or deliver food to employees that may have ordered it through a food service platform. (Troy, 1799:19-1800:3; Marc, 2383:8-2384:2). If non-employees come onto Amazon's property for any other purpose, they are trespassing. (*See* Troy, 1799:19-1800:3; Marc, 2383:8-2384:2). Moreover, any claim by Mr. Smalls that he was merely dropping off visitors or employees, waiting to pick-up visitors or employees, or delivering food on February 23, 2022, is dubious. (*See* EMP 0335). Mr. Smalls, in his own words, was there to film an interview. (Marc, 2397:8-16; *see also*, EMP 0361.1, EMP 0361.1-v (6:38-52)). Amazon's CCTV video evidences that Mr. Smalls was on Amazon's property for well over an hour. (EMP 0335). Numerous ALU

social media posts show Mr. Smalls engaged in solicitation efforts on Amazon's property. It is clear why he was there, and it certainly was not because he was an innocent bystander.

Also, as President of the ALU, Mr. Smalls had no other conceivable purpose when visiting but to gain and galvanize support for the ALU. Even if Mr. Smalls did deliver food occasionally, the entire point of such visits was to gain support for the ALU. That is solicitation. It's difficult to fathom that on the occasions that Mr. Smalls delivered food, he only did that without more, and did not speak or engage with any of the Associates walking by or in the breakroom/cafeteria. Indeed, Smalls testified that one of the ALU's organizing tactics was to provide food in the JFK8 breakrooms. (Smalls, 4562:12-22). Furthermore, the ALU's social media publications already show that Mr. Smalls repeatedly trespassed on Amazon's private property to solicit—he distributed flyers, food, and other union paraphernalia, danced, played music, and protested while using a megaphone—so it is reasonable that he did the same on February 23, 2022. (*See supra* pp. 26-34). Accordingly, Mr. Smalls was not a visitor, but rather a trespasser.

O. Objection 17

1. <u>Amazon's Objection</u>

The ALU unlawfully polled employee support, engaged in unlawful interrogation, and created the impression of surveillance during the critical period. During the critical period, the ALU distributed a pledge form that asked employees to fill out their name, state what day they planned to vote, what time they planned to vote, their phone number, their address, and to sign a commitment that they would vote "Yes." This constitutes objectionable polling and interrogation. The ALU's request that employees identify what time and date they would vote reasonably gave the impression that the ALU would surveil when and if they chose to vote, and the commitment to vote "Yes" gave the impression that they could not change their mind if they

signed one of these commitment forms. *See, e.g.*, *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 365 (1984) (citing *NLRB v. Claxton Mfg. Co.*, 613 F.2d 1364 (5th Cir. 1980)) (recognizing that an employer may successfully challenge a representation election by showing that pre-election polling by the union was coercive).

2. <u>Legal Standard</u>

It is well-accepted that a party can create an objectionable impression of surveillance when its statements or actions could cause employees to reasonably assume that their union activities had been placed under surveillance. *Caterpillar Logistics, Inc.*, 362 NLRB 395, 396 (2015). In evaluating such impressions of surveillance, "[t]he essential focus has always been on the reasonableness of the employees' assumption." *Frontier Tel.*, 344 NLRB 1270, 1276 (2005). Such reasonableness "is analyzed under an objective standard, not the subjective reaction of the individual[s] involved." *Id.*

Furthermore, courts recognize that "[i]n the interests of ensuring free, non-coerced elections, the Board has set aside elections if employee voters know, or reasonably can infer, that their names are being recorded on unauthorized lists." *T.K. Harvin & Sons*, 316 NLRB 510, 536 (1995) (quoting *Days Inn Mgmt. Co. v. NLRB*, 930 F.2d 211, 215 (2d Cir. 1991)). These federal court decisions emanate from the Board's longstanding *Piggly-Wiggly* rule, which states that it has "been the policy of the Board to prohibit anyone from keeping any list of persons who have voted, aside from the official eligibility list used to checkoff voters as they receive their ballots." *Piggly-Wiggly*, 168 NLRB 792, 793 (1967).

3. <u>The ALU's Collection of Pledge Forms Served as a *De Facto Piggly-Wiggly* List and Created an Objective Impression of Surveillance in the Mind of Voters</u>

Here, a mere week before the election, the ALU passed out election pledge forms in the main JFK8 breakroom that asked Associates to publicly commit to voting "Yes" in the election.

(Donaldson, 435:6 - 435:19; Anthony, 3611:12 - 3612:12; EMP 0369). The form stated: "I [insert name] COMMIT TO VOTE YES!" (EMP 0369). Significantly, the form also asked Associates to provide personal details, including their phone number, home address, and, most notably, to *state the date and time that they intended to vote* in the election. (EMP 0369). The ALU followed up the collection of such forms by directly contacting workers to remind them to vote, transporting voters to the polls,[82] and surveilling the polling area during the election. (Anthony, 3613:4-8). Indeed, no less than seven witnesses testified that during multiple voting sessions, ALU agents such as Mr. Smalls, Mr. Spence, Ms. Maldonado, Mr. Daniels, Mr. Anthony, Mr. Martinez, and/or Mr. Flowers, loitered in or within view of the no-electioneering zone, reasonably creating the impression of surveillance. *See* Factual Background, Sec. II.C.2, *supra*.

When considering all these circumstances, it can reasonably be inferred that the ALU's collection of pledge forms, combined with their surveillance of the polls and Associates' commutes to the polls (*see* Objections, 9, 23, 24, 25, *infra*), was akin to objectionable vote recording. In *Piggly-Wiggly*, the election was set aside because two representatives of the union were observed monitoring voters who entered the voting area, "checking off employees names as they entered." 168 NLRB at 792. The Board found this conduct objectionable because "it can be inferred…that at least some of the employees knew that their names were being recorded." *Id.* at 793. The ALU's conduct here is similar. The pledge forms obtained days before the election did more than simply gauge support; they also required voters to let the ALU know what *time they planned to vote* and informed voters that the ALU would be providing transportation to the polls.

[82] The provision of transportation is, in and of itself, objectionable conduct as the ALU did not offer transportation to all Associates. *Broward Cnty. Health Corp.*, 320 NLRB 212, 213 fn. 8 (1995) (holding party's provision of transportation to polls not objectionable "so long as the offer is available to all") (citing *Heintz Mfg. Co.*, 103 NLRB 768 (1953)).

(EMP 0369). Once the election began, multiple witnesses confirmed that ALU agents were stationed inside or within close proximity to the no-electioneering zone, giving the impression that the ALU was monitoring voting activity. *See* Factual Background, Sec. II.C.2, *supra*. These circumstances suggest that the collection of pledge forms served a more nefarious motive and purpose than simply gauging pre-election support. Because the pledge form asked for specific details about when employees planned to vote and because the ALU was monitoring the polls, as well as who was traveling to the polls, it is objectively reasonable for voters to believe that the ALU was recording and/or surveilling their votes. This is objectionable conduct and the Board should accordingly sustain Objection 17. *See, e.g., Kusan Mfg.*, 749 F.2d at 365.

P. Objection 18

1. <u>Amazon's Objection</u>

After disparaging—and celebrating its independence from—established, institutional unions for months leading up to the vote, the ALU's President and attorney asserted in 11th hour communications to voters that the ALU was backed by established unions with millions of union members, that those more-established unions were actively involved in the ALU's campaign, were providing funding and other services to the ALU, and would also be involved in contract negotiations if the ALU was elected. The ALU's failure to file any foundational documents and LM filings with the Department of Labor as required by the LMRDA, coupled with its late-hour promise of operational support from and affiliation with other unions, deprived Amazon of the ability to effectively respond and employees the opportunity to assess the ALU's credibility. These misrepresentations are objectionable conduct because, under the circumstances, employees were unable to discern the truth of these statements regarding which labor organization would be representing them.

2. **Legal Standard**

Board cases have set forth the standard when determining whether a union's misrepresentation about its autonomy is sufficient to set aside an election. In *Humane Soc'y for Seattle/King Cnty.*, 356 NLRB 32 (2010), the Board set aside an election where the petitioning union assured employees that they would be represented by their own independent union, even though the ballot and the Board's notice of election identified a separate, already-established union. *Id.* at 34-35. The petitioner retracted its prior statements and attempted to dissipate any resulting confusion before the election. *Id.* at 35. Ultimately, the hearing officer set aside the election due to the "strong showing of employee confusion over the identity of the organization seeking representative status." *Id.*

In *Woods Quality Cabinetry Co.*, 340 NLRB 1355 (2003), the notice of election and sample ballot incorrectly stated that the petitioner was affiliated with the AFL-CIO. *Id.* at 1355. Before the election, the petitioner clarified that it was no longer affiliated with the AFL-CIO, but the statement of affiliation remained on the ballot. *Id.* at 1356. The Board held that it was error for the Regional Director to discount the confusion caused by such misrepresentations because the misrepresentations were "material to the election campaign." *Id*. In so finding, the Board stated "that the affiliation issue was material to the election campaign was reflected by the fact that both parties specifically addressed it when meeting with the unit employees." *Id*. The Board rejected the Regional Director's reasoning, which was based, in part, on its finding that the employer failed to meet its burden of establishing that employees were confused about the union for which they were voting. *Id*. at 1355. Instead, the Board used an objective standard that assessed whether "[the misrepresentation] reasonably tended to interfere with the election process." *Id*.

Furthermore, in *Pac. Sw. Container*, 283 NLRB 79 (1987) the Board vacated an election where the petitioner union misrepresented its nature, structure, and identity to unit employees during the election campaign. *Id.* at 79. Although the petitioning union merged with a larger union just prior to the election, it failed to adequately inform all bargaining unit employees that such merger was complete, despite previously informing employees during the campaign that a merger was possible before the close of the election and previously informing over half of the bargaining unit that the merger was complete. *Id.* at 80.

3. <u>Evidence of Objectionable Conduct was Improperly Excluded</u>

As a preliminary matter, the Hearing Officer ruled that the ALU's misrepresentations about its backing, associations and affiliations were irrelevant to Objection 18. (Hearing Officer Dunn, 157:3-158:11). In so ruling, the Hearing Officer cited *Midland Nat'l Life Ins. Co.*, 263 NLRB 127 (1982), for the proposition that "the Board held that it would no longer probe into the truth or falsity of the party's campaign statements." (Hearing Officer Dunn, 157:3-158:11). Using *Midland* as purported authority, the Hearing Officer excluded witness testimony regarding the ALU's repeated misrepresentations about its autonomy as a union, which misled Associates about the extent of its association and relation to other unions. (Hearing Officer Dunn, 875:12-879:8; 2939:9-24).

While *Midland* does preclude inquiry into commonplace events like campaign puffery and exaggerations, it is not as far reaching as the Hearing Officer ascribed. *Midland Nat'l*, 263 NLRB at 130. Indeed, the Board's own Outline of Law and Representation in Representation Cases specifically states that *Midland Nat'l.* does not apply to the allegations in Objection 18: "*Midland National* does not apply, however, and the Board will set aside an election upon a showing that the employees did not know the identity of the organization that they were voting

for or against." *See* NLRB: An Outline of Law and Procedure in Representation Cases Sec. 24-307; *see also Humane Soc'y for Seattle/King County*, 356 NLRB at 35 fn. 5; *Pac. Sw. Container*, 283 NLRB at 80 fn. 2; *cf. Nevada Sec. Innovations*, 337 NLRB 1108, 1108 (2002) (recognizing that election should be set aside where it is unclear whether employees knew the identity of the union they were voting for).

4. <u>The ALU Caused Confusion within the Bargaining Unit as to its Affiliation with Other Unions</u>

In all three cases—*Humane Soc'y*, *Wood Quality Cabinetry Co.*, and *Pac. SW Container*—the petitioner made misrepresentations or omitted critical information that created confusion within the bargaining unit as to the proper union representative. This type of misrepresentation as to the nature of the proposed bargaining representative is precisely what occurred in this case.

ALU lead organizer Jason Anthony testified that "the thing that Amazon Labor Union established since day one [sic] that it was going to be independent." (Anthony 3674:4-5). Mr. Anthony's conclusory attestations to the contrary, the record evidence reveals that Associates were inundated with a bevy of eleventh-hour conflicting and contradictory information that suggested the ALU was not an independent union. This was particularly confusing because this was the ALU's first union election, leaving voters with no historical examples.

For example, on the last day of the election, ALU lead organizer Mr. Cioffi spoke to bargaining unit employee Mr. Martinez about Mr. Martinez's concerns with the ALU's lack of experience. (Martinez, Mo., 3287:11-3288:15). When Mr. Cioffi asked Mr. Martinez how he planned to vote, Mr. Martinez explained to Mr. Cioffi that "[he] was not actually going to support the ALU because [he] didn't really know who they really were." (Martinez, Mo., 3287:11-3288:15). In response, Mr. Cioffi encouraged Mr. Martinez to vote yes because the

ALU's intent was to have the ***Teamsters take over the ALU*** following the election. (Martinez, Mo., 3287:11-3288:15) (emphasis added). Such pointed last-minute communications regarding the affiliation of the ALU was the exact reason the Board found the affiliation issue in *Woods* to be material to the outcome of the election. *See Woods Quality Cabinetry*, 340 NLRB at 1356 ("That the affiliation issue was material to the election campaign was reflected by the fact that both parties specifically addressed it when meeting with the unit employees.").

Mr. Cioffi's response in allaying Mr. Martinez's concerns about the ALU compels the conclusion that such a statement was material to the ALU's campaign. Had Mr. Martinez's concerns about not "knowing" the ALU been a trivial one, Mr. Cioffi would not have been quick to allay his concerns about the ALU by raising the prospect that a more experienced, established, and well known union would "take over." Such a conclusion is further evidenced by the ALU's other confusing, inconsistent, and contradictory eleventh hour messages regarding the status of the ALU. Less than two weeks before the election, the ALU distributed to Associates a flyer that stated "[t]he Amazon Labor Union is backed by established unions such as the UFCW (1.3 Million Members) and Unite Here (300,000 Members). They help us with lawyers, advisors, and expertise." (Spence, 4371:11-23; *see also*, EMP 2916). On this flyer, the ALU included the logos of the UFCW, UNITEHERE, and the Coalition of Black Trade Unionists. (Spence, 4371:11-23; *see also*, EMP 2916). The ALU circulated another flyer at JFK8 during the campaign that included the logos of the UFCW, UNITEHERE, and the Coalition of Black Trade Unionists. (Spence, 4368:18-4369:6; *see also*, EMP 2917). In other campaign materials regarding dues circulated on March 15, 2022—completely unrelated to the ALU's campaign messaging concerning dues—the ALU again included the logos of other unions next to its own. (Spence,

4374:5-4375:4; *see also*, EMP 0491, EMP 0571 (boasting support from Unite Here, UFCW, and OPEIU)).

The record evidence shows that the ALU's mixed messages about its autonomy from, and affiliation with, other unions could reasonably lead to confusion among the Associates as to whether the ALU was entirely independent, whether it was affiliated with other unions, whether it simply had the vocal support from other unions, whether it was funded by other unions, and/or whether it in fact had plans to join the Teamsters. Compounding the confusion, the ALU failed to file required financial disclosure forms or its foundational documents required under the LMRDA, leaving Associates unable to verify the veracity of the ALU's messaging. *See* Objection 21, *infra*. Such confusion is precisely the reason the Board has found similar misrepresentations to be objectionable conduct. *See Woods Quality Cabinetry,* 340 NLRB at 1356 ("The discrepancy between the parties' message, and the conflicting notice and ballot language, reasonably would tend to confuse employees with respect to the affiliation status of the union that they were being asked to vote on as their as their bargaining representative."); *see also Humane Soc'y for Seattle/King County*, 356 NLRB at 34–35; *Pac. Sw. Container*, 283 NLRB at 80.

Q. Objection 20

1. <u>Amazon's Objection</u>

The ALU deployed a light projector outside the JFK8 facility that projected mass messaging on the façade of the JFK8 building immediately prior to the election. Late at night on March 23, 2022, and through the early morning hours, after the voting tent was in place, the ALU projected messaging on the front of JFK8 immediately over the polling area which read: "Amazon Labor Union"; "VOTE YES"; "VOTE YES! TO KEEP YOUR PHONES"; "BE THE FIRST IN HISTORY"; "THEY FIRED SOMEONE YOU KNOW"; "THEY ARRESTED

YOUR COWORKERS"; and "ALU FOR THE WIN". *See, e.g.*, Rachel Gumpert (@rlgumpert), TWITTER (Mar. 27, 2022), https://twitter.com/rlgumpert/status/1508089747289219082 (last visited Apr. 8, 2022). The ALU's light projections are also objectionable misrepresentations inasmuch as they caused confusion about the identity of the messenger, suggested that Amazon supported the messaging, and misrepresented the purpose and consequences of the vote. The ALU's light projections also reiterated the ALU's false campaign narrative that Amazon sought the arrest of employees. "[E]mployers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953). Because "the Board's goal is to keep voters as free of uninvited mass messages as possible during the period just prior to the conduct of the election," the ALU's mass projection of its campaign messaging falls squarely within the prohibitions of *Peerless Plywood*. *See Bro-Tech Corp.*, 330 NLRB 37, 39-40 (1999) (holding union's use of sound truck broadcasting pro-union music constituted objectionable conduct).

2. Legal Standard

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2).

Within 24 hours prior to the scheduled start time of the election, the ALU violated *Peerless Plywood* when it projected campaign propaganda on the front façade of JFK8—creating a captive audience of every Associate who entered and exited the building.[83] *See also Amazon.com Servs. LLC*, No. 10-RC-269250, Decision and Direction of Second Election, at 11 (citing *Guardsmark, LLC*, 363 NLRB No. 103, slip op at 4 (2016)) (finding rule against captive

[83] Amazon was prevented by the Hearing Officer from introducing evidence demonstrating that the light projection was displayed within 24 hours (actually within 8 hours) of the scheduled start of the first voting period. (Hearing Officer Dunn, 4889:15-4891:18).

audience meetings within 24 hours of poll opening applies in a mail ballot context as well as in manual elections). The ALU's projected messages appealed directly to the emotions of the JFK8 workforce in a blatant attempt to sway votes. (EMP 0381-83, EMP 0385-v, EMP 0386, EMP 0388-95, EMP 2923-26, EMP 2923v-26v). This violation of longstanding NLRB rules mandates a new election. *See Bro-Tech Corp*., 330 NLRB at 39-40; *Peerless Plywood Co.*, 107 NLRB at 429.

One of the Board's goals is to keep voters free from uninvited mass messaging, as much as possible, during the period immediately preceding the election. *Bro-Tech*, 330 NLRB at 39; *see also Peerless Plywood*, 107 NLRB at 429. This is particularly true for messages that constitute emotional appeals intended to sway votes. *Bro-Tech* , 330 NLRB at 38. Moreover, when the substantive considerations underlying the *Peerless Plywood* rule are present, even if the form differs, the objection must be sustained. *See U.S. Gypsum Co.*, 115 NLRB 734, 735 (1953) ("Accordingly, as the considerations operative in establishing the *Peerless Plywood* rule are here present in substance, albeit not in form, we are persuaded to reach the same result here.").

Here, just prior to the election, the ALU plastered its campaign messages on the façade of JFK8 across the only accessible entrance to the Associates. (EMP 0381-83, EMP 0385-v, EMP 0386, EMP 0388-95, EMP 2923-26, EMP 2923v-26v). Any Associate that entered and exited JFK8 was subjected to the ALU's campaign messaging regardless of whether they were interested or not. This is not a situation where the ALU was simply handing out lanyards or flyers and an employee could ignore its contents by rejecting its receipt. Nor is it analogous to a hung poster—which pales in comparison to the scope, size, and location of the ALU's presentation. Moreover, an employee can actively choose not to engage with a poster and simply ignore its contents. The ALU's projection did not afford any such opportunity to Associates.

Rather, any Associate who entered JFK8 that evening was unwillingly captive to the ALU's immense messaging.[84]

This matter is akin to the Board's analysis and decision in *Bro-Tech*. There, the Teamsters played two pro-union songs (interspersed with several popular songs) from an off-property speaker system within 24 hours of the election. 330 NLRB at 37. The music could be heard at various locations inside the plant. *Id.* The Board, upon remand, found the playing of the two pro-union songs constituted partisan campaign speech. *Id* at 39-40. Further, the Board found that because the employees were unwillingly exposed to the message they were a captive audience within the meaning of *Peerless. Id.* at 40. Given the above, the Court sustained the objection and ordered a new election. *Id*.; *see also Peerless Plywood*, 107 NLRB at 429.

The Board's reasoning in both *Bro-Tech* and *Peerless* undoubtedly applies in this matter. The ALU's messaging (e.g., "THEY ARRESTED YOUR COWORKERS" and "BEZOS FLEW TO SPACE OFF YOUR LABOR—followed by "VOTE YES! FOR THE ALU") is the type of communications that would "create a mass psychology" and "establish an atmosphere in which a free election cannot be held." *See Peerless Plywood Co.*, 107 NLRB at 429-30. These are emotional appeals intended to sway voters—not mere exhortations to vote. *See Bro-Tech*, 330 NLRB at 40. While the means by which the message was communicated differs from *Peerless* and *Bro-Tech*, the underlying considerations and the harmful effect do not.[85] As such, Objection 20 should be sustained and a new election ordered.[86]

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[84] Associates arriving and leaving work were not the only ones exposed to the light projection. The messages were visible from the area outside the breakroom where employees congregate during their breaks, as well as the designated smoking areas. *See* EMP 0381-83, 0385-v, 0386, 0388-95, 2923-26, 2923-v-26v.

[85] The mere fact that the mass messaging was written word as opposed to spoken word is inconsequential. Written word has long been considered "speech." *See Texas v. Johnson*, 491 U.S. 397, 404, (1989). Moreover, the *Peerless* analysis points to the substance and effect of the speech, not the means. *See Bro-Tech*, 330 NLRB at 38.

[86] The fact that the projection occurred within 36 hours of the election, as opposed to 24 hours, is a distinction without a difference. The underlying concern of *Peerless* is not lessened by the fact that the evidence the Hearing Officer allowed to be admitted demonstrated the projection occurred 36 hours prior to the election (and,

R. Objection 21

1. Amazon's Objection

The ALU failed to file forms required by the LMRDA. The LMRDA requires all unions purporting to represent private sector employees to file, among other things, detailed financial reports. 29 U.S.C. §§ 431-432. As acknowledged by the LMRDA, these disclosures are necessary to eliminate or prevent improper practices on the part of labor organization, their officers, and their representatives and to protect employees from the activities of labor organizations. *Id*. § 401(b)-(c). To date, the ALU has not filed any financial or other reports required by the LMRDA despite being under a legal obligation to do so. The ALU's failure to comply with the LMRDA deprived employees from access to critical financial information about the ALU's operations during a critical time period (*i.e.*, whether to vote for them as their bargaining representative). ALU President Smalls brazenly told CNN the week before the election that he would not file these disclosures until after the election, if at all.[87]

2. Legal Standard

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2).

The Board has long held, and the courts have agreed, that "[a]n election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative." *General Shoe Corp*., 77 NLRB at 126; *see also Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1052 (11th Cir. 1983). In *Pac. Sw. Container*,

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again, the Hearing Officer inexplicably prohibited Amazon from admitting evidence establishing that the projection occurred 8 hours prior to the election—raising questions about the motivation behind the Hearing Officer's ruling allowing evidence outside the *Peerless* 24-hour window, but rejecting evidence well within the *Peerless* 24-hour window.

[87] *See* Sara Ashley O'Brien, Two Amazon warehouses are vying to make history with company's first union, but they're very different, CNN BUSINESS, (Mar. 30, 2022), https://www.cnn.com/2022/03/25/tech/amazon-new-york-alabama-union-elections/index.html.

the Board vacated an election where the Petitioner materially mispresented its nature, structure, and identify to unit employees during the campaign. *Pac. Sw. Container*, 283 NLRB at 79-80. To prevent material representations to Associates, the LMRDA requires all unions purporting to represent private sector employees to file, among other things, detailed financial reports. 29 U.S.C. §§ 431-432. As acknowledged by the LMRDA, these disclosures are necessary to eliminate or prevent improper practices on the part of labor organization, their officers, and their representatives and to protect employees from the activities of labor organizations. *Id*. § 401(b)-(c).[88]

3. <u>The Board Should Not Condone the ALU's Failure to File Forms Required by the LMRDA</u>

The ALU's failure to timely file a LM-1 denied voters of their right to assess the truth and accuracy of the ALU's financial backing, financial condition, structure, and related representations. Unchecked by LMRDA filings, the ALU proliferated material

[88] While the Hearing Officer relied on *Midland* as purported authority for campaign misstatements, any reliance on *Midland* in this scenario is error. *Midland* precludes inquiry into commonplace events like campaign puffery and exaggerations, but it is not as far reaching as to capture the events objected to in Objection 21. Specifically, the LMRDA requires labor unions, including the ALU, to file legally mandated reports and filings. Recognizing that *Midland* is vague and there will often be situations in which there must be an exception to *Midland*, courts have created a number of exceptions to *Midland*, under which the ALU is not shielded from liability, and thus engaged in objectionable conduct when it failed to make legally required LMRDA filings. *Uniroyal Tech. Corp., Royalite Div. v. NLRB*, 98 F.3d 993, 1003 (7th Cir. 1996) ("[w]e have, on occasion, left unanswered the question of whether we agree with the Board that only forged documents would warrant setting aside an election-intimating that there may be other circumstances in which the deceptive manner used by a party would likewise render employees unable to evaluate the campaign propaganda for what it is."); *NLRB v. Affiliated Midwest Hosp.*, 789 F.2d 524, 528-29, fn. 3 (7th Cir.1986) (noting the Sixth Circuit's creation of an exception to the *Midland* standard in instances in which misrepresentations are so pervasive and deceptive that employees cannot separate the truth from falsehoods; declining to reach the issue of whether the Seventh Circuit would create such an exception); *NLRB v. Chicago Marine Containers*, 745 F.2d 493, 498-500, 498 fn. 4 (7th Cir.1984) (noting that there may be situations in which it might be inappropriate to be strictly bound by the *Midland* standard); *NLRB v. Hub Plastics*, 52 F.3d 608, 612 (6th Cir.1995) (quoting *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343 (6th Cir.) ("There may be cases where no forgery can be proved but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to free and fair choice will be affected.") (internal quotation marks omitted), *cert. denied*, 469 U.S. 1208 (1985)). The ALU's actions clearly fit into one of these exceptions. First, it would be grossly inappropriate for the NLRB to embrace a labor organization's blatant violation of the law (here, the LMRDA). Further, the fact that employees use LMRDA filings to evaluate labor organizations, such as their campaign statements, dues information, liquidity, etc., cannot be understated. In failing to make LMRDA filings, the ALU deprived Associates of their right and ability to evaluate what was being said by the ALU, making it impossible for them to properly educate themselves about the ALU. This deception by the ALU cannot be tolerated or embraced by the Board.

misrepresentations to Associates—usurping the laboratory conditions necessary to ensure a "free and untrammeled" election. *See General Shoe*, 77 NLRB at 126.

The Board cannot allow the election to stand in the face of the ALU's failure to file forms required by the LMRDA. Depriving Associates access to critical information during the critical time period creates a vacuum for voter confusion and material misrepresentations. Here, the ALU exploited the dearth of information to its own benefit. *See* Section IV(L). For example, had the ALU complied with the LMRDA filings, Associates would have ascertained their obligations surrounding dues. Instead, by not filing these required public disclosures, the ALU was free to change its messaging on a whim in order to influence Associates to vote for the ALU. *See supra* Section IV(L).

The ALU campaigning without having filed the required LMRDA forms irreparably harmed Associates' ability to discern critical information about the ALU. This is even more problematic given that the ALU is a new and unproven union. Indeed, one Associate testified that he was not going to vote for the ALU because he did not know what the ALU was about. (Martinez, Mo., 3287:11-3288:15). The ALU's failure to file the LMRDA required disclosures allowed it to continually alter its campaign messaging about its autonomy, required dues, and organizational structure in an attempt to influence Associates' votes. For these reasons, the ALU engaged in objectionable conduct and the election should be set aside.

S. Objection 22

1. <u>Amazon's Objection</u>

The ALU distributed marijuana to employees in return for their support in the election. Amazon made the Region aware of such conduct several times. The Board, as a federal agency and regulator, cannot condone such a practice as a legitimate method of obtaining support for a labor organization. *See e.g.*, *Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d

1154, 1165 (9th Cir. 2020) (citing *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018)) ("We will not presume that Congress would enact a statute that requires a federal agency to violate federal law."); *see also Epic Sys. Corp.*, 138 S. Ct. at 1624 (courts should strive to give effect to both laws when two are in conflict). The ALU's distribution of marijuana was an impermissible grant of benefit and interfered with employees' free choice in the election. *See Go Ahead N. Am., LLC*, 357 NLRB at 77-78, 77 fn. 6 (setting aside election where union granted benefits with a value in excess of "minimal").

2. <u>Legal Standard</u>

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2).

A union generally cannot make, or promise to make, a gift of tangible economic value as an inducement to win support in a representation election. *See Mailing Servs.*, 293 NLRB at 565-66 (objectionable for a union to provide free health screenings before an election); *Owens-Illinois, Inc.*, 271 NLRB 1235, 1235-1236 (1984) (finding the union's provision of $16 jackets to unit employees objectionable); *Gen. Cable Corp.*, 170 NLRB 1682, 1682-83 (1968) (concluding that the union's distribution of $5 gift certificates to unit employees was an objectionable inducement to support the union).[89]

[89] The Hearing Officer can take judicial notice of ALU President Mr. Smalls' public statements in which he admits to giving out free goods and benefits to Associates during the critical period to induce support to win the representation election. (*See, e.g.*, EMP 0204.2, 0454-Rejected). Such conduct is "sufficiently related" to Amazon's Objection 22. *See e.g., Labriola Baking Co.*, 361 NLRB at 412; *Fred Meyer Stores*, 355 NLRB at 543 fn. 7; *Fiber Indus.*, 267 NLRB 840, 840 fn. 2 (1983). According to relevant and controlling Board precedent, Regional Director Overstreet cannot learn about objectionable conduct during the objections hearing and ignore it. *See White Plains Lincoln Mercury*, 288 NLRB at 1136 (if the Regional Director receives or discovers evidence during the investigation that shows that the election has been tainted, he should not ignore such conduct even if it was not specifically alleged); *see also Gen. Signal Corp.*, 234 NLRB at 914 fn. 1 (citing *Am. Safety Equip. Corp.*, 234 NLRB 501 (1978), and *Dayton Tire & Rubber Co.*, 234 NLRB 504 (1978)) (noting that in two decisions issued subsequent to the Administrative Law Judge's Decision, the Board has restated and reaffirmed its policy permitting a Regional Director to set aside an election because of objectionable conduct discovered during his investigation, even though that conduct was not the subject of a specific objection); *Labriola Baking Co.*, 361 NLRB at 412 (explaining, "the

Although not all pre-election benefits are *per se* objectionable, the Board has explained that any benefit that would reasonably have been viewed by employees as "intended to influence" the outcome of the election is objectionable. *B & D Plastics, Inc.*, 302 NLRB at 245. In evaluating whether the benefit is "intended to influence" the outcome of the election, the Board "examine[s] a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the timing of the benefit; (3) the number of employees receiving it; and (4) how employees would reasonably view the purpose of the benefit." *Id.*

3. <u>The ALU's Distribution of Marijuana Constitutes Objectionable Conduct</u>

The ALU distributed marijuana to Associates during the critical period. At least eight Associates confirmed this fact during the Hearing, including the President of the ALU himself. When pressed, and despite the "critical period" being defined to him in numerous questions as December 22, 2021 to March 30, 2022, Mr. Smalls admitted at least four times during his testimony that the ALU distributed marijuana to Associates until "the date we got an election." (Smalls, 4580:5-17, 4563:5-11, 4576:9-4577:7, 4562:12-4563:4). That date was February 17, 2022, nearly two months from the start of the critical period (December 22, 2021), and thus, well within the critical period. (EMP 0182).

The Board must hold that such distribution amounts to objectionable conduct. The record evidence establishes that the ALU distributed a Schedule 1 narcotic under the federal Controlled Substances Act (CSA) to Associates during the critical period. Regardless whether or not New York State has legalized recreational use of marijuana, ratifying this behavior as a legitimate means of gaining support with voters would require the Board to turn a blind eye to violations of federal criminal law. The Board should reject the ALU's invitation to set such a precedent.

Board may consider conduct that does not exactly coincide with the precise wording of the objections where, as here, that conduct is sufficiently related to the filed objections.") (internal quotation marks omitted).

a) *In Undisputed Testimony, Numerous Associates Testified That the ALU's Marijuana Distribution Occurred during the Critical Period*

"With respect to timing, the Board draws an inference that benefits granted during the critical period are coercive." *Jam Productions, Ltd. et. al.*, 371 NLRB No. 26, slip op. at *12 (2021). A union is "like an employer, barred in the critical period prior to the election from conferring on potential voters a . . . benefit to which they would otherwise not be entitled." *Mailing Servs.*, 293 NLRB at 565.

Here, numerous witnesses testified that the ALU provided marijuana to Associates *during the critical period*. Indeed, no fewer than eight Associates confirmed that the distribution of marijuana occurred between December 22, 2021 and through March 30, 2022.

Ms. Goriva testified that she witnessed the ALU handing out marijuana at a table near the recruitment office at JFK8 approximately three to four weeks prior to the election. (Goriva, 936:1 - 936:21). She also stated that she saw a chalkboard next to the ALU table with the words "Free Weed" written on it. (Goriva, 937:16-20).

Mr. Delancey similarly testified that he witnessed the ALU provide marijuana to Associates on two separate occasions—once in January 2022 and once in March 2022. (Delancey, 1259:11-25). In fact, the ALU handed marijuana to him personally. (Delancey, 1261:8-17, 1261:20-1262:9). Mr. Delancey even recalled the strain or specific type of marijuana given: gorilla glue. (Delancey, 1262:13-18).

Mr. Cordova testified that he witnessed Mr. Smalls, Mr. Palmer, Mr. Martinez, and Mr. Dutchin, all agents of the ALU, distribute marijuana to Associates during the time period from December 22, 2021 through March 30, 2022. (Cordova, 1296:19-1297:18, 1298:19-1299:5, 1300:14-1301:5). Mr. Cordova explained that he knew this was occurring because there was a sign next to the ALU table that read "Free Weed and Pizza." (Cordova, 1297:19-1298:2).

Ms. Martinez testified that during the first week of March 2022, she witnessed Mr. Tristian Martinez[90] who was wearing an ALU shirt, yell "free food, free T-shirts, free weed" on a megaphone near the recruiting office on the northeast corner of the JFK8 building. (Martinez, K., 2007:22-2009:10, 2016:5-21, 2022:7-13).

Mr. Moises Martinez testified that he observed, in February 2022, the ALU offering free marijuana to Associates with a sign saying "free weed if they sign up for the ALU" outside of the JFK8 recruiting office. (Martinez, Mo., 3293:15-3295:15).

Ms. Rosario also testified that she witnessed ALU organizers distribute pizza, t-shirts, and bags of marijuana to Associates a few weeks prior to the election to collect signatures on JFK8 property. (Rosario, 3322:2-3325:12). She knew that they were ALU organizers because the individual who tried to give her marijuana was wearing an ALU T-shirt. (Rosario, 3325:2-7).

Ms. Rosado testified that, in February 2022, she witnessed Mr. Smalls provide marijuana to one of her co-workers while she was having a smoke break in an exterior breakroom at JFK8. (Rosado, 3071:25-3073:8). After Mr. Smalls provided the Associate marijuana in the exterior break room, she witnessed Mr. Smalls hand the Associate a white index card. (Rosado, 3078:17-3079:16). Ms. Rosado explained that the Associate signed the card and returned it to Mr. Smalls. (Rosado, 3078:17-3079:16).

Former ALU organizer Ms. Monarrez confirmed that she witnessed "Chris [Smalls] [give] out marijuana to workers in exchange for signatures" almost daily between December 22, 2021, and January 26, 2022 (Monarrez, 3992:15-3993:5, 3998:18-4001:1). Moreover, as

[90] Of note, the ALU never called Mr. Tristan Martinez, Mr. Palmer, or Mr. Dutchin to testify in order to ask them questions related to the distribution of marijuana. The ALU also neglected to ask Mr. Smalls any questions whatsoever. "[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *Flexsteel Indus.*, 316 NLRB at 757-58 (drawing the "strongest possible adverse inference against Respondent for failing to ask [the witness] to give the testimony that he could have given.").

Ms. Monarrez explained, Mr. Smalls' possession of marijuana and the fact that he distributed it to Associates "was not a secret" and that he "had [the marijuana] for multiple months and would openly talk about it. The workers would also openly talk about it." (Monarrez, 3998:2-14). Notably, on cross-examination, the ALU did not ask Ms. Monarrez any questions about this testimony. Accordingly, the Hearing Officer should make an adverse inference against the ALU on this issue. *Flexsteel Indus.*, 316 NLRB at 757-58 (noting that adverse inferences should be taken when a party fails to ask a witness questions about a topic).

Additionally, ALU President Mr. Smalls' testimony confirms that the ALU provided marijuana to Associates during the critical period. Although Mr. Smalls made the conclusory statement that the ALU only provided marijuana to Associates before the "critical period," he testified several times that his definition of "critical period" is the period after the ALU "had an election date." (Smalls, 4576:9-4577:11, 4562:12-4563:11, 4580:5-17):

> Q. And then, Mr. Smalls, when you said that you were giving out free weed because it's legal, what time period are you talking about that you gave out free weed because it's legal?
>
> A. Before the critical period.
>
> Q. And sir, when you say before the critical period, what exactly do you mean?
>
> A. Once again, before we had an election date.

(Smalls, 4580:10-17).

The ALU and Amazon did not have an "election date" until February 17, 2022, and the Region did not provide the Parties notice that the ALU obtained a sufficient showing of interest to warrant further processing of the petition until January 26, 2022—well over a month into the critical period. (EMP 0182). As Mr. Smalls testified, "[t]he reason that we gave out food during

our campaign and whatever else we gave out was to get people on board to have conversations. We didn't need to pass out anything during a critical time period because we already had an election date set." (Smalls, 4562:12-22). And once the ALU had its election date, "there was no need for [it] to continue distributing free anything because we already had an election date." (Smalls, 4563:5-11).

The ALU offered no credible testimony during the Hearing to rebut the Associates' testimony—and Mr. Smalls' admission—that the ALU distributed marijuana to Associates during the critical period. Like trained actors reciting their lines, each ALU officer and/or agent eagerly testified that such distribution only happened before the "critical period." But the details reveal irreconcilable contradictions.[91]

In sum, the overwhelming weight of credible testimony confirms that the ALU distributed marijuana to Associates during the critical period[92]—between December 22, 2021

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[91] ALU organizer Justine Medina initially stated that the ALU did not distribute marijuana between December 22, 2021 and March 30, 2022. (Medina 3896:17 - 3896:21). Importantly, however, after Amazon counsel was allowed to ask her follow-up questions to probe the veracity of her statement, she confirmed that what she meant was that she had no recollection as to whether the ALU distributed marijuana after December 22, 2021, stating, "you asked if I remembered and I do not have a recollection of that." (Medina 3897:7-8).

ALU lead organizer Mr. Anthony was eager to volunteer that the ALU never distributed marijuana during the critical period. When asked simply "whether [he] was aware that the ALU was distributing marijuana to employees," he replied, "Yes. I know about it Kurt, but we did it before the critical period." (Anthony 3635:10-19). When probed, Mr. Anthony acknowledged that he was not always present when the ALU solicited Associates at JFK8 near the recruiting office. (Anthony, 3635:10-24, 3642:18-3644:16). He further stated that the ALU stopped distributing marijuana in November 2021, contradicting Mr. Smalls' testimony that it continued until an election date was set. (Smalls, 4580:10-17; Anthony, 3638:8-13).

[92] Despite Hearing Officer Dunn's continuous rulings that the relevant period was limited to December 22, 2021 through March 30, 2022, Board law is clear that this is inaccurate. The Board generally "will not consider instances of prepetition conduct as a basis upon which to set aside an election." *Dresser Indus. Inc.*, 242 NLRB 74, 74 (1979). However, improper conduct occurring before the critical period may be considered when "such conduct adds meaning and dimension to related post-petition conduct." *Id.* Under this standard, prepetition conduct may be considered when it is of a similar nature to objectionable conduct that occurs during the critical period. *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 993 (4th Cir. 2012); *see also Cath. Med. Ctr. of Brooklyn & Queens, Inc. v. NLRB*, 589 F.2d 1166, 1173-74 (2d Cir. 1978), *modified sub nom.*, No. 4135, 1979 WL 4850 (2d Cir. Jan. 9, 1979) (finding that it was error for the Board, in considering objections to a representation election, to exclude evidence of alleged union misconduct that occurred during the pendency of an election petition that was subsequently withdrawn, but prior to the filing of the "operative" election petition; the Board was required to consider alleged misconduct consisting of pro-union activity by supervisors from the date of the filing of the first

and March 30, 2022. As Board caselaw unmistakably compels, the provision of such a benefit during the critical period gives rise to an inference of coercion. *See Jam Productions, Ltd. et. al.*, 371 NLRB at *12 (stating "benefits granted during the critical period are coercive"). Reaching a contrary conclusion would require the Board to ignore the uncontradicted testimony of eight non-party witnesses who all confirmed that the ALU's marijuana distribution continued well into the critical period, as well as the testimony of the ALU's President that distribution continued during the critical period until an election date was set.

b) *The Distribution of Marijuana was Well-Known to Associates and Created a False Impression of Support for the ALU*

The weight of testimony also supports the conclusion that it was common knowledge among Associates that the ALU was providing free marijuana in exchange for Associates' support of the ALU. Although no witness could be expected to testify as to the precise number of Associates who were offered marijuana, the testimony supports the conclusion that the ALU openly distributed marijuana at a table outside of the front corner of Amazon's JFK8 building, in the "smoke shack" outside of Amazon's JFK8 building, and at the bus stop where Associates got off and on the bus. *See supra* Sec. II(D)(1).

As already noted, Ms. Monarrez testified that the distribution of marijuana by the ALU was common knowledge and that the ALU did not attempt to keep it a secret. (Monarrez, 3997:13-3998:14). Indeed, many Associates testified that the ALU displayed large signs offering "free weed" in exchange for ALU support, and announced that it was distributing "free weed" to Associates via bullhorn. (Goriva, 937:16-20; Martinez, K., 2007:22-2009:10; Martinez, Mo., 3293:15-3295:15). This widespread knowledge among the Associates is corroborated by the

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election petition.) Thus, Hearing Officer Dunn erred in rejecting Ms. Fray's video of herself accepting marijuana from the ALU mere hours before December 22, 2021. (EMP 0513-v-Rejected).

existence of eight individuals who testified that they witnessed the ALU distributing marijuana to Associates, including themselves, during the critical period.

Much like the union in *Savair*, the ALU was able to campaign off the receipt of authorization cards that may have been signed by Associates who wanted nothing more than to procure a benefit squarely within the control of the ALU—here, an illicit substance that is entirely unconnected to any employment benefit. This necessarily has the tendency to create a false impression of union support, and the ALU was able to campaign off that support.

c) *The ALU's Stated Purpose in Providing Marijuana was to Influence Voters*

Even if the ALU provided marijuana to voters without requiring them to sign an authorization card, the conduct is still objectionable. In *B & D Plastics*, the Board set aside a representation election because it found that an employer-sponsored paid day off for all employees, during the critical period, was an objectionable benefit. 302 NLRB at 245. Although the day off was not conditioned on the employees' support for the Company, the Board found that the employees could have reasonably viewed the employer's actions as an attempt to influence their votes in favor of the employer's position. *Id.* The grant of a paid day off was enough for the Board to set aside the election. *Id.*

Similarly, in *Mailing Servs., Inc.*, the Board set aside an election because it found that a union's provision of free medical screenings to voters during the critical period may have caused the employees to feel an obligation to vote for the union. 293 NLRB 565-66. There, the union owned two mobile medical unit vans from which they screened around 80 employees for medical conditions such as high blood pressure and cholesterol. *Id*. at 565. The Board reasoned that the employees' free choice was impaired by the grant of this benefit because the employees might have felt an obligation to vote for the union after receiving the screenings. *Id.* at 566 fn. 3; *see also Go Ahead N. Am., LLC*, 357 NLRB at 77-78 (setting aside election because "employees

reasonably would infer that the purpose of the Union's expressed willingness to forgive [missed dues payments] was to induce them to support the Union."); *see also B & D Plastics, Inc.* 302 NLRB at 245 (where the Board found that a day off with pay for a cookout was objectionable)*; River Parish Maint., Inc.*, 325 NLRB at 816-17 (where providing employees with crab boil meal and less than 2 hours PTO was found objectionable); *Gen. Cable Corp.*, 170 NLRB at 1682-1683 (where the Board found that the provision of $5 gift certificates was objectionable); *Owens-Illinois*, 271 NLRB at 1235-1236 (where the Board found that providing $16 jackets was objectionable).

Here, the distribution of marijuana to Associates during the critical period had more than a reasonable tendency to install the same sense of obligation present in *B & D Plastics*, *Mailing Servs.*, *River Parish*, *Gen. Cable Corp.*, *Owens-Illinois*, and *Go Ahead N. Am*. In other words, the marijuana was distributed to induce the Associates to vote for the ALU. Indeed, the ALU's stated purpose in distributing marijuana to Associates was to "give them things that will make their lives better." (Medina, 3901:17-24). Consistent with this objective, many Associates testified that the ALU marketed marijuana as part of the ALU's efforts to win voter support. (Martinez, Mo., 3293:15-3295:15; Monarrez, 3992:15-3993:5; Rosado, 3071:25-3073:8, 3078:17-3079:16). Under these circumstances, it is clear that the ALU's distribution of marijuana was designed to "purchase" Associate support and make them feel obligated to vote for the ALU when they got to the polls, even if the distribution was not conditioned upon the signing of an authorization card.

d) *The Subjective Value of Marijuana Distribution Outweighs its Economic Value*

Here, the ALU's distribution of marijuana, even if dispensed to employees in "little bags," had a "tendency to influence" voters. The Board has held that if a benefit's economic

value is so minimal, then it may not be objectionable. *Go Ahead N. Am., LLC*, 357 NLRB at 78 fn. 6 (noting that the Board has previously held pro-union t-shirts not objectionable). Monetary value, however, is not the only factor that the Board must analyze. Rather, the Board also analyzes the benefit's subjective desirability and propensity to influence a vote. *See, e.g., River Parish Maint., Inc.*, 325 NLRB at 816-17 (holding that employees "could reasonably have viewed" the provision of a "crab boil" meal and "1 hour and 45 minutes of paid time" as "intended to influence their votes."). Indeed, the evidence establishing that the ALU was offering "free weed if [Associates] sign up for the ALU" demonstrates that this was an exchange carrying value, regardless of the monetary cost of the marijuana.

In *Owens-Illinois*, the Board set aside an election because it found that the union's distribution of $16 jackets to approximately 25 employees was an objectionable benefit. 271 NLRB at 1235-36. In its decision, the Board reasoned that although the distribution of inexpensive campaign propaganda (such as buttons, stickers, or T-shirts) is not *per se* objectionable, the overall value of the jackets was high because of the timing of their distribution. *Id.* Specifically, the Board concluded that the union's distribution of jackets in between voting sessions may have "appeared to the electorate as a reward for those who had voted for the [union] and as an inducement for those who had not yet voted to do so in the [union's] favor." *Id.* at 1235. This rendered the jackets an objectionable benefit, despite the relatively low economic value of the jackets. *Id.* at 1236.

Similarly, in *Gen. Cable Corp.*, the Board set aside an election because it concluded that the distribution of $5 gift certificates to employees was an objectionable inducement to support the union. 170 NLRB at 1682-83.

In the instant matter, witnesses testified that the ALU gave out "little bags" of marijuana to Associates. (*See e.g.*, Rosario 3328:9-12; Delancey, 1261:8-17, 1261:20-1262:9). ALU lead organizer Jason Anthony testified that each bag was "less than an ounce." (Anthony, 3638:13-16). Regardless of the precise economic value of the marijuana, the illegal nature of the benefit, coupled with the nature of its distribution, compels the conclusion that the probable impact on the Associates' election choice was much greater than the economic value of each "little bag." The receipt of a federally illegal narcotic—not yet sold in New York retail stores during the critical period—was an item of significant value to some Associates,[93] and certainly much more so than a $16 jacket, a $5 gift certificate, or a crab boil meal.

4. <u>The Board Should Not Condone the ALU's Distribution of an Illegal Substance to Gain Associate Support</u>

When considering all *B & D Products* factors, it becomes clear that that ALU's distribution of marijuana had a reasonable tendency to influence voters' free and fair choice. For this reason alone, the Board should set aside the results of the election. *See* Sec. IV.S.3, *supra*.

In addition, the Board should not, as a federal agency and regulator, condone the distribution of an illegal narcotic under the CSA as a legitimate method of obtaining support for a labor organization. *See e.g.*, *Stand Up for California!*, 959 F.3d at 1165 (citing *Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1624) (noting "[w]e will not presume that Congress would enact a statute that requires a federal agency to violate federal law."). Despite recent state and local efforts to decriminalize marijuana, the use and distribution of marijuana remains illegal under federal law. Specifically, the CSA prohibits the distribution of marijuana, possession with intent to distribute marijuana, and simple possession of marijuana. 21 U.S.C. § 841(a)(1); 21 U.S.C. § 844(a); 21

[93] To date, New York has yet to issue any retail licenses for the sale of cannabis. *See* New York State Office of Cannabis Management, Licensing, https://cannabis.ny.gov/licensing ("The Office of Cannabis Management is developing regulations which will outline how a person or business can apply for and receive a license in the new adult-use cannabis industry.") (last visited July 26, 2022).

U.S.C. § 812; 21 C.F.R. § 1308.11. Congress outlawed the distribution and possession of controlled substances, like marijuana, that were deemed to have a "substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2).

The Supreme Court has held on several occasions that the Board cannot effectuate the purposes of the NLRA if doing so would conflict with other federal statutes. For example, in *S.S. Co. v. NLRB*, 316 U.S. 31 (1942), the Supreme Court determined that the Board could not reinstate workers who were terminated for striking where the type of striking conduct was illegal under maritime law. *Id.* at 47-48.

Similarly, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Supreme Court held that federal immigration law, as expressed in the Immigration Reform and Control Act of 1986 ("IRCA"), foreclosed the Board from awarding backpay to an undocumented worker who had never been legally authorized to work in the United States. *Id.* at 140 (noting that IRCA prescribes employer penalties for the employment of undocumented workers). The Court reasoned that "allowing the Board to award backpay to [undocumented workers] would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." *Id* at 151*; see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) (holding that the Board cannot find a debtor-in-possession guilty of an unfair labor practice for rejecting or modifying a collective bargaining agreement because doing so would run counter to provisions of the Bankruptcy Code).

Here, the record evidence has clearly established that the ALU distributed marijuana to Associates during the critical period. Such activity unmistakably violates the CSA. For the Board to conclude that such illicit activity does not amount to objectionable conduct would require the

Board to hold that a union's violation of federal criminal law is immaterial and permissible in a representation case.[94]

For all of the foregoing reasons, Amazon respectfully requests that the Board sustain Objection 22 and set aside the election.

T. Objection 23

1. <u>Amazon's Objection</u>

On March 25, 2022, Mr. Smalls posted to his social media accounts a video of himself standing outside the voting area over 20 minutes after voting began and after he had told certain employees that the ALU would know how they voted. Employees viewing a video of the ALU's President appearing to stand outside the polling area while the polls were open reasonably tended to coerce and intimidate voters and potential voters and lead them to believe that the ALU and Mr. Smalls was or would surveil them. Mr. Smalls' social media post also reasonably tended to create the impression with voters that the Board supported the ALU in the election, as it failed to properly police and/or took no actions to remove him from the "no-electioneering zone" established by the Board.

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[94] While the ALU may attempt to argue that its conduct was not objectionable because New York decriminalized small possession and transfer of cannabis in 2021, *see* N.Y. Senate Bill 854-A (Jan. 6, 2021) (Marihuana Regulation and Tax Act) ("MRTA"), this fact is irrelevant because the Board is a federal agency and marijuana remains illegal under federal law. As held in *S.S.*, *Hoffman*, and *Bildisco*, the Board cannot ignore other federal laws in carrying out its directives. *See Hoffman Plastic Compounds, Inc.*, 535 U.S. at 151; *Bildisco & Bildisco*, 465 U.S. at 532.

Even assuming that the Board could ignore the CSA, the notion that the ALU's conduct was legal under New York state law is unsettled at best. First, the ALU set forth no record evidence that it is licensed to distribute marijuana under the MRTA. Nor could it. New York's Cannabis Control Board has yet to issue any retail licenses, so the retail sale of marijuana is still unlawful under New York law. Moreover, the law only allows unlicensed transfers of up to 3 ounces of cannabis between persons twenty-one years of age or older if such transfer occurs "without compensation." *See* NY Penal Law § 222.05(1)(b). Here, there is clear evidence that the ALU's distribution of marijuana was given in exchange for the signing of union authorization cards. *See* Sec. II.D.1, *supra*. Thus, it is unclear whether the ALU distributed marijuana "without compensation." As such, Mr. Smalls statement that the ALU gave out free weed because "it's legal" is of dubious validity.

2. Legal Standard

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1 and Objection 9, respectively. *See* Sections IV(A)(2) and IV(G)(2).

3. ALU President Mr. Smalls' March 25, 2022 Tweet Depicts Impermissible Electioneering and Gave the Appearance to Voters That he was Surveilling Them at the Polls

ALU President Mr. Smalls engaged in impermissible electioneering and gave voters the impression that he was surveilling them at the polls by his March 25, 2022 video which he distributed through his widely-known Twitter account.

a) *Mr. Smalls' Video and Tweet Constitute Illicit Electioneering*

At 8:21 am on March 25,[95] approximately 20 minutes after the election was scheduled to start, ALU President Mr. Smalls posted, on his social media accounts, a video of himself standing close to the front of the white election tent, well within the no-electioneering zone. In the video, Mr. Smalls, wearing a red ALU sweatshirt with the ALU's logo, pans the camera through the area and makes the number 1 with his hand. The video contains the caption "Let's go JFK8 Vote Yes." (EMP 0227-v). The tweet itself, which comes from Mr. Smalls' Twitter handle @Shut_downAmazon, is captioned "Day 1 @amazonlabor Vote Yes!!" (EMP 0227). The tweet was later retweeted by the ALU. (EMP 0229).

Mr. Smalls' own video evidence, which he publicly tweeted, and which the ALU publicly retweeted, establishes that he was in the no-electioneering zone, broadcasting pro-ALU messaging to the voters through hand gestures and written captioning, while wearing his red ALU sweatshirt the morning of the election while the polls were open. (EMP 0227, EMP 0227-v, EMP 0229). Neither the ALU nor the Region presented any evidence to establish that the video

[95] Although called as a witness by the ALU, Mr. Smalls did not testify as to when the video was taken. Mr. Smalls had the opportunity then to explain when he took the video, and for what purpose.

was made on a different date or time and, therefore, the record remains undisputed that Mr. Smalls was within the no-electioneering zone while the polls were open. Furthermore, the ALU's failure to question Mr. Smalls as to the timing of this video and tweet compels the inference that had the ALU questioned him about the video and tweet, Mr. Smalls would have admitted that he took the video, and posted the tweet, exactly when the evidence proves it was taken and posted—on the morning of March 25, 2022 while the polls were open. *See Flexsteel Indus.*, 316 NLRB at 757-58 (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

Under the *Boston Insulated* factors, Mr. Smalls' video and tweet constitute objectionable electioneering that require overturning the election results. The purpose of the *Boston Insulated* factors is "to determine whether the conduct reasonably tended to interfere with employee free choice." *Pearson Educ.*, 336 NLRB 979, 979 (2001). Pursuant to these factors, Mr. Smalls' video and corresponding tweet were coercive and interfered with Associates' free choice within *minutes* of the election's scheduled start time. Further, by the very nature of social media, the tweet and video remained accessible throughout the remainder of the election. Mr. Smalls, as President, is the highest ranking leader of the ALU and he was stationed just outside the opening of the voting tent, which was well inside the designated no-electioneering zone as established by Ms. Anderson, Ms. Fedorova, and Region 29. (EMP 0227, EMP 0227-v, EMP 0229, EMP 0695-E). Signage posted by Region 29 on the tent itself clearly set forth the Board's prohibition of electioneering or loitering in the area. (EMP 0673-A). As to the extent and nature of the message, Mr. Smalls used his social media presence to interact with voters and tell them to "vote yes" while standing in the no-electioneering zone. While he didn't *verbally say* anything, his

gestures and written dialogue make the point for him—voters should vote for the ALU. Mr. Smalls, using the same social media platform the ALU used to successfully communicate to mass voters, took the opportunity to get one final lasting message to voters *after* the election was scheduled to start and the polls were open. Assuredly, Mr. Smalls' conduct constitutes impermissible and objectionable electioneering and necessitates overturning the election.

b) *Mr. Smalls' Tweet and Video Impermissibly Gave the Impression That the ALU Will Surveil Voters at the Polls*

ALU President Mr. Smalls' tweet and video also impermissibly gave voters the impression that the ALU can, and will, surveil them at the polls. "[A] party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." *Nathan Katz Realty, LLC*, 251 F.3d at 993. Impermissible surveillance occurs even where the party representative says *nothing* to the voter and is *outside* the no-electioneering area. *Id.* Generally, it is well-accepted that a party can create an objectionable impression of surveillance when its statements or actions could cause employees to reasonably assume that their Section 7 activity had been placed under surveillance. *Caterpillar Logistics, Inc.*, 362 NLRB at 396.

By publicly tweeting a video of himself standing in front of the entrance to the polls twenty-one minutes after the first voting session was scheduled to start, Mr. Smalls broadcasted a clear message to all voters—that he had gained access to the polling area and he had the ability to watch them as they exercised their Section 7 right to vote. Critical to the question of illicit surveillance is whether voters are forced to pass by a party representative on their way to vote. *See e.g. Nathan Katz Realty, LLC*, 251 F.3d at 991-93. Mr. Smalls' message was clear: he would watch the voters and they would be required to pass him in order to exercise their Section 7 right

to vote.[96] A reasonable voter would believe that their activity would be under surveillance when they went to vote.

This is the exact messaging the Board prohibits regarding surveillance. Voters who are not in favor of the ALU, who also have Section 7 rights worthy of protection, would reasonably be coerced by Mr. Smalls' surveillance. As explained by the ALJ, whose decision was approved by the Board in *Elec. Hose & Rubber Co.*:

> Without any explanation for a supervisor to be "stationed" outside the voting area, it can only be concluded that his purpose in observing the event was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched. This conduct is found to have destroyed the laboratory conditions necessary for the conduct of a free and fair election.

262 NLRB at 216.

Accordingly, it was incumbent on the ALU and Mr. Smalls to explain why Mr. Smalls was "stationed" outside the voting area, which they failed to do during the Hearing. An adverse inference should be drawn based on the ALU's failure to illicit testimony from Mr. Smalls regarding his conduct in front of the polling place as depicted in the video. It is apparent, then, that Mr. Smalls' purpose was to let voters know that he would be there, surveilling them. Of course, such surveillance would have the tendency to coerce non-ALU supporters from voting. The Board cannot allow a party representative, be it a union president or a company president, to surveil and intimidate voters in this way. The election must be set aside on this basis.

[96] As stated in Section II.G.3(b), the unrebutted evidence established that not only did Mr. Smalls (and other ALU officers and agents) post a tweet of himself, which gave the impression of surveillance, he actually surveilled voters. It is also undisputed that the Board Agents never told Mr. Smalls (or the other ALU officers and agents) not to electioneer in the no-electioneering zone, or to leave.

U. Objection 24

1. Amazon's Objection

The ALU engaged a camera/documentary crew that maintained a consistent presence in the polling place. Despite being directed to leave the area by Amazon in front of the Board Agents and ALU President Mr. Smalls, the crew returned several times and filmed Associates in line waiting to vote, and Associates entering and exiting the voting tent. These actions reasonably tended to coerce and intimidate voters and potential voters and lead them to believe that Mr. Smalls and the ALU would know if or how they voted, and created the impression of surveillance.

2. Legal Standard

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1. *See* Section IV(A)(2). Amazon also incorporates by reference its discussion of the applicable legal standard in Objection 13 regarding the objectionable nature of unions photographing employees engaged in Section 7 activity. *See Randell Warehouse of Arizona*, 328 NLRB 1034 (1999) (*Randell I*). Namely, "[i]n the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer." *Randell Warehouse of Arizona*, 347 NLRB at 591 (*Randell II*); *see also Sprain Brook Manor Nursing Home*, 348 NLRB 851, 851 (2006) (distinguishing *Randell II* as identity of photographer was unclear and union obtained signed consent forms prior to using the photographs in campaign materials).

Finally, Amazon also incorporates by reference its discussion in Objection 8 regarding the statements made by the Hearing Officer and Representative for the Regional Director for Region 29 about (i) how the secret ballot vote is "sacrosanct," (ii) "part of the vote is queuing up

to vote when the polls are open," (iii) and it is "inappropriate to have photos and videos" of voters in line to vote entered into the record. (Friedheim-Weis, 426:4-426:13; Dunn, 426:14-24).

It is axiomatic that the ALU engaged in objectionable conduct by video recording voters engaged in the most "sacrosanct" Section 7 activity the Board sponsors—a secret ballot election.

3. The ALU Engaged a Documentary Film Crew That Recorded Employees in Line While They Waited to Vote

The evidence establishes that the ALU's documentarian, Mr. Maing, was in the no-electioneering zone on the morning of March 25, 2022. Ms. Russell testified that she confronted him near the voting tent just before the polls opened that morning and he identified himself as a documentary filmmaker making a documentary about Mr. Smalls and the ALU. (Russell, 2353:21-2355:1, 2355:13-19, 2354:3-2355:16, 2356:3-18). Other witnesses—including Lead Organizer Mr. Anthony, admitted that the ALU was working with a documentarian, Mr. Maing, to make a documentary about the ALU. (Anthony, 3657:15-3659:3).[97] (EMP 0201.3, EMP 0344-v, EMP 0361-v, EMP 0364.1, EMP 0758-v, EMP 3002).

Following Ms. Russell's initial conversation with the ALU documentarian Mr. Maing, he remained on site in the no-electioneering zone, filming voters as they waited in line to vote. In unrebutted testimony, Ms. Kanzler testified that while in the voting line on March 25, 2022, she saw Mr. Smalls accompanied by a cameraman—likely Mr. Maing—standing close to the entrance of the tent. (Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). Initially, Ms. Kanzler saw Mr. Smalls standing about 20 feet away from her as she stood in the voting line, but as Ms. Kanzler progressed through the voting line and approached the entrance to the tent, Mr.

[97] The question of whether or not the ALU maintained a contractual relationship with Mr. Maing as it relates to the ALU documentary is of no consequence. The record is replete with evidence that Mr. Maing consistently accompanied the ALU and its officers, making it obvious the ALU and/or Mr. Smalls worked in conjunction with Mr. Maing. (Troy, 1751:3-1752:8; Anthony, 3657:15-3659:3; EMP 0201.3, EMP 0364.1, EMP 3002).

Smalls and the cameraman were only about 5 feet away from Ms. Kanzler. (Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). Ms. Kanzler marked where Mr. Smalls was standing with the cameraman, clearly within the no-electioneering zone. (EMP 0695-B). Ms. Kanzler also witnessed Mr. Smalls converse with the cameraman. (Kanzler, 2174:2-4). Ms. Aluqdah testified that she too saw Mr. Smalls with a cameraman on March 25, 2022, while the voting session was ongoing, and that Mr. Smalls was in the no-electioneering zone. (Aluqdah, 2219:25-2220:24, 2227:12-25; EMP 0695-D). The ALU's own attorney elicited uncontroverted testimony from Ms. Aluqdah that Mr. Smalls was speaking to the cameraman in the no-electioneering zone, and that the cameraman was recording Mr. Smalls as he was speaking. (Aluqdah, 2244:20-2245:2).

On March 28, 2022, Ms. Villalongo, whose testimony stands unrebutted, saw Mr. Smalls, Mr. Daniels, Mr. Anthony, Mr. Martinez, and Mr. Flowers standing between the entrance to JFK8 and the voting tent, speaking with Associates who were in line to vote while one of the ALU members, Mr. Daniels, recorded the interaction. (Villalongo, 2791:13-2792:21, 2794:17-2795:11; EMP 0527).

All of the testimony that Mr. Smalls was accompanied by Mr. Maing on Amazon's property during the election and in the no-electioneering zone is unrebutted. These facts, therefore, are not in dispute. Counsel for the ALU also failed to question Mr. Smalls, Mr. Daniels, and Mr. Anthony about any of the facts alleged by Amazon's witnesses with respect to Objection 24, including whether Mr. Maing was on site during the election, whether Mr. Maing accompanied Mr. Smalls in the no-electioneering zone, and the nature of the relationship between the ALU and Mr. Maing. Such failure to examine a favorable witness regarding a factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact. *Flexsteel Indus.*, 316 NLRB at 757-58. The

appropriate inference here is that the ALU engaged a camera crew that violated the Associates' Section 7 rights by interviewing and filming them in line, and otherwise surveilling and intimidating voters, and that these actions are imputed to the ALU.

Accordingly, the record evidence remains undisputed that the ALU engaged a documentarian who was accompanied by Mr. Smalls in the no-electioneering zone while the polls were open during the election. The cameraman recorded Associates as they participated in the "sacrosanct" secret ballot process of a Board-run election. The ALU, through its documentarian, electioneered in the no-electioneering zone and photographed statutory employees engaged in Section 7 activity and therefore violated these Associates' Section 7 rights. As such, Objection 24 should be sustained, and the election must be set aside.

V. Objection 25

1. Amazon's Objection

ALU officials, agents, and supporters, including but not limited to non-employee ALU President Smalls and non-employee Gerald Bryson, engaged in objectionable conduct, including loitering in the "no-electioneering zone" established by the Board and/or within view of the polling area while polls were open, creating the impression among employees that the ALU was surveilling the polling area, and otherwise engaging in electioneering. This conduct reasonably tended to coerce and intimidate voters and potential voters.

2. Legal Standard

Amazon incorporates by reference the applicable standard from its earlier discussion regarding Objection 1 and Objection 9, respectively. *See* Section IV(A)(2) and IV(G)(1).

3. <u>The ALU's Pervasive Objectionable Electioneering and Surveillance around the Polls during the Election Requires That the Election be Overturned</u>

Throughout the Hearing, witnesses provided uncontroverted testimony regarding the ALU's objectionable conduct in the voting tent and impermissible loitering in the no-electioneering zone. As set out more fully in Objection 9, Region 29 abdicated their statutory obligation to police the no-electioneering zone. This abdication allowed the ALU unfettered access to the no-electioneering zone, which the ALU utilized to electioneer and loiter during multiple voting periods. Many witnesses described precisely where the ALU's electioneering took place, and some witnesses used maps of the JFK8 facility to illustrate the ALU's location. (Villalongo, 2790:3-2792:21, 2794:17-2798:20; Chu, 843:20-844:17, 850:9-15; Troy, 1717:24-1718:6; Martinez, K., 2000:13-2001:18, 2006:17-2007:3; Kanzler, 2168:12-2171:14, 2170:22-2172:11, 2173:5-2174:4; Aluqdah, 2219:25-2220:24, 2226:14-2228:14, 2250:21-2251:17; Spinella, 4809:21-4815:3; EMP 0227, EMP 0227-v, EMP 0695, EMP 0695-B, EMP 0695-D, EMP 0695-E, EMP 0695-G, EMP 0695-H). Each one of the events described below—almost all of which the ALU chose not to address in its presentation of evidence—would be enough on its own to mandate a rerun election. Yet when analyzed in totality, the Hearing Officer must find that the ALU engaged in protracted, repeated, and egregious electioneering in the no-electioneering zone while the polls were open. Such conduct is prohibited under the Act and, therefore, the election must be overturned.

a) *Five ALU Leaders Engaged in Objectionable Conduct on Friday, March 25 by Recording and Speaking with Associates Standing in Line to Vote*

Ms. Villalongo testified that on Friday, March 25, 2022, when she took her break at approximately 10:00 a.m., she saw Mr. Smalls, Mr. Flowers, Mr. Daniels, Mr. Anthony, and Mr. Tristan Martinez standing between the voting tent and the front entrance to JFK8. (Villalongo,

2791:12-22; 2792:14-18; 2797:16-25; 2798:1-14; 2798:20-22). The five ALU leaders were talking to voters in line while Mr. Daniels was recording the conversations. (Villalongo, 2792:19-21). The individual she identified as Mr. Daniels was filming with a large camera pointed toward the tent and the line of voters. (Villalongo, 2795:18-20; 2809:10-18). On cross-examination, Ms. Villalongo testified that she was outside the building on break for 5 to 6 minutes and she witnessed the five ALU leaders speaking with voters in line throughout the entirety of her break. (Villalongo, 2809:2-9). Critically, Ms. Villalongo's testimony is uncontroverted. Indeed, although Mr. Smalls, Mr. Daniels, and Mr. Anthony testified at the Hearing, not one of them disputed the factual account presented by Ms. Villalongo nor did counsel for the ALU question them on Ms. Villalongo's testimony. Failure to examine a favorable witness regarding factual issues upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact. *Flexsteel Indus.*, 316 NLRB at 757-58. The only inference for the Hearing Officer to draw from the undisputed record testimony on these events is that the incident occurred exactly how Ms. Villalongo testified it occurred.

The ALU's actions violate the Board's bright-line rule in *Milchem, Inc.*, which requires that the election be set aside as a result of these actions.[98] 170 NLRB at 362. Under *Milchem, Inc.*, a representative of a party to an election is strictly prohibited from engaging in "prolonged conversations" with "voters waiting to cast ballots . . . ." *Id.* In *Milchem Inc.*, the Board found that a 5 minute conversation constituted a "prolonged conversation" which justified overturning the election. *Id.* at 363. The Board's strict rule is meant to protect the voter from last minute electioneering pressure, and to avoid unfair advantage. *Id.* at 362. Here, uncontroverted

[98] The NLRB's website further notes that an election may be overturned where a party "[e]ngage[s] in prolonged conversations with employees waiting in line to vote, regardless of the subject." *See* https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/election-related-content.

testimony establishes that the five ALU officers and leaders were engaged in at least a 5 to 6-minute conversation with voters who were waiting in line to cast their vote. (Villalongo, 2809:2-:9, 2794:17-25). This is precisely the type of conduct *Milchem* prohibits. Moreover, the Board applies the *Milchem* rule "without inquiry into the nature of the conversations." 170 NLRB at 362-63 (finding a union official's five minute conversation with approximately 15 voters waiting to vote voided the election without considering the content of the conversation); *Volt Tech. Corp.*, 176 NLRB at 836-37 (finding a company supervisor's multiple short conversations with voters along the voting line for almost the entirety of the voting period was sufficient to void an election particularly because the supervisor previously asked employees not to vote for the union). Accordingly, this conduct *alone* warrants setting aside the election.

Furthermore, the ALU impermissibly videotaped voters while they were engaging in Section 7 activity. "In the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer." *Randell Warehouse of Arizona*, 347 NLRB at 591 (*Randell II*). Accordingly, the ALU, through its admitted agents Mr. Smalls, Mr. Mr. Daniels,[99] Mr. Flowers, Mr. Anthony, and Mr. Tristan Martinez,[100] engaged in objectionable conduct by conversing with and filming voters standing in line on March 25, 2022, as observed by Ms. Villalongo and relayed through her uncontroverted testimony.

b) *Cassio Mendoza Engaged in Objectionable Electioneering on March 25 and 26 by Signaling Voters with "Thumbs Up" and Big Smiles*

Cassio Mendoza, a lead organizer of the ALU, served as an ALU Observer during six separate voting sessions during the election. (Anthony, 3511:24-3512:7). Mr. Mendoza testified

[99] Mr. Daniels is a stipulated agent of the ALU. (Milner, 4309:10-13).

[100] Mr. Martinez identifies himself as an ALU organizer in an affidavit filed in federal court. (EMP 1505).

that he was instructed by a Board Agent not to say anything to voters during the election or to provide any assistance to voters. (Mendoza, 5064:14-16). Notwithstanding these instructions, Mr. Mendoza admitted he repeatedly gave a "thumbs up" signal to certain voters in the tent while performing his duties as an observer.[101] (Mendoza, 5064:9-16). Charlene Novoa, who was serving as an Observer for Amazon during the same voting sessions as Mr. Mendoza, testified that Mr. Mendoza was giving the "thumbs up" accompanied by a "big smile" towards certain voters who were inside the tent, many of whom were wearing ALU lanyards. (Novoa, 2880:23-2881:18, 2884:18-2885:24). Ms. Novoa testified she observed Mr. Mendoza give the "thumbs up" and smiles on the evening session on March 28, and just "big smiles" and enthusiasm to certain voters wearing ALU lanyards on March 29. (Novoa, 2888:8-2890:21). She also testified that she could see Mr. Mendoza smiling at some voters because his mask was not covering his entire nose and mouth area at times during the election. (Novoa, 2903:1-8).

The Board has previously found that electioneering nearly identical to that of Mr. Mendoza was objectionable and necessitated overturning an election. *Brinks Inc.*, 331 NLRB at 46-47. Analyzing conduct under the *Boston Insulated Wire* framework, the Board first noted that the electioneering occurred in the polling place by a union observer, who was therefore an agent of the union at the time of the election misconduct. *Id.* (citing *Dubovsky & Sons, Inc.*, 324 NLRB 1068 (1997)). The Board then noted that the union observer's conduct, telling four employees how to vote, and giving others the "thumbs up" signal, was contrary to the Board Agent's instructions. *Id.* The Board concluded "we believe that party electioneering during the voting, and indeed in the election room, is a serious interference with the election process." *Id.* Ultimately, the Board overturned the election based solely on this conduct. *Id.* at 47.

[101] Mr. Mendoza's testimony regarding *why* he gave the "thumbs up" signal, which was allegedly to signal voters who looked lost, is self-serving and should not be credited. (Mendoza, 5064:9-16).

Like the observer in *Brinks*, Mr. Mendoza engaged in electioneering while serving as an observer during the election and did so in the same location where Associates were casting their votes. He gave "thumbs up" and big smiles to voters, which is contrary to the Board Agent's rules not to communicate with the voters. Mr. Mendoza's acts of electioneering in the election tent seriously interfered with the election process. Similar to *Brinks*, Mr. Mendoza's conduct was objectionable and warrants overturning the election results.[102]

c) *ALU President Christian Smalls Engaged in Objectionable Electioneering and Surveillance Repeatedly on Friday, March 25, the First Day of the Election, and Throughout the Course of the Election*

In addition to the conduct described above, ALU President Mr. Smalls personally engaged in several other instances of impermissible electioneering and gave voters the impression that he was surveilling them at the polls during the March 25 through March 30 voting sessions.[103] Prior to the election, Region 29 established a specific no-electioneering zone surrounding the polls. (Russell, 2294:22-2295:10; EMP 0695-E). Uncontroverted testimony establishes Mr. Smalls was flagrantly and repeatedly present within the no-electioneering zone while the polls were open. *See* Sections II(G)(3)(b) and IV(G).

i. Mr. Smalls Engaged in Objectionable Surveillance during the Morning of March 25

During the morning voting session of March 25, Mr. Smalls was repeatedly in, or within view of, the no-electioneering zone. Uncontroverted testimony from Ms. Karen Martinez

[102] Mr. Mendoza's explanation of his actions is not credible and should be overlooked. First, there is zero likelihood of voter confusion inside of the tent. A voter would wait in line until he or she was called. Then, the voter would check-in. From there, a Board Agent would provide the voter with a ballot and instruct the voter where to go and what to do. If a voter was to get confused, there were directional signs on the floor of the tent directing voters where to go. Further, even if this was true, which it clearly is not, it still would not be permissible under the Board's observer rules. Form NLRB-707, which are written instructions the Board is supposed to provide the Observers, states that Observers shall not: "[g]ive any help to any voter. Only a Board Agent can assist the voter." (emphasis added). Mr. Mendoza did this so many times that even he could not identify an accurate number, rather saying that he made this hand gesture "a good amount" of times. (Mendoza, 5025:2-22). No Board Agent ever told Mr. Mendoza that he could not make those gestures and that he should stop. (Mendoza, 5065:9-10).

[103] Mr. Smalls' March 25 tweet and video are addressed at Objection 23.

established that between 9:30 a.m. - 10:00 a.m., Mr. Smalls stood 15 - 20 feet from the entrance of the voting tent. (Martinez, K., 1999:2-2002:24; EMP 0227, EMP 0227-v, EMP 0229). While at the polls, Mr. Smalls donned his well-known bright red ALU sweatshirt. (Martinez, 2006:17-22). The ALU even publicized Mr. Smalls' presence in the voting area by retweeting a post showing Mr. Smalls standing at the exit of the voting tent. (EMP 0229).

Further uncontroverted testimony from Ms. Kanzler establishes that at 11:00 a.m., Mr. Smalls was still standing near the entrance of the tent and within the no-electioneering zone. (Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). She further testified that Mr. Smalls was accompanied by a cameraman and standing close to the entrance of the tent. (Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). When Ms. Kanzler made her way through the line and approached the entrance to the tent, Mr. Smalls and the cameraman were only about 5 feet away from her. (Kanzler, 2168:12-2172:11, 2184:7-2185:3; EMP 0695-B). Ms. Kanzler testified that the cameraman took her picture against her wishes. (Kanzler, 2171:12-14). Voters had to walk past both Mr. Smalls and his cameraman to exercise their right to vote. At no point did the Board Agents responsible for policing the area remove Mr. Smalls.

Ms. Kanzler and Ms. Martinez provided uncontroverted testimony, and the Hearing Officer should draw an adverse inference based on the ALU's failure to solicit testimony from Mr. Smalls regarding these events. *Flexsteel Indus.*, 316 NLRB at 757-58. Mr. Smalls' conduct on the morning of March 25 constitutes objectionable surveillance. "[A] party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." *Nathan Katz Realty, LLC*, 251 F.3d at 993. Impermissible surveillance occurs even where the party representative says *nothing* to the voter and is *outside* the no-electioneering area. *Id.* Here, Mr. Smalls conduct was clearly

impermissible. Uncontroverted testimony establishes that he stationed himself within 5 feet from voters who were at the entrance of the tent waiting to vote. These voters had to pass by Mr. Smalls *and* his cameraman to exercise their Section 7 rights. Mr. Smalls' loitering was impermissible even if he did not say anything to voters. Furthermore, Mr. Smalls gave no explanation during his testimony as to why he was standing at the voting tent entrance; therefore, an inference must be drawn that he was there to surveil voters and to relay to them that they were being watched by the ALU. *See Elec. Hose & Rubber Co*., 262 NLRB at 216.

An agent's videotaping of a voter is objectionable conduct. *Randell Warehouse of Arizona*, 347 NLRB at 591 (*Randell II*); *but see Sprain Brook Manor Nursing Home*, 348 NLRB at 851 (distinguishing *Randell II* as identity of photographer was unclear and union obtained consent forms prior to photographing). It defies credulity that Mr. Smalls and his cameraman are shielded from the *Randell Warehouse* rule merely because Mr. Smalls was not the one operating the camera. They were clearly together, and the same concerns articulated by the Board in *Randell Warehouse* are implicated here as well. Accordingly, the election must be overturned based on Mr. Smalls' conduct on Monday morning alone.

ii. Mr. Smalls Engaged in Objectionable and Unexplained Loitering in the No-Electioneering Zone

Mr. Smalls continued to impermissibly enter and loiter in or near the no-electioneering zone throughout the election. At approximately 11:00 a.m. on March 25, Mr. Troy observed Mr. Smalls near the weather shelter located across the street from the parking garage. (Troy, 1709:18-1710:19, 1717:24-1718:20; Chu, 843:20-844:17, 850:11-15). Mr. Troy testified that later that morning he observed Mr. Smalls and Mr. Bryson[104] parked outside of the no-

[104] As Region 29 admits in one of its pleadings in support of the 10(j) injunction, Mr. Bryson, during the critical period, held a leadership position with the ALU, in which he helped co-found. (EMP 1507). Thus, Mr. Bryson is unquestionably an agent of the ALU.

electioneering zone in a white sedan speaking with the cameraman, Steven Maing,[105] whom Mr. Troy and Ms. Gross had instructed to leave Amazon's property earlier that morning. (Troy, 1709:18-1710:19, 1717:20-24).

Ms. Aluqdah provided uncontradicted testimony that on March 25, between 2:30 p.m. and 2:45 p.m., while the polls were still open, Mr. Smalls was parked in his well-known black SUV in the first car lane right in front of the JFK8 building, within the no-electioneering zone. (Aluqdah, 2219:25-2220:24; EMP 0695-D). On this occasion, a cameraman was filming Mr. Smalls from the passenger seat of Mr. Smalls' SUV. (Aluqdah, 2227:12-25). After approximately five minutes, Mr. Smalls pulled away in his SUV and circled the building. (Aluqdah, 2228:1-14).

On March 29, during the evening voting session, Mr. Smalls returned to the no-electioneering zone yet again, this time with Ms. Maldonado. (Spinella, 4809:21-4815:3). Mr. Spinella testified that at approximately 12:20 a.m., he was notified that the generator had shut off, and with it the lights in the tent, so he went outside to fix it. (Spinella, 4809:21-4815:3). As Mr. Spinella was fixing the generator, he saw Ms. Maldonado standing within the no-electioneering zone, right near the generator and the restroom at the exit of the voting tent. (Spinella, 4809:21-4815:3). When Mr. Spinella walked back to the building from fixing the generator, he saw Mr. Smalls' black SUV drive up past the exit to the voting tent and park where the orange cones were located. (Spinella, 4809:21-4815:3). Although Ms. Maldonado testified at the Hearing, neither the ALU nor the Region questioned her about her presence outside of the tent *with Mr. Smalls*. Thus, an adverse inference should be made against the ALU because such a failure to examine a favorable witness regarding a factual issue upon which that witness would

[105] Mr. Maing was identified as the cameraman by Mr. Troy. (Troy¸ 1751:3-1752:8; EMP 0364.1).

likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact. *Flexsteel Indus.*, 316 NLRB at 757-58.

Each of the above instances establishes that Mr. Smalls and other ALU agents and officers were a regular presence during the election. Even though Mr. Smalls was at times observed in a vehicle, he was still engaged in unlawful loitering and surveillance of Associates as they waited in line to vote. *See e.g. Nathan Katz Realty, LLC*, 251 F.3d at 993.[106] Impermissible surveillance occurs even where the party representative says *nothing* to the voter and is *outside* the no-electioneering zone. *Id.* The above uncontradicted testimony clearly establishes that Mr. Smalls and his associates were engaged in impermissible loitering and surveillance.

d) *Connor Spence Engaged in Objectionable Conduct on March 28 and 30 by Loitering Immediately outside the Exit of the Voting Tent and within the No-Electioneering Zone*

Mr. Cordova testified that as he was going to vote on Monday March 28, around 9:00 am, he saw Mr. Spence, an ALU agent, right outside the exit of the voting tent, on his phone, within the no-electioneering zone. (Cordova, 1304:19-1305:2). Mr. Spence did not deny these allegations when he testified at the Hearing and Mr. Cordova's testimony was uncontroverted. Similarly, Ms. Lopez provided uncontroverted testimony that on Wednesday, March 30 around noon, she observed Mr. Spence loitering at the exit of the voting tent, within the no-electioneering zone. (Lopez, 2701:12-2704:5; EMP 0695-E).[107] Further, Ms. Campbell testified

[106] Mr. Smalls and the black SUV that he would drive in and around JFK8 was such a frequent presence during the critical period that several witnesses testified they associated that vehicle with Mr. Smalls given that he was so often seen driving it. (Aluqdah, 2226:14-2227:11; Spinella, 4809:21-4815:3). Each provided a similar description of his vehicle in their testimony. The fact that a lay witness could not provide the exact make, model, and vin number of the vehicle does not make their testimony any less credible. Mr. Smalls can be seen standing near and getting out of the exact type of vehicle they described. (*See*, for example, EMP 0335-v, EMP 0344-v).

[107] On cross-examination, ALU counsel asked Ms. Lopez whether it was possible that Mr. Spence was standing outside the voting tent at that time simply because he had just voted. (Lopez, 2737:8-11). However, the ALU chose not to explore this possibility with Mr. Spence during his own testimony, and he never addressed it. This raises the strongest possible inference that he was not in the area because he had just finished voting, but instead he was electioneering at the time both Mr. Cordova and Ms. Lopez saw him.

that, while serving as an Amazon Observer, she witnessed Mr. Spence leave the voting tent at least four or five times to talk with voters at the exit of the voting tent immediately after they had voted. (Campbell, 1555:21-1557:15). Sometimes he would not even leave the tent entirely, but rather hold the exit door open while he conversed with these voters. (Campbell, 1555:21-1557:15). Shockingly, the Board Agents not only were able to clearly see Mr. Spence engage in this impermissible and objectionable conduct, but they never even told him to stop. (Campbell, 1555:21-1557:15).

Mr. Spence's unexplained loitering within the no-electioneering zone outside the voting tent was for the purpose of surveilling voters and giving the impression that the ALU was watching them. *Elec. Hose & Rubber Co*., 262 NLRB at 216. Mr. Spence's impermissible conduct is not excused simply because he did not speak to the voters. Indeed, impermissible surveillance occurs even where the party representative says *nothing* to the voter. *Nathan Katz Realty, LLC*, 251 F.3d at 993. Moreover, as their testimony shows, voters specifically took note of Mr. Spence's presence, and it was reasonable for them to infer that he was standing outside the exit of the voting tent in order to report back to the ALU whom he had observed voting.[108] Mr. Spence's conduct constituted objectionable surveillance. Accordingly, Objection 25 should be sustained, and a rerun election should be ordered.[109]

[108] Mr. Spence's dual status as an ALU agent and an Associate does not impact the result here. It is well-established that a union is accountable for the conduct of its representatives who are also employees where the employees are agents or cloaked with apparent agency. *See e.g. Vickers, Inc.*, 152 NLRB 793, 794-95 (1965) (overturning the results of an election and finding the petitioning union was accountable for the objectionable statements made by its committeemen who were also employees of the employer); *cf. A. Rebello Excavating Contractors*, 219 NLRB 329, 329 (1975) (same).

[109] Amazon withdraws Objection 19.

V. THE REPRESENTATIVES FOR THE REGIONAL DIRECTOR DID NOT ACT IMPARTIALLY AND PREJUDICED AMAZON

On June 1, 2022, Amazon filed with Regional Director Overstreet its Motion to Exclude Region 29's Participation in the Post-Election Objections Hearing Through Appointment of a "Representative." (EMP 0655 at Exhibit J, hereinafter "Motion to Exclude"). In the Motion to Exclude, Amazon argued that Region 29 Regional Director Kathy Drew-King had no legal right to a representative in the post-election objections hearing, to special status in the pending proceeding, or to access Amazon's offer of proof. (EMP 0655 at Exhibit J). On Friday, June 10, 2022, after 7:30 p.m. EST on the last business hour before the opening of the post-election objections hearing, Regional Director Overstreet denied Amazon's Motion to Exclude. (EMP 0655 at Exhibit N). In denying Amazon's request, Regional Director Overstreet admitted he appointed a representative from Region 29 so that it would have the opportunity "to defend and explain [its] conduct." (EMP 0655 at Exhibit N). Regional Director Overstreet also found that Region 29 was entitled to a representative because Region 29 has the "right to face his or her accuser and respond," which is a "bedrock principle of judicial and the administrative process." (EMP 0655 at Exhibit N). On June 12, 2022, Amazon filed with the Board its Emergency Request for Review of Regional Director's Denial of Amazon.com Services LLC's Motion to Exclude Region 29's Participation in the Post-Election Objections Hearing through Appointment of a "Representative." (EMP 0655, hereinafter "Request for Review"). On July 11, 2022, the Board issued its order denying Amazon's Request for Review. (Bd. Ex. 3). While the Board ultimately denied Amazon's Request for Review, it held that "in certain respects the Regional Director for Region 28's description of the representatives' role diverges from what is provided in the Casehandling Manual, and we reject his additional commentary where it does so." (Bd.

Ex. 3). It also addressed Amazon's concerns regarding the prejudice it would suffer based on Region 29's participation, stating

> the concerns being raised here are speculative. Indeed, as these concerns were raised before the hearing even began, the Employer cannot point to any *actual* prejudice or specific misconduct by the representatives, and instead relies on the mere unsubstantiated possibility that the representatives will not "exercise self-restraint and display impartiality" during the hearing. It follows that any allegations of prejudice are more appropriately raised at the conclusion of the hearing, at which time specific, fact-based arguments can be considered.

(Bd. Ex. 3).

Amazon's "speculative" concerns raised in its Motion to Exclude and Request for Review regarding Region 29's participation in the Hearing were realized over the course of the twenty-four day Hearing. Amazon incorporates its arguments from its Motion to Exclude and Request for Review that neither Board Rule nor policy permitted Regional Director Kathy-Drew King to have a representative at the Hearing.

Moreover, to the extent Regional Director Kathy-Drew King was entitled to a representative at the Hearing, which she was not, Representatives Weis and Pereda wholly failed to "exercise self-restraint and display impartiality as well as the appearance of impartiality," as the Board's Casehandling Manual and the Board's decision denying Amazon's Request for Review require. *See* Sec. 11424.4(b). Rather, Representatives Weis and Pereda, apparently acting under the auspices of their role described by Regional Director Overstreet (a description specifically rejected by the Board), acted as Regional Director Drew King's defense attorneys throughout the Hearing.[110] Indeed, any notion that Representatives Weis and Pereda were only

[110] While Representatives Weis' and Pereda's stance on the issue vacillated throughout the Hearing, both refused at times to provide their input on evidentiary issues related to objections that did not involve Region 29. Their occasional refusal to interject on objections only relating to the ALU suggests that they were only present to "defend" Region 29, as opposed to ensuring a complete record was built on all objections. Certainly, the Casehandling Manual's direction to Representatives Weis and Pereda "to see that the relevant evidence adduced during the region's administrative review becomes part of the record" is not limited only to that evidence related to Region 29's misconduct.

present to "see that the relevant evidence adduced during the region's administrative review [became] part of the record" was quickly disposed of within minutes of the record opening when Ms. Weis moved to dismiss 10 of Amazon's 25 objections that were set for hearing by Regional Director Overstreet. (Weis, 59:23-60:4).[111] Weis' improper motion to dismiss is an affront to fulfilling her "primary function . . . to see that the relevant evidence adduced during the region's administrative review becomes part of the record."

Representative Weis and Pereda's partiality continued each day of the Hearing, with every witness called by Amazon, and with every exhibit Amazon sought to introduce. While the record reflects the full nature and extent of Representative Weis and Pereda's partiality, Representative Weis clearly stated the quiet part out loud regarding the Representatives' true leanings in the case. When Hearing Officer Dunn asked Representative Weis whether she had any objections to several exhibits Amazon sought to introduce, Representative Weis stated, "[g]enerally, my position is aligned with that of the Union." (Weis, 3456:22-3457:6). This admission from Representative Weis proves that she and Ms. Pereda's conduct throughout the Hearing was antithetical to their duty to "exercise self-restraint and display impartiality as well as the appearance of impartiality." *See* Casehandling Manual (Part Two) Representation Proceedings, Sec. 11424.4(b).

Representatives Weis' and Pereda's conduct severely prejudiced Amazon's ability to introduce evidence in this case. For example, sustaining the objections of Representative Weis and Pereda, Hearing Officer Dunn improperly precluded the introduction of almost any

[111] Further highlighting Representative Weis' inappropriate conduct during the Hearing is that her request to dismiss Amazon's objections was, as described by Regional Director Overstreet, "procedurally deficient as there is no mechanism for the Hearing Officer to dismiss objections which I have set for hearing." Order Granting Motion for Special Permission to Appeal to the Regional Director the Hearing Officer's Ruling on the Petitioner's Motion to Dismiss Objections and Denying Petitioner's Appeal, at n. 1. The Representatives for Regional Director Drew-King, in particular Representative Weis, were nothing short of obstructionist and partial against Amazon.

testimony and exhibits on Objections 1-5. Hearing Officer Dunn also repeatedly sustained Representative Weis and Pereda's objections that Amazon's evidence was cumulative on Objections 6, 7, 8, 15, 16, and 20. Also, concurring with the objections of Representatives Weis' and Pereda, Hearing Officer Dunn excluded a variety of evidence to the extent related to conduct occurring outside of the December 22, 2021 to March 30, 2022 time period. While Amazon was undoubtedly prejudiced in presenting its case, Amazon cannot know the true prejudice caused by Representatives Weis' and Pereda's conduct until Hearing Officer Dunn issues her report and recommendation and Regional Director Overstreet makes a final ruling on any exceptions filed thereto. Accordingly, Amazon expressly reserves the right to address "any allegations of prejudice" so that "specific, fact-based arguments" can be considered as contemplated by the Board's order denying Amazon's Request for Review.

VI. CONCLUSION

As demonstrated throughout, the actions of Region 29 and the ALU destroyed the laboratory conditions necessary for a free and fair election. In its opening statement, Amazon invited the Hearing Officer to consider the fact that less than a year ago, Region 10 of the NLRB found that the installation by a third party—the U.S. Postal Service—of a U.S. postbox at Amazon's Bessemer, Alabama facility was sufficiently destructive of laboratory conditions to overturn a landslide, 1,000 vote union loss there. If an inanimate object can so significantly interfere with a free and fair election as to require a revote, it is inconceivable that a different result can be obtained here based on the evidentiary record. Each of the Region's and ALU's many instances of misconduct alone surpasses the evidence on which Region 10 ordered a rerun in Bessemer. Together, their actions obliterated—indeed, reduced to a mockery—the high standards the Board requires for its representation elections. There is no other way to put it: this laboratory experiment was a total failure. The only way to repair the damage is to order a second

election and give Amazon's Associates the chance to vote their preferences in a setting untainted by misconduct, coercion, and the evisceration of free choice. The Board must sustain Amazon's objections, overturn the results of the March 25-30, 2022 election, and order a second election.

Respectfully submitted this 1st day of August, 2022.

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CERTIFICATE OF SERVICE

I certify that on this 1st day of August, 2022, I caused the foregoing to be electronically filed with the National Labor Relations Board at http://nlrb.gov and a copy of same to be served via e-mail on the following parties of record:

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