OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 20

In the Matter of:

Whole Foods Market Services, Inc.,	Case No.	01-CA-263079
		01-CA-263108
		01-CA-264917
Respondent,		01-CA-265183
		01-CA-266440
and		01-CA-273840
		04-CA-262738
Savannah Lynn Kinzer, Suverino Frith, Leea Mary Kelly, Ana Belen Del Rio Ramirez, Camille Tucker-Tolbert, Truman Read, Abdulai Barry, Haley Ashley Evans, Cassidy Visco, Justine O'Neill, Sarita Wilson, Lyla Marcella Styles, Yuri London, Christopher Michno, Kirby Burt, and Kaeleb Rae Candrill, As Individuals,		04-CA-263142
		04-CA-264240
		04-CA-264841
		05-CA-264906
		05-CA-266403
		10-CA-264875
		19-CA-263263
		20-CA-264834
		25-CA-264904
		32-CA-263226
		32-CA-266442

Charging Parties.

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Place: Oakland, California

Dates: August 9, 2022

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

In the Matter of:		
WHOLE FOODS MARKET SERVICES, INC.,	Case No.	01-CA-263079
		01-CA-263108
		01-CA-264917
RESPONDENT,		01-CA-265183
		01-CA-266440
and		01-CA-273840
		04-CA-262738
SAVANNAH LYNN KINZER, SUVERINO FRITH, LEEA MARY KELLY, ANA BELEN DEL RIO RAMIREZ, CAMILLE TUCKER-TOLBERT, TRUMAN READ, ABDULAI BARRY, HALEY ASHLEY EVANS, CASSIDY VISCO, JUSTINE O'NEILL, SARITA WILSON, LYLA MARCELLA STYLES, YURI LONDON, CHRISTOPHER MICHNO, KIRBY BURT, AND KAELEB RAE CANDRILL, AS INDIVIDUALS,		04-CA-263142
		04-CA-264240
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		32-CA-263226
		32-CA-266442
CHARGING PARTIES.		

The above-entitled matter came on for hearing, pursuant to notice, before **ARIEL SOTOLONGO**, Administrative Law Judge, at the National Labor Relations Board, Region 20, Ronald V. Dellums Federal Building, 1301 Clay Street, 2nd Floor, Conference Room A, B, and C, Oakland, California 94612, on **Tuesday, August 9, 2022, 9:04 a.m.**

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1 **I N D E X**

2

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Ana Belen	2885	2947	2987	2995	2912
	2916	2982		2999	2920
	2921				2934
					2981
Cassidy Visco	3002	3042			3022
	3024				3025
	3040				3037
	3096				

1 **E X H I B I T S**

2

3 EXHIBIT	IDENTIFIED	IN EVIDENCE
4 **General Counsel:**		
5 GC-89	2932	2938
6 GC-90	2892	--
7 GC-91	2931	2932
8 GC-92	2917	2921
9 GC-93	2944	2946
10 GC-94	3008	3019
11 GC-95	3019	3023
12 GC-96	3025	3026
13 GC-97	3035	3040
14 **Respondent:**		
15 R-90	2977	2982

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1 **P R O C E E D I N G S**

2 JUDGE SOTOLONGO: All right. Good morning. This is Judge
3 Ariel Sotolongo. We're here in the continuation of the trial
4 in Whole Foods Market. And we're now -- and it is now Tuesday,
5 August 9th. We are in Oakland, California, and we're ready to
6 proceed.
7 Mr. Peterson, you have some preliminary matters to -- to
8 address?
9 MR. PETERSON: I -- not at this -- not at this time, Your
10 Honor. We'll reserve the formal documents until a later break,
11 so the counsel has a better opportunity to review.
12 JUDGE SOTOLONGO: Oh, okay. Very well. Then in that
13 case, are you ready to call your first witness?
14 MR. PETERSON: Yes, Your Honor. General Counsel calls Ana
15 Belen Del Rio Ramirez.
16 JUDGE SOTOLONGO: All right. Could you please step
17 forward? And you can remove your mask.
18 MS. BELEN: Okay.
19 JUDGE SOTOLONGO: If you -- if you -- just also, it's
20 easier to hear when -- when --
21 MS. BELEN: Yeah, sure.
22 JUDGE SOTOLONGO: All right. And Ms. Del Rio Ramirez,
23 will you please raise your right hand?
24 MS. BELEN: Um-hum.
25 Whereupon,

1 **ANA BELEN DEL RIO RAMIREZ**

2 having been duly sworn, was called as a witness herein and was
3 examined and testified as follows:
4 JUDGE SOTOLONGO: Thank you. Could you please spell your
5 name for us and give us your address?
6 THE WITNESS: First name is Ana, A-N-A.
7 JUDGE SOTOLONGO: Okay.
8 THE WITNESS: Belen is my middle name, B-E-L-E-N. Last
9 name, Del Rio, D-E-L, space, R-I-O, space, R-A-M-I-R-E-Z.
10 JUDGE SOTOLONGO: Okay. So it's Del Rio Ramirez?
11 THE WITNESS: Um-hum.
12 JUDGE SOTOLONGO: All right. All right. Very well. And
13 your address?
14 THE WITNESS: It's 151 Inverness Drive, Vallejo,
15 California 94589.
16 JUDGE SOTOLONGO: All right. One thing I'm going to ask
17 you do is these microphones, they do not amplify the voice.
18 They simply record.
19 THE WITNESS: Okay.
20 JUDGE SOTOLONGO: They're recording your testimony and
21 what -- what -- and this is a big room, so you need to speak
22 up, project your voice so that they can hear you. I can hear
23 you. I'm closer to you, but --
24 THE WITNESS: Gotcha.
25 JUDGE SOTOLONGO: -- the, you know, attorneys in the

1 tables in front of you here are a little farther away, so you
2 need to speak loud enough for them to hear you. Okay?
3 THE WITNESS: Um-hum. Sure.
4 JUDGE SOTOLONGO: Thank you. Please proceed, Mr.
5 Peterson.
6 MR. PETERSON: Thank you, Your Honor.
7 Good morning.
8 THE WITNESS: Good morning.
9 MR. PETERSON: As you know, I'm Matt Peterson. I'm the
10 attorney for the -- the National Labor Relations Board. So I'm
11 going to be asking you some questions today. Listen carefully.
12 Answer truthfully. If you don't understand a question, let us
13 know, and we can say it in a different way. If you need a
14 break or anything, let us know as well.
15 THE WITNESS: Okay.
16 **DIRECT EXAMINATION**
17 Q BY MR. PETERSON: So starting by asking if you have
18 preferred pronouns?
19 A She/her.
20 Q And what's your -- how do you prefer to be addressed
21 formally?
22 A Belen.
23 Q Ms. Belen; is that okay?
24 A Yes. Ms. Belen.
25 Q Ms. Belen, are you familiar with a company called Whole

1 Foods?
2 A Yes.
3 Q And how are you familiar with Whole Foods?
4 A I worked for the company.
5 Q Over what time period did you work at Whole Foods?
6 A From around June 2016 to July 2020.
7 Q And during your time working at Whole Foods, were you at a
8 particular location?
9 A I was at three locations.
10 Q And can you kind of walk us through those locations?
11 A Yeah, sure. In 2016 I started at the Oakland location.
12 There's only one. And then I believe it was 2000 -- actually,
13 I don't remember what -- when I transferred over to the next
14 one. But I went to San Francisco, a San Francisco location.
15 And then in I believe 2018, I went to Berkeley and -- on
16 Telegraph.
17 Q In which -- what positions have you held throughout
18 your -- your employment at Whole Foods?
19 A I was a Prepared Foods team member, and I became a
20 Prepared Foods supervisor, and then I was a specialty team
21 member, and then I was a Whole Body buyer. Yeah.
22 Q And much of this case focuses on the summer of 2020?
23 A Um-hum.
24 Q And it -- it -- is it correct that you were at the
25 Berkeley store at that time?

1 A Correct.
2 Q What position were you working at that time?
3 A I was a Whole Body buyer.
4 Q Can you describe what that means? What -- what do -- what
5 do you do as a Whole Body buyer?
6 A So basically, I buy the inventory for the -- for the
7 department, the Whole Body department. So I shoot inventory
8 tags, and then I would -- yeah, replenish the store -- or the
9 department. Sorry.
10 Q And can you kind of describe where you do -- where --
11 where you're performing this work?
12 A Most of the work is done on the floor. 90 percent of my
13 work is on the floor.
14 Q What -- what percentage did you say?
15 A Around 90 percent.
16 Q And before that's the -- is that the front of the house
17 where customers are?
18 A Exactly.
19 Q Do you recall your -- the management structure at your
20 store in the summer of 2020? Who did you report to, and who
21 did they report to?
22 A Yes. So my assistant -- I can't remember the -- the
23 things that they're called, but the -- my assistant team leader
24 was Sarah Bruno. My team leader was Angel Ruiz.
25 JUDGE SOTOLONGO: What -- what was the name again?

1 THE WITNESS: Angel Ruiz.
2 JUDGE SOTOLONGO: Okay.
3 A Um-hum. The -- there was two assistant store team
4 leaders. One was Jessica -- I can't quite remember her last
5 name. And then there was Tanda Brown. And then the store team
6 leader was Kelly Fox.
7 JUDGE SOTOLONGO: Kelly Fox?
8 THE WITNESS: Yes.
9 Q BY MR. PETERSON: For Jessica's last name, does Rodriguez
10 sound right?
11 A Yes. That's correct.
12 Q And the Whole Body, is that a -- is that a department? Is
13 Whole Body its own department?
14 A Yes.
15 Q Are you familiar with the term "Black Lives Matter"?
16 A Yes.
17 Q Are you aware of its acronym, BLM?
18 A Yes.
19 Q What -- how -- how are you familiar with the term "Black
20 Lives Matter"?
21 A I first started hearing it after the shooting of George
22 Floyd. And I also am familiar with the -- the -- the protests
23 that ensued.
24 Q And how did you --
25 JUDGE SOTOLONGO: Yeah, I'm going to -- I'm going to ask

1 you to keep your voice up because --
2 THE WITNESS: Yes.
3 JUDGE SOTOLONGO: -- again.
4 THE WITNESS: Sorry.
5 Q BY MR. PETERSON: The -- and your awareness, is that
6 through the news, social media, how -- how -- how do you -- how
7 do you heard (sic) about the Black Lives Matter?
8 A Yeah, through the news and social media.
9 Q Did you ever wear anything at work with the phrase "Black
10 Lives Matter" or BLM on it?
11 A I did, yes.
12 Q About how many times?
13 A I would say I would wear it about three times a week.
14 Q And that brings up a good question. What was your -- what
15 was your schedule during the summer of 2020?
16 A So I would work from usually 6 a.m. to 2:30 p.m., and I
17 would work -- I -- well, I had Sunday, Monday off. So Tuesday
18 through Saturday.
19 Q Is that considered full time?
20 A Yes.
21 Q And what -- what -- can you describe your uniform if --
22 if -- if you had one during the summer of 2020?
23 A My uniform was just a apron. So it's a half apron that
24 goes around my waist. And that's essentially my uniform.
25 Q We've see -- heard testimony about aprons that covered the

1 chest. Was that part of your uniform?
2 A I did not have to wear one of the aprons that covered my
3 chest because I didn't work with food.
4 Q Can you -- can you describe what you wore that had Black
5 Lives Matter or -- or BLM on it?
6 A Yeah, so I had two pieces of -- two articles. One was the
7 pin that said, "Black Lives Matter", and then the other one was
8 this mask that I embroidered "Black Lives Matter" onto.
9 Q Okay. Is that the mask you're holding up right now?
10 A Yeah.
11 Q Maybe show it to the judge.
12 JUDGE SOTOLONGO: All right. So just for the record, it
13 is a mask that appears to have a white background with black,
14 like, polk -- polka-dots for lack of a better term or at least
15 some -- some -- so it's like a -- and then it has stitched
16 lettering in red that says, "Black Lives Matter". That's on
17 one half of the mask, right?
18 THE WITNESS: Yes.
19 JUDGE SOTOLONGO: And how about the other half?
20 THE WITNESS: There's not --
21 JUDGE SOTOLONGO: The -- the other half, it's just a --
22 just a -- the black and white pattern; is that correct?
23 THE WITNESS: Um-hum.
24 JUDGE SOTOLONGO: All right.
25 Q BY MR. PETERSON: And what -- can you describe -- what was

1 the other article you said you wore?
2 A It was just a small pin about this big, and it had -- it
3 was black, and it had white lettering that said, "Black Lives
4 Matter".
5 MR. PETERSON: May I approach the witness, Your Honor?
6 JUDGE SOTOLONGO: Yes, go ahead. Thank you.
7 MR. PETERSON: All right. Before we talk about the
8 exhibit, I was going to make a -- Your Honor, as -- as -- as
9 we've been doing throughout the trial, I have a -- a statement
10 to make about the -- the -- the exhibits being electronic as
11 opposed to formal, as we have a new court reporter, so --
12 JUDGE SOTOLONGO: Okay. Go ahead.
13 MR. PETERSON: Before offering additional exhibits in this
14 case, which to reiterate the General Counsel's intention to
15 offer/receive exhibits in electronic, formal, or practicable,
16 and with respect to each exhibit offered or received in
17 electronic form, the exhibit is contemplated for offering or
18 receipt in electronic form and that there is no request to have
19 electronic documents scanned or otherwise formatted.
20 JUDGE SOTOLONGO: Now, just for the record, the -- the
21 reporter had informed me before we started this morning that
22 she was having trouble logging onto -- I guess it would -- it
23 would be to -- to --
24 MR. PETERSON: The SharePoint file?
25 JUDGE SOTOLONGO: -- SharePoint. And so she had been

1 unable to access the exhibits already in the record. Is that
2 still the case, Reporter? Yeah, apparently so. We'll have to
3 deal with that when the time comes. I just want to -- just for
4 the record. All right.
5 Q BY MR. PETERSON: Starting with first page of the -- of
6 the exhibit.
7 A Yes.
8 Q Do you recognize that?
9 A Yes.
10 Q And what is that?
11 A That's the mask that I would wear to Whole Foods on my
12 shift.
13 Q Is that the mask you just showed us today?
14 A That's correct.
15 Q The second page, do you recognize what's -- what -- what
16 that is?
17 A Yes.
18 Q What is this?
19 A This is a post on Whole Foods Workers' page, Instagram
20 page. And it's a picture of myself and some other Whole Foods
21 workers holding up signs at a rally.
22 Q And which -- which one are you?
23 A I'm the one in -- pretty much in the middle of the
24 picture. Yeah.
25 Q And are you wearing that same mask you've been testifying

1 about?
2 A Yes.
3 Q Where was this protest taking place?
4 A This process took place at another Berkeley store. Yeah.
5 Q By store, do you mean a Whole Foods store?
6 A Yes. Sorry. Um-hum.
7 Q And was that -- it -- the -- the post is dated July 20th.
8 Is that about the time when you were at this protest?
9 A That's correct.
10 Q In the Instagram -- the post you mentioned, what is --
11 what is -- you said Whole Worker?
12 A Yeah, there's some coworkers -- yeah. My partner is there
13 as well just supporting us, but yes.
14 Q The -- the post, the Instagram post is that -- what --
15 what is the post you -- you -- you described? You said Whole
16 Worker?
17 A Yes, it's a -- it's a profile on Instagram that basically
18 puts up information about Whole Foods whenever they do anything
19 that for us doesn't seem okay, basically.
20 Q Do you know who the participants are?
21 A I don't know who runs this page, no.
22 Q Is it your understanding that it's other Whole Foods
23 workers that are -- are -- that are following and commenting on
24 these pages?
25 A Yes.

1 MR. FERRELL: Objection, foundation for that answer if she
2 doesn't know who runs the page.
3 MR. PETERSON: I was asking about the participants, like
4 she herself as a participant.
5 THE WITNESS: Right. Right. I can be a participant.
6 MR. FERRELL: I guess I'm still unclear on the foundation.
7 How does she know the other participants?
8 THE WITNESS: Well, some of the participants I know are
9 people who work with me at the store.
10 MR. FERRELL: You're talking about the -- in the photo?
11 THE WITNESS: I'm talking about who -- the people who
12 comment on these -- on this -- who are part of this, I guess,
13 profile or follow this profile.
14 MR. FERRELL: Are you just referring to the -- the
15 redactions here, those redacted names of coworkers from the
16 Berkely store, the Telegraph store?
17 THE WITNESS: Some of them are, yes.
18 MR. FERRELL: I'm sorry. Are there redactions here that
19 are not coworkers at the Telegraph store?
20 THE WITNESS: I'm -- I'm sure there is.
21 MR. FERRELL: Your Honor, I -- I would ask -- I guess I
22 would ask counsel what's the basis of the redactions that are
23 not of team --
24 JUDGE SOTOLONGO: All right. Well, first of all, let --
25 let's wait till he offers it, and then you can do voir dire,

1 and then we can, you know -- you can object, Mr. Ferrell, when
2 the time comes. But I think we need to get further
3 clarification -- further foundation and -- and you're -- you'll
4 be allowed to ask questions in voir dire and then voice your
5 objections if you have any at the -- at the time, so.
6 MR. FERRELL: Thank you, Your Honor.
7 JUDGE SOTOLONGO: He hasn't offered it yet, so he -- the
8 witness at this time was just providing background information,
9 and -- and we'll -- I'm sure we'll get more details. So go
10 ahead.
11 So this was -- these postings were a Instagram -- this
12 last one was an Instagram, you said?
13 THE WITNESS: Yes.
14 JUDGE SOTOLONGO: Okay. Were you the creator of this
15 post, or were you just simply one of the participants?
16 THE WITNESS: I was just one of the participants.
17 JUDGE SOTOLONGO: Okay. Please proceed, Mr. Peterson.
18 MR. PETERSON: Thank you.
19 Q BY MR. PETERSON: And what was your -- why were you
20 participate -- why were you a participant in this particular
21 Instagram handle, I guess, for lack of a better word -- group?
22 A Just because we were a part of this demonstration that was
23 against, basically -- we were protesting against Whole Foods
24 not letting people wear the Black Lives Matter mask and taking
25 action against those -- those employees.

1 Q Is that photograph an accurate depiction of what you
2 recall from your participation in the protest?
3 A Yes.
4 Q The third page, can you identify what -- what -- what's on
5 pages 3 and 4?
6 A This is from my own Instagram profile. And this was a
7 post I made on the day that I was let go from Whole Foods for
8 wearing the Black Lives Matter pin.
9 JUDGE SOTOLONGO: What -- and what day was that?
10 THE WITNESS: I believe that was July 15th.
11 JUDGE SOTOLONGO: July 15th? Okay.
12 THE WITNESS: Yeah.
13 Q BY MR. PETERSON: And is that the -- who's depicted in
14 that photograph on page 3?
15 A That is myself.
16 Q Is -- is that the -- the Black Lives Matter button you
17 were describing earlier?
18 A Yes.
19 Q Okay. I'll -- I'll come back -- I'll come back to this
20 before offering it. Apart from the mask and the button, are
21 those the -- are those the Black Lives Matter or BLM articles
22 that you wore to work at Whole Foods?
23 A Yes.
24 Q Over what time period did you wear those articles to work?
25 A So I would say from July to -- sorry. June to July 2020.

1 Q And where did you get the idea to -- and I guess, did you
2 wear them both at the same time or how -- can you kind of
3 describe your -- your -- your practice as far as --
4 A Um-hum. Yes.
5 THE COURT REPORTER: Sorry. Can we go off the record?
6 JUDGE SOTOLONGO: Yes.
7 (Off the record at 9:22 a.m.)
8 JUDGE SOTOLONGO: Just for the record, there was some -- I
9 guess there -- some voices coming from the reporter's laptop,
10 and so she's trying to -- quiet them down. So I think we
11 we're -- I think we've had the -- we have it under control I
12 believe. So let's proceed.
13 **RESUMED DIRECT EXAMINATION**
14 Q BY MR. PETERSON: Ms. Belen, where -- where did you -- how
15 did you -- how did you get the idea to wear the Black Lives
16 Matter articles you -- you testified about to -- to work at
17 Whole Foods?
18 A It was a way to show support for some of the things that
19 had happened within the store, and I can, I guess, go over
20 those.
21 Q Yeah, sure. What -- yeah. What -- what -- what things
22 happened at the store that made you want to do that?
23 A So firstly, I believe on -- on July 11th, I was sent a
24 text message within a group text, and it included -- it came
25 from my assistant team leader, Sarah Bruner -- Bruno. Sorry.

1 And it had, I believe, like five other people in it, and she
2 basically let us know that -- of an incident that had occurred
3 in which an as -- a Prepared Foods team leader -- his name is
4 Darnelle, and he's a black man. He had a Black Lives Matter
5 little sign on his desk up in the office away from clients, and
6 it said, "Black Lives Matter". Then apparently Kelly Fox, the
7 manager, saw it. She asked Tanda Brown, her assistant store
8 team leader to ask him to remove the sign -- or I'm sorry --
9 tell him to remove the sign.
10 MR. FERRELL: Objection. Foundation with respect to
11 how -- how the witness knows what Ms. Fox told Ms. Brown. Was
12 she there?
13 JUDGE SOTOLONGO: Yes. Okay. So --
14 Q BY MR. PETERSON: This is a report -- I think you -- is
15 this a report you received in the text message that you
16 described?
17 A Correct. Yes.
18 JUDGE SOTOLONGO: Okay. Go ahead.
19 MR. PETERSON: Not being offered for the truth --
20 JUDGE SOTOLONGO: And you said this was July 11th?
21 THE WITNESS: I believe so, but I can look at the -- my
22 affidavit just to recall.
23 JUDGE SOTOLONGO: All right. So --
24 MR. PETERSON: May -- may -- may I approach, Your Honor?
25 JUDGE SOTOLONGO: Sure.

1 Q BY MR. PETERSON: Have you had a chance to look at this?
2 A Yes.
3 Q Is this the text message you're describing?
4 A Yes.
5 Q On the second page, there's a date in the middle of the
6 page, June 11th?
7 A Yes, that's correct.
8 Q Did the -- do you know if the first part of the text came
9 from June 11th, or was that a different day?
10 A It came from June 11th.
11 JUDGE SOTOLONGO: And -- and who -- who -- who is the --
12 who started this -- who sent this message to who?
13 THE WITNESS: My assistant team leader, Sarah Bruno.
14 JUDGE SOTOLONGO: Sarah Bruno, assistant team leader.
15 Okay.
16 THE WITNESS: Yes.
17 JUDGE SOTOLONGO: All right.
18 Q BY MR. PETERSON: And do you know who else -- are -- are
19 these -- are these other coworkers or --
20 A They're -- yes, they're all other coworkers, yes.
21 Q Okay. And so this is where you received the report that
22 you're describing?
23 A Correct.
24 Q And so what was your -- what was your understanding of
25 what happened based on this text message?

1 A My understanding of what happened is that Kelly saw the
2 sign that Darnelle had on his desk, asked her --
3 MR. FERRELL: Your Honor, I -- I'm going to object again,
4 foundation. If -- if I understand this -- if I'm following
5 this correctly, the witness' entire knowledge about the
6 incident she wants to testify about is based on the
7 representation in a text thread from her assistant store leader
8 Ms. Sarah Bruno who -- and the General Counsel assistant team
9 leader, I guess --
10 JUDGE SOTOLONGO: All right. But I --
11 MR. FERRELL: -- who the General Counsel's not calling --
12 JUDGE SOTOLONGO: But I -- I understand.
13 MR. PETERSON: I'm not offering it for its truth.
14 JUDGE SOTOLONGO: Right. Right. So I think -- yeah, I
15 think they're not offering for the truth of the matter
16 asserted, but I think they're offering for it as background as
17 to what led her to -- then to wear the Black Lives Matter --
18 that's at least my understanding; is that correct?
19 THE WITNESS: Correct.
20 JUDGE SOTOLONGO: All right. So go -- so whether or not
21 her understanding is correct ultimately doesn't matter.
22 It's -- she's explaining to us why she did what she did later
23 on. So go -- go ahead.
24 THE WITNESS: You want me to start over?
25 MR. PETERSON: Yeah, what -- yeah, I guess.

1 THE WITNESS: Okay.
2 Q BY MR. PETERSON: Yeah, what was your understanding of
3 the --
4 A My understanding was that Kelly Fox saw the Black Lives
5 Matter sign on Darnelle's desk and asked Tanda Brown to tell
6 him to remove it because it was against store policy. And
7 yeah, that's what happened.
8 Q And what -- how did that -- what -- what -- what did that
9 have to do -- what connection does that have with your wearing
10 the Black Lives Matter masks?
11 A We just thought that, for one, it wasn't in the GIG book,
12 so there was no reason for them to ask him to remove it. And
13 two, I think we all agreed that since it's related to race and
14 it's a protected status, that he shouldn't be made to take it
15 down because it very much identi -- it's like the core of his
16 identity that he's a black man.
17 Q And so what -- how did the -- how did -- what -- how did
18 the text message and learning about that progress into you
19 wearing the -- the Black Lives Matter mask and pin?
20 A Well, besides that incident, there was two other incidents
21 that kind of, yeah, made me decide to wear the pin and -- and
22 the mask as well.
23 Q And what -- what -- can you describe the fir -- the first
24 of those incidents?
25 A Sure. So I believe it was on July 14th. I -- my coworker

1 Bella came back --

2 JUDGE SOTOLONGO: But -- back up. I -- I want to veri --

3 THE WITNESS: Sure.

4 JUDGE SOTOLONGO: I -- my understanding was that you

5 started -- you -- and perhaps I'm wrong -- that you started

6 wearing the Black Lives Matter messaging sometime in June?

7 THE WITNESS: Yes.

8 JUDGE SOTOLONGO: June and July?

9 THE WITNESS: Yes.

10 JUDGE SOTOLONGO: So you're saying now on July 14th,

11 something happened. So are you saying --

12 THE WITNESS: I'm sorry.

13 JUDGE SOTOLONGO: Do you mean June 14th?

14 THE WITNESS: I mean June 14th. Sorry.

15 JUDGE SOTOLONGO: Okay.

16 THE WITNESS: I keep --

17 JUDGE SOTOLONGO: And June 14th, 2020?

18 THE WITNESS: Yes.

19 JUDGE SOTOLONGO: Okay. Just to make sure that record is

20 clear. All right.

21 A June 14th, my coworker Bella, I -- I told her about the

22 incident with Darnelle, and then as well as another incident,

23 the previous -- like, that morning. And I guess I should start

24 with that. Sorry.

25 So with that incident, a coworker whose name is Gee

1 (phonetic throughout). I don't know what his real name is.
2 It's just what's on his name tag. But he was upset and told me
3 that his -- his team leader, the front-end team leader asked
4 him to take off his mask because it had the Mexican flag on it.
5 And he -- I told him I would call team member services about
6 it. He said that was fine, but he was upset about having to,
7 you know, take off that mask.
8 And so I told my coworker who later came in about it,
9 Bella, about what had happened to him as well as what had
10 happened to Darnelle. She decided to write Black Lives Matter
11 on a blue -- what is it called -- the surgical masks that they
12 give us. She went upstairs at some point to talk to somebody
13 in the office.
14 Q And just to -- just to --
15 A Um-hum.
16 Q -- slow you down --
17 A Sure.
18 Q -- you -- did you -- you saw her do this, write --
19 A Yes.
20 Q -- write the Black Lives Matter?
21 A Yes.
22 Q And then did you see her leave to go upstairs?
23 A I did, yes. She came back down, and -- oh, I'm sorry.
24 Yes, she came back down and was upset, and she said she was
25 going home. She was being sent home. And then -- because she

1 wouldn't take off the mask. And then Kelly came down, Kelly
2 Fox came down and wanted to meet with the team.
3 Q This is all the same --
4 A The same day.
5 Q The same day?
6 A Yeah. I -- I believe it was Angel Ruiz, myself, I want to
7 say my coworker Ariel, and some other coworker. And she
8 basically said Bella was sent home because she refused to take
9 off the Black Lives Matter mask and that the mask was against
10 store policy because it had a political statement on it.
11 Q Where was this meeting?
12 A This meeting took place in -- in the Whole Body
13 department.
14 Q Did anyone respond to what Kelly said?
15 A I responded by asking her if it was a policy within the
16 GIG book, and she said it was -- she didn't answer me, but it
17 was -- it was a political statement. And I said, it's not a
18 political statement. And she said, well, it's a safety issue
19 because somebody could come in the store who doesn't agree with
20 the statement and could put the team member and the leadership
21 at risk.
22 Q Anything else you recall being discussed during that
23 meeting?
24 A Nothing I can discuss.
25 Q And how was -- how -- how if at all did that lead to you

1 wearing the Black Lives Matter articles?
2 A Yes, so on -- after that happened, we made a -- a group
3 messaging on Instagram. So we created a group message with a
4 bunch of people from -- from the store. And we decide -- we,
5 you know, talked to them about all the things that were going
6 on, the things I just described, and we decided to do a
7 demonstration for June 19th, which is Juneteenth. And we
8 decided to wear black apparel as well as any sort of
9 memorabilia that had the Black Lives Matter logo on it or
10 saying.
11 Q And what were you hoping to accomplish by -- by doing
12 that?
13 A Just to show support to our black team members as well as
14 to kind of let Kelly Fox and the management where -- where we
15 stand on this specific policy that wasn't in the GIG book.
16 Q What was your -- so what was your under -- what was your
17 understanding at that point? What was the -- what were they
18 saying? Which part of the policy or GIG book were you
19 supposedly violating? Or the -- the -- I guess, Bella, your --
20 your coworker and -- and Gee?
21 A Well, they -- they couldn't tell me that they were -- they
22 couldn't point to anything in the GIG book. So they said it
23 was because it was political, but there was nothing in the GIG
24 book that they could show -- show us.
25 Q Did you think it was, at least with respect to the mask,

1 the -- the -- the mask removal, Gee's Mexican flag and -- and
2 Bella's Black Lives Matter mask -- was it your understanding
3 that that was consistent with how they'd been applying the
4 dress code before?
5 A No, it's not.
6 Q And can you explain?
7 A Yeah, so one of the policies is that you're not supposed
8 to wear gore-ish, I guess, pictures on anything. And people
9 often wore, like, metal band T-shirts. And then we weren't
10 supposed to wear sports-related attire, but people wore those
11 every day. Every day I saw somebody wearing those. Um-hum.
12 Q Had you worn any -- any articles other than your --
13 your -- your uniform prior to June of 2020?
14 A No, other than -- well, not related to, like, gore-ish
15 pictures or, like, sports. But one -- one of the things I did
16 wear was Doc Martins all the time. And we weren't supposed to
17 wear shoes that weren't from a company called Shoes For Crews,
18 but I often wore my Docs and was never reprimanded.
19 Q Did you ever wear buttons or pins?
20 A I did, yes.
21 Q Prior to June of 2020?
22 A Yes.
23 Q Can you describe what you wore?
24 A I had a little pin that had a hand and some flowers. And
25 then I also wore another pin that had my sister's, like, band

1 logo.
2 Q And had -- how long had you been wearing that up to June
3 2020?
4 MR. FERRELL: Your Honor, I'm -- I'm just going to object
5 about the relevance of kind of this consistency of enforcement
6 with materials that are unquestionably not protected, aren't
7 intended to be protected. I know we've had this issue come up
8 in a number of other locations. I don't know what the
9 relevance of -- of the -- of the flower pin or -- or -- or what
10 any of this is going to have to do with the issue of whether
11 BLM messaging is protected.
12 MR. PETERSON: Well, the -- Your Honor, the -- the
13 language of the -- the language of the rules at issue don't say
14 anything about political statements. And -- and -- and I, you
15 know -- so they're trying to write something in -- into -- into
16 the rulebook that isn't necessarily there. So it's -- the rule
17 says no -- no logo -- logo -- logos, symbols, or messages, and
18 these are examples of -- of logos, symbols, and messages that
19 have been worn prior to the -- the Black Lives Matter
20 messaging.
21 JUDGE SOTOLONGO: Well, you know, this is something --
22 MR. PETERSON: And part of their public image defense
23 is --
24 JUDGE SOTOLONGO: Whether this is ultimately relevant or
25 not is something I'm going to have to decide. This has been

1 coming in consistently, and -- and always a -- you know, I'm
2 going to give it the -- the proper weight when the times comes.
3 It's going to be up to the General Counsel to make the argument
4 that because, you know -- because a company allowed a person to
5 wear a little pin that had a hand with flowers, it must
6 therefore allow Black Lives Matter and for that matter any
7 other logo. Once you let the -- I guess, once you open the
8 trap door, anything goes. If he -- they can make that argument
9 and persuade me and the Board and the Courts, that -- that's
10 fine.
11 MR. PETERSON: Right. But --
12 JUDGE SOTOLONGO: But it's -- but I'll -- I'll give
13 them -- I'll give them a little leeway. I don't want to go
14 into, you know, a long -- long explanation of every pin that
15 every employee ever were -- wore because it -- you know,
16 ultimately it may not matter. Go ahead.
17 MR. PETERSON: Thank you, Your Honor.
18 Q BY MR. PETERSON: The -- the Mexican flag mask that you --
19 you were talking about, how -- how long did your -- had you --
20 had you noticed Gee wearing that before?
21 A Yes.
22 Q For a long period of time or a short period of time or
23 how -- how frequently did you see him wearing the Mexican mask?
24 A We didn't work in the same department, so I didn't see him
25 often, but I saw him wearing it maybe at least three times.

1 Q And is that in weeks or months before John came --
2 A Weeks.
3 Q Had you seen other masks with other flags or -- or other
4 types of messaging?
5 A Yes, I used to see -- my coworker had a mask that had the
6 Nicaraguan flag, which the flag from her country. And there's
7 also a bakery team member who wore a mask with the Puerto Rican
8 flag.
9 Q And like, about when -- when did you first notice any of
10 those -- those masks?
11 A Starting in March of 2020 when the pandemic kind of
12 started and we were asked to wear masks.
13 Q You mentioned --
14 MR. PETERSON: May I approach, Your Honor?
15 JUDGE SOTOLONGO: Yes. Yeah, in the future, what I would
16 prefer that you do is deal with each exhibit and then offer
17 into evidence, and then go on to the next one. As -- as right
18 now, we have three -- three exhibits with multiple parts that
19 have not been offered, and the record may become a little
20 muddled. So I would prefer that you do one at a time and --
21 and -- unless there's a reason why -- there a reason you -- you
22 keep expanding, and later on we may lose track of what's been
23 admitted and what hasn't, so.
24 MR. PETERSON: Yeah, no, I understand, Your Honor. The --
25 the first exhibit, I was holding off on because it -- there's

1 a -- it's out of the time line order. But the second exhibit,
2 General Counsel's 90 --
3 JUDGE SOTOLONGO: Well, for example, you haven't even --
4 if I recall -- I mean, I could be wrong, but I haven't --
5 remember hearing -- identifying the -- the -- the document,
6 General Counsel 90, and certainly, maybe I missed it, but all
7 righty. So we have 90, and then the next one is 91? It's not
8 even so marked.
9 MR. PETERSON: Yes, the General Counsel's 90 is the text
10 messages that we were -- that she was describing earlier
11 that --
12 JUDGE SOTOLONGO: Okay.
13 MR. PETERSON: So I will move for their admission -- or
14 move for the admission of General Counsel's 90.
15 MR. FERRELL: Your Honor, I would object to General
16 Counsel's 90. I mean, certainly if it were offered for the
17 truth, I -- I would object on a hearsay -- hearsay grounds.
18 Also --
19 JUDGE SOTOLONGO: I guess -- assistant -- assistant team
20 leaders are not considered supervisors; is that -- is that
21 correct?
22 MR. FERRELL: Assistant team leaders are not considered
23 statutory supervisors. However, it does lead me to a relevance
24 objection about all of this dialogue. It deals with an
25 incident that happened, as the witness testified, with a team

1 leader named Darnelle, who is a statutory supervisor not
2 covered by this statute at all.
3 MR. PETERSON: Here it is.
4 MR. FERRELL: That is -- that is the -- the gentleman
5 whose -- had the sign on his desk, the Black Lives Matter, is
6 identified by the witness as Darnelle is a -- is a team leader.
7 He's a member of store leadership and is not a statutory
8 employee under the statute at all. So the -- their discussion
9 about management asking another member of management to remove
10 a sign from his desk or directing him to do so is not --
11 JUDGE SOTOLONGO: All right -- and the -- right. I -- so
12 that's understood. And I think this -- the -- the -- the
13 reason this is being offered, as I understand it is that this
14 incident as well as one or two others, according to the
15 witness, is what led her to then take some action herself,
16 meaning wear -- wear Black Lives Matter messaging whether in a
17 mask or in a pin.
18 MR. FERRELL: I understand, Your Honor. And -- and we
19 have the witness' testimony about what caused her to don Black
20 Lives Matter messaging at work. This document advances that
21 not one iota.
22 MR. PETERSON: Well, this is also the best evidence of --
23 of -- of -- of the text that she was describing.
24 JUDGE SOTOLONGO: Well, I'll -- I'll allow it. And you
25 know, I'll just give it what -- whatever weight I think is

1 appropriate. It's -- it -- it's -- again, a lot of it is
2 rather superfluous. The witness has told us why she acted the
3 way she did. So -- but I'll -- I'll admit it.
4 Again, I'm not admitting for the truth of the matter
5 asserted. And again, I'm not reading anything into the fact
6 that this person, Darnelle, who is a statutory supervisor was
7 asked to remove a sign from his desk. Besides, apparently this
8 sign was in -- in -- in his office. It wasn't something that
9 was public anyway, which is what's been at issue here anyway.
10 But --
11 MR. FERRELL: The -- the -- the other issue I -- I would
12 have, Your Honor, understanding your ruling as you just gave
13 it, because we did not go into a voir dire on -- on this
14 exhibit. There are redactions throughout that I don't think
15 have been explained as to who they are or what they are, and I
16 don't know whether the witness, frankly, knows.
17 JUDGE SOTOLONGO: Well, go -- well, you're going to --
18 okay. All right. So let -- let before -- okay. So let's --
19 let's get -- let's get some clarification on that. You want to
20 voir dire now, Mr. Ferrell, go ahead. I mean, I've already
21 admitted it, but I could change my mind. So go -- but go ahead
22 and ask about these redactions.
23 MR. FERRELL: Thank you, Your Honor.
24 **VOIR DIRE EXAMINATION**
25 Q BY MR. FERRELL: Ms. Belen --

1 A Um-hum.
2 Q -- is that your preferred --
3 A Yes.
4 Q -- manner in which I ask --
5 A Um-hum.
6 Q I'm looking at General Counsel's 90. Do you have it in
7 front of you?
8 A Yes.
9 Q There -- if you're looking at the page 2 of 9 and 3 of 9,
10 there are number of places where something is -- is blacked
11 out. Do you see the black boxes?
12 A Um-hum.
13 Q Did you do that?
14 A No.
15 Q Do you know who did?
16 A I believe it was -- I don't know. It was you all, right?
17 MR. PETERSON: Well, it was -- yeah, it was -- it was
18 representative's counsel for the Charging Parties.
19 Q BY MR. FERRELL: All right. Do you know what's -- what's
20 redacted here?
21 A Yes.
22 Q So at the -- at the middle of page 2, there's a couple
23 redacted. You know what's redacted there?
24 A I guess, what -- the first redaction is -- or I guess, the
25 first redaction is somebody's name. The second is somebody's

1 name was added to the conversation. And then those are all
2 people's names that were redacted.
3 Q Your understanding is that they're just people's names
4 that have been redacted from the document?
5 A Yes.
6 Q Do you know if any of those names are Christopher Adam or
7 Maddy (phonetic throughout) Michno?
8 A I don't recall if they are, but they could be.
9 Q Was Adam Michno part of this same group chat?
10 A I -- don't recall. He was a part of another group chat,
11 but I'm not sure that he was part of this one.
12 MR. FERRELL: Your Honor, I would ask that at a -- at a
13 minimum that -- that counsel confirm whether Charging Party
14 Michno is one of the names that's redacted here or -- or not.
15 And if Michno is, there's conversations here --
16 JUDGE SOTOLONGO: Yeah, we need to get some clarification
17 because my ruling was obviously to an extent that persons were
18 parties or witnesses in this proceeding, their names may not
19 be -- may not be redacted. My ruling was simply to protect
20 those other employees who may have engaged in protected
21 concerted activity that are not part of this action either
22 because they're not even -- either charging parties nor
23 witnesses in this matter. So --
24 MR. PETERSON: Yeah, I can -- over break, I can -- I can
25 reach out to counsel for the Charging Parties and get

1 confirmation as to --

2 JUDGE SOTOLONGO: All right. So I'm going to -- I'm going

3 to then -- I'm going to then withhold my admission of this

4 exhibit. I'm going to put an -- an abeyance until we get

5 further clarification.

6 Obviously, you me -- just now you -- you mentioned an Adam

7 Michno. There's a Christopher Michno. Is Adam Michno a

8 different person?

9 MR. FERRELL: Same person, Your Honor. The Charging

10 Party's legal name is Christopher Adam Michno, but at the time

11 of working, I understand went by Adam and now goes by Maddy.

12 So I know there's --

13 JUDGE SOTOLONGO: Okay. All right.

14 MR. FERRELL: It's --

15 JUDGE SOTOLONGO: Okay.

16 MR. FERRELL: As far -- the only Michno I'm aware in the

17 case is going to be one and the same person.

18 JUDGE SOTOLONGO: All right.

19 MR. FERRELL: Many names but one person.

20 JUDGE SOTOLONGO: All right. So I'm going to withhold my

21 admission of this exhibit until we get clarification on

22 these -- on these redactions.

23 Q BY MR. FERRELL: The -- the one last question I'm going to

24 ask just before counsel continues, Ms. Belen, your comments,

25 your statements are indicated on this chat by -- by what --

1 A The --
2 Q -- letter?
3 A The dark gray.
4 Q It's all -- all grayed out, so I'm trying to understand
5 which one are your statements. Can you point us to a page and
6 tell us which one?
7 A The only statement of mine that I see is the first one
8 here, that I said, "Thank you for sharing this."
9 Q Okay. That -- that's your only statement in this?
10 A The -- yes.
11 MR. FERRELL: Thank you, Your Honor. I understand the
12 ruling's been --
13 JUDGE SOTOLONGO: All right.
14 MR. FERRELL: -- withheld until we hear further.
15 JUDGE SOTOLONGO: Very well. Let's proceed.
16 **RESUMED DIRECT EXAMINATION**
17 Q BY MR. PETERSON: Okay. And just to clarify -- like,
18 page -- page 7 of General Counsel's 90 --
19 A Yes.
20 Q -- is that -- is one of those your texts?
21 A Oh, yes. Just when I said, "Same".
22 Q Okay. So what did -- did -- was there further discussion
23 after the -- with your coworkers about -- following the meeting
24 with Kelly where she said that you couldn't wear Black Lives
25 Matter at work?

1 A Yes. Just about basically doing this thing for Juneteenth
2 about wearing all black and wearing the Black Lives Matter
3 masks.
4 Q And that's General Counsel's 92; is that right?
5 A This one?
6 Q Yeah.
7 A Yes.
8 Q Yeah, you can -- yeah, there's -- kind of in the bottom --
9 A Oh, 90 -- yup.
10 Q -- it says --
11 A I see it.
12 Q -- Exhibit 92.
13 A Um-hum.
14 Q What role did you play -- did -- and what is this on the
15 first page that we're looking at?
16 A So this is the flyer that somebody from the group made for
17 that event.
18 Q And what -- what -- where -- did you do anything with this
19 flyer?
20 A Yeah, I printed out some copies, and I handed it out to
21 about 20 of my coworkers.
22 Q Of -- a copy of this flyer?
23 A Yes.
24 Q And what was your purpose in doing that?
25 A Just to inform them of the event.

1 Q And why did you -- is it understanding you're a part in
2 the -- part -- you played a part in planning this event?
3 A Correct.
4 Q What were you -- what was -- what were you hoping to
5 accomplish by encouraging coworkers to wear the accessories
6 that show support for the black TMs and the BLM movement?
7 A Just to show solidarity with our black team members to let
8 them know that we're with them and to show management that --
9 well, also to show management that in fact if we do wear these
10 things that it's not -- it's not going to cause harm to us, and
11 yeah.
12 Q And did your -- prior to -- prior to June of 2020, was
13 your it your understanding that wearing Black Lives Matter
14 would be a violation of the dress code?
15 A No.
16 Q Why not?
17 A It's not a political statement, so I didn't think that it
18 was an issue.
19 Q What is -- on pages 2 and 3 of the exhibit, do you
20 recognize what those are?
21 A Yes.
22 Q And can you tell us what they are?
23 A These are other posts that somebody in the -- in the
24 group, in the organizing group made.
25 JUDGE SOTOLONGO: Mr. Peterson, I don't think I have a

1 copy of 9-1.
2 MR. PETERSON: Which --
3 JUDGE SOTOLONGO: Oh, the -- I thought it was 92.
4 MR. PETERSON: That is 92. I'm sorry. Did I say 91?
5 Yeah, I -- I -- I meant 92.
6 JUDGE SOTOLONGO: Okay. Right.
7 MR. PETERSON: Yeah.
8 JUDGE SOTOLONGO: All right. There we go. So you
9 haven't -- you haven't marked 91?
10 MR. PETERSON: Correct.
11 JUDGE SOTOLONGO: All right. So 92. All right. Go
12 ahead.
13 Q BY MR. PETERSON: Yeah, so you're describing the -- the
14 second pages?
15 A Yeah, so this was a post on -- on Instagram that somebody
16 made, and somebody in the organizing group -- or organizing
17 group made it just to share online as -- as well for other
18 people who were on their Instagram page who were also
19 coworkers.
20 Q The second -- the third page that says, "A team member at
21 WFM in SEA wore a BLM facemask and was told to take it off", do
22 you see that?
23 A Yes.
24 Q Do you know what that's referring to?
25 MR. FERRELL: I'm sorry. Where -- where are you, counsel?

1 MR. PETERSON: Page 3.
2 A I -- I guess I don't know what they mean by "SEA".
3 Q BY MR. PETERSON: Yeah, were you aware of any actions
4 taking place at other stores in other parts of the country?
5 A I was, yes.
6 Q What locations?
7 A I don't remember what locations, but some were on the east
8 coast, I know there were some -- something. I had somebody I
9 knew at the other Berkely location store who was also sent home
10 for wearing the mask. Yeah.
11 Q Were you -- did you do any -- were you part of any
12 coordination between different stores?
13 A Not the coordination, just the communication. So I was
14 informed about the -- the rally at the other Berkely Whole
15 Foods location as well as the one in Oakland that happened
16 later on.
17 MR. PETERSON: Move for the admission of General Counsel's
18 92.
19 JUDGE SOTOLONGO: Any voir dire or objections?
20 MR. FERRELL: Your Honor, just a -- just a moment. I'm
21 taking a look at it. If I -- voir dire, Your Honor?
22 JUDGE SOTOLONGO: Yes, go ahead.
23 **VOIR DIRE EXAMINATION**
24 Q BY MR. FERRELL: Ms. Belen, the second page of General
25 Counsel's 92 --

1 A Um-hum.
2 Q -- do you have any idea who -- who posted that or who
3 wrote that?
4 A I believe it was Ariel.
5 Q One of your team members at the store?
6 A One -- yes.
7 JUDGE SOTOLONGO: I had nothing to do with it. I just
8 want to put it --
9 THE WITNESS: Sorry.
10 JUDGE SOTOLONGO: Sorry. My name is Ariel also, so.
11 THE WITNESS: Oh, okay.
12 JUDGE SOTOLONGO: Go -- go ahead. Sorry.
13 MR. FERRELL: No -- no objection, Your Honor.
14 JUDGE SOTOLONGO: All right. General Counsel 92 is
15 admitted.
16 **(General Counsel Exhibit Number 92 Received into Evidence)**
17 **RESUMED DIRECT EXAMINATION**
18 Q BY MR. PETERSON: Did you have any -- do you recall any
19 conversations with Kelly Fox between the June -- June 14th
20 meeting and -- and this June 19th event that you -- you've
21 testified about?
22 A Yes, on June -- I believe it was June 17th, Kelly had a
23 meeting again with the Whole Body department. I -- I believe
24 she was having it with all -- all the teams. It was myself,
25 Angel Ruiz, and I'm not sure of the last person who was there.

1 But she did inform us that she had spoken to the -- oh, what is
2 his name, the regional president, Omar Gaye, and that he had
3 instructed her not to enforce the mask policy that they had
4 been previously enforcing.
5 Q And did you or anyone else respond?
6 A I -- I think I once again asked Kelly, you know -- I --
7 that -- asked her to -- to show me in the GIG book where the
8 policy was in the first place, and she said it doesn't matter
9 because we're not enforcing it.
10 Q Anything else you recall from that -- that meeting?
11 A I don't recall anything else.
12 Q Where -- where did it take place?
13 A I believe it took place on -- on the floor of the
14 department.
15 Q And what -- what was your understanding at that point as
16 to whether you could wear Black Lives Matter at -- at your
17 Whole Foods store?
18 A That we could wear them.
19 Q Did you go through with the -- the June 19th event?
20 A We did, yes.
21 Q And can -- can you describe -- can you describe what
22 happened on June 19th?
23 A We just had a lot of team members wear black and wear
24 Black Lives Matter messaging, and nothing really happened.
25 Kelly was not in the store that day. She was off. But nobody

1 got in trouble. The -- it's just a normal day.
2 JUDGE SOTOLONGO: So just to be clear. So on this date,
3 you observed a number of other employees --
4 THE WITNESS: Um-hum.
5 JUDGE SOTOLONGO: -- wearing Black Lives Matter masks --
6 THE WITNESS: Yes.
7 JUDGE SOTOLONGO: -- and other items such as pins and the
8 like?
9 THE WITNESS: Yes.
10 JUDGE SOTOLONGO: And -- and just to further -- for more
11 clarification, the -- were the masks that you saw were similar
12 to the ones depicted on page 3 of General Counsel 92? In other
13 words, they're black -- the black mask that says in white
14 "Black Lives Matter" in white --
15 THE WITNESS: Um-hum.
16 JUDGE SOTOLONGO: -- or the masks that had, like, a black
17 fist? Or did you see what -- a different -- what did you --
18 exactly did you see?
19 THE WITNESS: Yeah, I just saw either the messaging of the
20 words "Black Lives Matter" or the "BLM" as well. Not those
21 specific masks, but I did see people wearing pins and masks
22 and -- and shirts.
23 JUDGE SOTOLONGO: And all these masks were a variety of
24 colors or -- or --
25 THE WITNESS: Yes.

1 JUDGE SOTOLONGO: -- and okay. And so okay. There was no
2 one -- one similar mask being worn by everybody?
3 THE WITNESS: Correct. Yeah.
4 JUDGE SOTOLONGO: All right. Please proceed.
5 THE WITNESS: Um-hum.
6 Q BY MR. PETERSON: About how many -- how many -- how many
7 coworkers did you observe wearing Black Lives Matter on
8 Juneteenth?
9 A I saw, I -- I believe, around 15 to 20 people, but I can't
10 quite remember.
11 Q Were -- were you wearing one of the articles you
12 described?
13 A Yeah, I was --
14 Q What were you --
15 A I was wearing both my mask and -- and my pin.
16 Q After June 19th, did you continue to wear either of those
17 articles to work?
18 A I did, yes.
19 Q Was -- which -- which -- which articles did you wear and
20 how frequently?
21 A I wore both my mask and my pin sometimes together,
22 sometimes separately. And I wore them, I would say, three to
23 four times a week.
24 Q And how long did you continue to -- to wear -- wear --
25 wear the -- the pin or the mask that said, "Black Lives

1 Matter"?
2 A I wore them up until I was instructed to -- to leave on my
3 last day.
4 Q What -- what -- did you have -- after -- after Kelly Fox
5 said that they weren't going to -- that you were going to be --
6 they were going to permit the wearing of the Black Lives Matter
7 mask. Did -- did -- did you ever have a follow-up discussion
8 with her where that changed?
9 A Yes. I believe this was some months later. On July 14th.
10 She did huddle the Whole Body department once again on -- in
11 the department. It was Angel Ruiz, myself, and another
12 coworker, Denise (phonetic throughout). I don't remember her
13 last name. But she instructed us that it was --
14 JUDGE SOTOLONGO: Who was -- who instructed you? Who --
15 THE WITNESS: Kelly Fox.
16 JUDGE SOTOLONGO: Oh, so this is the -- the store team
17 leader?
18 THE WITNESS: The store team leader --
19 JUDGE SOTOLONGO: Okay. Go ahead.
20 THE WITNESS: -- Kelly Fox. Yes.
21 JUDGE SOTOLONGO: All right. Go ahead. Complete proceed.
22 Sorry.
23 THE WITNESS: She -- she let us know that they were now
24 enforcing the mask policy, and that masks had to be basically
25 clear of any sort of messaging. And yeah, so we -- we also

1 couldn't wear essentially any logos or anything like that that
2 didn't have to do with Whole Foods or their -- I can't remember
3 what the word is -- but the -- the -- the products that they --
4 they buy. The brands that -- that are within the store.
5 JUDGE SOTOLONGO: And just for my understanding, because
6 I -- I missed something earlier. At some point earlier, Kelly
7 Fox had informed you and other employees that you could go
8 ahead and wear Black Lives Matter masks and other items of
9 clothing?
10 THE WITNESS: Correct.
11 JUDGE SOTOLONGO: And when -- when was that person -- when
12 was that initial statement?
13 THE WITNESS: That was June, I -- I believe 17th. But if
14 you could remind me?
15 MR. PETERSON: Yeah, I can -- yeah. But we're looking at
16 your affidavit.
17 JUDGE SOTOLONGO: All right. So sometime in mid-June.
18 THE WITNESS: Yes.
19 JUDGE SOTOLONGO: I don't think you mean exactly. Just --
20 THE WITNESS: Yes.
21 JUDGE SOTOLONGO: All right. And then from that moment
22 on -- from that -- from June 19th, on until July 14th, was when
23 Kelly Fox informed you that you were now not allowed to wear
24 these items. So during that period of time, you and others
25 were wearing Black Lives Matter masks and other clothing items?

1 THE WITNESS: Correct.
2 JUDGE SOTOLONGO: Okay.
3 THE WITNESS: Um-hum.
4 JUDGE SOTOLONGO: Just please proceed.
5 Q BY MR. PETERSON: And then in -- okay. And so you're
6 describing what happened on -- on, I believe you said, July
7 15th?
8 A Yes. Correct. Or I'm sorry, July 14th.
9 Q July 14th.
10 A Yes.
11 Q Okay. What was -- did anyone react to -- to Ms. Fox
12 describing the -- the change?
13 A Yeah. I said that I was really disappointed in the -- the
14 change in the policy. And she said, you know, I'm disappointed
15 as well, but I have to enforce the policy.
16 Q Did -- were you -- were you wearing any Black Lives Matter
17 articles at the time?
18 A I was wearing the Black Lives Matter pin on my jacket.
19 Q Did Ms. Fox say anything to you about that specifically?
20 A No. She did not. She -- she did, however, look at my --
21 my -- of my store -- not store team leader -- team leader's
22 pins, which was a little counsel (sic) -- console, a little
23 gaming console, and then another pin that I can't remember what
24 it was. But she did instruct them to take those off.
25 Q Did you continue to work the rest of your shift?

1 A Yes.
2 Q Did you remove the pin that day?
3 A No.
4 Q What happened the -- the -- the next day?
5 A The next day I came to work. I was also wearing the pin.
6 And around 10:30 in the a.m., Angel Ruiz came up to me and told
7 me to take off the pin. And I told him that I was not going to
8 take it off. He seemed a little taken aback, and he said,
9 well, would you mind telling Jessica, the assistant store team
10 leader, what you just told me?
11 And so he took me up to the office and he told her, you
12 know, she doesn't want to take off her pin. And she said,
13 well, I'm going to have to send you home. And I said, that's
14 fine. And then she said, but I would like to know if you're
15 going to change your mind for the next shifts that you're
16 scheduled until you're -- you're done. And I said, no, I'm not
17 going to change my mind. I'll still wear it every day that I
18 come to work. And she said, well, would you like this to be
19 your last day? And I said, you know, do what you have to do if
20 that's what you have to do, and that's fine.
21 Q And when you say you had a few shifts before you were
22 done, what -- what is that referring to?
23 A I had already put in my two weeks' notice. I had already,
24 you know, I -- I was supposed to -- my last day was supposed to
25 be three days later. So on, I believe, the 18th.

1 MR. PETERSON: All right. Your Honor, may I approach the
2 witness?
3 JUDGE SOTOLONGO: Yes.
4 Q BY MR. PETERSON: Have you had a chance to flip through
5 those -- those documents?
6 A Yes.
7 Q Directing your attention to page -- page 2.
8 A Um-hum.
9 Q Can you tell us what that is?
10 A That is my resignation letter. That's when I gave my two
11 weeks.
12 Q And this was -- is that your signature in the middle?
13 A Yes.
14 Q Did you sign it on or about July 7th, 2020?
15 A Yes.
16 Q And if I understand your testimony right, that was at a
17 time when they were not enforcing the Black Lives Matter
18 prohibition?
19 A Yes.
20 Q Is that -- is that correct?
21 A Correct.
22 JUDGE SOTOLONGO: All right. So you're -- just so I'm
23 understanding, your reason for leaving Whole Foods was that you
24 were moving on to some other work you wanted to do --
25 THE WITNESS: Um-hum.

1 JUDGE SOTOLONGO: -- and had nothing to do with the Black
2 Lives Matter issue; is that correct?
3 THE WITNESS: That's what I wrote on the document. That's
4 not really how I felt. But that's what I wrote, because they
5 weren't enforcing the mask policy, and I was a little bit
6 worried about what it would mean if I had to use Whole Foods as
7 a reference in the future.
8 JUDGE SOTOLONGO: Okay. Please proceed.
9 Q BY MR. PETERSON: In -- in that letter, you put your
10 effective resignation date as July 18th; is that correct?
11 A Correct.
12 Q And as I understand it, during this July 15th
13 conversation, you were -- were -- you had some additional
14 shifts that you were scheduled to work?
15 A Correct.
16 Q Would you have -- would you have worked those last
17 remaining shifts had Whole Foods not told you that you were not
18 allowed to wear the Black Lives Matter mask at work?
19 A Yes.
20 Q Yeah. Do -- do you know what's on page 1? I don't know
21 if you've ever seen that before.
22 A I'm not sure if I have seen this before.
23 Q What about page 3; have you seen that before?
24 A I'm not sure if I've seen this one before, either.
25 Q Did you work after July 15th when your -- when you had

1 your discussion?
2 A No.
3 MR. PETERSON: Okay. I guess I'll move -- I'll move for
4 the admission of just the second page of General Counsel's 91.
5 MR. FERRELL: We have no objection to any of the three
6 pages.
7 MR. PETERSON: Okay.
8 MR. FERRELL: they're documents from the separation of Ms.
9 Belen's employment. We -- we would introduce them ourselves.
10 JUDGE SOTOLONGO: Well, they're probably -- now, since
11 it's all contained in one document that's copying both sides of
12 the page, he's going to have to -- it's going to be difficult
13 just isolating the one.
14 MR. PETERSON: Well, if they're -- I mean, I guess if
15 there's no objections, then --
16 MR. FERRELL: We have no objection, Your Honor.
17 JUDGE SOTOLONGO: All right. So we'll have -- you'll
18 admit the whole --
19 MR. PETERSON: Yeah.
20 JUDGE SOTOLONGO: -- the whole document.
21 MR. PETERSON: Yes.
22 JUDGE SOTOLONGO: All right.
23 MR. FERRELL: I would -- I would -- I would point out that
24 these same three pages were actually produced in Ms. Belen's
25 subpoena production. They are pages 11, 12, and 13. Ana

1 Belen, pages 11, 12 and 13. So I'm not sure how she said she
2 doesn't have them. She -- she produced them in response to our
3 subpoena.
4 Q BY MR. PETERSON: You don't recall seeing these?
5 A I -- I just don't recall. It's been two years. But if I
6 saw them, I -- then I did.
7 MR. PETERSON: Okay. Yeah, I move -- move for the
8 admission of General Counsel's 91.
9 MR. FERRELL: No objection.
10 JUDGE SOTOLONGO: All right. General Counsel 91 is
11 admitted.
12 **(General Counsel Exhibit Number 91 Received into Evidence)**
13 Q BY MR. PETERSON: Directing your attention back to the --
14 the General Counsel's 89, with the mask on the front.
15 A Um-hum.
16 Q The first page. Pages 3 and 4, I can't recall if you
17 testified already to this, but who -- do you know whose
18 insta -- is that -- what is that?
19 A This is my Instagram post after I was -- on my last day
20 that I worked at Whole Foods.
21 Q And why did you -- why did you make -- those statements
22 are yours; the comments on pages 3 and 4?
23 A Yes.
24 Q And what was your purpose in making that post?
25 A Just to let people know that I was -- you know, that my

1 days were cut short from Whole Foods. That I was sent home
2 because I was wearing the Black -- Black Lives Matter pin. And
3 just my -- I guess, my disappointment in -- in the whole
4 situation.
5 Q Did you believe that was a fair application of their --
6 did they tell you what -- ever -- ever tell you what policy or
7 what -- what -- what provision of the handbook that you
8 violated?
9 A No. They did not.
10 Q Did you think it was a fair action that they took against
11 you?
12 A No. I did not.
13 JUDGE SOTOLONGO: Now, just for clarification. Where --
14 exactly where were you wearing your pin and what -- you wearing
15 it on your body? Where -- where -- where exactly were you
16 wearing it?
17 THE WITNESS: I was wearing it on this jacket. Just like
18 this.
19 JUDGE SOTOLONGO: Okay. Just like that? Okay.
20 THE WITNESS: Yeah.
21 JUDGE SOTOLONGO: Okay. The witness is pointing to the
22 photograph on page 3 of General Counsel's 89. Okay. So -- and
23 you said the apron that you typically wore at Whole Foods was
24 below that. It was below the waist?
25 THE WITNESS: Yeah. It was at waist level.

1 JUDGE SOTOLONGO: At waist level.
2 THE WITNESS: Um-hum.
3 JUDGE SOTOLONGO: Now, is it true that most employees at
4 Whole Foods stores wear the normal aprons that go all the way
5 to just below their shoulders. Those type of -- type of
6 aprons?
7 THE WITNESS: Yes. Most -- most of them do. But
8 there's --
9 JUDGE SOTOLONGO: But in your position, you were not
10 required to wear that apron, so you wore a lower apron; is that
11 correct?
12 THE WITNESS: Correct.
13 JUDGE SOTOLONGO: All right. So understood. Okay.
14 MR. PETERSON: Move for the admission of General Counsel's
15 89.
16 MR. FERRELL: Your Honor, I'd like to look at this as a,
17 really three different -- they're three different documents
18 that have been stapled together here. So I'd like, if we
19 could, address them together -- or address them separately.
20 JUDGE SOTOLONGO: Yes.
21 MR. FERRELL: On General Counsel's 89, page 1 of 4, for
22 the purposes of voir dire, I'd just like to confirm with Ms.
23 Belen.
24 **VOIR DIRE EXAMINATION**
25 Q BY MR. FERRELL: Did you -- is this the mask that you

1 wore while working in the store?
2 A Correct.
3 Q About how many times?
4 A Anywhere from like 3 to 4 days a week.
5 JUDGE SOTOLONGO: And that was from -- from the June 19th
6 to July 14/15th time period?
7 THE WITNESS: Yes.
8 JUDGE SOTOLONGO: Okay.
9 MR. FERRELL: The only request I would make with respect
10 to the first page is if the actual exhibits that General
11 Counsel uploads to the SharePoint could be in color? I think
12 it would be easier for us to see.
13 MR. PETERSON: This -- yeah. They are and they will be.
14 MR. FERRELL: Okay. Because I have a color -- I know
15 General Counsel emailed us a color picture of this, this
16 morning. So it makes for a better exhibit, but I understand
17 printer limitations. So that's -- that's okay.
18 MR. PETERSON: It's been -- it's been a burden.
19 MR. FERRELL: With respect to page 2, Your Honor, I
20 believe I would object relevance to this page. As I understand
21 it from Ms. Belen, I believe this is a post on an Instagram
22 account that she does not manage. It is from a protest at a
23 store that is not at issue in this case. It is not the
24 Telegraph Store -- the Telegraph Avenue store in Berkeley,
25 California. And it is a post from a protest she attended after

1 her separation from employment at Whole Foods. So I'm not sure
2 what the relevance of this is. This is not while she's working
3 at all.
4 JUDGE SOTOLONGO: Your point is well taken. Mr. Peterson?
5 MR. PETERSON: Yeah. So it's -- I mean, it's -- I was
6 going to ask her about other activities that she's participated
7 in. Other -- other protests. The main purpose was
8 demonstrative. I didn't get this photograph of the mask
9 until -- until last night. So -- so this was a demonstration,
10 albeit a small one of the mask -- the type of the -- the mask
11 that she was wearing. And the relevance is, it's another
12 pick -- it's a picket outside of a Whole Foods location.
13 JUDGE SOTOLONGO: Yeah, I -- I just don't see this
14 photograph being relevant. This is a post-termination or
15 resignation photo at a different store. I just don't see what
16 relevance it would have.
17 MR. FERRELL: And so I would -- I would move to exclude --
18 or ask to exclude page 2 from the -- from the actual exhibit.
19 JUDGE SOTOLONGO: I -- I agree. I -- I -- I think this
20 page should be excluded.
21 MR. FERRELL: With respect to pages 3 and 4 of General
22 Counsel's 89, I would ask, what's the purpose for which it's
23 being offered to Counsel? I -- I assume that it would be
24 hearsay. It's being offered for the truth by General Counsel.
25 It's not being offered for that, so I'd like to understand the

1 purpose of the -- the relevant purpose it's being offered for.
2 MR. PETERSON: Yeah. I mean, one is obviously the -- it
3 demonstrates what the button or pin that she was wearing is --
4 looks like, and captures. And her post is her -- her reaction
5 to -- to -- to Whole Foods sending -- sending her home.
6 Basically, forcing her to -- to resign early because of the
7 policy. So it's more the -- the witness' intents and
8 motivations.
9 MR. FERRELL: Your Honor, in that case, I would -- I would
10 object with respect to relevance to the actual post. The
11 statements by themselves that are being offered for truth are
12 hearsay. We do have the witness' testimony. I don't know what
13 her intent post-separation and post-resignation has to do with
14 anything. She had submitted, at this point, a week earlier on
15 July 7, her resignation and was simply working out her two
16 weeks' notice, and this is a post she makes post-separation
17 from her last day.
18 MR. PETERSON: You know, when her -- in response to her
19 two weeks' notice being cut off early.
20 MR. FERRELL: The two-week notice is -- well --
21 JUDGE SOTOLONGO: I -- I see some relevance. It may be
22 marginal, but I see some -- also relevance. I'm going to admit
23 certainly, the photograph of the pin as relevant. Again, the
24 messaging on 3 and 4 -- on pages 3 and 4, I -- I see some
25 relevance. It may be marginal, but I see relevance. So I'm

1 going to allow it.

2 MR. FERRELL: Allowed not for the truth of the matter

3 asserted, correct?

4 JUDGE SOTOLONGO: Correct.

5 MR. FERRELL: Correct.

6 JUDGE SOTOLONGO: But it reflects -- the pin -- I mean,

7 it -- it's -- I haven't taken a look at the complaint in a

8 couple of weeks. So is this -- is this witness alleged as a

9 constructive discharge?

10 MR. PETERSON: Yeah, as an actual, and -- and in the

11 alternative a construction -- constructive discharge.

12 JUDGE SOTOLONGO: So the messaging here is relevant as to

13 what -- what is this motivation may have been for -- for

14 resigning. So in that extent, I will allow it.

15 MR. FERRELL: Very well, Your Honor. Just for clarity,

16 her resignation was July 7. It would have been a week prior.

17 JUDGE SOTOLONGO: I -- I -- so understood. So

18 understood. But I think it should -- it may shed some light on

19 the question post -- ex post facto, as it may be.

20 MR. PETERSON: Right.

21 MR. FERRELL: Very well, Your Honor.

22 JUDGE SOTOLONGO: So General Counsel's Exhibit 89, pages

23 1, 3, and 4, are admitted.

24 **(General Counsel Exhibit Number 89 Received into Evidence)**

25 MR. PETERSON: Thank you, Your Honor.

1 **RESUMED DIRECT EXAMINATION**

2 Q BY MR. PETERSON: Did you participate in any -- any
3 protests at -- at -- at any Whole Foods location?
4 A Yes. So the -- the first one I went to was at the other
5 Berkeley location. And then we also -- I was part of
6 organizing one at our location that took place after I had been
7 let go. However, I had part in organizing before I left the
8 company.
9 Q What was the -- the first -- what was the other location
10 that wasn't your store? Where was that? What store location
11 was that?
12 A I don't know the address, but -- yeah, I don't know the
13 address.
14 Q Was it --
15 MR. FERRELL: Your Honor -- Your Honor, I'd also object to
16 what's the relevance about the activity at the store that's not
17 in the case.
18 JUDGE SOTOLONGO: And when was this activity? Well, let's
19 find out when the activity was.
20 MR. PETERSON: That would be my -- my next question.
21 JUDGE SOTOLONGO: Go ahead. Okay. Well, let's --
22 MR. PETERSON: Yeah, that's what I was trying to figure
23 out.
24 Q BY MR. PETERSON: When -- yeah, when -- when did -- when
25 did -- was this before or after your termination that the first

1 time -- the -- the --
2 A Before.
3 Q And when was that in -- and what -- why did you attend the
4 protest? And just -- we keep getting interrupted, but this
5 other location, is that in -- do you know what city the other
6 store is in?
7 A It's -- it's in Berkeley --
8 Q Okay. So --
9 A -- as well.
10 Q -- it's another story in Berkeley.
11 A Yes.
12 Q And when was the protests in relation to -- to when you
13 were separated?
14 A It -- it was -- it was in June of 2020. I don't remember
15 the date, though.
16 Q Was it -- was that -- was it during a time when they had
17 said that they weren't enforcing the Black Lives Matter at --
18 at your store, or -- or do you remember it was before or after
19 that?
20 A I don't remember. Yeah.
21 Q What was your purpose in attending the protest at the
22 other Berkeley store?
23 A To show support for a team member -- a black team member
24 at that location who had been sent home as well for wearing a
25 Black Lives Matter -- I believe it was a T-shirt, but I'm not

1 super sure.
2 Q And then you mentioned protests at your store that
3 occurred after your -- your separation.
4 A Yeah. There was -- there was one at -- at the store I
5 left at, and there was one at the Oakland location as well.
6 Q What was your purpose in participating in a protest at the
7 store that you had -- you had been recently separated from?
8 A Just to show support for the people who were still there,
9 and were -- were still, like, at risk of having, like, punitive
10 action against them.
11 Q What was the purpose of the protest?
12 A Just again, to -- well, specifically to say that Black
13 Lives -- that Whole Foods should not be telling people they
14 can't wear Black Lives Matter messaging because, in our eyes,
15 that was racist.
16 MR. PETERSON: May I approach, Your Honor?
17 JUDGE SOTOLONGO: Yes.
18 Q BY MR. PETERSON: Do you recognize what's on that
19 document?
20 A Yes.
21 Q And can you tell us what it is?
22 A It is another flier that -- or somebody in our group made,
23 or the -- the people who have been -- who did the -- you know,
24 the Juneteenth Blackout Friday. And so this was in relation to
25 the rally that we did at the -- the location I worked at it.

1 Q Do you know whose -- do you know what -- what -- what
2 application this is?
3 A This is Instagram, as well.
4 Q Who -- do you know whose account it's from?
5 A This is from Ariel's Instagram.
6 Q Okay. Did you -- did you have anything to do with the
7 creation of this flier?
8 A I did not create this flier. No.
9 Q Did you -- did you have any role? Did you know the flier
10 was coming out or did you have any discussions with anyone
11 about it?
12 A Yeah. So I -- I worked on -- with her on some of the
13 wording for the flier.
14 Q And what was the purpose of creating this flier?
15 A Just to inform people that we were going to, you know,
16 have a -- have a rally, as -- as well as, you know, just to
17 call Whole Foods Market TALK, and to call the regional office
18 and let them know that, you know, we don't agree with the --
19 the so-called -- the rule that they were enforcing.
20 Q And it looks -- the -- the post is dated July 14th; is
21 that -- is that -- that -- is that correct?
22 A Yes.
23 Q That -- so that was before you were -- you were fired?
24 A Yes.
25 MR. FERRELL: Objection to the characterization of fired

1 after we've had testimony that she resigned on July 7th.
2 JUDGE SOTOLONGO: All right. I will, you know, I'll give
3 it the proper value or weight.
4 Q BY MR. PETERSON: Yeah. So this is -- this is prior to
5 your separation?
6 A Yes.
7 Q Was this the same day that you'd been informed that Whole
8 Foods was -- your store was going to be enfor -- enforcing the
9 dress code policy?
10 A Yes.
11 JUDGE SOTOLONGO: What platform was this again; Instagram?
12 THE WITNESS: Instagram. Yes.
13 JUDGE SOTOLONGO: And the person who posted -- you --
14 this -- this is not your posting; is that correct?
15 THE WITNESS: It's something I did post at some point.
16 But no, somebody made this flier and shared it with us through
17 Instagram.
18 JUDGE SOTOLONGO: Okay. And then do you know if the
19 person who created this was --
20 THE WITNESS: Yes.
21 JUDGE SOTOLONGO: -- an employee? Well, the person, you
22 don't have to mention his or her name or their name. Is the
23 person who created this posting, if you know, a Whole Foods
24 employee?
25 THE WITNESS: Yes.

1 JUDGE SOTOLONGO: At your store?
2 THE WITNESS: Yes.
3 JUDGE SOTOLONGO: Okay.
4 Q BY MR. PETERSON: And just in case it got lost, what --
5 you -- you were -- were you working -- did help in -- in -- in
6 drafting this in any way?
7 A Yes. Correct. I -- I helped in the -- just the -- what
8 was written. I helped in -- in that messaging.
9 Q What were you trying to convey by saying Whole
10 Foods/Amazon is racist?
11 A Well, we were trying to convey that they pick and choose
12 what parts -- or what to enforce, I guess. And they seem to
13 not enforce it for some people and enforce it for -- for
14 others, specifically, the Black Lives Matter messaging.
15 MR. PETERSON: Nothing further, Your Honor.
16 JUDGE SOTOLONGO: All right. Are you going to offer 93?
17 MR. PETERSON: Oh, sorry. I would offer 93.
18 MR. FERRELL: Your Honor, I may have more objections to 93
19 after I confer with Counsel; but as an outside, I would object
20 to the relevance of 93. The -- the only allegations -- there
21 are only two allegations about the Telegraph Berkley store in
22 the complaint. And with respect to Ms. Belen, it's that her
23 remaining time at work during her two-week notice was cut short
24 by a few days after -- after she submitted her resignation.
25 And they deal with the separation of Charging Party Michno's

1 employment.

2 Both of those deal with their complaint that they were not

3 being allowed to wear Black Lives Matter messaging while

4 working. There is no allegation that anybody has been

5 retaliated against or discharged or disciplined in any form or

6 fashion for engaging or attending or participating in any kind

7 of protest outside of work, whether at the Telegraph store or

8 any other store or location.

9 MR. PETERSON: No, there's not. Yes. And we've, you

10 know, we've gone over this ad nauseum, I -- I feel, but this

11 is --

12 MR. FERRELL: But what is the relevant purpose of the --

13 the attendance or the distribution of a flier about a protest

14 at another store, or you know, at all? She's not -- it's not

15 alleged that she's retaliated against for attending a store --

16 a rally at -- I think what she's referring to is the Gilman

17 store, the other store in Berkeley, California.

18 MR. PETERSON: This is a totality of circumstances test.

19 One of the big -- big issues is determining whether this is

20 protected or not. Employees expressions of their views of how

21 their employer is operating are -- are relevant to show the

22 connection to the workplace that they believe that this policy

23 is unfairly -- the dress code policy was unfairly prov --

24 applied, and also, there is an element of a racial motive that

25 some of the employees perceived. So protesting --

1 JUDGE SOTOLONGO: I'll admit it.

2 **(General Counsel Exhibit Number 93 Received into Evidence)**

3 JUDGE SOTOLONGO: All right. You're resting with this

4 witness, Mr. Peterson?

5 MR. PETERSON: Yes, Your Honor.

6 JUDGE SOTOLONGO: All right. Mr. Ferrell?

7 MR. FERRELL: I would like to request the -- the Jencks

8 materials, Your Honor. And --

9 JUDGE SOTOLONGO: Okay.

10 MR. FERRELL: -- and one second, please.

11 (Counsel confer)

12 MR. FERRELL: I'd like the Jencks materials and request

13 some -- some time.

14 JUDGE SOTOLONGO: Sure.

15 MR. FERRELL: I'm not sure what the current time is.

16 JUDGE SOTOLONGO: Okay. How long is -- is the affidavit?

17 MR. PETERSON: There is a nine-page original and a one-

18 and-a-half page supplemental that does have an exhibit -- a

19 five-page exhibit that's from the Title 7 case.

20 JUDGE SOTOLONGO: All right. How much time do you need,

21 Mr. Farrell?

22 MR. FERRELL: I'm going to ask for maybe 45 minutes, if

23 that's all right?

24 JUDGE SOTOLONGO: All right. It is now -- it is now 25

25 until 11. So let's reconvene at 11:20.

1 MR. FERRELL: Very well, Your Honor.
2 JUDGE SOTOLONGO: All right. Off the record.
3 (Off the record at 10:32 a.m.)
4 JUDGE SOTOLONGO: Mr. Farrell, please proceed.
5 MR. FERRELL: Thank you, Your Honor.
6 **CROSS-EXAMINATION**
7 Q BY MR. FERRELL: Ms. Belen, the -- the Black Lives Matter
8 related activity at the Telegraph Avenue Whole Foods store in
9 Berkeley, California, where you worked began following the
10 killing of George Floyd and the Black Lives Matter protests and
11 rallies that came after that, right?
12 A Yes.
13 Q And that's why the activity you testified about on direct
14 started in basically June of 2020, right?
15 A Yes.
16 Q And I'm just going to ask you to speak up just so I can
17 hear you. Okay?
18 A Yes.
19 Q That was following Mr. Floyd's killing in late May of
20 2020, right?
21 A Correct.
22 Q You gave two Board affidavits in this case, right?
23 A Yes.
24 Q And in the second one there's an attachment in Exhibit 1.
25 There's another affidavit that you gave in a Title 7

1 litigation, right?
2 A Yes.
3 Q And that was an affidavit you submitted in support of an
4 injunction in the Title 7. It's an affidavit you filled out in
5 July of 2020, right?
6 A Yes.
7 Q It gives you the exact date. July 19 of 2020.
8 A Um-hum.
9 Q Is that right?
10 A Yes.
11 Q So that was much closer in -- in time than the events are
12 today, right?
13 A Yes.
14 Q In that affidavit, you described -- you stated that
15 following the death of -- of George Floyd and the protests, the
16 demonstrations springing up across the country in support of
17 the Black Lives Matter movement, one of my coworkers put a
18 small Black Lives Matter sign on his desk and he was told to
19 remove it. That's what you said in that earlier affidavit back
20 in July of 2020, right?
21 A Yes.
22 Q And who you describe there as one of your coworkers is who
23 you testified about earlier on direct, is named Darnelle?
24 A Correct.
25 Q And he's actually a team leader for the prepared foods

1 department at the store?
2 A Yes.
3 Q As a manager. He's a member of the store's leadership,
4 right?
5 A Correct.
6 Q So he's not one of your coworkers, other than he works at
7 the store, but he's a member of leadership in management,
8 right?
9 A Correct.
10 Q You talked about the other -- and that happened -- that
11 incident with Darnell, I believe you testified, happened on
12 June 11, 2020, right?
13 A That's when I was informed about it.
14 Q That's when you learned of it --
15 A Yes.
16 Q -- through --
17 A Through the text messages.
18 Q -- Sarah Bruno.
19 A Correct.
20 Q Who was your ASTL, right?
21 A Yes.
22 Q Associate or assistant team leader?
23 A Correct.
24 Q Who's who you directly reported to?
25 A Yes.

1 Q You also talked about an inspiration to you wearing the
2 Black Lives Matter messaging was about three days later on June
3 14, 2020, right?
4 A Yes.
5 Q When one of your -- I think is it a coworker in -- in
6 Whole Body, Bella?
7 A Correct.
8 Q Is that -- her first name is Isabella, but she went by
9 Bella; is that right?
10 A Correct.
11 Q She had handwritten Black Lives Matter on her face mask --
12 A Um-hum.
13 Q -- and the store team leader, Kelly Fox, had told her she
14 couldn't because it was a political statement, and it was
15 against the dress code; is that right?
16 A Correct.
17 Q In fact, the wearing of masks at the store started with --
18 came out of the pandemic, right? In March and April 2020?
19 A Correct.
20 Q Initially, team members were allowed to wear masks, and
21 then they were required to wear a mask. Is that what you
22 recall?
23 A Correct.
24 Q And in fact, initially, masks were kind of hard to come
25 by. The company said almost wear whatever mask you can find,

1 right?
2 A Correct.
3 Q It was a matter of just trying to get people who -- who
4 could come to the store, right, to work?
5 A Um-hum.
6 Q It was -- it was chaotic, right?
7 A Yes.
8 Q And then eventually, Whole Foods started providing the
9 masks to the team members, right?
10 A Correct.
11 Q I think you said in your affidavit they -- they tried to
12 provide you with at least one a day. If you -- if you needed
13 one. If you didn't have one. Right?
14 A Yes.
15 Q And Ms. Fox also told you that -- that the mask policy
16 would be similar to the dress code?
17 A Yes.
18 Q Right? And she told you this when -- when you were
19 implementing the mask policy at the Telegraph -- the Berkeley
20 store?
21 A Correct.
22 Q And I say Telegraph and Berkeley interchangeably. It's
23 Telegraph Avenue, right?
24 A Yes.
25 Q Which is also, oftentimes referred to as the Berkeley

1 store.
2 A Correct.
3 Q Now, there was some testimony in your direct about a
4 second Berkeley store, which some people more often referred to
5 as the Gilman store; is that right?
6 A Yes.
7 Q So when I say the Berkeley Store or Telegraph, we're
8 talking about the store where you worked?
9 A Um-hum.
10 Q And is that a yes?
11 A Yes.
12 Q And if I said the Gilman store, that's the other store in
13 Berkeley, California, where you did not work?
14 A Correct.
15 JUDGE SOTOLONGO: By the way, the masks that you were
16 provided by Whole Foods, were they the blue surgical masks, or?
17 THE WITNESS: Correct. Yes.
18 JUDGE SOTOLONGO: All right.
19 Q BY MR. FERRELL: And when Ms. Fox told you in that time
20 frame -- March/April of 2020 -- that the dress code -- the mask
21 policy will be similar to dress code policy, she told you it
22 could not include things like political statements, right?
23 A Correct.
24 Q And the dress code policy itself is contained in what's
25 referred to as a general information guide. Have you ever

1 heard of it?
2 A Yes. The GIG book.
3 Q The GIG book.
4 A Yes.
5 Q You acknowledge receiving a copy when you were hired?
6 A When I was hired, yes.
7 Q And then occasionally, if there were updates, you were
8 required to sign off that you'd received the updates to GIG?
9 A Yes.
10 Q And you understood -- that's in your Board offered
11 affidavit. It's my understanding that the policy states that
12 if you wear any type of T-shirt or hat that it must have the
13 Whole Foods logo. For pins, they can only be Whole Foods pins
14 or pins from vendors that we carry, right?
15 A Yes.
16 Q That's what you understood the policy to be?
17 A Yes.
18 Q And when you testified about it on July 14, your coworker,
19 Bella, was told by the store team leader, Kelly Fox, that she
20 couldn't wear BLM on her face mask, right?
21 A Correct.
22 Q Because it was a political statement and it was against
23 the policy, right?
24 A Correct.
25 Q And Bella left work that day. She went home.

1 A Yes.
2 Q Correct?
3 A She went home.
4 Q So you -- you knew from what Mr. Fox had told you before
5 and the incident that you just had with Bella, and that
6 interaction, that wearing -- writing BLM or Black Lives Matter
7 on your face mask was viewed by the company as a violation of
8 dress code?
9 A Yes. At the time, yes.
10 Q In fact, I think you testified on direct that -- that the
11 next day, on June 15, Ms. Fox came and had a huddle meeting
12 with the Whole Body department that you worked in, right?
13 A Yes.
14 Q And with your team leader, Angel Ruiz?
15 A Yes.
16 Q And I might be pronouncing it -- am I pronouncing his last
17 name correctly? Ru --
18 A Ruiz.
19 Q -- Ruiz.
20 A Yes.
21 Q Angel Ruiz. He was your team leader. Your -- the direct
22 team leader of the Whole Body department, right?
23 A Yes.
24 Q So again, it was reinforced on June 15, that policy
25 doesn't permit wearing BLM while you're working in the store on

1 your uniform?
2 A That's what she said.
3 Q You had some testimony on direct about also being upset, I
4 think, on the same day on June 14, about a coworker who you
5 referred to as Gee, being told that his mask was not in
6 compliance -- his face mask -- because it had the Mexican flag
7 on it.
8 A Correct.
9 Q And that upset you, as well?
10 A Yes.
11 Q Now, do you believe that the wearing of national flags on
12 the face mask is the same issue -- the same thing? Ought to be
13 allowed. You have a right to do it. Just as wearing Black
14 Lives Matter or BLM on your face mask?
15 A Yes.
16 Q And why is it that you view the right to wear a national
17 flag on your facemasks as -- as one that ought to be a
18 protected right? You -- you view it as a protected right.
19 A Well, it's related to national origin, which is a
20 protected class. Many facets of life. Same as race, which
21 is -- relates to the Black Lives Matter mask.
22 Q Well, let me ask you this, because you said Bella had
23 written Black Live -- BLM on her face mask, right?
24 A Um-hum.
25 Q What -- what was Bella's race?

1 A Bella was white.
2 Q Now, Gee, the coworker you mentioned named Gee who had the
3 Mexican flag on his face mask, do -- do you know what his
4 national origin was?
5 A He's Mexican.
6 Q So he was wearing a mask that actually identified him?
7 A Correct.
8 Q And Bella was a white woman wearing the BLM on her face
9 mask, right?
10 A Correct.
11 Q And yourself; what race do you identify as?
12 A I'm Mexican.
13 JUDGE SOTOLONGO: Do you see that as a race or a
14 nationality?
15 THE WITNESS: That's a nationality, but people conflate
16 the two. I'm -- I would consider myself partially indigenous.
17 JUDGE SOTOLONGO: Okay.
18 Q BY MR. FERRELL: Now, you also testified that not long
19 thereafter, Kelly Fox had another huddle meeting with the Whole
20 Body group -- the Whole Body department, right?
21 A Yes.
22 Q And during that huddle, she told you that the regional
23 president had told her not to send anybody home. Not to
24 enforce the mask --
25 A Yes.

1 Q -- the dress code, with respect to the mask at that time;
2 is that right?
3 A Correct.
4 Q And so from June 17 until July 14 -- I think you testified
5 on direct -- you're able to wear any BLM messaging you -- you
6 wanted. At least on your face mask and your pin at the store,
7 right?
8 A Yes.
9 Q And while that was the case, at your store, you submitted
10 your resignation from Whole Foods, right?
11 A Correct.
12 Q On July 7?
13 A Correct.
14 Q And do you have General Counsel's 91 in front of you up
15 there?
16 A Yes.
17 Q If you look on the second page of General Counsel's 91, in
18 the lower right-hand corner, it has a what we call a Bates
19 number. It says WFM, page 258. Do you see that?
20 A Yes.
21 Q This is the resignation letter you submitted on July 7th,
22 right?
23 A Correct.
24 Q Under the reason for my voluntary resignation -- "The
25 reason for my voluntary resignation is" -- you handwrote these

1 words, right, that are underneath it?
2 A Um-hum. Yes. Correct.
3 Q "I am moving on to work in the nonprofit field." So
4 that's what you wrote?
5 A Correct.
6 Q That's what you told Whole Foods on July 7?
7 A Correct.
8 Q Did you go to work for a nonprofit?
9 A Yes.
10 Q What's the name of the nonprofit?
11 MR. PETERSON: Objection. Relevance.
12 JUDGE SOTOLONGO: Relevance?
13 MR. FERRELL: Well, Your Honor, it goes to their
14 constructive discharge allegation.
15 JUDGE SOTOLONGO: Well, she went to work for a
16 nonprofit -- another company. Do we need to know the name of
17 it?
18 MR. FERRELL: Absolutely, Your Honor. She's -- she's also
19 testified on direct that -- that she was going to continue to
20 work for Whole Foods. But for the General Counsel's theory is
21 that she was actually discharged, and in the alternative,
22 constructively discharged. It's relevant. Did she have
23 another job? When did she apply for that job? Did she
24 interview for that job?
25 JUDGE SOTOLONGO: Well, she just testified that she, in

1 fact, went to work for another company. But I guess, the name
2 of the company is irrelevant.
3 MR. FERRELL: You -- I'll rephrase, Your Honor.
4 JUDGE SOTOLONGO: Okay.
5 Q BY MR. FERRELL: You did, in fact, go to work for the
6 nonprofit that you planned to as of July 7, right?
7 A Yes.
8 Q And when did you start that other job?
9 A I started that on -- I believe it was like, four days
10 later. So --
11 Q Four days later?
12 A -- it was on the -- on the Monday that followed that
13 firing. I believe that firing happened on -- I don't remember
14 what date, but --
15 Q When you -- when you say that firing, you mean the last
16 day you worked was July 15th?
17 A The last day I worked, yes.
18 Q And your planned day as of July 7, it says right here --
19 right above your handwriting -- you had handwritten, your last
20 planned day of work was July 18, 2020, right?
21 A Yes.
22 Q And your planned start date at the new job --
23 A Um-hum.
24 Q -- at the nonprofit was July 19?
25 A It was July 20th, actually.

1 Q So July 20, you were scheduled to work for your new job?
2 A Yes.
3 Q And that was probably timed in with when you gave two
4 weeks' notice for -- for Whole Foods, right?
5 A Yes.
6 Q And July 20, do you recall that -- that was a Monday you
7 were going to start your new job?
8 A Yes.
9 Q Now, when did you apply for the new job?
10 A I applied somewhere between -- you know, I can't remember,
11 actually.
12 Q Was it in June, or was it before that?
13 A It was in June.
14 Q So you first applied for it in June? Did you interview?
15 A Yes.
16 Q When did you interview?
17 A I don't remember.
18 Q Was that in June?
19 A Yes.
20 Q When did you learn -- when did they make you an offer?
21 A They had offered me the job pretty quickly. On the same
22 day that I interviewed.
23 Q So that was June?
24 A Yes.
25 Q When did you accept?

1 A The same day.
2 Q So you accepted the offer. You -- you already had another
3 job lined up in June, which is fine. Good for you.
4 A Um-hum.
5 Q You had another job in June that you'd been offered and
6 accepted, and on July 7, you told Whole Foods and gave your two
7 weeks' notice because you were going to start your new job on
8 July 20?
9 A Yes.
10 Q Now, Ms. Belen, the initial Board affidavit you gave in
11 this case was on August 3, 2020. Does that date sound right?
12 A Sure.
13 Q It looks like the Board agent who took your initial
14 affidavit was Amy Berbower. Do you remember meeting Mr.
15 Berbower?
16 A Um-hum.
17 Q And that was about 19 days after your last day worked for
18 Whole Foods, right?
19 A Yes.
20 Q And a couple of weeks into your new job, right?
21 A Um-hum.
22 JUDGE SOTOLONGO: Is that a yes?
23 THE WITNESS: Yes.
24 JUDGE SOTOLONGO: You need to answer --
25 THE WITNESS: Sorry.

1 JUDGE SOTOLONGO: -- answer verbally. Yes.
2 THE WITNESS: Yes.
3 Q BY MR. FERRELL: And your Board affidavit -- your
4 signature's on page 10. So you had ten pages where you discuss
5 your employment, the allegations that, well, we're here about,
6 in your sworn statement -- your affidavit, right?
7 A Yes.
8 Q And -- and on page 1 of your affidavit, you stated -- this
9 is the second full substantive paragraph after you give your
10 contact information. "I resigned from my employment in July.
11 I gave two weeks' notice, and my last day was supposed to be
12 July 18, 2020." Which is what we've been talking about, right?
13 A Um-hum.
14 Q And nowhere in this ten pages did you say you planned to
15 continue working at Whole Foods, right?
16 A Yes.
17 Q That the only reason you resigned from foods was because
18 of their dress code policy with respect to Black Lives Matter,
19 right?
20 A Yes.
21 Q Now, you said something entirely different when you gave
22 your second confidential affidavit to the Board, didn't you?
23 A I don't remember.
24 Q You don't remember what you said?
25 A No.

1 Q Do you remember when you gave that second Board affidavit?
2 A I don't remember. No.
3 Q It was June 10, 2021. Does that sound about right?
4 A Yes.
5 Q In that affidavit you said you'd resigned from your
6 position with Whole Foods in July of 2022 (sic) due to the
7 employer's discriminatory and retaliatory response to its
8 employees wearing Black Lives Matter.
9 A Um-hum.
10 Q Right?
11 A Yes.
12 Q You made no such allegation when you gave your first ten-
13 page affidavit, did you?
14 MR. PETERSON: Objection. If the Counsel is going to be
15 questioning the witness about a ten-page document, the witness
16 should be shown the document.
17 JUDGE SOTOLONGO: Well, but the witness has admitted that
18 she said what Mr. -- what Counsel has read it from the
19 affidavit.
20 MR. PETERSON: He's asking what -- what's in the
21 affidavit. She said she doesn't remember.
22 MR. FERRELL: I don't believe that's what she said.
23 JUDGE SOTOLONGO: But I don't remember her saying that she
24 didn't remember what she had said in the affidavit. I remember
25 what date she had given it, and Mr. Ferrell had indicated. So

1 go ahead, ask -- ask your question again.
2 Q BY MR. FERRELL: Ms. Belen, your initial affidavit given
3 August 3, 2020, about 19 days after your last day worked at
4 Whole Foods, just under a -- just over a month -- just under a
5 month after you submitted your resignation, over a month since
6 you took that new job --
7 A Um-hum.
8 Q -- you gave this affidavit. You didn't say anything in
9 here about resigning because of Whole Foods dress code policy
10 or not permitting Black Lives Matter to be worn while you're
11 working, right?
12 A Yes. But she didn't ask me.
13 Q It's your affidavit. It's ten pages of your statement.
14 There's not one word in here about that being the reason you
15 resigned, is there?
16 A I guess not.
17 Q Do you have some doubt about that, Ms. Belen?
18 A I don't have any doubt that that's not in there. But if
19 she didn't ask me why I resigned, then I didn't say why I
20 resigned.
21 Q But you talked about your resignation, right?
22 A Yes.
23 Q But you didn't say that was why?
24 A She didn't ask me.
25 Q I question you, Ms. Belen, because you didn't say that was

1 why you resigned, right?
2 A Correct.
3 Q And you didn't mention that you'd actually accepted
4 another job back in June?
5 MR. PETERSON: Objection. Relevance.
6 JUDGE SOTOLONGO: Overruled.
7 Q BY MR. FERRELL: You didn't -- you didn't tell the Board
8 agent you'd actually accepted another job back in June, right?
9 A Right. I -- I don't -- again, I don't remember when it
10 was that I accepted that, but it would have been late June.
11 And at that time I basically had already been -- I already
12 decided that I wasn't going to work for a company that their
13 position was the one that they had already taken.
14 Q And the position, as you understood it at that time, was
15 that you were actually wearing your BLM button and/or your mask
16 while you're working at that store?
17 A Yes.
18 Q Do you have in front of you -- well, and let me -- let me
19 stay with that for a second, Ms. Belen. On July 14, I think
20 you testified on direct that Ms. Fox, the store team leader,
21 had another huddle meeting with your department in Whole Body,
22 right?
23 A Yes.
24 Q And she informed you that they would now be enforcing the
25 dress code, which meant no - no slogans on face masks; they

1 included that, right?
2 A Yes.
3 Q So on July 14 -- which is again after you had already
4 resigned, but while you were still working out your last notice
5 period -- you were told there -- that's going to be enforcement
6 of the dress code going forward, right?
7 A Yes.
8 Q And you wore your Black Lives Matter -- your BLM pin the
9 next day?
10 A Yes.
11 Q Knowing that it was a violation of the dress code, right?
12 A Yes.
13 Q You were spoken to, you said, by your team leader, Angel
14 Ruiz, and the associate store team leader, Jessica Rodriguez,
15 right?
16 A Yes.
17 Q I think you were asked to remove it to be in compliance
18 with the dress code, and you declined, right?
19 A Yes.
20 Q And Ms. Rodriguez informed you that if you were going to
21 refuse to be in dress code, that she'd have to send you home,
22 right?
23 A Correct.
24 Q And I think Ms. Rodriguez, you testified, asked you, is
25 this going to be your same position between now and Saturday,

1 because Saturday's going to be your last day anyway, on July
2 18, right?
3 A Yes.
4 Q And you said that it would be.
5 A Yes.
6 Q And Ms. Rodriguez asked, instead of me sending you home
7 each day, do you want to just make it -- today your last day,
8 right?
9 A Um-hum.
10 Q Correct?
11 A Yes.
12 Q And she told you -- because it was just the notice period
13 because you'd already resigned -- she told you, it'll be no
14 problem from Whole Foods. You'll still be credited as eligible
15 for rehire as you gave us two weeks' notice.
16 A Yes.
17 Q Right? She told you that.
18 A Um-hum.
19 Q And you said, if that's what you want to do, that's fine.
20 We'll make today my last day?
21 A Yes.
22 Q And that was the -- your last day worked, July 15?
23 A Yes.
24 Q Now, you have -- do you have General Counsel's 89 in front
25 of you?

1 A Yes.
2 Q If you'll look at page -- well, looking at page 1. Let me
3 ask you a question about the photo. It's in black and white.
4 A Um-hum.
5 Q You had referred to your affidavit as a mask -- a Black
6 Lives Matter mask that you wore as having a cheetah print on
7 it.
8 A Yes.
9 Q Is that this mask?
10 A Yes.
11 Q So this is a cheetah-print patterned mask, right?
12 A Um-hum.
13 Q Yes?
14 A Yes.
15 Q That's for the court reporter. I'm just making sure they
16 have an audible answer.
17 A Yes.
18 Q All right. And you had stitched the letters to spell out
19 Black Lives Matter on one half of the cheetah-print mask,
20 right?
21 A Yes.
22 Q And you use red lettering when you switched that together,
23 right?
24 A Yes.
25 Q Was there any re -- particular reason you used red?

1 A It's just what popped out because there was a lot of
2 patterns on it.
3 Q Okay. You wanted it to be noticeable?
4 A Correct.
5 Q To customers who came in the store?
6 A To anybody.
7 Q Including customers who came in the store?
8 A Yes.
9 Q On the third page of General Counsel's 89, you testified
10 this is a post that you made to your Instagram account the last
11 day that you worked at Whole Foods.
12 A Yes.
13 Q And that's -- that's your picture. Is that you right
14 outside the store; is it from that day?
15 A That's at my house.
16 Q Okay. But it's wearing the -- the -- the button that you
17 were wearing that day?
18 A Yes.
19 Q You have a post -- a text that starts below that, and
20 then -- then on the next page of General Counsel's Exhibit 89,
21 I believe, it's the complete post. Would you agree with me
22 about that?
23 A Yes.
24 Q And if you're looking at that last page, you said, "My
25 last day was to be Sunday" -- it was actually to be July 18,

1 right?
2 A Yes.
3 Q And if a calendar said July 18 was on a Saturday, would
4 you agree your last -- your last day actually that you were
5 supposed to work was going to be Saturday?
6 A That's correct.
7 Q You mentioned that you spoke -- you told -- then you spoke
8 to management, and they said they would have to send me home.
9 The they you're referring to is Jessica Rodriguez and Angel
10 Ruiz?
11 A Yes.
12 Q And you -- you added in here -- you -- you included what
13 we talked about a moment ago. I said that was fine, but my
14 convictions wouldn't change.
15 A Yes.
16 Q Right?
17 A Um-hum.
18 Q You mention below that, "This isn't the first time this
19 issue has come up at Whole Foods or at our" -- "at our
20 location." The other time you're referring to at -- at the
21 location, the Telegraph Avenue store in Berkeley, that's Bella
22 from June 14?
23 A No. Bella worked at my location.
24 Q Right.
25 A Right.

1 Q I'm talking about at -- at the Telegraph location.
2 A Yes.
3 Q At your location.
4 A Uh-huh.
5 Q The only other time you were aware of that an employee --
6 a team member, had been sent home for wearing Black Lives
7 Matter at the store, you're referring to Bella on June 14,
8 right?
9 A I was referring to Bella, but I was also referring to
10 the -- the -- the incident with the -- the sign.
11 Q The sign? You're talking about to Darnelle?
12 A Yes.
13 Q But Darnelle wasn't sent home.
14 A Right. But I was referring to the totality of -- of what
15 was going on.
16 Q And -- and Darnell's a member of the store management,
17 isn't he?
18 A Correct.
19 Q But among the team members -- among your -- your
20 coworkers, the only other case you were aware of was -- was
21 Bella, from June 14?
22 A Yes.
23 Q So when you say -- and I'm looking at the middle of that
24 paragraph -- you see where it says other employees have been
25 sent home at our store for the same reason.

1 A Yes.
2 Q When you say other employees, plur -- plural, it's
3 really -- it's -- it's just Bella we're talking about?
4 A Yes.
5 Q Down a little further you say -- and tell me if you -- if
6 you're able to find this -- "The truth is that Whole Foods does
7 not care about the black community. I know this because of the
8 lack of diversity in the company." Do you see that?
9 A Yep.
10 Q Now, at -- at your store -- the Telegraph Avenue store in
11 Berkeley, your store team leader was -- was female, Kelly Fox,
12 right?
13 A Yes.
14 Q Your team leader was Angel Ruiz, right?
15 A Yes.
16 Q Latino?
17 A Yes.
18 Q Even your assistant store team leader was Sarah Bruno, a
19 female, right?
20 A Yes.
21 Q The two associate store team leaders were Jessica
22 Rodriguez, a Latino female, right?
23 A Yes.
24 Q And Tanda Brown, female, right?
25 A Correct.

1 Q Do you know what race is Tanda Brown?
2 A She's black.
3 Q African-American?
4 A Yes.
5 Q That's the leadership structure at the store where you had
6 been since 2018.
7 A Um-hum. Yes.
8 Q That's the -- the store management that was not diverse
9 enough for you?
10 A I was more directly tal --
11 MR. PETERSON: Objection. Argumentative.
12 JUDGE SOTOLONGO: Sustained.
13 Q BY MR. FERRELL: At the end of your post here, you say you
14 have a demand. Do you see that in the last three lines of your
15 comment?
16 A Yes.
17 Q You encourage people to call customer service at Whole
18 Foods and demand that they -- Whole Foods, right?
19 A Yes.
20 Q Let team members wear BLK messaging. Did you mean BLM
21 messaging?
22 A BL -- yes.
23 Q And demand that they stop retaliating against emp --
24 against their employees. And the retaliation you're referring
25 to there is enforcing the dress code that they're not being

1 allowed to wear BLM messages while they're working in the
2 store?
3 A Correct.
4 Q Right? That they'd not face any consequences for wearing
5 BLM messaging while working. That's the retaliation you're
6 talking about?
7 A Yes.
8 Q And when you're talking about to wear BLM messaging.
9 That's in order that they want to be able to -- you wanted to
10 be able to before you left -- to show support for the Black
11 Lives Matter movement, right?
12 A And for our black team members.
13 Q But the BLM is what you're wearing on your mask, right?
14 Or your body.
15 A Yes.
16 Q And that's to show support for Black Lives Matter
17 movement?
18 A The movement and our team members. Yes.
19 Q Okay. But -- but when -- when you referenced BLM, you're
20 talking about Black Lives Matter, right?
21 A Yes.
22 Q And I understand you're -- in part you're saying in
23 support of our African American coworkers, as well, right? But
24 it's part of a broader Black Lives Matter movement for the
25 black community, no?

1 A Yes. For the black community.
2 Q I mean, you -- you testified earlier, this activity at
3 your store started following the death of -- of George Floyd.
4 George Floyd was not one of your coworkers at Whole Foods,
5 right?
6 A Correct.
7 Q He's an individual who lived in Minneapolis, Minnesota,
8 right?
9 A Right.
10 Q So when you're talking about the broader Black Lives
11 Matter movement, that's the same Black Lives Matter movement
12 that was having at that time -- summer of 2020 -- their
13 rallies -- protests in the Bay Area, right?
14 A Yes.
15 Q Were there some in Berkeley --
16 A Yes.
17 Q -- that you attended, or no?
18 A I attended a couple.
19 Q There's others in -- in Oakland, San Francisco; am I
20 right?
21 A Yes.
22 Q All in support of the Black Lives Matter movement, right?
23 A Yes. I -- I think some were about -- generally about
24 police brutality, but yes.
25 Q. Well, police brutality because it was the police who had

1 killed George Floyd, right?
2 A Correct.
3 Q I mean, that's where so much of that Black Lives Matter
4 movement came out of, right?
5 A Right.
6 Q Are you aware of how it started and how it was founded in,
7 I believe, 2014 or '13? Do you remember that?
8 A I believe there was another shooting.
9 Q The killing of a young man named Trayvon Martin. Do you
10 remember that?
11 A Yes.
12 Q In Florida.
13 A Um-hum.
14 Q So it came out of violence against and killing of unarmed
15 African-Americans. Would you agree with me about that?
16 A Yes.
17 (Counsel confer)
18 Q BY MR. FERRELL: I'm going to hand you what we're marking
19 as Respondent's Exhibit -- if I can figure out what number
20 we're up to. Bear with me.
21 MS. SCHAEFFER: I think we're at 89.
22 MR. PETERSON: I think you're at 90. You had -- you had
23 offered two different 90s and withdrew them both in the last
24 hearing.
25 JUDGE SOTOLONGO: That's correct.

1 MS. SCHAEFFER: I think we're at 90, yes.
2 JUDGE SOTOLONGO: That's correct.
3 MR. FERRELL: Okay.
4 Q BY MR. FERRELL: I'm going to hand you what I'm marking as
5 Respondent's Exhibit 90.
6 (Counsel confer)
7 Q BY MR. FERRELL: Ms. Belen, I've handed you what's been
8 marked as Respondent's Exhibit 90. This was part of your
9 recent supplemental subpoena production. You'll see it's
10 marked at the lower right-hand corner by your Counsel as Del
11 Rio Ramirez supplemental production. This particular one is
12 page 24. Do you see that?
13 A Yes.
14 Q At the -- at the top left, there's a -- a photo. Is that
15 the photo you used at the time for your Instagram account? Is
16 that you?
17 A That's my current Insta -- Instagram photo.
18 Q Okay. But that's -- that's you? It's your photo?
19 A That's me. Yes. Um-hum.
20 Q Is this -- and this is something you posted on your
21 Instagram account?
22 A Yes.
23 Q The redaction to the immediate right of your own name; do
24 you know what that is?
25 A That's my username.

1 Q This particular flier -- I'm going to call it a flier --
2 it was something you helped create?
3 A I didn't create this one. No.
4 Q Did you -- did you work with others who were creating it?
5 A Yes.
6 Q Others who were your former coworkers at Whole Foods, the
7 Telegraph store?
8 A Yes.
9 Q The Telegraph store in Berkeley?
10 A Yes.
11 Q And this -- I'm going to call it a flier, because I'm just
12 old fashioned that way -- but --
13 A Yes.
14 Q -- this document was about a planned protest or rally you
15 were going to have at the Telegraph store in Berkeley,
16 California, where you had most recently worked?
17 A Yes.
18 Q And the date that was planned was July 25, as -- as
19 indicated on the on the -- on the flier, right?
20 A Yes.
21 Q And to the -- to the top quarter of it -- if you're
22 looking at the blue, the -- the right half-- or the top half --
23 it says, "Whole Foods Market team members demand the right to
24 support BLM at work." Do you see that?
25 A Yes.

1 Q And when you were there, and -- and the team members that
2 you worked with and spoke to about this, that demand to support
3 BLM at work, that was the demand to wear and display Black
4 Lives Matter messaging while working in the store?
5 A Yes.
6 Q And you asked people to come out to protest WFM's --
7 that's Whole Foods, right?
8 A Um-hum. Yes.
9 Q Decision to retaliate against team members who openly
10 support Black Lives Matter movement, right?
11 A Yes.
12 Q And again, the retaliation was enforcement of the dress
13 code codes that they were not being allowed to wear BLM while
14 working, right?
15 A Yes.
16 Q But it -- it's to -- they want to be able -- you would
17 want it to be able -- as it states here -- to openly support
18 the Black Lives Matter movement, right? Correct?
19 A We didn't put movement in there. We just said, "Black
20 Lives Matter".
21 Q Really? Because I'm -- I'm looking at -- will you look at
22 Respondent's Exhibit 90? It says, "Protest WFM's decision to
23 retaliate against team members who openly support the Black
24 Lives Matter movement." It's the last word on the right.
25 A Okay. Yes.

1 Q I read it correctly, didn't I?
2 A Yes.
3 Q And that's, again, something that's -- that's much bigger
4 than the Telegraph store?
5 A Yes.
6 Q Right? It's a -- at that time, a national thing, right,
7 movement?
8 A Yes.
9 Q And is this your comments -- your post at the bottom of
10 this page?
11 A Yes.
12 Q Well, you said, "Whole Foods is not listening and
13 continuing to threaten team members with retaliation." We
14 talked about that. That's the same retaliation that is the
15 enforcement of the dress code, right?
16 A Correct.
17 Q "For standing with #BlackLivesMatter, the Black Lives
18 Matter movement. So that's -- that's you who used the word
19 movement, right?
20 A Yes.
21 Q And you say, "We will not stand down." You see where you
22 said that?
23 A Yes.
24 Q And this is -- this is a week after your last day worked
25 at Whole Foods, right?

1 A Yes.
2 Q I mean, at this time, July 22nd, you were working for the
3 nonprofit.
4 A Yes.
5 Q And you put hashtags at the end --
6 A Um-hum.
7 Q -- to flag it for -- for other relevant topics, right, for
8 other posts?
9 A Yes.
10 Q And it was about #BlackLivesMatter, #AllBlackLivesMatter,
11 #TranBlackLivesMatter, #FuckWhiteSupremacy, right? Those
12 are -- that's your doing, right?
13 A Yes.
14 Q Because that's what this was about to you, right; it was a
15 larger societal fighting white supremacy?
16 A Partially, yes.
17 MR. FERRELL: Your Honor, I'd move to admit Respondent's
18 Exhibit 90 into evidence?
19 JUDGE SOTOLONGO: Any voir dire or any objection?
20 MR. PETERSON: Just quick voir dire.
21 **VOIR DIRE EXAMINATION**
22 Q BY MR. PETERSON: I'm not sure if you covered this or not
23 exactly, but you -- you -- you helped create this in some way?
24 A I just helped with, like, the messaging. We all, like,
25 kind of would create the fliers, edit it together, or you know,

1 just give feedback on what should be on it.

2 MR. PETERSON: No objection.

3 JUDGE SOTOLONGO: All right. Respondent's 90 is admitted.

4 **(Respondent Exhibit Number 90 Received into Evidence).**

5 **RESUMED CROSS-EXAMINATION**

6 Q BY MR. FERRELL: Ms. Belen, do you have General Counsel's

7 93 in front of you?

8 A Yes.

9 Q And this is another post from your Instagram account; is

10 that right?

11 A Yes. Not -- not from my pos -- not from -- this is

12 specifically from the message thread that we had on Instagram.

13 Q The message thread that you had with some of your

14 coworkers?

15 A Yes.

16 Q And the -- the post at the bottom. It begins, "Hey,

17 y'all". Is that -- are these -- is this a post by you?

18 A Oh, yes. Actually, you're right. Yes. This is actually

19 a post.

20 Q This is actually your Instagram account?

21 A Yes.

22 Q And so this is you talking at the bottom here it says,

23 "Hey, y'all"?

24 A Yes.

25 Q You say, "Whole Foods is showing their true colors. They

1 are attempting to silence team members standing with the BLM
2 movement" -- there's that word again, the movement -- "and
3 retaliating." Do you see that?
4 A Yes.
5 Q Now, you -- you're not -- you didn't receive any
6 disciplinary action before you left for preparing fliers,
7 right?
8 A No.
9 Q You're not aware of anybody who was disciplined for
10 attending your protest at the other store -- the Gilman
11 store -- that you talked about on direct, right?
12 A No.
13 Q Or the protest that you organized at the Telegraph store,
14 right?
15 A No.
16 Q Nobody was -- was punished for that, right?
17 A Not that I know of.
18 Q But you say, "People have been sent home while others have
19 been fired even before there was a policy." Now, this is a
20 post from July 14; is that right?
21 A Correct.
22 Q Now, as of July 14, when you wrote that, there, in fact,
23 had been no team member who had been fired at the Telegraph
24 store, right?
25 A I wasn't referring to the Telegraph store. I knew of

1 somebody on the East Coast who was fi -- who was fired.
2 Q Who did you know on the East Coast?
3 A Somebody -- there was a post about it on -- on this Whole
4 Foods Workers Instagram that said that this person had been
5 fired. So that's what I was relaying.
6 Q So what you knew was you had read something on social
7 media about somebody else who had allegedly been fired, but you
8 never spoke to them?
9 A I never spoke directly to them, no.
10 Q Okay. So you didn't have any personal knowledge about
11 what happened in that other store 3000 miles away, right?
12 A I didn't have personal knowledge, but I -- it was -- I
13 believe it was part of a news article, but I can't quite
14 remember.
15 Q Oh, well, it's in the news, huh?
16 MR. PETERSON: Objection. Argumentative. Not even a
17 question.
18 Q BY MR. FERRELL: Ms. Belen, but what you actually knew
19 from the store where you worked, when you wrote this, no one
20 had been fired?
21 A From the store. No.
22 Q You worked at one store, right?
23 A I worked at --
24 Q At this time?
25 A Yes.

1 Q In 2020, you worked at one place, right?
2 A Yes.
3 Q And no one had been fired for this?
4 A Correct.
5 Q Do you have General Counsel's 92 in front of you?
6 A Yes.
7 Q I think you testified that this was another flier that you
8 helped prepare?
9 A Yes.
10 Q And this was for an organized activity on -- on June 19th,
11 right?
12 A Correct.
13 Q And I think you testified on direct nobody received any
14 adverse action at your store for June 19th, right?
15 A Correct.
16 Q You were asking people to "dress in all black, wear
17 paraphernalia to show support" -- I'm reading here -- "to show
18 support for our black team members." TMS, that's team members?
19 A Yes.
20 Q "And BLM movement", right?
21 A Yes.
22 Q And on the third page of the exhibit -- of the General
23 Counsel's exhibit, there's a -- a motto of a Black Lives Matter
24 mask, right?
25 A Which page? I'm sorry.

1 Q The last page of the exhibit. There's a couple of
2 masks --
3 A Yes.
4 Q -- in the -- in the exhibit, right?
5 A Yes.
6 Q And one says the word Black Lives Matter, right?
7 A Yes.
8 Q And the other one has the -- the black fist of power
9 raised in the air, right?
10 A Yes.
11 Q And that would be something else that people are being
12 encouraged to wear as part of -- to show support?
13 A I don't think so. It's just, like, a picture. Probably a
14 picture that that person found that they could use.
15 Q But you posted it with -- with the flier, right?
16 A Yes.
17 Q You were encouraging people to -- to wear all black
18 clothing, accessory, to show support for our black team members
19 and BLM movement. Mask, patches, pins, et cetera, right? As
20 I'm reading from the first page.
21 A Yes.
22 Q And then in that flier are -- are two masks that are
23 shown, right, on the last page?
24 A Yes. This is a different flier that we did not hand out.
25 Q Are you saying this last page is not part of the -- the

1 General Counsel's exhibit?
2 A I mean, we -- we used this to communicate it, but we
3 didn't hand these out in person. We just shared these through
4 Instagram.
5 Q But you used it to communicate?
6 A Yes.
7 Q And -- and the two masks that are used in that
8 communication -- that you're promoting it about -- one says the
9 words "Black Lives Matter", and one has the raised black fist,
10 right?
11 A Yes.
12 MR. FERRELL: Your Honor, I'd like to take a few minutes
13 and confer with -- with Counsel and see what else we may have?
14 JUDGE SOTOLONGO: Okay. How -- how much time will you
15 need?
16 MR. FERRELL: If I could have five minutes.
17 JUDGE SOTOLONGO: All right. Let's go off for -- let's go
18 off the record for five minutes.
19 (Off the record at 12:13 p.m.)
20 JUDGE SOTOLONGO: All right. Mr. Ferrell?
21 MR. FERRELL: No further questions at this time, Your
22 Honor.
23 JUDGE SOTOLONGO: Thank you. Mr. Peterson?
24 MR. PETERSON: Thank you, Your Honor.
25 **REDIRECT EXAMINATION**

1 Q BY MR. PETERSON: Ms. -- Ms. Belen, I -- just some
2 follow-up questions based on some of the things that the Whole
3 Foods lawyer was asking you about. One was your -- the -- the
4 affidavit you gave in support of the Title 7 injunction case.
5 Do you recall him asking you about that?
6 A Yes.
7 Q And one of the -- one of the statements he had you recall
8 was that "following the" -- the "death of George Floyd, and
9 demonstrations springing up across the country in support of
10 the Black Lives Matter movement, one of my coworkers put a
11 small Black Lives Matter sign on his desk and was told to
12 remove it." Do you remember that?
13 A Yes.
14 Q Do you recall stating immediately after that, that you
15 reported this to Whole Foods corporate because you believed it
16 was discrimination?
17 A Yes.
18 Q What -- how -- did you report this incident to Whole Foods
19 corporate?
20 A Yeah. I called the -- the WFM --
21 MR. FERRELL: Objection.
22 A -- TALK.
23 MR. FERRELL: Relevance as to a discrimination allegation.
24 JUDGE SOTOLONGO: Excuse me?
25 MR. FERRELL: Objection. Relevance as to the

1 discrimination allegation.
2 JUDGE SOTOLONGO: Overruled. Go ahead.
3 THE WITNESS: Yes. I called the -- the number, the
4 WFM-TALK number.
5 JUDGE SOTOLONGO: Excuse me. I can't hear you. You
6 called which number?
7 THE WITNESS: The 844, I guess, WFM-TALK.
8 JUDGE SOTOLONGO: Is that -- is that a number that Whole
9 Foods provides its members to call where there's any kind of
10 problems --
11 THE WITNESS: Yes. It's like a complaint line, I guess.
12 Yes.
13 JUDGE SOTOLONGO: All right. All right. Go ahead.
14 Q BY MR. PETERSON: Did you speak to someone when you made
15 that phone call?
16 A Yes. There was someone on the other line.
17 Q And what do you recall reporting?
18 A I just recall reporting the incident itself. They
19 didn't -- yeah. The -- just reporting the incident.
20 Q Can you tell us what -- instead of just summarizing the
21 incident, can you try to remember what you said? How did you
22 describe the incident?
23 A I just described that a -- a black team member was asked
24 to remove a sign that said "Black Lives Matter" from his
25 personal desk, that wasn't anywhere where clients could see it,

1 by the assistant store team leader who was instructed by the
2 team leader, Kelly Fox.
3 Q And what did you tell the person why you were reporting
4 that?
5 A Yeah. I was reporting it because I thought it was -- that
6 I thought it was racist, basically.
7 Q And why did you think it was racist?
8 A Because it's -- it related the -- the phrasing, Black
9 Lives Matter, is related to his race, which is being a black
10 man and it's -- he should not, in my eyes, be made to have to
11 take down the sign that says his own life matters.
12 Q And this was the -- this was a team leader; is that right,
13 who this happened to?
14 A Yes.
15 Q Do you consider team leaders team members, also?
16 A I consider them coworkers.
17 Q Coworkers?
18 A Yes.
19 Q Did the individual on the other end, did you -- did they
20 identify themselves?
21 A I'm not sure I remember if they did or not.
22 Q Do you remember if they responded to your report?
23 A They didn't respond to the report. They just said that
24 they had logged it and that I could check back on it in -- in
25 two weeks if I called back the -- the number.

1 Q Did you report back or follow up?
2 A I don't remember if I did or not.
3 Q Moving on, there was -- you we're asked about Whole Foods
4 and the mask policy and about at -- at some point they started
5 making -- making masks available to -- to team members. Do you
6 recall that testimony?
7 A Yes.
8 Q Was -- and was that if -- were -- were you still permitted
9 to wear your own mask at that point?
10 A Yes.
11 Q Had you worn the -- the cheetah mask to work prior to
12 stitching the BLM -- the Black Lives Matter onto it?
13 A Yes.
14 Q By July 14th, Counsel for Whole Foods asked you if you
15 had, by that point, understood that Whole Foods was viewing the
16 wearing of Black Lives Matter as a violation of the dress code
17 policy. Do you recall that?
18 A Yes.
19 Q And what was your -- what was the basis of your
20 understanding that that was how Whole Foods was interpreting
21 the policy?
22 A Just that it was a political statement.
23 Q And is -- I guess, who told you that?
24 A Kelly Fox.
25 Q Prior to her saying that, did you believe that the Black

1 Lives Matter -- wearing the Black Lives Matter phrase at work
2 was against the dress code?
3 A On what date? I'm sorry.
4 Q Prior to -- prior to June, when Kelly first, I guess, sent
5 home Bella and had the meeting with you guys?
6 A I did not think it was against the rules.
7 Q And why -- why did you not think it was against the rules?
8 A Because they just said that they couldn't have political
9 statements on it or gore-ish imagery, which I didn't think of
10 Black Lives Matter as a political statement.
11 Q You put in your -- your resignation on July 7th, and -- is
12 that correct?
13 A Yes.
14 Q And at that point, you, as I understand it, Whole Foods --
15 you were aware that Whole Foods was not enforcing the dress
16 code as prohibiting Black Lives Matter?
17 A Correct.
18 Q At that point, and -- and -- and you put in July 18th as
19 your -- your last day?
20 A Yes.
21 Q Had you planned on continuing working until your -- your
22 last day before July 15th?
23 A Yes.
24 Q Would you have continued working your final few
25 shifts after July 15th, had they continued to allow you to wear

1 the Black Lives Matters pin and message at work?
2 A Yes.
3 Q Do you have General Counsel's 89 up there? It's the
4 first -- the first one with -- your mask is on the first page.
5 A Yes.
6 Q And Whole -- Whole Foods' lawyer was asking you about the
7 diversity -- about the comment about the lack of diversity in
8 the company.
9 A Yes.
10 Q And he kind of went through your -- the -- the leadership,
11 in -- in your particular store. Do you remember him asking you
12 about that and going through that?
13 A Yes.
14 Q What were you referring to when you -- by -- by your
15 phrase, the -- the lack of diversity in the company?
16 A I -- I was more referring to, like, upper management, and,
17 like, corporate, and stuff like that. Yes.
18 Q And what was your understanding of the -- the diverse
19 makeup of the upper-level corporate management at that time?
20 A That it's mostly white and male.
21 Q And what was your -- what was the basis of your under --
22 of that understanding?
23 A Just looking through I guess -- I -- we had access to
24 looking at pictures and information about corporate, so --
25 Q You -- did you go through that yourself?

1 A Yes.
2 Q And what conclusion did you draw?
3 A That it's not very diverse.
4 Q There's been -- you were asked several questions about --
5 about wearing -- about whether you were wearing Black Lives
6 Matter at work to show support for the movement. Do you recall
7 that?
8 A Yes.
9 Q And then you've also testified and -- and some of the
10 exhibits show that you were also wearing it to show support for
11 your black team members?
12 A Yes.
13 Q How -- how -- how was wearing the Black Lives Matter at
14 work, how did you view that as showing support for your -- for
15 your team members?
16 A Well, just to show that we care about their -- their lives
17 in general, and all aspects of life, within the work setting as
18 well. And because for me, Black Lives Matter is not just about
19 police brutality, but it's ab -- about human rights, and in all
20 facets of life, including -- including work.
21 MR. PETERSON: Nothing further, Your Honor.
22 JUDGE SOTOLONGO: Mr. Ferrell?
23 MR. FERRELL: Yes, Your Honor. One second.
24 **RECROSS-EXAMINATION**
25 Q BY MR. FERRELL: Ms. Belen, we're talking about the

1 diversity of the Whole Foods management. You mentioned on
2 direct, Regional President Omar Gaye, who's -- store team
3 leader Fox had said she had spoken to Omar Gaye, right?
4 A Yes.
5 Q And Omar was the -- the regional president. You
6 understood that, right?
7 A Yes.
8 Q Do you know what race Mr. Gaye is?
9 A I don't know.
10 Q You don't? You don't know that he's African-American, in
11 fact?
12 A Okay.
13 MR. PETERSON: Objection, asked and answered.
14 JUDGE SOTOLONGO: Overruled.
15 Q BY MR. FERRELL: When you made the comment that they're --
16 they're all -- they're all white if you get above the store
17 level or something like that, the regional president's, in
18 fact, African-American. Did you know that?
19 A I didn't know that at the time.
20 Q When you say "Black Lives Matter" is about all facets of
21 life, in -- including work, is that what you said?
22 A Yes.
23 Q So is it also about housing?
24 A Yes.
25 Q Is it about banking, access to money?

1 A Yes.
2 Q Education?
3 A Yes.
4 Q Is it about policing and the justice system?
5 A Yes.
6 Q Is it about access to healthcare?
7 A Yes.
8 Q Is it about the call for political, societal reform, in
9 all of those areas, for greater racial equity?
10 A I guess I would answer it's about -- it is about reform,
11 yes.
12 Q Well, but to get reform in -- in how we do banking in this
13 country requires changes in our banking laws, doesn't it?
14 A Yes.
15 Q That -- that's done through what we call the political
16 process, right?
17 A Yes.
18 Q Laws get passed?
19 A Yes.
20 MR. PETERSON: Objection, relevance.
21 JUDGE SOTOLONGO: Overruled.
22 Q BY MR. FERRELL: Right, if you want to reform how
23 education -- public education's done in this country, you know
24 you have to go change state laws, right? Do you know that?
25 A Yes.

1 Q So that's political process reform to change education,
2 right? Correct?
3 A Yes.
4 Q You want to change how police are funded in this city, in
5 this state? That's political process at the city and state
6 level; do you understand that?
7 A Yes.
8 Q You understand who runs the prisons, it's -- it's the
9 state and municipalities in it. It's really the state, right?
10 A Yes.
11 Q So if you're going to reform --
12 A Some prisons are private.
13 Q -- criminal -- and who runs the court system? It's the
14 state.
15 A Yes.
16 Q Right? You've got federal government court system, and
17 state court system, and it's -- it's the government.
18 A Um-hum.
19 Q Governmental reform for all of those things, right?
20 A Yes.
21 MR. FERRELL: No further questions.
22 JUDGE SOTOLONGO: All right.
23 MR. PETERSON: Yeah, just a quick follow-up?
24 JUDGE SOTOLONGO: Okay, it better be quick.
25 **FURTHER REDIRECT EXAMINATION**

1 Q BY MR. PETERSON: The re -- you know, the -- the -- the
2 political reform component of the Black Lives Matter message
3 that you were just asked about, I guess I'm wondering, is there
4 any aspect of the Black Lives Matter message that doesn't
5 require political reform in your -- in your view?
6 A I guess, just the right to express oneself would not
7 require political reform, because those are already things that
8 are protected.
9 Q Would more equality in the workplace, would that require
10 political action or legislative action?
11 A I mean, there's -- I don't think it should, because
12 there's already laws that are set that would guarantee that.
13 Q So what does the Black Lives Matter message mean in the
14 workplace if it's -- if it's -- if it's unrelated to political
15 reform?
16 A I guess re -- related to being able to express yourself,
17 and express your identity, is what it would relate to?
18 Q And you don't identify as black; is that correct?
19 A I don't, no.
20 Q But you were wearing Black Lives Matter at work. Why --
21 why were you wearing Black Lives Matter at work if that's not
22 your identity?
23 A Well to -- just to show support for the team members that
24 are black.
25 MR. PETERSON: All right, nothing further.

1 MR. FERRELL: One minute, Your Honor.

2 **FURTHER RECROSS EXAMINATION**

3 Q BY MR. FERRELL: Ms. Belen, did you ever wear the Black
4 Lives Matter pin, facemask, outside of work, to show support
5 for the black community?
6 A Yes.
7 MR. PETERSON: Objection, exceeds the scope of cross.
8 JUDGE SOTOLONGO: Frankly, it does.
9 MR. FERRELL: Your Honor --
10 JUDGE SOTOLONGO: Oh, yeah, go -- go ahead, ask your
11 question, let's -- let's get this over with.
12 Q BY MR. FERRELL: When -- when you wore it outside of work,
13 did it -- did it mean something different when you were wearing
14 it in the store?
15 A It -- I don't know what you mean.
16 Q Did it have a different meaning when you were wearing the
17 same three letters, BLM, when you're wearing it out in the
18 community at a protest, or just out in the community, as
19 opposed to when you were wearing it while you were working.
20 Was it supposed to have a different meaning?
21 A Not that I'm aware, no.
22 MR. FERRELL: No further questions.
23 JUDGE SOTOLONGO: All right. Thank you, you're excused.
24 THE WITNESS: Thank you.
25 JUDGE SOTOLONGO: Thank you for your testimony. Please do

1 not discuss your testimony with any other witness or potential
2 witness in this matter until this whole case is over, all
3 right?
4 THE WITNESS: Okay.
5 JUDGE SOTOLONGO: Thank you very much.
6 THE WITNESS: Thank you.
7 JUDGE SOTOLONGO: All right. Counsel, it is now 20 to 1.
8 At this point, I don't know if there's any time to take a lunch
9 break. Okay, we're going to -- we could -- at -- let's see,
10 what -- do you have other witnesses lined up for today, Mr.
11 Peterson?
12 MR. PETERSON: Yes.
13 JUDGE SOTOLONGO: All right. So -- so we resume -- it is
14 a quarter -- so we resume court at 2? Would that be fine?
15 About an hour -- about an hour and five minutes from now?
16 MR. PETERSON: Yes, that's fine, Your Honor.
17 JUDGE SOTOLONGO: All right. Let's resume court at 2.
18 MR. FERRELL: Thank you, Your Honor.
19 (Off the record at 12:38 p.m.)
20 JUDGE SOTOLONGO: All right. Mr. Peterson, are you ready
21 to call your next witness?
22 MR. PETERSON: Yes, Your Honor, General Counsel calls
23 Cassidy Visco.
24 JUDGE SOTOLONGO: All right.
25 You can take your mask off. That's fine. Could you --

1 let me first swear you in. Will you please raise your right
2 hand? Right hand.
3 Whereupon,
4 **CASSIDY VISCO**
5 having been duly sworn, was called as a witness herein and was
6 examined and testified as follows:
7 JUDGE SOTOLONGO: All right, thank you. Please spell your
8 name for us and give us your address.
9 THE WITNESS: My name is Cassidy Visco. C-A-S-S-I-D-Y.
10 JUDGE SOTOLONGO: Oh, it's C-A-T-A --
11 THE WITNESS: C-A-S-S-I-D-Y.
12 JUDGE SOTOLONGO: Okay.
13 THE WITNESS: And then Visco, V-I-S-C-O.
14 JUDGE SOTOLONGO: Thank you. Could you please give us
15 also your address, please?
16 THE WITNESS: Right. 1545 Debra Drive, D-E-B-R-A, Drive,
17 in Petaluma, California.
18 JUDGE SOTOLONGO: All right. Thank you very much. And
19 then one thing I need to -- to inform you is, these microphones
20 do not amplify your voice, they simply record. So you need to
21 project your voice so they can hear you over there. You have a
22 soft voice, which normally is good, but in a room this big, it
23 kind of get -- gets lost, so you need to sort of speak up so
24 they can hear you. All right? Thank you very much.
25 THE WITNESS: Thank you.

1 MR. PETERSON: Thank you. Good afternoon. As you know,
2 I'm Matt Peterson. I'm the lawyer for the National Labor
3 Relations Board. We're going to be asking you some questions
4 today. Listen carefully, answer truth -- truthfully. If you
5 don't understand a question, let us know and we'll try and say
6 it in a different way. Try and give a little pause so the
7 attorneys can make objections in -- in between questions. And
8 first of all, it looks like you have some exhibits on the
9 table. Do you mind just stacking those and kind of putting
10 them out of -- out of your sight for the moment? Thank you.
11 **DIRECT EXAMINATION**
12 Q BY MR. PETERSON: And I'll start by asking if you have any
13 preferred pronouns.
14 A I just use she/her.
15 Q And is Ms. Visco okay?
16 A That's fine. Yes.
17 Q Okay. Ms. Visco, are you familiar with the company called
18 Whole Foods?
19 A I am familiar, yes.
20 Q And how are you familiar with Whole Foods?
21 A I worked at Whole Foods from August 2014 to April 2021.
22 Q Did you work at a particular Whole Foods location
23 throughout that time?
24 A Yeah. I worked at the Petaluma Whole Foods in Petaluma,
25 California.

1 Q Did you work in more than one position throughout your
2 tenure at Whole Foods?
3 A Most of my position was in the deli, but I did also work
4 in the cheese department and the Amazon shopping.
5 Q A lot of these -- most of this case focuses on the summer
6 of 2020. Do you recall what position you were working in the
7 summer of 2020?
8 A I had just started working as well in the cheese
9 department, but every once in a while, I would also work in the
10 deli or the Amazon shopping.
11 Q Can you describe what your duties were in the deli, cheese
12 department, and Amazon shopping?
13 A Yeah, I was in the front end of the deli department, so I
14 dealt with customers, and I would make sandwiches, pizza,
15 burritos, stuff like that. In the cheese department, we mainly
16 were wrapping the cheeses and just preparing the floor.
17 Q And were you doing the cheese wrapping?
18 A It's -- it's, like, kind of like the service desk right
19 in -- by the cheese department. It is in the front, so the
20 customers can approach you.
21 Q And then what about the Amazon shopping? You said you did
22 some Amazon shopping?
23 A Yeah, that would be usually just with -- throughout the
24 store, collecting the items for the customers, or in the back,
25 kind of putting them away so that they could be given at later

1 times to the customer.
2 Q Do you recall the management structure at your store in
3 summer 2020? Who did you report to, and who did they report
4 to, up to the top of the store?
5 A Yeah. There was different team leaders for each section.
6 So for the deli department there was John Abbott. He was the
7 team -- the deli team leader. There was also the -- I believe
8 the cheese team leader was Sterling (phonetic throughout). I
9 don't remember his last name. And then they had associate team
10 leaders that were for the whole store, and the store team
11 leaders as well, just --
12 Q Do you remember who the store team leader was at that
13 time?
14 A Yeah, Frank Avila.
15 Q And do you remember who the associate store team leaders
16 were?
17 A Yeah, there were several. There was -- I know for sure,
18 Sean McNiff, Alvina Layden. A couple more, I'm forgetting some
19 right now, but --
20 Q Are you familiar with the term -- what was your -- I'm
21 sorry, let me back -- back up a little bit. What was your work
22 schedule like in the summer of 2020?
23 A I was mainly part time. I had previously been seasonal.
24 So I believe I was still under the seasonal status. So there
25 would be some weeks that I'd go without a scheduled shift. But

1 at that time I was working perhaps, like, three times a week,
2 eight-hour shifts, so about 24 hours a week.
3 Q And what -- what's your understanding of the difference
4 between seasonal and -- and part time?
5 A Part time generally was a set schedule of 24 hours -- or
6 at least 20 hours a week, and the -- for the seasonal
7 department, it was -- or the seasonal status, it was once --
8 you had to work once every 17 weeks to maintain employment.
9 Q And I think you said you were working about three times a
10 week in -- in the summer?
11 A Yeah. But it would be not uncommon for us to go a couple
12 weeks without having a shift because the status I was under.
13 Q And when you were working, were you working the same
14 shifts?
15 A It would vary. It would be pretty much what they needed.
16 Q What are the -- can you give some examples of the various
17 shifts that you worked?
18 A There was, like, morning shift was usually from 6 a.m. to
19 2 p.m. The mid shift was 9:30 to 5, and the evening shift was
20 2 p.m. to 10 p.m.
21 Q Did you have -- were you required to wear a uniform with
22 any of those positions that you held in summer of 2020?
23 A Yeah. I usually wore the kitchen jacket in both the
24 cheese department and the deli. We would have to wear --
25 during that time we had to wear masks as well, for the

1 pandemic, and we had to have nonslip shoes.
2 Q Can you describe the jacket that you wore?
3 A Yeah. It was, like, a short-sleeved button-up black shirt
4 that had, like, pockets on either side. And they usually said,
5 the kitchen, on it. And it would cover whatever you were
6 wearing underneath.
7 Q Are you familiar with the term "Black Lives Matter"?
8 A I am, yes.
9 Q And how -- how are you familiar with the term "Black Lives
10 Matter"?
11 A I remember it being about maybe, 2014 I first encountered
12 that. And it was in relation to some of the things going on in
13 the country and, you know.
14 Q Have you -- and -- and how did you -- how did you learn
15 about what was happening with the -- with Black Lives Matter,
16 and what was going on in the country?
17 A It was mainly on the news. It was also -- some of my
18 friends had brought it up as well. But it was -- it was
19 basically just, like, people trying to find justice where they
20 felt like there was none.
21 Q Did you ever wear anything at work with the phrase "Black
22 Lives Matter" on it?
23 A Yeah, I did put -- I -- on a sticky note, I kind of made
24 bubble letters that said --
25 MR. BROWN: Objection, Your Honor. The question was

1 whether she had, and now there's a narrative.
2 THE WITNESS: Yes, I have.
3 Q BY MR. PETERSON: Okay. And what -- on -- on more than
4 one occasion?
5 A Yeah, multiple occasions. Yes.
6 Q Can you describe what you wore that had Black Lives Matter
7 on it?
8 A Yeah, I made a sticky note that said, "Black Lives
9 Matter', and I placed it inside the clear plastic of my
10 nametag, where it wasn't obstructing the name. Yeah, of --
11 Q Any other Black Lives Matter -- did you -- did you wear it
12 in any other -- any other way?
13 A There was a little pin that I put on, but it was after the
14 fact, and it was kind of something that I would hide from the
15 management.
16 Q Was it the -- was -- nametags, is that a required part of
17 your uniform?
18 A It was required to have a nametag, yes.
19 MR. PETERSON: May I approach, Your Honor?
20 JUDGE SOTOLONGO: Yes.
21 (Counsel confer)
22 MR. PETERSON: Yeah, the -- the exhibit file is in color.
23 Counsel for Respondent, is that enough to provide --
24 MR. BROWN: Oh, okay.
25 MR. PETERSON: -- a color copy as well?

1 Q BY MR. PETERSON: Do you see what's been marked as General
2 Counsel's Exhibit 94 there in front of you?
3 A Yes.
4 Q Do you -- do you recognize what's on that exhibit?
5 A Yes. Yeah, it's a picture of my nametag.
6 Q Is that the nametag you were describing?
7 A Yes.
8 Q Do you recall when you -- when you -- when you first used
9 the -- created the sticky note that said "Black Lives Matter"
10 in your nametag?
11 A It was June of 2020. I -- for pride month added the
12 flag -- the pride flags on the side. And then in addition
13 right after, the George Floyd thing in Minn -- Minneapolis, I
14 added the Black Lives Matter as well, so at the same time.
15 Q And when -- when you say pride flag, what are you
16 referring to?
17 A On the right-hand side there's four pride flags. Some of
18 them are a little faded, but the top one is the gay pride flag,
19 the second one is the trans pride flag, the third one is a
20 pansexual pride flag, and the thir -- fourth one is the queer
21 pride flag.
22 Q And then -- and -- and so just so I'm clear, did you put
23 the -- did you put the Post-its -- are they all Post-its that
24 you just described?
25 A Yeah, they're all just on paper, yeah.

1 Q And did you do it at the same time, the -- the Black Lives
2 Matter and the pride flags that you described?
3 A Yes. Yeah.
4 Q And I think you -- you recall -- what was your estimate as
5 to when -- when this was?
6 A The beginning of June 2020.
7 Q What -- what gave you the idea to put Black Lives Matter
8 on your nametag?
9 A It was right after the George Floyd case in Minneapolis,
10 and I wanted to show support for both my black coworkers and
11 the black customers, to know that -- that Whole Foods was a
12 safe place to be, and it was just to kind of -- yeah, make a
13 feeling of safety in the workplace.
14 Q At the -- at the time you -- you made those modifications,
15 I guess there's -- it looks like there's a couple other things
16 on your nametag.
17 A There are a couple stickers as well that were a lot --
18 very previous to that. I think maybe at the beginning of the
19 year.
20 Q And is that the -- what appears to be a crown and a
21 flower?
22 A That's correct.
23 Q At the time you made those modifications to your nametag,
24 did you believe that the modifications would be a violation of
25 any Whole Foods policies?

1 A I didn't believe so, because Whole Foods had issued a
2 statement saying they supported Black Lives Matter, and they
3 had also in the past supported the LGBT movement. And so to
4 me, it felt like it was very in-line with the company's
5 ideology.
6 Q Were -- what was your experience with the -- your store's
7 enforcement of the -- the dress code up to that point?
8 A It was pretty lenient. There was -- was certain things
9 like no spaghetti straps that were enforced. But for the most
10 part, things like they -- during the playoffs, people would
11 wear sports logos, and people would have, like, pride flags
12 during the June, because it's pride month. And so it seemed
13 pretty lenient, and it was one of the nice things about working
14 at Whole Foods.
15 Q Did you have any discussions with your coworkers about
16 wearing -- about putting Black Lives Matter on your nametag
17 prior to -- prior to you doing so?
18 A There wasn't any discussions prior, but afterwards.
19 MR. BROWN: Objection. Question was prior.
20 JUDGE SOTOLONGO: And so Ms. Visco -- so Ms. Visco, what I
21 want to ask you is, if -- just limit yourself to answering the
22 question that you're asked, and -- and stop, and I'm sure Mr.
23 Peterson will follow up with --
24 THE WITNESS: Okay, thank you.
25 JUDGE SOTOLONGO: -- the next question, and I will let --

1 allow you to expand. Otherwise, we're going to be getting
2 objections.
3 THE WITNESS: Okay.
4 JUDGE SOTOLONGO: Proceed.
5 THE WITNESS: Thank you.
6 Q BY MR. PETERSON: Who -- so prior to you wearing, you
7 hadn't discussed it with -- with coworkers?
8 A No.
9 Q Had you seen other coworkers wearing anything that said
10 "Black Lives Matter" or -- or BLM at work?
11 A No.
12 Q Had you heard about the sa -- about something similar
13 happening at other stores?
14 A At that time, no.
15 Q What were you hoping to accomplish by wearing Black -- by
16 putting Black Lives Matter on your nametag?
17 A It was mainly for my black coworkers and customers to feel
18 like there was a safe space.
19 Q After you -- after you started wearing -- once you started
20 wearing it, about -- over what time period did you wear the --
21 wear this nametag?
22 A For about a month, from the beginning of June 2020 to the
23 beginning of July 2020.
24 JUDGE SOTOLONGO: So you said mid -- what time in June?
25 Mid-June?

1 THE WITNESS: It was the beginning of June.
2 JUDGE SOTOLONGO: Oh, beginning of June, okay.
3 Q BY MR. PETERSON: And after you started wearing the -- and
4 did you wear it to all -- all of your scheduled shifts during
5 that time period?
6 A Yes.
7 Q And where -- is the nametag visible from your -- with your
8 jacket and apron?
9 A Yeah, I would attach it about here, and so it would be
10 about here on me.
11 JUDGE SOTOLONGO: So the witness is pointing to an area
12 just below her shoulder, on le -- on the left side. And that
13 was, I guess -- would that have been above the apron line?
14 THE WITNESS: Right.
15 JUDGE SOTOLONGO: Because you wear an apron at work; is
16 that correct?
17 THE WITNESS: Yes.
18 JUDGE SOTOLONGO: So this would be just slightly above
19 where the upper --
20 MR. BROWN: Judge, she just -- she testified she didn't
21 wear an apron. She wore a chef's coat. A short sleeved --
22 JUDGE SOTOLONGO: Excuse me, I stand corrected. You wear
23 a chef's coat. So this would have been above the -- the chef's
24 coat?
25 THE WITNESS: Yeah, I would usually attach it to the

1 pocket.

2 JUDGE SOTOLONGO: Oh, to the pocket, I see. So it was --

3 so it was visible?

4 THE WITNESS: It was, yes.

5 JUDGE SOTOLONGO: Okay. Very good.

6 Q BY MR. PETERSON: And once you began wearing the Black

7 Lives Matter on your nametag, did you have any discussion with

8 your coworkers about wearing the Black Lives Matter symbol --

9 A I --

10 Q -- on your nametag?

11 A -- I did have cus -- er, coworkers approach me and tell me

12 that they really appreciated that I had it, and that was mostly

13 what we would talk about.

14 Q About how many of your coworkers did you speak to about

15 the Black Lives Matter nametag?

16 A I would say about five.

17 Q Who were you -- who were you hoping would see the Black

18 Lives Matter message on your nametag?

19 A It was mainly, again, for coworkers who were people of

20 color, and for customers as well.

21 Q Did you make any attempts to hide it from management?

22 A At that time, for the -- this nametag, no, I did not.

23 JUDGE SOTOLONGO: Now just so that I understand, because I

24 may have misheard you. The -- the pride flags that are next to

25 the Black Lives Matter, did you start wearing those about the

1 same time, or were -- had you already been wearing those before
2 you put the Black Lives Matter?
3 THE WITNESS: It was at the same time that I added them,
4 yeah.
5 JUDGE SOTOLONGO: Same time. So you added both things at
6 the same time?
7 THE WITNESS: Right.
8 JUDGE SOTOLONGO: I see. Very good.
9 Q BY MR. PETERSON: And did you have any discussions with
10 store -- store leadership about the Black Lives Matter nametag
11 that you had?
12 A I did, when it was asked to remove it.
13 Q And about -- did you have one conversation or more than
14 one conversation with -- with store leadership?
15 A There was probably about four or five conversations. And
16 this was when it became a problem.
17 Q Do you recall -- do you recall when the first conversation
18 was with store leadership about your Black Lives Matter
19 nametag?
20 A It was July 7th, 2020.
21 Q And where -- where -- where did the discussion take place?
22 A It began in the cheese department. I was working at the
23 counter, and Frank approached me and told me I needed to remove
24 it from my nametag. And I responded that I was not comfortable
25 doing so.

1 Q And Frank again, what -- can you -- what -- what's Frank's
2 position?
3 A He's the store team leader at the Petaluma store.
4 Q That was Frank Avila?
5 A That's right.
6 Q And what happened after you said you weren't comfortable
7 removing it?
8 A He told me that he was going to talk to the HR
9 representative, and he said that he was going to come back
10 and -- and talk to me about it, and so later, yeah.
11 JUDGE SOTOLONGO: Did he -- excuse me. Did he ask you to
12 remove all the tags, including the pride flags, or just the
13 Black Lives Matter message?
14 THE WITNESS: He specifically asked me to remove the Black
15 Lives Matter message.
16 JUDGE SOTOLONGO: He said nothing about the gay pride --
17 THE WITNESS: No.
18 JUDGE SOTOLONGO: -- the gay -- the -- the pride flags?
19 THE WITNESS: No.
20 JUDGE SOTOLONGO: Okay.
21 Q BY MR. PETERSON: And after -- anything else you recall
22 from that -- that -- that initial discussion?
23 A We were taken back to the HR department, and I rock --
24 talked with him and Ricki McCarthy, who is the HR
25 representative. I don't remember who said what, but they both

1 were kind of saying to support it outside of work, and that it
2 was controversial, and if they allowed me to put that in my
3 nametag, they would have to allow opposite ideology like Blue
4 Lives Matter. I kind of argued that I don't think that Blue
5 Lives Matter is the opposite ideology as Black Lives Matter. I
6 think the opposite ideology would be Black Lives Don't Matter.
7 And so I felt that it was not really an opposite ideology that
8 anyone would tolerate in a workplace, because it felt like
9 blatant racism.
10 Q And that's what you -- you said that to -- to Frank Avila
11 and you said Ricki McCarthy, is that the -- the name?
12 A Correct.
13 Q And what was -- what was their response?
14 A They told me that they're not trying to have any
15 controversial issues in the service floor. And I kind of
16 pointed out that the gay pride flags were not an issue. And
17 they said that that was something that they were talking about
18 regionally to maybe remove in the future.
19 Q The -- the flags, what -- what fla -- what pride flags
20 were you referring to?
21 A The pride flags in my nametag.
22 Q Had either of them mentioned the pride flags before you --
23 you brought it up?
24 A They did not. They only asked me to remove Black Lives
25 Matter.

1 Q Do you recall anything else about that conversation?
2 A I know they said that I was not going to be allowed on the
3 service floor if I had -- kept it in my nametag, and that I
4 would have to go home if -- if I was not willing to, which I
5 was not.
6 Q Yeah, what was your reaction to that?
7 A I -- I said I was not comfortable with removing it. It
8 felt against my beliefs, and it felt, I don't know, bad, so I
9 didn't -- I went home for that day.
10 Q Did you have time remaining in your shift?
11 A I did. I believe it was less than half of my shift for
12 July 7th.
13 Q Did you get paid for that portion of your -- of the day
14 that you were sent home.
15 A I got paid for the first half where I was working, but
16 afterwards, I was not paid for those hours.
17 Q Do you recall the ne -- did -- the next conversation you
18 had with store leadership about your Black Lives Matter
19 nametag?
20 A On July 10th, 2020, I was working again, and that was when
21 I was approached again and asked to remove it.
22 Q Do you recall who -- do you recall where you were working?
23 A I believe I was in the deli that day, and Frank approached
24 me.
25 Q And what -- what do you recall him saying?

1 A It was very similar, like, you can't have Black Lives
2 Matter in your nametag and if you're not willing to take it
3 out, you're going to have to go home again.
4 Q And what did you -- what did you do in response?
5 A I told them I was still not comfortable removing it, and
6 so I wa -- I was sent home.
7 Q Had you -- by that point, or -- did you ever become aware
8 of -- of employees at other Whole Foods stores wearing or
9 attempting to wear Black Lives Matter -- the phrase at work?
10 A Yes. I found out about the lawsuit around July 21st.
11 Q And what -- what lawsuit are you referring to?
12 A I believe it was some Savannah had started going where
13 they were wearing Black Lives Matter masks in one of the
14 stores, and they were asked to -- sent home, and it felt very
15 similar to my own experience.
16 Q Do you know Savannah's last name?
17 A I believe it starts with a K, but I do not recall what --
18 Q Does -- does Kinzer sound familiar?
19 A That sounds correct.
20 Q How did -- and how did you find out, what were -- how did
21 you find out about this lawsuit?
22 A I was looking to maybe even, like, start a petition to
23 allow Black Lives Matter to be worn by employees at Whole
24 Foods. And at that time, I found that there was already
25 petitions in place because of what was happening at the other

1 stores. And that's when I also found out that they had started
2 the suing process.
3 MR. PETERSON: Before we go further, can I -- I'd like to
4 move for the admission of General Counsel's 94.
5 MR. BROWN: No objection.
6 JUDGE SOTOLONGO: All right, General Counsel 94 is
7 admitted.
8 **(General Counsel Exhibit Number 94 Received into Evidence)**
9 MR. PETERSON: May I approach, Your Honor?
10 JUDGE SOTOLONGO: Yes.
11 Q BY MR. PETERSON: I'll give you a chance to look at
12 that -- that -- that exhibit, General Counsel's 95, and let us
13 know if you recognize it?
14 A I do. Yeah.
15 Q And what is this?
16 A This is a story that I posted on my Instagram that
17 includes somebody else's post about the original Black Lives
18 Matter hashtag, and where it came from, and what they were
19 asserting with that statement.
20 Q And what -- what -- what platform or application is this?
21 A It's Instagram.
22 Q Is that your Instagram account?
23 A It is my Instagram. Or the -- the -- it's my Instagram
24 story. The -- I was reposting a different person's Instagram
25 post.

1 Q Whose post were you --
2 A The chasinggarza, which I believe is Alicia Garza's
3 account, who is one of the people who coined the term "Black
4 Lives Matter".
5 Q And what was your purpose in -- in posting this story?
6 A I added a little bit at the end there kind of pointing out
7 that I don't feel that this statement is controversial, and
8 that we don't need to be neutral about saying Black Lives
9 Matter, and it was in response to the fact that I was being
10 sent home over wearing it to work.
11 Q Is that -- what -- what did you mean by, "I'm looking at
12 you, Whole Foods"?
13 A They -- I was -- because I was told to take it out because
14 it was a consi -- considered a political slo -- slogan by Whole
15 Foods, I was pointing out that I don't consider it a political
16 slogan, because this is what the -- to me, the definition of
17 Black Lives Matter is.
18 Q And yeah, what is your understanding of what the phrase
19 "Black Lives Matter" means?
20 A To me, it very much represents the fact that there -- we
21 haven't always treated black people in this country with
22 humanity and dignity. And to me, it's just asserting the fact
23 that black people are just as important and valuable in our
24 country as anyone else is.
25 Q Is that limited to certain areas of life?

1 A I don't know that I understand the question.
2 Q Yeah. Yeah, Black Lives Matter, is it -- is it -- yeah,
3 what -- in what arenas are -- or what -- what -- what aspects
4 of society does Black Lives Matter apply?
5 A I think it's very much related to, like, human rights kind
6 of thing. And in pretty much every arena, I think that people
7 should be treated with dignity and humanity. And that's what I
8 feel it asserts.
9 Q Do you see a connection between the phrase "Black Lives
10 Matter" and the workplace?
11 A I do because I have both coworkers and customers in the
12 workplace who are black.
13 MR. PETERSON: Move for the --
14 Q BY MR. PETERSON: And I guess the second page, what is the
15 second page?
16 A Somebody had responded to my post, and they said that some
17 stores actually made nametags -- like, as in, stores being
18 Whole Foods, that had nametags that say "Black Lives Matter".
19 And I was surprised, because I was hoping that that's something
20 that Petaluma might be able to do.
21 Q And was that your -- is that your response?
22 A Yeah, the, "That's surprising. I wonder why Petaluma
23 hasn't done something like this," was me responding back to
24 that person.
25 Q And there's --

1 A The other person, yeah.
2 Q -- there -- there's two dates on that second page. At the
3 top it's July 16th, 2020, and the bottom's February 15th, 2021.
4 Do you know what dates these messages were -- when -- when the
5 person responded, and your response to --
6 A Yeah, they responded to me on July 16th. Anything
7 underneath the February 15th would be later interactions with
8 that person. But yeah, this -- this interaction was July 16th,
9 2020.
10 Q Who -- is your -- who were you -- who were you hoping
11 would see your Instagram post?
12 A Anyone who was following me, I suppose. I don't have a
13 public account, so it was just to show people that I know that
14 this is something that matters to me, I guess.
15 MR. PETERSON: Move for the admission of General Counsel's
16 95.
17 JUDGE SOTOLONGO: Any voir dire or objections?
18 MR. BROWN: Yeah, I -- with regard -- a quick voir dire
19 on -- on page 2 of General Counsel's Exhibit 95.
20 **VOIR DIRE EXAMINATION**
21 Q BY MR. BROWN: Do you have any -- who -- who is the person
22 who posted this misinformation on Reddit?
23 A The person who responded to my story was another person --
24 another coworker at Whole Foods. She worked in my department
25 when I first started, and then later was moving to the

1 receiving. And so I was under the impression, yeah, that she
2 had heard correctly.
3 Q Okay. And you learned that that wasn't true, though,
4 right?
5 A I -- I never actually learned whether or not it was true.
6 MR. BROWN: Okay. Your Honor, I -- I -- I just don't
7 understand the relevance of page 2. I'm not objecting to page
8 1, if that relates to, I guess, what her understanding of what
9 Black Lives Matter means, but page 2 is not --
10 JUDGE SOTOLONGO: Yeah, I agree. Yeah, I don't see a
11 relevance of page 2, Mr. Peterson.
12 MR. PETERSON: All right, that's fine. I can withdraw
13 page 2.
14 JUDGE SOTOLONGO: All right. So only the first page of
15 General Counsel 95 is admitted.
16 **(General Counsel Exhibit Number 95 Received into Evidence)**
17 JUDGE SOTOLONGO: And what -- Ms. Visco, what -- what
18 platform was this on?
19 THE WITNESS: Instagram.
20 JUDGE SOTOLONGO: Okay.
21 THE WITNESS: This in particular is the story feature of
22 Instagram.
23 JUDGE SOTOLONGO: Okay.
24 MR. PETERSON: May I approach again, Your Honor?
25 JUDGE SOTOLONGO: Yes.

1 **RESUMED DIRECT EXAMINATION**

2 Q BY MR. PETERSON: Give me a -- give you a chance to look
3 at the -- the -- there's two pages of that document. Let me
4 know if you are familiar with -- with either?
5 A I am. Yes.
6 Q Can you tell us what the first page is?
7 A The first page is me reaching out to Savannah to tell her
8 my situation and ask if I could help in any way in the
9 injunction that she filed against Whole Foods.
10 Q And then what about the second page?
11 A The second page is the petition that I found where -- in
12 which I -- when I basically found out that this was happening
13 in other stores was because I had found this petition in search
14 of a petition, or in possibly making a petition if it had not
15 been made already.
16 Q And what were you -- as your -- what were -- what were you
17 thinking about what -- what was the petition that you were
18 thinking of?
19 A Very similar. Basically just saying that Whole Foods
20 employees should be allowed to express support for the Black
21 Lives Matter movement, especially considering Whole Foods had
22 made a public statement in support.
23 Q And what was your understanding about what happened at
24 the -- with -- with Savannah Kinzer's situation?
25 A From my understanding, they were wearing masks instead of

1 in their nametag, that had Black Lives Matter written across
2 it, and that they were also told to -- they would have to
3 remove it or be sent home in order to -- yeah.
4 Q And did you ultimately become part of the lawsuit that you
5 had referenced?
6 A I did, yes.
7 MR. PETERSON: I move for the admission of General
8 Counsel's 96.
9 JUDGE SOTOLONGO: All right, any voir dire or objection?
10 MR. BROWN: Quick voir dire, if I could, Your Honor.
11 **VOIR DIRE EXAMINATION**
12 Q BY MR. BROWN: Ms. Visco, by July 20 -- this is dated July
13 23rd. When you ta -- you texted Savannah Kinzer, is that
14 right?
15 A It's a messaging app, yes.
16 Q Okay. By July 23rd, you had already, on your own
17 initiative, worn the Black Lives Matter messaging on your
18 nametag repeatedly, correct?
19 A Right.
20 Q And you had already been told that it violated the dress
21 code, and -- and you testified had been sent home, correct?
22 A Yes.
23 MR. BROWN: Your Honor, I do object to this -- this
24 proposed exhibit. I just don't understand the relevance.
25 We've -- we've been through this so many times. She can

1 certainly testify about what she was wearing and why she was
2 wearing it, but the lawsuit is not part of this case.
3 JUDGE SOTOLONGO: Mr. Peterson?
4 MR. PETERSON: So again, this kind of goes to the -- I
5 know you've heard plenty of concerted activity, but it's --
6 and -- and it -- activity can -- you know, activity can grow.
7 It can start as an individual action and grow into concerted
8 activity. And that's what this represents.
9 MR. BROWN: Your Honor, the witness has testified that she
10 was the only -- only team member who wore Black Lives Matter
11 messaging. That's not a fact in dispute. And she's testified
12 that she was aware, at some point, that there were other team
13 members, in other stores, in other parts of the country who had
14 similar experiences. Her communications with Savannah Kinzer
15 about a Title 7 lawsuit that has since been dismissed is not
16 relevant.
17 JUDGE SOTOLONGO: Well, was this -- was this communication
18 post -- post her alleged discipline or pre?
19 MR. PETERSON: This -- this comes before her alleged
20 discipline. Two days -- two days before her first writeup
21 that --
22 JUDGE SOTOLONGO: All right. I think it has some
23 relevance. I'll admit it. So General Counsel 96 is admitted.
24 **(General Counsel Exhibit Number 96 Received into Evidence)**
25 **RESUMED DIRECT EXAMINATION**

1 Q BY MR. PETERSON: Did -- did learning about what was
2 happening at other Whole Foods stores have any impact at all on
3 your -- on your desire to continue wearing the Black Lives
4 Matter nametag that you were wearing?
5 A I did feel that there was a little bit -- it was that I
6 was not the only one that felt this way and that I wanted to,
7 like, help, I guess, in any way that I can, to allow -- for
8 Whole Foods to allow this messaging being worn.
9 Q Do you -- do you remember -- do you remember your next
10 shift, when that was?
11 A I believe it was July 24th or 25th of 2020.
12 Q Did you -- did you wear the -- were you wearing the Black
13 Lives Matter nametag on -- on -- on this date?
14 A I was, yes.
15 Q Were you able to work your entire shift?
16 A No. I was approached by Alvina Layden and told that I
17 would have to come talk to her in her office.
18 Q And Alvina Layden, is that one of the associate store team
19 leaders you described earlier?
20 A That's correct.
21 Q And when was this in relation to when you started work
22 that day?
23 A It was definitely before the halfway mark because I
24 believe I got two points for the absence, essentially.
25 Q Did you -- did you meet with -- with Alvina Layden?

1 A I did. She was explaining to me --
2 Q And just before I go -- like, was it -- where did you meet
3 with her?
4 A We met in her office -- the store team leader's office.
5 Q Was anyone else present?
6 A No. It was just me and Alvina.
7 Q And yeah, go ahead and tell us, to the extent you can
8 recall, who -- how did it begin, and who said what?
9 A She was basically explaining to me that I couldn't have
10 Black Lives Matter in my nametag, and that if I got sent home,
11 I would acquire points for absence, and that after a certain
12 number of points, I would receive a -- like, a disciplinary,
13 like, corrective kind of paper -- paperwork.
14 Q And what -- what was your response?
15 A I said that I was still not comfortable removing it from
16 my nametag.
17 Q And what happened then?
18 A I was sent home for the day.
19 MR. PETERSON: May I approach, Your Honor?
20 JUDGE SOTOLONGO: You may.
21 Q BY MR. PETERSON: I'm going to give you a chance to look
22 at the first two pages of that exhibit. Let me know if you've
23 had a chance to do that.
24 A Yes. Thank you.
25 Q Do you recognize what's -- what's on those first two pages

1 of the exhibit?
2 A Yes. This is the corrective notice that I received after
3 acquiring four points.
4 Q Is that your signature on page 2?
5 A It is, yes.
6 Q Did you sign it on or about July 25th, as indicated?
7 A Yeah, this was during my meeting with Alvina.
8 Q Was -- do you know what -- on -- on the first page,
9 there's -- there's a reference to three -- three dates of
10 partial absence and absence?
11 A Right.
12 Q Do you have an understanding of what -- what -- what those
13 were for?
14 A Those were all of the interactions that I had where I was
15 asked to remove the Black Lives Matter from my name, and
16 because I was not willing to, I was sent home early. And so
17 these are the points that I acquired for not completing the
18 full shift or more than half for the other -- second two.
19 Q What was your understanding of the attendance points and
20 how that would impact your employment?
21 A I believe that it was -- the more you acquire, there's
22 a -- a point where you get a corrective, and that you can be
23 terminated for having a certain amount of points in a certain
24 amount of time.
25 Q The -- on page 2, the -- the -- the handwritten comments,

1 do you know who wrote those?
2 A I wrote that.
3 Q And why did you write that?
4 A I wanted to point out that this wasn't just a time and
5 attendance issue. It wasn't that I was leaving home early for
6 no reason, or that I was skipping work. It was very
7 specific -- more specific to a dress code violation, and I felt
8 that it should be filed under a dress code violation rather
9 than a time and attendance violation.
10 Q How did the -- how did that meeting end with -- with
11 Alvina Layden?
12 A It pretty much ended with her telling me that I would gain
13 points for not removing it, and that -- and that by the end I
14 was asked to leave since I was not willing to.
15 Q And did you -- did you leave that day?
16 A I did, yeah.
17 Q Do you remember how much -- how -- how much you had left
18 remaining in your shift at the time you left?
19 A I believe she approached me very close to the beginning of
20 the shift. And so it was probably close to the full, like
21 seven and a half, eight-hour shift.
22 Q Did you continue to report to work wearing the Black Lives
23 Matter nametag?
24 A I did, I believe for one other occasion.
25 Q And when was that?

1 A August 2nd, 2020.
2 Q Had you worked between July 25th and August 2nd on any
3 occasions without wearing the Black Lives Matter nametag?
4 A I did on August 1st, 2020.
5 Q And why did you -- why -- why did you not wear your -- why
6 did you not wear the Black Lives Matter nametag on that day?
7 A By that time, I had spoken with the lawyers, and they had
8 kind of reassured me that, like, they don't want me to get
9 fired, and, like, I didn't want to get fired during the
10 pandemic. Finding a job felt like it would be iss -- an issue,
11 and so I was trying to -- because I had joined the lawsuit, to
12 me it felt like I was still kind of making an effort to oppose
13 the -- the removal of allowing us to write that. And so I was
14 trying to maintain my employment at that time.
15 Q Did you have any conversations with store leadership on
16 August 1st about nametags when you were not wearing the Black
17 Lives Matter nametag?
18 A I arrived at work with no nametag, and so I did talk to
19 Alvina, and she came back with a new nametag for me that did
20 not include the Black Lives Matter on it.
21 Q And were you able to work your entire shift that day,
22 August 1st?
23 A I was, yes.
24 Q And then you alluded -- you said earlier that August 2nd
25 you -- you also recalled showing up to work wearing the Black

1 Lives Matter nametag?
2 A I did, yeah.
3 Q And what -- what -- what led you to put the Black Lives
4 Matter nametag back on?
5 A I think receiving the new nametag, it felt -- I don't
6 know, it felt wrong, I guess. It definitely felt like I was
7 taking my beliefs and leaving them at the door and not standing
8 up for people in the way that I wanted to.
9 Q And what -- and -- and were you able to work your entire
10 shift on -- on August 2nd wearing the Black Lives Matter
11 nametag?
12 A I was not; I was sent home early again.
13 Q How did that come about?
14 A I believe that on August 2nd, it was Alvina that I talked
15 to again. And she -- she informed me that not -- that I would
16 not be able to work my whole shift if I was not willing to take
17 it -- or August 2nd, you said? I'm sorry, I'm confusing this
18 with August 1st -- the 25th. August 2nd I was working outside.
19 I was cleaning carts, and Sean McNiff is the one who approached
20 me. And I believe I had worked over half my shift at that
21 point. Because I was outside, I think they hadn't noticed.
22 And so I was approached then and asked to remove it.
23 And I believe they also included that they would have a
24 policy where they could -- I could get the point and work the
25 rest of my shift, or I could get a point and -- and leave

1 early. And I think I was -- because I was upset with the --
2 with the decision that they had made to make sure that it was
3 not going to be included, or that you could wear Black Lives
4 Matter, and I felt that I was going to be punished either way,
5 either with a -- for that case a time and attendance versus a
6 dress code violation, I was willing to go home, because I was
7 upset with -- I didn't want to finish my day at work because
8 of -- I didn't necessarily want to labor for a company that was
9 not willing to -- to allow its employees to state things that I
10 felt that they, as a company, agreed with.
11 Q And that -- Sean McNiff, that is -- is that one of the
12 associate -- associate store team leaders you testified about
13 earlier?
14 A That's correct.
15 Q And when you say outside -- outside cleaning carts, can
16 you kind of describe what, where -- what you were doing and
17 where?
18 A Yeah. During the -- 2020, because of the pandemic, there
19 was extra measures to clean off, like, grocery carts. And so
20 we had a sanitizing spray and a towel that certain team -- team
21 members were sent outside. And basically, every time someone
22 was done using a cart, you would spray it off and, like, wipe
23 it down, to ensure that the next customer to use it doesn't get
24 exposed to anything if there was somebody asymptomatic for
25 COVID, or something like that.

1 Q And is this area in the front of the store where customers
2 pass, or is it somewhere else?
3 A Yeah, it's at -- it was in, like, the premises. It's
4 right in the front by the door.
5 Q And where -- where did the conversation you described with
6 Sean McNiff take place?
7 A He asked me to come back to the office. So it was the
8 same team leader office in the back where the conversation took
9 place.
10 Q Was anyone present other than you and -- than you and Sean
11 McNiff?
12 A No. It was just us.
13 Q What -- I guess you -- can you provide a little more
14 clarity about what -- what he said about -- about you -- it
15 sounded like he -- he gave you some options?
16 A Yeah. He told me that there was a decision made where
17 they would allow people to work the -- the remainder of their
18 shift, but with -- with, I assume, the Black Lives Matter
19 present, but that if there was any issues with customers, then
20 I would be sent home. And I was -- because I was upset with
21 that decision that had been made, in terms of them not, like,
22 allowing it without punishment, I felt that between laboring
23 with punishment or not laboring with punishment, I did, in that
24 case, choose to not labor, since I was going to get punished
25 either way.

1 Q Did you -- did you -- did you wear your Black Lives Matter
2 nametag to your next shift?
3 A I don't believe I did.
4 Q Did you have any more discussions with -- with store
5 leadership about the Black Lives Matter nametag?
6 A No.
7 Q Did you wear any other Black Lives Matter adornments?
8 A I did have a small pin that I would place somewhere on my
9 person and try to avoid being noticed for it.
10 Q You -- you -- you -- you were trying to conceal that pin?
11 A Yes.
12 MR. BROWN: What was the answer?
13 THE WITNESS: Yes.
14 Q BY MR. PETERSON: Back to General Counsel's 97, the -- the
15 last two pages. Do you recognize what's on -- what's on those
16 two pages?
17 A Yes.
18 Q Can you tell us what it is?
19 A I received an -- an additional point for August 2nd and
20 because I had a total of five points within a -- or four points
21 within a 90-day frame, it was another corrective kind of
22 just -- I don't know that it's separate from the first one,
23 but it is -- but, yeah, I received this one on the 15th of
24 August.
25 Q Do you recall who presented this to you?

1 A I believe it was Alvina.
2 Q And where -- where did you -- where did you do receive
3 this?
4 A I signed this in the team leader office.
5 Q Do you recall, was anyone else present?
6 A I don't -- I don't think so.
7 Q Do you recall the -- the -- the discussion you had?
8 A It was essentially telling me that because I had occurred
9 (sic) a certain amount of time and attendance points, I would
10 be -- that this was my first corrective counseling -- shirt --
11 sheet, sorry.
12 MR. PETERSON: Move for the admission of General Counsel's
13 97.
14 MR. BROWN: Object. Not because of each of them, but
15 because they're together. I don't understand why they're
16 together. There's -- I mean, it doesn't make any sense. I can
17 voir dire the witness about why it makes no sense, but there
18 are two different first corrective actions. The first one was
19 rescinded, and actually never issued. And the second one was
20 issued with totally different dates than the first one -- well,
21 almost entirely different dates than the first one. They're
22 different -- they're different corrective actions, and they
23 shouldn't be one exhibit.
24 MR. PETERSON: Yeah, well, I was attempting to be
25 efficient by including all the disciplines that -- that are

1 included. I don't know that that's a valid basis for an
2 objection. The witness has testified to --
3 MR. BROWN: This --
4 MR. PETERSON: -- what it is and when she received it.
5 I'm not aware of them being rescinded or --
6 MR. BROWN: Well, let's -- I'll voir dire the witness,
7 because it was rescinded, and she knows it.
8 JUDGE SOTOLONGO: Well, of course you can voir dire,
9 but -- go ahead.
10 **VOIR DIRE EXAMINATION**
11 Q BY MR. BROWN: Ms. -- Ms. Visco, the first corrective
12 action with an effective date of July 25th that you -- you
13 signed -- the first two pages. Do you see those?
14 A Yes.
15 Q You got a -- you received a call from Frank Avila that, in
16 fact, this corrective action had been removed, withdrawn,
17 revoked, rescinded, correct?
18 A I don't recall that, no.
19 Q You don't remember Frank calling you and telling you to
20 ignore this and that it was no longer valid?
21 A I believe that I re -- if I -- I think that Alvina once
22 told me that she was going to redo it because -- because I had
23 made the comment on the -- the statement that was saying that I
24 think this should be dress code rather than time and
25 attendance, and so the second one, which is also the first

1 corrective action, I believe was just done -- reworking it,
2 although they didn't actually change it to a dress code
3 violation.
4 Q The second -- this -- the second first discipline -- do
5 you see that? They're both first --
6 A Yes.
7 Q -- corrective counseling. The first one has the dates of
8 July 7th, July 10th, and July 25th. Do you see that?
9 A Yes.
10 Q And the second first corrective action has the dates of
11 July 10th, July 26th, and August 2nd. Do you see that?
12 A Yes.
13 Q You see that those are all six -- or -- or I should say,
14 five out of the six are different dates?
15 A I bel -- I think that the 26th is a typo on Alvina's part.
16 It should be --
17 Q You don't remember working on July 26th as well and
18 being -- wearing Black Lives Matter messaging on that day as
19 well?
20 A No, I don't believe that is correct.
21 Q You don't think that's right?
22 A No.
23 Q Okay. I'll show you -- I'll show you your work records.
24 MR. BROWN: Judge, these are two different disciplines. I
25 don't think they should be -- and -- and one is completely

1 inapt because it was withdrawn.

2 JUDGE SOTOLONGO: Well, but if you have evidence, you can

3 show evidence. The witness doesn't really recall. If you have

4 evidence that you're going to establish during your part of the

5 case, your -- that will clarify this, and then --

6 MR. BROWN: But -- but Your Honor, when I cite her

7 testimony on this case in the exhibits, I don't understand why

8 I need to refer to Exhibit 97 as two corrective -- first

9 corrective actions, when they are two different incidents.

10 MR. PETERSON: Your Honor, I've been really meticulous

11 about paginating these, so in reference -- ref -- referring to

12 pages 1 and 2 and 3 -- and there should be 5.

13 JUDGE SOTOLONGO: Well, I think, if indeed, in fact is

14 correct that -- that at least one of the -- one of the

15 corrective actions was rescinded, I think we need both to show

16 that.

17 MR. BROWN: I'm not objecting, Your Honor, to each

18 corrective action. I'm objecting to it being one exhibit.

19 JUDGE SOTOLONGO: I don't -- I don't -- I don't have a

20 problem with that, so I'll -- I'll admit it.

21 **(General Counsel Exhibit Number 97 Received into Evidence)**

22 MR. PETERSON: Thank you, Your Honor.

23 **RESUMED DIRECT EXAMINATION**

24 Q BY MR. PETERSON: Ms. Visco, did you attend any protests

25 at Whole Foods stores related to Black Lives Matter?

1 A I did attend one in Berkeley across the street from the
2 Whole Foods in Berkeley.
3 Q Do you have Respondent's Exhibit 90 up there? Yes. Have
4 you seen -- have you seen that before?
5 A I have, yes.
6 Q Where have you seen that before?
7 A I believe I saw it on Instagram as well, where this is
8 from.
9 Q Is this one of the protests that you attended?
10 A This is the one I attended, yes.
11 Q And what was your purpose in attending the protest?
12 A I wanted to, kind of, state my piece that I didn't think
13 that Black Lives Matter is controversial and that it's more of
14 a human rights issue. And I was hoping that Whole Foods would
15 see this and allow Black Lives Matter to be worn in the
16 workplace.
17 Q How did you become aware of this protest?
18 A It was on Instagram, and I saw it on Instagram.
19 Q Did you have a understanding of what had taken place at
20 the Berkely store?
21 A From my understanding, it was that they had worn masks
22 that had Black Lives Matter and were told that they had to
23 remove them; otherwise they would be sent home.
24 JUDGE SOTOLONGO: What -- what was that understanding
25 based on?

1 THE WITNESS: That was based on just generally what I had
2 heard about other team members, too, being sent home. So I
3 wasn't -- it wasn't very specific. Like, I didn't know
4 specifically.
5 MR. BROWN: Object to witness hearsay.
6 JUDGE SOTOLONGO: What did you -- did you hear -- someone
7 you saw -- you heard from another coworker? Is it something
8 you saw on the media or -- or on the web? What -- what
9 exactly -- how did you --
10 A Yeah, when I was on Instagram, I oversaw -- or I saw
11 this as well -- and -- that people were being retaliated
12 against for wearing Black Lives Matter and I felt that it
13 related to what I had been through, so that's why I attended.
14 JUDGE SOTOLONGO: Thank you.
15 MR. PETERSON: I have no further questions.
16 JUDGE SOTOLONGO: And Mr. Brown?
17 MR. BROWN: Yes. I would like to ask for Jencks material.
18 JUDGE SOTOLONGO: Okay. Mr. Peterson, can you tell us how
19 long the affidavit is? We need to -- tell us how much time
20 you'll need.
21 MR. PETERSON: We have a eight-page affidavit.
22 MR. BROWN: 20 minutes? 20 minutes?
23 JUDGE SOTOLONGO: Okay. That's fair. So it is 12
24 minutes -- 12 minutes to 10. Let's make it at 3:10. That'll
25 give you an extra two minutes.

1 MR. BROWN: Thank you.

2 (Off the record at 2:46 p.m.)

3 JUDGE SOTOLONGO: All right. Mr. Brown, please proceed.

4 MR. BROWN: Thank you, Your Honor.

5 **CROSS-EXAMINATION**

6 Q BY MR. BROWN: Ms. Visco, I am an attorney for Whole Foods
7 Market, and I've asked you a few questions, but now is my
8 opportunity to ask you some more. And I want to start by
9 asking you whether you recall filing an unfair labor practice
10 charge in this case very early on in -- in August of 2020?
11 A I belie -- if that's the one with Savannah -- is that --
12 then, yes.
13 Q Okay. It's not the one with Savannah. It's the one that
14 you filed -- you signed under oath and filed it with the
15 National Labor Relations Board. I'm going to show you the
16 document. Maybe that will refresh your recollection.
17 MR. BROWN: This is in evidence, Your Honor, as General --
18 as General Counsel's Exhibit 1-GGG.
19 MR. PETERSON: It's one of the formal reviews, yes.
20 MR. BROWN: Yes. If I could approach the witness?
21 JUDGE SOTOLONGO: Yes.
22 MR. BROWN: I have a copy, if you want it.
23 MR. PETERSON: If you don't mind, I'd --
24 Q BY MR. BROWN: Ms. Visco, I'm -- I'm putting in front of
25 you a document that's already in evidence as General Counsel's

1 Exhib -- Exhibit 1 -- I thinks it's EEE? GGG?
2 (Counsel confer)
3 Q BY MR. BROWN: I'm -- I'm going to ask you, Ms. Visco, if
4 you -- you recognize this document as the unfair labor practice
5 charge that you filed on August 18th of 2020? It's signed by
6 you and there's a declaration under penalty of perjury on July
7 30th of 2020.
8 A Is there a question? Sorry.
9 Q Do you -- do you recall -- is this your -- is that your
10 signature on the second page?
11 A It's an electronic signature, but I --
12 Q Is that your signature?
13 A -- assume -- I assume yes, then.
14 Q Yes?
15 A Yes.
16 Q I -- I can't hear you.
17 A Yes.
18 Q That's your signature? It's an electronic --
19 A Electronic, yeah.
20 Q -- signature, but you --
21 A Yeah.
22 Q -- you signed it electronically?
23 A Yes.
24 Q Okay. And you signed it under -- under oath, right?
25 Penalty of perjury? Do you see that?

1 A Yes.
2 Q Willful false statements on this charge can be punished by
3 fine and imprisonment.
4 A Yes.
5 Q Okay. Turning to the first page of the document, you
6 wrote in the second full paragraph, you're "filing this charge
7 opposing the Company's policy of not allowing them to engage in
8 concerted activity of wearing Black Lives Matter masks at work
9 and disciplining employees in response to protesting the
10 policy." Do you see that?
11 A Yes.
12 Q Okay. Did I read that correctly?
13 A Yes.
14 Q Okay. And in the -- in the charge -- I'm reading -- let's
15 see, six lines down, you wrote, "Around June 2020, many Whole
16 Foods employees began wearing masks with the message Black
17 Lives Matter." Do you see that?
18 A Um-hum.
19 Q Yes?
20 A Yes.
21 Q Okay. And so my question to you is the statements that I
22 just read to you, are they true?
23 A I believe so.
24 Q There -- there were -- you -- let's start with the first
25 quote that I read to you, which is the se -- se -- first, I'm

1 sorry, second full paragraph that -- well, let me ask you this;
2 were you wearing a Black Lives Matter mask?
3 A No, I was not.
4 Q Were you disciplined for wearing a Black Lives Matter
5 mask?
6 A No, I was not.
7 Q Was any other team member in Petaluma wearing a Black
8 Lives Matter mask?
9 A Not a mask specifically, no.
10 Q Was any -- not a what?
11 A Not a mask specifically, no.
12 Q Was any team member in Petaluma, other than yourself,
13 wearing anything that said, "Black Lives Matter"?
14 A Not that I -- not that I saw personally.
15 Q And was any team member in Petaluma disciplined for
16 wearing a Black Lives Matter mask?
17 A Not a mask specifically, no.
18 Q But that's what your unfair labor practice charge says,
19 doesn't it?
20 A It does. This was, I believe I was not the only one
21 included in this, and so, when they wrote "masks", mine
22 specifically was about the name tag. I did not correct it.
23 I -- I did not realize that it was sp -- very specific to only
24 me. I assumed that that also ref -- that referred to the other
25 people who were sent home for the masks, specifically.

1 Q But not at Petaluma?
2 A Not at Petaluma.
3 Q You were -- you were making an assumption that this charge
4 related to something beyond Petaluma?
5 A Yes.
6 Q Okay. Did anyone else from Petaluma file a unfair labor
7 practice charge?
8 A No.
9 Q You can -- you can set that aside. I want to show you a
10 copy of the complaint in this matter that was filed 18 months
11 after this unfair labor practice charge.
12 JUDGE SOTOLONGO: So the -- complaint or --
13 MR. BROWN: No.
14 JUDGE SOTOLONGO: -- the court complaint?
15 MR. BROWN: The court complaint.
16 JUDGE SOTOLONGO: Okay.
17 Q BY MR. BROWN: Merely 18 months of, I assume,
18 investigation, into -- into this issue. And I'm going to refer
19 you specifically to paragraph 7 --
20 JUDGE SOTOLONGO: 7-J.
21 Q BY MR. BROWN: 7-J on the bottom of page 16. I'm going to
22 hand this to you. This is General Counsel Exhibit 1-WWW. And
23 I'm just referring you to -- to that. This is the first page
24 of the document.
25 A Okay.

1 MR. PETERSON: 1-W?
2 MR. BROWN: WWW.
3 MR. PETERSON: Three Ws?
4 MR. BROWN: Yes.
5 MR. PETERSON: Can you point me to it?
6 MR. BROWN: Of course. So Matt, tell me when you're
7 there.
8 MR. PETERSON: Okay. Thank you.
9 Q BY MR. BROWN: Ms. Visco, I'm showing you an exhibit
10 that's already in evidence, General Counsel's Exhibit 1-WWW,
11 which is the complaint dated December 3rd, 2021, and signed by
12 Jill H. Coffman, the Regional Director here in Region 20.
13 Again, approximately 18 months after you filed that unfair
14 labor practice charge. And I'm calling your attention to
15 paragraph 7-J, sub-I, and it reads, "On various occasions in
16 and about July and August, store team leader, Frank Avila" --
17 and I'm going to skip the others -- "informed employees that
18 they were prohibited from wearing Black Lives Matter masks, and
19 would be sent home, face discipline for refusing to remove
20 their Black Lives Matter masks." Do you see that?
21 A I do.
22 Q Okay. Was that the -- is that true?
23 A It -- it's close to the truth. The problem is the -- the
24 word "masks" and "employees". It was not plural. It was just
25 me for the most part, although other people were aware of the

1 fact that I was being sent home. The -- in terms of the saying
2 "masks" rather than a name tag, that was just about the fact
3 that there was a lot of people in this, and most people were
4 wearing masks. It's a small typo -- that -- it was supposed to
5 refer to me wearing a name tag, not a mask.
6 Q Well, this is a small -- have you seen this document
7 before? This --
8 A I have, yes.
9 Q You have. This 35-page document -- I apologize -- 21-page
10 document that specifies what occurred in each store. And
11 there's a heading that says, "at Respondent's Petaluma,
12 California store". Do you see that?
13 A Yes.
14 Q So the three paragraphs that are below that, relate only
15 the Petaluma? Do you see that?
16 A Yes.
17 Q Okay. So my -- my question then was under J, sub-I, as it
18 relates to Petaluma, it is incorrect that you or anyone else
19 was disciplined for wearing a Black Lives Matter face mask,
20 correct?
21 A Yes, not a face mask.
22 Q And -- and nobody, including yourself, was sent home or
23 told -- I'm sorry -- that they were prohibited from wearing
24 Black Lives Matter face masks, right?
25 A Well, it was implied that you couldn't wear a face mask,

1 either. However, for my specific case, it was in fact the name
2 tag that I had Black Lives Matter written on, not on my mask.
3 It was a typo, yeah.
4 Q You testified -- well, le -- let's look at sub-2. It
5 says, "About July 7th, 10th, and 25th, and August 2nd,
6 Respondent sent home Charging Party Visco for refusing to
7 remove her Black Lives Matter mask."
8 A Again --
9 Q Do you see that?
10 A I do. Again --
11 Q Is that correct or not correct?
12 A It is technically not correct because it should be
13 referring, instead of masks, to name tag, but I feel that it is
14 a small typo.
15 Q I asked you if it was correct or not. Is it correct?
16 A The mask part is not correct.
17 Q Sub-3 says, "On or about August 1st, 2020, Respondent
18 issued Charging Party Visco a number of disciplinary actions
19 for refusing to remove her Black Lives Matter mask." Do you
20 see that?
21 A Yes.
22 MR. PETERSON: Counsel, we can stipulate that there's a
23 typo and that should be referred to "name tag".
24 MR. BROWN: Yeah. It's not a typo. It's wrong. And the
25 Board had 18 months to investigate it, and --

1 JUDGE SOTOLONGO: Well --
2 MR. BROWN: -- they still haven't --
3 JUDGE SOTOLONGO: All right.
4 MR. BROWN: -- investigated it.
5 JUDGE SOTOLONGO: Okay. So. And the -- the witness is
6 not responsible for what may arguably be the General Counsel's
7 imprecise pleading, in which in -- in relation to this
8 paragraph, it certainly appears to be.
9 MR. BROWN: In every city we've been in, Judge -- in every
10 city. And it's not a typo. And it's also the wrong date.
11 That's not a typo either. It's wrong. And her -- and her
12 unfair labor practice charge that she signed is wrong. It's
13 not truthful.
14 Q BY MR. BROWN: Ms. Visco, you said -- you testified -- you
15 can set that aside -- that you were the only team member in the
16 whole Petaluma store in the summer of 2020 who wore a Black
17 Lives Matter messaging on her, or his, or their clothing,
18 correct?
19 A Correct.
20 Q Okay. And you said that you wore it to support your black
21 coworker team members? Do I have that right?
22 A Yeah. And customers, yes.
23 Q Well, I'm asking about one thing.
24 A Sorry.
25 Q Just answer my question, okay? Did you wear it, in part,

1 to support your black coworkers?
2 A Yes.
3 Q Okay. Which coworkers were those?
4 A The one in particular that I feel the most -- there was
5 somebody who worked at the front end named David, and he was
6 often subjected to the worst of the customers when asked to --
7 because during that time we had to ask people to pull their
8 masks up. And he, in particular, was always the one who people
9 would go off on the most. Even though he was the most kind,
10 gentle person in the store. He was a very nice person. And so
11 it felt very unwarranted that he was always the one signaled
12 (sic) -- sig -- like, singled out as somebody to, like, take
13 out that frustration on, to the point where sometimes
14 management would have to send him to the back room so the
15 customers would calm down and they could get them out of the
16 store and keep the line moving.
17 JUDGE SOTOLONGO: And this coworker is black --
18 THE WITNESS: He is.
19 JUDGE SOTOLONGO: -- or African-American?
20 THE WITNESS: He is African-American, yeah.
21 Q BY MR. BROWN: All right. So I asked you who, and that
22 was your answer, right?
23 A Yes.
24 Q All of that was your answer?
25 A That is -- was --

1 Q So is the answer, David?
2 A Sure. Yes.
3 Q Okay. Did David wear any Black Lives -- David, your black
4 team member -- that you were wearing Black Lives Matter apparel
5 to support, did he wear any Black Lives Matter messaging?
6 A No.
7 Q Okay. Who else did you wear Black Lives Matter messaging
8 to support?
9 A There was also another coworker, Dion, as well. And I --
10 Q Did Dion -- is Dion black?
11 A He is. Yes.
12 Q Okay. Did Dion wear Black Lives Matter messaging?
13 A No.
14 Q Okay. Who else? Who else did you wear this messaging to
15 support?
16 A There was a couple other people within the store who I
17 didn't know personally, but I wanted to show support as well.
18 Q And these other people were black?
19 A Yes.
20 Q Did they wear Black Lives Matter messaging?
21 A No. I was the only one.
22 Q You also wore Black Lives Matter messaging to support
23 customers. Do I have that right?
24 A Yeah.
25 Q Okay. Any particular customers?

1 A I wanted it -- it wasn't any particular -- it was just
2 anyone -- I wanted -- to come into the store, I wanted them to
3 feel safe, whether they knew me or not.
4 Q Right. Any particular customers?
5 A Again --
6 Q White customers? Black customers? All customers?
7 A Mainly black customers, but any people of color, I think,
8 would feel safer.
9 Q Any people of color meaning -- does that include white
10 people or just people of color, like POC.
11 A POC, as in people of color.
12 Q Okay. So you were wearing Black Lives Matter messaging to
13 support all customers of color?
14 A Right.
15 MR. PETERSON: Sorry. May -- may I interrupt briefly?
16 Can we go off the record for a second?
17 JUDGE SOTOLONGO: Let's go off the record.
18 (Off the record at 3:21 p.m.)
19 MR. BROWN: Thank you.
20 Q BY MR. BROWN: Ms. Visco, you said that you were wearing
21 Black Lives Matter messaging to support your black coworkers as
22 well as customers of color. Do I have that right?
23 A Yes.
24 Q Okay. And do you recall giving an affidavit in the
25 Massachusetts matter, the -- the lawsuit?

1 A Right.
2 Q You gave an affidavit on August 10th of 2020. Does that
3 sound right?
4 A I -- yeah.
5 Q I can't hear you.
6 A Yeah, I believe so.
7 Q Okay. Do you recall writing that "Following the death of
8 George Floyd and demonstrations springing up across the country
9 in support of the Black Lives Matter movement, it became all
10 the more clear to me that our society does not value people
11 equally."
12 A Right.
13 Q Okay. Do you remember writing that?
14 A Yes.
15 Q Okay. And when you wrote that, the words following the
16 death -- death of George Floyd, was that one of the reasons
17 that you were wearing Black Lives Matter messaging?
18 A Yes.
19 Q Okay. And the demonstrations springing up across the
20 country in support of the Black Lives Matter movement. What
21 were you referring to there?
22 A Basically the -- and -- even though the -- the term "Black
23 Lives Matter" was coined in, I believe, 2014 or 2013, maybe,
24 there was then a lot of examples of why, basically, black lives
25 don't matter in this country. There was -- and George Floyd

1 was one of them, the most recent to when I started wearing my
2 Black Lives Matter messaging.
3 Q And so when you wrote "in support of the Black Lives
4 Matter movement", what specifically were you referring to?
5 Were you referring to the murder of black people? Is that --
6 do I have that right?
7 A That is part of it, yeah, but --
8 Q Okay. So what -- what -- what people -- I don't want to
9 put words in your mouth. When you -- when you say, "Black
10 Lives Matter movement", and the murder of black people --
11 A Right.
12 Q -- who are you referring to? In the summer of 2020? Who
13 were you -- who was on your mind?
14 A Not only George Floyd, there's also ones from previous --
15 there was people like Tamir Rice, who was playing with a toy
16 gun across the street from his house --
17 Q Right.
18 A -- who was murdered by the police. There's also Sandra
19 Bland. She's somebody who was stopped for traffic, for not --
20 failing to signal during a -- a emergency vehicle, and she was
21 found dead in the police custody, that they said was a suicide.
22 There's people like Atatiana Jefferson. She was in her home
23 playing video games with her nephew when she was shot through
24 the window by police.
25 And there's also things like, I believe, George Zimmerman

1 was somebody -- not the person who was shot, but he shot a
2 person for going home and -- with his hoodie on. I think --
3 believe his name was Trayvon Martin. And so it -- to me, it
4 seemed like not only police, but also citizens were sometimes
5 targeting black people and their justice was not always had.
6 And so to me, it felt that it was an example of black lives not
7 being given the value and the humanity that I felt that they
8 deserved.
9 Q Right. And -- and so the examples that you're -- you're
10 giving today under -- under oath, these were the things in your
11 mind in terms of examples of -- of police and -- and citizens
12 murdering innocent black people?
13 A Right.
14 Q Okay. And with regard to the Black Lives Matter movement,
15 I asked you specifically about police violence and -- and --
16 and murder. Was there anything else that you view as part of
17 the Black Lives Matter movement in the summer of 2020?
18 A I think in general, just also seeing sometimes how people
19 react to my coworkers as well. Like I had the example of
20 David, he always seemed like he was given a little bit of extra
21 aggression towards him, even though he was asking of the same
22 things that I would ask of -- of the customers, just to pull
23 their masks up, but the reaction was always much stronger for
24 him, which I can only assume was because he was black. I also
25 had other coworkers who even other coworkers would be, like,

1 rude to or have opinions about.
2 They would say that he was lazy, or that he was -- had an
3 attitude, even though I felt that him and I had very similar
4 work ethics, and I was always praised for my work ethic, and
5 I -- so I felt that to me, the only difference between our work
6 was the fact that he was a black man doing it and I was a white
7 woman. So to me, it felt that not only on the scale of murder,
8 but even on, like, a daily, like, work kind of mode, it felt to
9 me that black people were not always treated equally to me.
10 Q Okay. And the words "Black Lives Matter", had you ever
11 worn "Black Lives Matter" in the workplace before June of 2020?
12 A I don't know that it was before of June of 2020, no.
13 Q And the phrase "Black Lives Matter", that was -- well, had
14 you -- had you participated in any other protests, other than
15 the one you testified about at the Berkeley store?
16 A I have attended a few, yeah.
17 Q Yeah. When did you attend Black Lives Matter protests in
18 the summer of 2020? And I'm not talking about it at the
19 Berkeley store.
20 A Right. I don't remember the specific dates. I just
21 remember there's at least maybe three that I attended.
22 Q Okay. And where -- we -- we -- where were those three?
23 Where were the protests?
24 A There was -- one was in Oakland, around the lake, Lake
25 Merritt. Although that was less of a protest, and more, it was

1 trying to give back to the co -- the black community ,and
2 support black businesses.
3 Q Okay.
4 A And then there was others that were in downtown Petaluma.
5 Q Two -- two in downtown Pet -- Petaluma?
6 A Yeah, it's -- it was multiple.
7 Q Okay. Let's talk about the two in -- in downtown
8 Petaluma.
9 A Sure.
10 Q Were they rallies? Were they marches? What -- what were
11 they?
12 A They were more of, like, marches, kind of. They went, I
13 believe, like down the street. It did take up one street.
14 Yeah.
15 Q Okay. Hundreds of people?
16 A There was, yeah. A good amount of people. Yeah.
17 About --
18 Q Okay.
19 A -- at -- at least 100.
20 Q Okay. Did you wear any Black Lives Matter attire,
21 apparel?
22 A I did have a sign that said, "Black Lives Matter", yeah.
23 Q Okay. And were there other people wearing signs or -- or
24 having the message "Black Lives Matter" on -- on their body at
25 the -- at the -- at the marches in downtown Petaluma?

1 A Yes.
2 Q Okay. And was there a chant, like "Black Lives Matter"?
3 A Yeah.
4 Q Okay. And what were the other chants?
5 A Some of them would be, like, people would say, "say his
6 name", or "say her name", and we would respond with either
7 "George Floyd", or "Breonna Taylor", "Atatiana Jefferson", and
8 so on. People that we, yeah, were -- lives had been lost,
9 basically.
10 Q Okay. And at the same Black Lives Matter rallies, was --
11 was the chant "no justice, no peace"?
12 A I believe I did hear that at -- at least once.
13 Q Okay. Any other chants that you recall?
14 A Not that I recall, no.
15 Q Okay. What about "defund the police"?
16 A I have heard of that, but it wasn't the chant,
17 necessarily, at the rallies.
18 Q Okay. Any other chants that you can think of, other than
19 what you've testified to?
20 A I can't -- I'm sorry. I don't remember. I can't recall
21 any --
22 Q Okay.
23 A -- right now.
24 Q And with regard to any other signs, you were holding a
25 sign that said, "Black Lives Matter"?

1 A Right.
2 Q Was that at both protests?
3 A Yeah. The -- yeah.
4 Q Okay. What other signs did you see?
5 A I believe -- I think there was one that said that --
6 that -- that "murder is worse than looting". I think that was
7 one of the signs. A lot of them were more specific to, like,
8 that the spec -- that those people didn't deserve to die, that
9 the -- the actions that they were, like, being approached by
10 police were not the -- the kind that you would seek the death
11 penalty for, and so it was saying maybe that police shouldn't
12 be executioners. They're supposed to bring you to a -- a
13 lawyer and have a trial. And so I think that was kind of the
14 general. Yeah.
15 Q Okay. The message Black Lives Matter at these protests,
16 and the sign that you were holding that said, "Black Lives
17 Matter", did it mean the same thing at the rally as it did when
18 you wore that messaging on your nametag?
19 A I believe it did have the message that -- yes, that black
20 people's lives should be valued as well.
21 Q Because black lives matter, right?
22 A Right.
23 Q Okay. The customers at your store, the purp -- and I
24 apologize for the phraseology here, the customers at the store
25 that you had hoped to see your name tag --

1 A Right.
2 Q -- did that include white customers as well as customers
3 of color?
4 A Yeah. I do believe that white people agree that -- that
5 black lives should matter as well.
6 Q Okay. And that included people who --
7 A I do believe there is a possibility that racism exists in
8 Petaluma as well, yeah.
9 Q And when you say "racism", I'm not sure that was exactly
10 my question, but I'll -- I'll go with it. There are people,
11 customers, who didn't know anything about Black Lives Matter.
12 A Right.
13 Q Do you agree with me?
14 A Sure. Yeah.
15 Q Okay. And you wanted those customers to see your name tag
16 as well, right?
17 A Yeah.
18 Q Okay. And then there were customers who you -- may not
19 have agreed with the Black Lives Matter movement or message,
20 correct?
21 A Right. Yeah.
22 Q And in -- and I think you said that they were racist? Do
23 I have that right?
24 A I was under the impression that you meant that they didn't
25 agree with the -- the phrase "Black Lives Matter", which I

1 would assume would mean that they -- they are saying black
2 lives don't matter, and if somebody makes that statement, I
3 would assume that is racist, yeah.
4 Q If you worked with a coworker who wore a -- a name tag
5 with "Black Lives Matter" with a red x through it, is that
6 racist in your view?
7 A To me, it does make it seem like they're saying that black
8 lives don't matter.
9 Q Okay.
10 A Yeah.
11 Q And is it -- is it your view that somebody disagreeing
12 with you that black lives don't matter should not be allowed to
13 wear that in the workplace?
14 A Right. I believe that's a form of racism that shouldn't
15 be in the workplace.
16 Q And that's because you don't agree with it?
17 A I believe, yeah, that saying "black lives don't matter" is
18 very much, like, a human rights violation. It's very much in,
19 like -- in line with the dehumanization of black people in this
20 country.
21 Q Okay. The team members -- well, let me ask you this.
22 When you were at the protests, were there any counter-
23 protesters?
24 A I didn't personally see any counter-protesters.
25 Q Were you aware of any?

1 A I believe that I -- I had heard of counter-protests being
2 held, but I personally did not en -- have any engagement with
3 counterprotests.
4 Q What did you hear about?
5 MR. PETERSON: Objection. Calls for hearsay.
6 MR. BROWN: I'm trying to probe her relevance or --
7 JUDGE SOTOLONGO: Yeah. Overrule -- overruled.
8 Q BY MR. BROWN: What did you hear about with regard to the
9 counter-protesters?
10 A I had just heard that people would show up, like, not in
11 Petaluma even, but like, in -- in other states, where people
12 would show up with Blue Lives Matter flags, usually. Which is
13 odd to me, because I don't think that that's the antithesis of
14 black lives, is blue lives. In fact, there's, like, an
15 overlap. There are black cops, and -- and so I -- I didn't
16 necessarily understand the counterprotests, other than the fact
17 that they were, I guess, in support of the fact that black
18 people were being killed by police, and so I assume that's why
19 they brought up the Blue Lives Matter messaging in response to
20 that, and so to me, it seems like the counterprotest was very
21 specifically in support of the murder of black people by
22 police. Yeah.
23 Q So did you have an understanding that there were groups of
24 people, maybe even large groups of Americans, who opposed Black
25 Lives Matter? Who -- who thought it was controversial? Not --

1 I'm not ask -- I'm not asking you if you agreed with them.
2 Obviously, you don't. I'm asking you if you were aware that
3 there were large groups of Americans who disagreed with your
4 view?
5 A Out of my area, yeah, I am aware of that existence.
6 Q And "out of your area" meaning what?
7 A Well, Petaluma is not somewhere that I would consider
8 being very strongly opinionated against Black Lives Matter,
9 because California in itself is a very liberal area, and so
10 to -- like, I think for -- when I think of that, I'm thinking
11 more likely, it's more, like, southern states, kind of thing.
12 Q Okay. Did you understand one of the Black Lives Matter
13 messages to be related to defunding the police?
14 A I believe that some people have that connection, yeah.
15 Q Okay. Did you have that connection? Did you make that
16 connection?
17 A I -- I understand where they're coming from.
18 Q Okay. And so did -- in -- in view of that, did you
19 understand that folks wearing "Blue Lives Matter" in support of
20 the police were addressing, or could have been addressing, the
21 defund the police message?
22 MR. PETERSON: Objection. Relevance. Calls for
23 hypothetical.
24 MR. BROWN: I'm going to --
25 JUDGE SOTOLONGO: All --

1 MR. BROWN: -- I'm going to tie it up very soon.
2 JUDGE SOTOLONGO: All right. I'll -- I'll allow it, but
3 you -- don't stray too far, because it -- because it was --
4 we're straying now to hypothetical opinions and --
5 MR. BROWN: Well, I'm going to -- I'll -- I'll -- I'll
6 connect it right now.
7 JUDGE SOTOLONGO: Okay.
8 Q BY MR. BROWN: Did you understand the connection there,
9 Ms. Visco?
10 A I could see that connection, yeah.
11 Q Okay. Were you aware of a team member, in late 2019 or
12 early 2020, who wore a Blue Lives Matter, like, I think it's an
13 American flag with a blue line through it.
14 A Yeah.
15 Q Do you recognize that as the Blue Lives Matter symbol --
16 A Right. Yeah.
17 Q -- or logo?
18 A Yeah.
19 Q Okay. Were you aware that a team member, in late 2019 or
20 early 2020, had worn the Blue Lives Matter logo or message on
21 her -- on her arm?
22 A I believe Frank mentioned that, yes.
23 Q Okay. That's how you became aware of that?
24 A Right.
25 Q Did you know that independently?

1 A I did not, no.
2 Q Okay. Were you aware of any team member who had worn that
3 kind of messaging and was told to remove it?
4 A I think that same person, yeah, I believe.
5 Q Were you aware of team members who wore pins or buttons in
6 support of a political party or a political candidate?
7 A I -- I don't, no.
8 Q Okay. Were you aware of team members who wore stickers
9 that said, "I just voted", or "I voted"?
10 A I have seen those, yeah.
11 Q Are you aware that they were told to remove them, in vi --
12 because they violated the dress code?
13 A I don't --
14 MR. PETERSON: Objection. Vague as to time period.
15 Q BY MR. BROWN: In November of 2020 -- thank you. In
16 November 2020, the election, do you recall team members wearing
17 stickers that said, "I voted"?
18 A Yes.
19 MR. PETERSON: Objection. Relevance as to November 2020.
20 JUDGE SOTOLONGO: Overruled.
21 Q BY MR. BROWN: Do you recall that those team members were
22 directed to remove those stickers because they violated the
23 dress code?
24 A I was not aware, no.
25 Q Okay. With regard to Black Lives Matter messaging, you

1 testified, and now I'm referring you, and them, to General
2 Counsel 94, which is the color photograph of a nametag, and I
3 want to review that with you, okay?
4 A Okay.
5 Q So this nametag is, I think it looks to be about five
6 inches by two inches; is that -- is that fair to say?
7 A That's fair.
8 Q Okay. And the -- this is a preprinted nametag by the
9 Petaluma store?
10 A Correct.
11 Q Okay. And the -- the outline of the -- the building
12 there, that's the railroad station; isn't it?
13 A That's correct, yeah.
14 Q Okay. Is that, like, an iconic sort of famous thing in --
15 in Petaluma?
16 A Yeah. We were actually able to vote on what background we
17 wanted, and that was the winning one, and yeah. So it was,
18 like --
19 Q Okay.
20 A -- representative.
21 Q And I see, in the lower left corner, and it looks to be
22 about an inch and a half by an inch and a half, "Black Lives
23 Matter"?
24 A Correct.
25 Q Okay. Now, it has a black background, and I don't know if

1 it's white, or light, or yellow, or --
2 A Yeah.
3 Q -- what -- what -- what -- what color is that?
4 A It's the -- like, a yellow, like a sticky note. So the
5 black was what I dro -- drew, and the yellow is what was not
6 drawn.
7 Q And the back of that was not sticky. It was -- it was
8 something you could slip in and out, correct?
9 A Yes. Correct.
10 Q Okay. And then the same question with regard to the --
11 the four flags that you have there. Was that also something
12 you had drawn -- drawn on a sticky pad --
13 A Correct.
14 Q -- a sticky note? And that, too, did not have any stick,
15 or -- or -- or -- glue on the back. That also could be slid in
16 and -- and out.
17 A Yeah. That --
18 Q Do I have that right?
19 A That one, I did take down a little bit, cause it covered
20 my name sometimes when it moved, so it was in place, but yes.
21 Q Okay. And as I understand it, the first flag is the pride
22 flag?
23 A Correct.
24 Q Second flag is the trans pride flag?
25 A Correct.

1 Q And the third is the pansexual pride flag?
2 A Correct.
3 Q And the last one is the gender queer flag --
4 A Correct.
5 Q -- the pride flag?
6 A Yes.
7 Q Okay. Why were you wearing those flags?
8 A It was -- I added them in June of 2020 as part of the
9 Pride Month, and also because it is representative, in some
10 part, of -- of myself.
11 Q Okay. I did not hear that last part --
12 A Sorry.
13 Q -- and I apologize.
14 A It also is somewhat representative of myself.
15 Q Okay. The pride flags that you had slipped into your
16 nametag, did you take them out at any point?
17 A No.
18 Q Okay. All the way through the end of your employment, you
19 were wearing a nametag with those four flags on them?
20 A If I was wearing this nametag, I was wearing the ones with
21 the flag -- pride flags, yes.
22 Q Okay. So that begs the question, at some point, did you
23 get a different nametag?
24 A Yeah. On August 1st, that's when Alvina had made me a new
25 one.

1 Q Okay. And so as of August 1st, you were not wearing
2 the -- the pride flags?
3 A On August 2nd, I was wearing this nametag again, but after
4 that point, I was wearing a new nametag.
5 Q Okay. With regard to your testimony about -- about the
6 pride -- pride flags, in June of each year, the company
7 sponsored and supported the wearing of pride messaging; do I
8 have that correct?
9 A I believe so.
10 Q Okay. You also testified that there was some sports logos
11 worn at the store --
12 A Yeah.
13 Q -- is that correct?
14 A Yes.
15 Q That also was approved by the store team leader, wasn't
16 it?
17 A I -- what I assume, because it was no disciplinary action,
18 so I assume that it was.
19 Q You can say you don't know if you don't know.
20 A I'm not entirely sure, but --
21 Q Do you know whether --
22 MR. PETERSON: Objection. Calls for speculation.
23 MR. BROWN: I don't want her to speculate. That's the
24 point.
25 Q BY MR. BROWN: Do you know whether the sports logos were

1 approved by the store team leader to be worn?
2 A Not to my knowledge.
3 Q Okay. And with regard to the pride logos, and other
4 things, do you know whether that messaging was approved by
5 Whole Foods?
6 A By my specific shore -- store, I'm not entirely sure, but
7 I'm -- I know that because they were issuing -- I think, in at
8 least one year, they issued lanyards that had the rainbow on it
9 that also said, "Whole Foods", so from my understanding, it
10 seemed to me that it was approved, but again, I don't actually
11 know if it was specifically approved at my store.
12 Q Okay. So you don't know? Yes, you don't know?
13 A Yes.
14 Q Okay. With regard to Team Member Appreciation Week, do
15 you -- do you know what that is?
16 A Yeah.
17 Q What is that?
18 A It's a week where the -- from what I remember, it was
19 the -- the team members would have their lunches provided by
20 the -- the store in celebration of team members.
21 Q Okay. Were -- were there any clothing, or approved
22 apparel during Team Member Appreciation Week?
23 A I don't know.
24 Q Okay. The uniform that you wore, and I believe you
25 testified to, when you were in the cheese and the prepared

1 food, which was most of the time --
2 A Right
3 Q -- is that correct?
4 A Yeah.
5 Q Okay. You wore a short-sleeve chef coat; is that correct?
6 A That's correct.
7 Q It's a black coat. Where -- where do the sleeves end?
8 A It was about here.
9 Q Okay.
10 A It kind of looked like --
11 Q Above your elbow?
12 A Yeah. It looked like a button-up shirt.
13 Q And it went all the way up to the nape of your neck?
14 A About, yeah.
15 Q Okay. And then you wore a -- a nametag?
16 A Correct.
17 Q And was there a Whole Foods logo on that chef's coat?
18 A I believe it said the kitchen specifically, but yes.
19 Q Okay. It was a circle with the Whole Foods logo, the
20 green logo?
21 A Some of them had the green. The other ones said "the
22 kitchen" on it, and that was for when I was working,
23 specifically in the kitchen.
24 Q Okay. And the -- the chef's coat covered your entire
25 torso, correct?

1 A Correct.
2 Q Okay. Do you recall wearing a Black Lives Matter T-shirt
3 to and from work, and on break at the Whole Foods store in
4 Petaluma throughout the summer of 2020?
5 A I -- I do, yes.
6 Q Okay. What was that -- was that -- what color was the T-
7 shirt?
8 A I believe there is a gray one and a black one.
9 Q Okay. So you wore a gray T-shirt and a black T-shirt?
10 A On occasion, yes.
11 Q Okay. And what did -- what did the -- the T-shirt say?
12 A It said, "Black Lives Matter".
13 Q Was it on the front and back? Just the back? Just the
14 front?
15 A I believe it was just on the front.
16 Q Okay. And was it white stenciling? Black stenciling?
17 A I think that the black shirt had white stenciling, and
18 then the gray shirt had black stenciling.
19 Q Okay. And is it true, Ms. Visco, that in the summer of
20 2020, beginning in June, and all the way through August, on
21 occasion, and you only worked occasionally, you would wear
22 either the gray or the black, Black Lives Matter T-shirt coming
23 in to work?
24 A Yes, that's correct.
25 Q Okay. And then you would wear that same T-shirt leaving

1 work?
2 A That's correct.
3 Q Okay. And then you would wear that same T-shirt when you
4 were on break?
5 A Correct, yeah.
6 Q Okay. And when you were walking around the store on
7 break, you were wearing that same T-shirt, or those same T-
8 shirts, correct?
9 A During lunch, but yeah.
10 Q During lunch break?
11 A Right.
12 Q Okay. What about in the break room, when you were on
13 break?
14 A I was in the back, but yeah. I would wear it.
15 Q You would wear the Black Lives Matter T-shirts?
16 A Yeah.
17 Q Okay. Were you ever disciplined, or even -- let me start
18 with that. Were you ever disciplined for wearing the Black
19 Lives Matter T-shirts when you were not working?
20 A I was told I was not allowed to wear it on the floor if I
21 was punched in.
22 Q Right. So my question is, were you ever disciplined --
23 let -- let me ask this. Were you ever disciplined for wearing
24 the Black Lives Matter T-shirts when you were not working on
25 the clock?

1 A No.
2 Q Okay. And that included coming into work, leaving work,
3 and on break time in the store?
4 A Correct.
5 Q Okay. And that was never even discussed with you that you
6 would be disciplined for that, correct?
7 A Correct.
8 Q Okay. With regard to the conversation that you had on
9 July the 7th of 2020, which I believe you testified was the
10 first incident in which store leadership, at least, addressed
11 your wearing Black Lives Matter; do I have that right?
12 A Yeah.
13 Q Okay. Was that the first time, as far as you knew, that
14 anyone in leadership had seen the name tag with -- with your
15 Black Lives Matter message on it?
16 A I don't know.
17 Q Okay. With regard to -- to this name tag, when team
18 leaders or store leadership came around in June, did you turn
19 your nametag around so that they couldn't see that you were
20 wearing Black Lives Matter?
21 A No.
22 Q Okay. On July 7th, your testimony is that, I assume
23 somebody in leadership observed that you had the Black Lives
24 Matter messaging that's reflected in Exhibit -- General Counsel
25 94?

1 A I assume, yeah.
2 Q Okay. Who -- who -- who approached you first?
3 A It was Frank Avila.
4 Q Okay. It -- it wasn't Sean McNiff?
5 A I don't believe so.
6 Q Okay. But do you have -- do you have a -- are you -- are
7 you clear that it was either Sean or Frank, or you don't know?
8 A I'm very -- pretty confident that it was Frank.
9 Q Okay. And where did -- where did Frank approach you?
10 A I was --
11 Q Where in the store?
12 A I was behind the counter at the -- in the cheese
13 department, or the specialty department.
14 Q Okay.
15 A Yeah.
16 Q And did he tell you that the nametag violated the dress
17 code?
18 A He told me verbatim, I think, "you can't have Black Lives
19 Matter in your nametag".
20 Q Okay. And what did you say in response?
21 A "I don't feel comfortable removing it".
22 Q Okay. And at that point, did the conversation continue
23 there, or did it move elsewhere?
24 A That was when he said he was going to talk to the H.R.
25 rep, Ricki McCarthy, and that we would -- he later brought me

1 back to the H.R. office to have that conversation.
2 Q Okay. And when you say "later", what do you mean by that?
3 A He -- he went to talk to Ricki, and then it was maybe,
4 like, 10, 20 minutes, maybe, and then he came back and brought
5 me back there.
6 Q And Ricki McCarthy is the team member services
7 representative at the Petaluma store?
8 A I believe -- yeah. She's the H.R. rep. That's, like,
9 yeah.
10 Q Okay. And -- and do you know TMS em -- is -- is like the
11 H.R. department? Do you know that?
12 A I -- I don't.
13 Q Okay. But you understood Ricki McCarthy to be the H.R.
14 representative of the store?
15 A Correct.
16 Q Okay. So you were with Ricki and Frank in Ricki's office?
17 A Correct.
18 Q Okay. And so what -- what did -- what did you say, and
19 what did they say at that part of the meeting?
20 A They were saying that I should limit the Black Lives
21 Matter support to outside the workplace, that they were trying
22 to avoi -- avoid any controversial or political slogans in
23 general.
24 Q Okay. Did they say anything about your safety?
25 A They did say that if -- if an -- a team member or a

1 customer were to get really upset, that there was a -- a
2 possibility that there could be a safety issue.
3 Q Okay. And what, if anything, did you say in response to
4 what they had said to you?
5 A I -- I think that most of what I was saying was in regards
6 to I don't see it as political or controversial. I see it as a
7 human rights issue, and I think that it's something that Whole
8 Foods, especially since I had seen their public statement in
9 support of it, I didn't understand why they could publicly
10 support it, but they wouldn't want the -- like if they were
11 already supporting it publicly, then what controversy are we
12 bringing up if this is al -- something they've decided is
13 worthy of support?
14 Q Okay. You didn't see a difference between a statement and
15 you as a team member wearing -- wearing that message directly
16 in front of a customer?
17 A Right. Because I hadn't experienced any -- like, nobody
18 had come up to me with complaints, or --
19 Q Right.
20 A -- coworkers or customers alike, so to me, it felt like it
21 was very in line with our communities and id -- like, ideology.
22 Q Okay. So in a store where there were different ideologies
23 and different customers, it would be okay to -- to say, don't
24 wear Black Lives Matter?
25 A I would understand why somebody would fear for their

1 safety if it was something like that, but in -- but yeah, for
2 my particular case, it didn't feel like.
3 Q And with regard to this public statement, what public
4 statement are you referring to?
5 A I remember that in 2020, there was a -- after the death of
6 George Floyd, a lot of companies were showing support for Black
7 Lives Matter by making statements. I don't have any, like,
8 physical copy, but I remember being -- I just remember being
9 like, oh, it's good that Whole Foods is supporting it because I
10 work there, and --
11 Q Do you remember Whole Foods in any statement, supported
12 Black Lives Matter?
13 A That's what I -- from my, yeah, understanding.
14 Q Okay. What -- what -- what other things did Whole Foods
15 support, if you -- if you know, what other causes, what other
16 human rights issues?
17 A It seemed to me that they also supported the LGBT
18 community, as well.
19 Q With regard to July 7th, you punched out for the day?
20 A Correct.
21 Q Okay. Were you told the punch out?
22 A Yes.
23 Q Okay, and the next scheduled day was July 10th. Do I have
24 that right?
25 A Correct.

1 Q Okay, and on July 10th, you were wearing your chef's coat
2 with the same nametag, correct?
3 A Correct.
4 Q Okay, and do you recall Frank Avila approaching you?
5 A I do, yeah.
6 Q Okay, and do you remember him telling you that you were in
7 violation of the dress code?
8 A Yes.
9 Q Okay, and do you remember telling -- him telling you that
10 you had 30 minutes to think about your position and whether you
11 wanted to remain working and wearing a compliant nametag or
12 decide that -- that you don't want to be in compliance with the
13 dress code?
14 A Yes.
15 Q Okay, and in response, do you recall saying to him that
16 you -- you were not going to change your mind and that you were
17 going to clock out for the day?
18 A Yes.
19 Q Okay, and do you recall, before you clocked out, asking
20 Frank, your store team leader. if -- what would happen to you
21 if you kept wearing this nametag in violation of the dress
22 code?
23 A I don't remember specifically.
24 Q Okay. Do you remember Frank telling you that if you kept
25 violating the dress code, at some point, you could be

1 disciplined?
2 A I believe it was Alvina who mentioned it, but yeah.
3 Q Okay. Do you remember asking your store team leader if
4 he -- you could speak to somebody higher up in the company?
5 A I do, yeah.
6 Q Okay, and did Frank come back to you with a name and a
7 number of somebody for you to call?
8 A I don't recall.
9 Q Okay. Did you speak to someone outside the Petaluma store
10 about your position on this, other than the phone call to the
11 hotline that you testified about?
12 A I don't believe so.
13 Q Okay. With regard to the third incident, which was July
14 25th. Do I have that right?
15 A I believe so.
16 Q Okay. I'm going to ask you if you would look at what is
17 in front of you as Exhibit -- GC Exhibit 97, which is that --
18 the two corrective actions, counseling. I'm going to just
19 limit my questions initially to the first two pages?
20 A Okay.
21 Q Okay. Those are the -- that's the July 25th first
22 corrective counseling. You see that?
23 A Correct, yeah.
24 Q Okay, and who handed this to you? Who gave this to you?
25 A I believe this was Alvina that gave it to me.

1 Q Okay, and you see, on the bottom of the first page, that
2 the points that you had accrued were for July 7th, July 10th,
3 and that very day, July 25th?
4 A Yes.
5 Q Okay, and it references the time and attendance policy in
6 the GIG; do you see that?
7 A Yes.
8 Q Okay, and then turn to the second page. You wrote in the
9 team member statement. I believe he testified to that, right?
10 A Right.
11 Q What -- I'm -- I don't understand what your -- your
12 feelings were in that last -- in that last line that you wrote.
13 Can you explain what you meant by that?
14 A I was being -- on record, it was saying that it was a time
15 and attendance issue. And I wanted to make it clear that it
16 wasn't that I was calling out for any reason in particular
17 other than being sent home for specifically this dress code
18 violation. So I felt that the corrective should have been like
19 a dress code violation more than -- than a time and attendance.
20 Because I felt it was falsely representing me as somebody who
21 was just calling out or leaving early for no reason when there
22 was a very specific reason that I was being sent home.
23 Q Do you recall receiving a call from Frank Avila or anyone
24 else in leadership shortly after being issued this first
25 corrective counseling on July 25th and being told that it was

1 being rescinded?
2 A I don't recall specifically, no.
3 Q Do you recall generally?
4 A I believe that I had a conversation with Alvina after I
5 had wrote this where she said she was going to redo the
6 corrective action. So I didn't know that it was rescinded. I
7 just thought they were just redoing it and that would be the
8 second half of the --
9 Q I got it. So in your -- in your -- your view, when Alvina
10 said she's going to redo it, the second first corrective action
11 that you received a few weeks later was the replacement
12 corrective action --
13 A That's what --
14 Q -- for the first one?
15 A That's what I was -- yeah.
16 Q Okay, so do -- do we agree, though, there was only one
17 corrective action or counseling issued to you that -- that
18 stuck?
19 A Right.
20 Q Okay, and that second corrective counseling, even though
21 it's the first credit counseling that we're talking about,
22 that's the one that you were actually issued and that is on
23 your record?
24 A Right.
25 Q Okay, and with regard to that, it references July 10th,

1 and now, I'm referring to page 3 of 4 in General Counsel's
2 Exhibit 97. It refers to July 10th, July 26th, and August 2nd,
3 correct?
4 A Correct.
5 Q Okay. With regard to August 1st, do I understand your
6 testimony that you worked on August 1st without wearing the
7 Black Lives Matter messaging?
8 A That's correct.
9 Q You had taken it out of your -- out of -- out of your ID
10 card?
11 A I had just removed the nametag altogether, so I arrived at
12 work without a nametag.
13 Q Okay, and your testimony, as I understood it, was that the
14 reason you did that was at the direction of counsel, of your
15 lawyers?
16 A Right. It was, like, partially because they were assuring
17 me that, like, you don't need to get fired for this, and also
18 because -- give me a moment. At that point, because I had
19 joined the lawsuit, to me, it felt that I was still kind of
20 fighting for what I felt was right and that I didn't
21 necessarily need to do it in the store. I was now doing it as
22 part of a bigger lawsuit.
23 Q And do you recall telling Seam McNiff on this day, on
24 August 2nd, that the second reason you didn't wear Black Lives
25 Matter on August 1st was because your team would have been

1 shorthanded had you left for the day?
2 A I don't recall.
3 Q Do you recall that you never told Sean McNiff or anyone
4 else that the reason you were not wearing Black Lives Matter
5 was because of this lawsuit or anything like that?
6 A I don't think I mentioned to them, no.
7 Q Okay. On August 2nd, you did wear it again, and you did
8 leave early?
9 A Correct.
10 Q With regard to social media posts, let's go back to
11 General Counsel's 95. This is an Instagram story, which I'm
12 not sure I understand, but you -- you put this up on Instagram?
13 A Right.
14 Q It has your image at the top. You click on it, and for a
15 short period of time, your story is --
16 A Yeah, I believe for 24 hours, yeah.
17 Q Okay, fair enough. And you reposted Alicia Garza's
18 definition or statement about Black Lives Matter from July 16th
19 of 2013?
20 A Right.
21 Q And you then -- the second half of the page, that's your
22 writing?
23 A Correct.
24 Q Okay, and you -- you write "since BLM is considered",
25 quote, "a political slogan now", close quote, "now, I'm looking

1 at you, Whole Foods, here's one of the original definitions of
2 the movement from 2013", correct?
3 A Correct, correct.
4 Q Okay. Your view, as I take it from your post, is that
5 Black Lives Matter was not a political slogan, but rather, it
6 was a human rights message?
7 A Correct.
8 Q Okay, and you're saying, "tell me" -- you also write in
9 all -- a bigger -- bigger font "tell me how this is
10 controversial and why we should be neutral about it". Do you
11 see that?
12 A Right.
13 Q Okay. Did somebody tell you it was controversial?
14 A Yes.
15 Q Who?
16 A It was Frank.
17 Q Okay. Did you understand that it was controversial?
18 A I don't consider it, no.
19 Q Do you understand that other people think it's
20 controversial?
21 A Yes.
22 Q Okay, and with regard to Alicia Garza's post that you've
23 attached here, you -- you attached because you -- you supported
24 what she was saying, correct?
25 A Correct.

1 Q Okay, and who is she?
2 A She's one of the people who coined Black Lives Matter.
3 Q Okay. Was she the founder of the Black Lives Matter
4 movement?
5 A I -- from what I understand, the -- of the hashtag
6 specifically. I don't know how close she is to the -- the
7 movement altogether.
8 Q Okay. Ms. Garza was one of the founders of the
9 #BlackLivesMatter movement, correct?
10 A Correct, yes.
11 Q Okay, and wasn't that the -- in the summer of 2020, what
12 the Black Lives Matter movement was?
13 A It was included in that because it was another example of
14 black lives not being valued, yeah.
15 Q Okay, and I think you know that Ms. Garza founded the
16 #BlackLivesMatter movement after Trayvon Martin's killer was --
17 was acquitted. Is that right?
18 A Right, yes.
19 Q Okay, and are you aware that Ms. Gaza, as part of the
20 #BlackLivesMatter movement, had called for abolishing the
21 police?
22 A I was not aware, no.
23 Q Are you aware that Ms. Gaza, as the founder and head of
24 the #BlackLivesMatter movement, had issued statements to -- to
25 defund the police?

1 A I --

2 MR. PETERSON: Objection. What's the relevance of this

3 line of questioning?

4 JUDGE SOTOLONGO: Sustained.

5 MR. BROWN: Your Honor, if I could be heard on that?

6 JUDGE SOTOLONGO: Go ahead.

7 MR. BROWN: This witness is attaching the words of the

8 Black Lives Matter movement founder here and definition of

9 Black Lives Matter. That's what this case is about. I'm

10 trying to probe whether this witness has any knowledge, outside

11 of this quote here, about the Black Lives Matter movement. It

12 seems to me that's fundamental to what this whole case is

13 about.

14 JUDGE SOTOLONGO: But here's the thing. I don't think

15 that the statement of any individual, including the founder or

16 the founders, ultimately is going to be objective evidence of

17 what the movement was about. It's just the view of one

18 individual. The fact that he or she or they were the founders

19 ultimately will not have any impact, and objectively, it's

20 going to be whatever measure we -- we use to objectively

21 understand what the message -- message was all about isn't

22 going to be based on -- on the views of, you know, a few

23 individuals.

24 MR. BROWN: Your Honor, I -- I don't disagree with you.

25 General Counsel put this exhibit in as support for what this

1 witness understood and defined the Black Lives Matter movement
2 to mean. I'm probing her knowledge and her statement that her,
3 I guess, objective understanding of the Black Lives Matter
4 movement is derived from Ms. Garza. If she doesn't know
5 anything about Ms. Garza, that's fine. I'll -- I will limit
6 myself to -- to this paragraph, but she seems to be aware --
7 JUDGE SOTOLONGO: Okay. Well, then, yeah.
8 Do you know anything else Ms. Garza said about the Black
9 Lives Matter meaning or what the objective of the Black Lives
10 movement, Black Lives Matter movement, is?
11 THE WITNESS: I'm sorry. Can you repeat?
12 JUDGE SOTOLONGO: Are you -- are you familiar with, are
13 you aware of, any other statements made by Ms. Garza, by Alicia
14 Garza, regarding the -- the -- the meaning or the objectives of
15 the Black Lives Matter movement?
16 A For the most part, all I know about Alicia Garza is that
17 she was one of the people who coined the term, and I did come
18 across this post, as well. But honestly, I don't know --
19 JUDGE SOTOLONGO: So you -- you did some research on Black
20 Lives Matter and her, Mr. Garza's, name popped out, and -- and
21 you found this quote from her; is that --
22 THE WITNESS: Yeah, essentially.
23 JUDGE SOTOLONGO: Okay.
24 Q BY MR. BROWN: Did -- did you -- when you were doing
25 research on Black Lives Matter, did you go to the

1 blacklivesmatter.com website?
2 A I did not, no.
3 Q Okay. Have you ever been to that website?
4 A I don't believe so.
5 Q Okay. Did -- when you were researching Black Lives
6 Matter, did you type in the search term, Black Lives Matter?
7 A In Instagram, it'd be, like, the hashtags.
8 Q Okay?
9 A And then you go -- you see the ones --
10 Q So when you typed in the #BlackLivesMatter,
11 #BlackLivesMatter didn't come up?
12 A I'm sorry. I don't understand.
13 Q I don't understand how Instagram works, so?
14 A Oh, so if you click the hashtags, then it shows you every
15 post that has those hashtags, as well.
16 Q Got it. When you -- when you do that, does -- and again,
17 it doesn't come up -- all right. When you did any research on
18 Black Lives Matter, did the #BlackLivesMatter movement, you
19 know, the big one with Ms. Garza, did -- did that come up?
20 A The -- people posting about it comes up, yeah.
21 Q Okay. Have you seen other definitions of Black Lives
22 Matter?
23 A Not -- not par -- in particular, no, besides just people,
24 you know, use -- being very -- very literal with it, usually.
25 Q Okay. Are you aware of the definition by the

1 #BlackLivesMatter movement that defines Black Lives Matter as
2 the -- as being -- the purpose being to eradicate white
3 supremacy and violence inflicted on black communities by the
4 state and vigilantes?
5 A I knew the first part, yeah.
6 Q Which --
7 A I think, with the -- with the state and vigilantes' part,
8 I don't think that was included in the definitions that I saw.
9 Q Okay, and you aware of the #BlackLivesMatter movement
10 defining Black Lives Matter as combating and countering acts of
11 violence against black people?
12 A Yes.
13 Q When you defined, or you testified that Black Lives Matter
14 as a human right --
15 A Right.
16 Q -- what do you mean by that?
17 A Well, when I look at, like, the history of our country and
18 even beyond the scope of our country, dehumanization of black
19 people has been a significant part of it. I think the first
20 African slaves were brought in 1619, and -- and 1776 is when
21 our country started. And so from 1776 to 1865 is, like, 89
22 years, I think, of, I think, black people being considered
23 three-fifths of a person, which is over a third of our
24 country's history. As well as, if you count starting at 1619
25 to 1865, I believe it's 246 years, which is actually the same

1 length of time that we've been a country, from 1776 to 2022.
2 And so 89 out of those 246 years, that's, like, a third of
3 our country's history, not even including the next hundred
4 years where people were still fighting for civil rights. So to
5 me -- and 189 years out of 246 is, I think, over three quarters
6 of our country's history. So to me, it seems very in line with
7 our country's history that there's ongoing human rights issues,
8 specifically with black people being denied their humanity.
9 Q And when you talk about Black Lives Matter and humanity
10 and human rights, is there any aspect of society that you're
11 aware of that Black Lives Matter would not touch on?
12 A I'm not sure I understand.
13 Q I can do -- I'll go the other way. Does Black Lives
14 Matter and -- and its relationship to human rights relate to
15 the environment?
16 A I think it does, yeah.
17 Q Does it relate to education?
18 A Yes.
19 Q Does it relate to voting rights?
20 A Yes.
21 Q Does it relate to incarceration?
22 A Yes.
23 Q Does it relate to the justice system?
24 A Yes.
25 Q Does it relate to sentencing laws?

1 A Yes.
2 Q Does it relate to funding of police?
3 A Yeah.
4 Q Does it relate to abortion rights?
5 A I'm not sure.
6 Q Does it relates to gun control issues?
7 A I'm not sure.
8 Q Okay, and it relates to workplace; you've testified to
9 that?
10 A Right.
11 Q Does it relate to any political issues?
12 A I don't think it's specifically political, no.
13 Q Well, I'm -- I'm ask -- let me ask it a different way.
14 You're talking about human rights --
15 A Right.
16 Q -- as it relates to African Americans?
17 A Yeah.
18 Q Is one of the ways that -- that the dehumanization of
19 African Americans through three quarters of the history of this
20 country can be addressed through the political system?
21 A Right.
22 Q Is that correct?
23 A I could see that.
24 Q So the Black Lives Matter can touch upon political issues,
25 as well; isn't that fair to say?

1 A I suppose.
2 Q Okay. In order to make changes to the election laws, you
3 need to have political change, right?
4 A Right, but it -- it seems more of a human rights thing to
5 me than -- it's not, like, a bipartisan issue is I think what I
6 mean when I say it's not political.
7 Q Right. Are you aware of the political parties in this
8 country addressing human rights as part of their platforms, as
9 well?
10 A Not much, but yeah.
11 Q What's that?
12 A I'm not exactly -- I don't necessarily think that our
13 political system does -- not -- it's not, like, a
14 bipartisan -- human rights is generally not a bipartisan issue,
15 I think.
16 Q No, I'm -- I'm not asking you that. I'm asking you, like,
17 for example, the Democratic Party?
18 A Right.
19 Q The Democrats, do they have policies that support human
20 rights?
21 A Sometimes.
22 Q What about the Republican Party? Do they have policies
23 that support human rights
24 A Sometimes.
25 Q Any other political party that you're aware of that has

1 policies that support human rights?
2 A Yeah.
3 Q Okay, and are you aware of whether those policies that
4 support human rights address African Americans?
5 A I'm not sure of any specific, but I assume that it would.
6 MR. BROWN: Okay. The -- Your Honor, if I could just have
7 a few minutes, I think I'm almost done.
8 JUDGE SOTOLONGO: All right. Let's go off the record for
9 two minutes.
10 (Off the record at 4:16 p.m.)
11 JUDGE SOTOLONGO: Go ahead.
12 MR. BROWN: No further questions.
13 JUDGE SOTOLONGO: All right. Mr. Peterson?
14 MR. PETERSON: Thank you, Your Honor.
15 **REDIRECT EXAMINATION**
16 Q BY MR. PETERSON: Hello again, Ms. Visco. Just a -- just
17 a few follow-up questions. The -- the ULP charge that you
18 signed, General Counsel's, I believe, 1-quadruple-E, were you
19 assisted by counsel in -- in the filing of that charge?
20 A Yeah, I did not write it. I pretty much signed the thing
21 that I assumed covered most of the people that were making that
22 charge.
23 Q Were you intending to be untruthful in any way when you
24 signed it the charge?
25 A No, I considered the -- referring to it as -- just as a

1 generalization that I was just specifically different on.
2 Q Counsel was asking you about the -- about which
3 individuals, like, which of your black coworkers, you were
4 intending to support?
5 A Right.
6 Q And you mentioned David and explained that. You also
7 mentioned Dion?
8 A Right?
9 Q What -- why -- why were you -- what were you -- how were
10 you intending to support Dion?
11 A I think one of the -- he was one of the first people who
12 approached me when I was wearing it in my nametag and just said
13 that he really appreciated that I was doing that. It's
14 something that I think a lot of black people don't show up in
15 the workplace to do because they could face very direct
16 consequences for it. And so I felt that I was kind of doing
17 that on behalf of other coworkers who didn't necessarily feel
18 that they wanted to bring something that, I guess, would, you
19 know -- could affect them at work. Yeah.
20 Q Were there any other examples that you didn't mention?
21 A Not specifically, no.
22 Q Counsel was asking you about some of the protests that you
23 attended away from Whole Foods?
24 A Right.
25 Q And one of them you mentioned briefly, you said one of

1 them was more about supporting black businesses?
2 A Right.
3 Q What -- what were you referring to?
4 A On Juneteenth of -- I believe it was -- it must have been
5 2021. I'm not sure. I'm not sure of the date specifically,
6 but I know that it was a Juneteenth celebration here in Oakland
7 at Lake Merritt, in which a lot of various people that were
8 either fundraising for, I assume, like, black businesses,
9 essentially, where they were bringing their businesses to,
10 like, Merritt. And you could walk around, and like, buy food,
11 or buy, like, shirts or something just to support the black
12 community in Oakland.
13 Q And what connection did that have with Black Lives Matter
14 or the phrase "Black Lives Matter"?
15 A I think there was also a march that day. I wasn't in
16 attendance, but I did go to the Juneteenth celebration with a
17 sign that said, "Black Lives Matter". So it felt to me kind of
18 like it was like going to a protest, but I don't know.
19 Q And this was -- the Juneteenth, this is after June --
20 after 2020?
21 A I -- it must have been because I'm trying to -- I can't --
22 I can't recall if -- it was either 2020 or 2021. I'm not sure
23 specifically. I -- it mu -- yeah, I can't -- I don't remember.
24 I'm sorry.
25 Q You can't recall if it was the --

1 A It was -- yeah, it was one --
2 Q same time period that you were wearing the -- the nametag?
3 A It would make sense to me that it would be 2020.
4 Q The -- and the -- the protest you attended in -- in
5 Berkeley, Counsel asked you about some of the signs at the
6 other -- at the protests apart from the -- the Berkeley store?
7 A Um-hum.
8 Q Do you recall any of the signs at the Berkeley store
9 protest?
10 A Not -- not really. I think I was mainly just focused on
11 showing my sign that had stated that I don't think it's a
12 controversi -- or a political statement. I think it's a human
13 rights statement. Yeah, I was, I think, making more eye
14 contact with, like, the drivers of cars than, like, other signs
15 and stuff, but.
16 Q Fair enough. Do you recall any -- do you recall any --
17 seeing any signs that referenced Whole Foods or its actions?
18 A I don't know that it was specifically towards Whole Foods
19 or if it was just in general. I'm not -- yeah, I don't recall.
20 Q The -- you were asked some about the -- the Black Lives
21 Matter T-shirts that you wore to work?
22 A Right.
23 Q Do you recall when that was in relation to August 2nd of
24 2020?
25 A I did have some afterwards. I don't think I was ever

1 approached because, when I went onto the service floor, it was
2 covered. And so I think that, in that way, they were like,
3 it's -- it's not in the workplace. And so it was, like,
4 essentially, like, my time off, like, or in my breaks or going
5 to and from work that I was wearing it. So it was essentially
6 like I was off the clock in that regard.
7 Q And then the disciplines, the -- the -- the two
8 disciplines that you received, General Counsel's 97, in the --
9 the, you know -- the first -- the July 25th discipline,
10 you -- you wrote what you wrote, expressing that you felt it
11 was more dress code than time and attendance?
12 A Right.
13 Q The second discipline also appears to be time and
14 attendance related?
15 A Right.
16 Q Any -- any reason why you didn't make the same comment?
17 A I think I had -- I had assumed that it was -- it was,
18 like, a different -- that they had changed it. Because she
19 told me she was going to kind of redo it, and so I thought it
20 was redone. And so when it was presented to me, I did not
21 notice that it was still in -- in line with the original one,
22 essentially saying that it was a -- a time and attendance
23 issue. I think if I had noticed it, I probably would have
24 wroten (sic) again -- again, but.
25 Q So you didn't read it closely enough to notice that it

1 wasn't the dress code?
2 A Yeah, I -- I trusted that she was -- that she had changed
3 it.
4 MR. PETERSON: No further questions.
5 JUDGE SOTOLONGO: Mr. Brown?
6 MR. BROWN: No further questions.
7 JUDGE SOTOLONGO: All right. Ms. Visco, thank you very
8 much for your testimony. You are excused. Please do not
9 discuss your testimony with any other witness or potential
10 witness in this matter until this whole case is over. Thank
11 you very much.
12 THE WITNESS: Okay. Thank you so much.
13 JUDGE SOTOLONGO: Let's go off the record.
14 (Off the record at 4:30 p.m.)
15 JUDGE SOTOLONGO: All right. We've had an off-the-record
16 discussion about our schedule. We have decided that -- it is
17 now 4:35. There's no point in starting a witness now, so we're
18 going to resume tomorrow morning at 9 a.m. The parties have
19 informed me of the schedule of witnesses, and it would appear
20 that we're going to conclude most, if -- if perhaps not all, of
21 the witnesses by Friday. And then, Respondent will have an
22 additional witness next week, and we have talked about starting
23 that witness on Tuesday morning rather than -- rather than
24 Monday afternoon, as we had spoken about, so very well.
25 Off the record.

1 **(Whereupon, the hearing in the above-entitled matter was**
2 **recessed at 4:34 p.m. until Wednesday, August 10, 2022 at 9:00**
3 **a.m.)**
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1 **C E R T I F I C A T I O N**

2 This is to certify that the attached proceedings before the
3 National Labor Relations Board (NLRB), Region 20, Case Number
4 01-CA-263079, 01-CA-263108, 01-CA-264917, 01-CA-265183, 01-CA-
5 266440, 01-CA-273840, 04-CA-262738, 04-CA-263142, 04-CA-264240,
6 04-CA-264841, 05-CA-264906, 05-CA-266403, 10-CA-264875, 19-CA-
7 263263, 20-CA-264834, 25-CA-264904, 32-CA-263226, 32-CA-266442,
8 Whole Foods Market Services, Inc. and Savannah Lynn Kinzer,
9 Suverino Frith, Leea Mary Kelly, Ana Belen Del Rio Ramirez,
10 Camille Tucker-Tolbert, Truman Read, Abdulai Barry, Haley
11 Ashley Evans, Cassidy Visco, Justine O'Neill, Sarita Wilson,
12 Lyla Marcella Styles, Yuri London, Christopher Michno, Kirby
13 Burt, and Kaeleb Rae Candrill, held at the National Labor
14 Relations Board, Region 20, National Labor Relations Board,
15 Region 20, Ronald V. Dellums Federal Building, 1301 Clay
16 Street, 2nd Floor, Conference Room A, B, and C, Oakland,
17 California 94612, on August 9, 2022, at 9:04 a.m. was held
18 according to the record, and that this is the original,
19 complete, and true and accurate transcript that has been
20 compared to the reporting or recording, accomplished at the
21 hearing, that the exhibit files have been checked for
22 completeness and no exhibits received in evidence or in the
23 rejected exhibit files are missing.

24 Amanda Self

AMANDA SELF

25

Official Reporter

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 20

In the Matter of:

Whole Foods Market Services, Inc.,	Case No.	01-CA-263079
		01-CA-263108
		01-CA-264917
Respondent,		01-CA-265183
		01-CA-266440
and		01-CA-273840
		04-CA-262738
Savannah Lynn Kinzer, Suverino Frith, Leea Mary Kelly, Ana Belen Del Rio Ramirez, Camille Tucker-Tolbert, Truman Read, Abdulai Barry, Haley Ashley Evans, Cassidy Visco, Justine O'Neill, Sarita Wilson, Lyla Marcella Styles, Yuri London, Christopher Michno, Kirby Burt, and Kaeleb Rae Candrill, As Individuals,		04-CA-263142
		04-CA-264240
		04-CA-264841
		05-CA-264906
		05-CA-266403
		10-CA-264875
		19-CA-263263
		20-CA-264834
		25-CA-264904
		32-CA-263226
		32-CA-266442

Charging Parties.

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_____

Place: Oakland, California

Dates: August 10, 2022

Pages: 3103 through 3356

Volume: 18

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Phoenix, AZ 85020
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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

In the Matter of:		
WHOLE FOODS MARKET SERVICES, INC.,	Case No.	01-CA-263079
		01-CA-263108
		01-CA-264917
RESPONDENT,		01-CA-265183
		01-CA-266440
and		01-CA-273840
		04-CA-262738
SAVANNAH LYNN KINZER, SUVERINO FRITH, LEEA MARY KELLY, ANA BELEN DEL RIO RAMIREZ, CAMILLE TUCKER-TOLBERT, TRUMAN READ, ABDULAI BARRY, HALEY ASHLEY EVANS, CASSIDY VISCO, JUSTINE O'NEILL, SARITA WILSON, LYLA MARCELLA STYLES, YURI LONDON, CHRISTOPHER MICHNO, KIRBY BURT, AND KAELEB RAE CANDRILL, AS INDIVIDUALS,		04-CA-263142
		04-CA-264240
		04-CA-264841
		05-CA-264906
		05-CA-266403
		10-CA-264875
		19-CA-263263
		20-CA-264834
		25-CA-264904
		32-CA-263226
		32-CA-266442
CHARGING PARTIES.		

The above-entitled matter came on for hearing, pursuant to notice, before **ARIEL SOTOLONGO**, Administrative Law Judge, at the National Labor Relations Board, Region 20, Ronald V. Dellums Federal Building, 1301 Clay Street, 2nd Floor, Conference Room A, B, and C, Oakland, California 94612, on **Wednesday, August 10, 2022, 9:02 a.m.**

1 **A P P E A R A N C E S**

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1 **I N D E X**

2

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Maddy Michno	3109	3175 3192	3226	3233	3190
Frank Avila	3239 3244 3260 3270 3274				3260 3269
Jessica Rodriguez	3294	3338	3351	3353	3316

1 **E X H I B I T S**

2

3 EXHIBIT	IDENTIFIED	IN EVIDENCE
4 **General Counsel**		
5 GC-1(gggg) through 1(qqqq)	3107	3107
6 GC-90	2892	3173
7 GC-99	3116	3174
8 GC-100	3138	3149
9 GC-101	3349	3349
10 **Respondent:**		
11 R-91	3185	3192
12 R-92	3198	3201
13 R-93	3201	3293
14 R-94	3251	3256
15 R-95	3256	3260
16 R-96	3264	3267
17 R-97	3268	3270
18 R-98	3307	3317

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1 **P R O C E E D I N G S**

2 JUDGE SOTOLONGO: All right, good morning. This is Judge
3 Ariel Sotolongo. It is now Wednesday, August the 10th. And we
4 are resuming our hearing in the Whole Food Market case. Just
5 as a preliminary matter, the General Counsel wants to introduce
6 a -- an amendment or supplement to the index and description of
7 formal documents. Mr. Peterson.

8 MR. PETERSON: Thank you, Your Honor. Your Honor, I wish
9 to offer as a fourth supplement to the formal papers that have
10 previously been received into evidence as General Counsel's
11 Exhibit 1. Exhibits 1(ggg) -- or sorry 1(gggg-g) (sic) through
12 1(qqqq), inclusive. Exhibit 1(qqqq) being an index and
13 description of the supplemental exhibits.

14 I have provided Counsel with a copy and will be uploading
15 it into the SharePoint file.

16 JUDGE SOTOLONGO: All right. Any objection.

17 MS. SCHAEFER: No objection, Your Honor.

18 JUDGE SOTOLONGO: All right. The exhibit is received.

19 **(General Counsel Exhibit Number 1-GGGGG through 1-QQQQQ**
20 **Received into Evidence)**

21 JUDGE SOTOLONGO: So this would be 1(qqqq) -- (qqqq), is
22 that correct?

23 MR. PETERSON: 1(gggg) --

24 JUDGE SOTOLONGO: -- through 1 -- through 1(qqqq). Sorry.

25 MR. PETERSON: Correct.

1 JUDGE SOTOLONGO: All right. Mr. Peterson are you ready
2 to call your next witness?
3 MR. PETERSON: Yes, Your Honor.
4 JUDGE SOTOLONGO: All right. Why don't you go get him?
5 Let's go off the record while that witness comes in.
6 (Off the record at 9:03 a.m.)
7 JUDGE SOTOLONGO: Mr. Peterson.
8 MR. PETERSON: Thank you, Your Honor. The General Counsel
9 calls Christopher Maddy Michno.
10 Whereupon,
11 **CHRISTOPHER MADDY MICHNO**
12 having been duly sworn, was called as a witness herein and was
13 examined and testified as follows:
14 JUDGE SOTOLONGO: All right. Thank you. Can you please
15 spell your name for us and give us your address?
16 THE WITNESS: M-A-D-D-Y M-I-C-H-N-O. My current address
17 is 652 60th Street, Oakland, California.
18 JUDGE SOTOLONGO: All right. Thank you very much, Mr.
19 Peterson. Please proceed.
20 MR. PETERSON: Thank you, Your Honor.
21 Good morning.
22 THE WITNESS: Good morning.
23 MR. PETERSON: As you know, I'm Matt Peterson and I'm the
24 attorney for the NLRB. We're going to be asking you some
25 questions today. Listen carefully and answer truthfully. If

1 you're not sure about what that question means, let us know,
2 and we'll say it in a way to make sure you understand. If you
3 need a break or anything let us know. And try to give a little
4 pause between your answers so the attorneys can make
5 objections. And if the judge instructs you to answer, you can
6 answer. And if the judge says you don't have to answer, you
7 don't have to answer.
8 **DIRECT EXAMINATION**
9 Q BY MR. PETERSON: First, I'll ask if you have any
10 preferred pronouns?
11 A They, them, he, him.
12 Q And how do you prefer to be addressed today?
13 A Mx. or Ms.
14 Q All right. Ms. Michno, have you gone by any other names?
15 A I have.
16 Q Can you kind of tell us what names you've gone by?
17 A Yeah. In professional settings, I'm sometimes known as
18 Christopher because that's my given name. My birth
19 certificate. I went by Adam for all of my adolescence, though.
20 And now I go by Maddy.
21 JUDGE SOTOLONGO: Now, you go by what?
22 THE WITNESS: Maddy.
23 JUDGE SOTOLONGO: And you spell -- how do you spell that
24 again?
25 THE WITNESS: M-A-D-D-Y.

1 JUDGE SOTOLONGO: All right. And by the way, I want to
2 ask you -- these microphones, they don't amplify your voice,
3 they're set to record, so you need to project your voice so
4 that the folks over there can hear you. This is a big room,
5 and the sound tends to dissipate. So make sure you speak up so
6 everybody can hear you, okay? Thank you.
7 THE WITNESS: Understood.
8 JUDGE SOTOLONGO: All right.
9 Q BY MR. PETERSON: Ms. Michno, are you familiar with the
10 company called Whole Foods?
11 A Yes.
12 Q And how are you familiar with Whole Foods?
13 A I worked there for three years.
14 Q Over what time period was that?
15 A If I remember correctly, I started October 2017 and I was
16 separated September 13th, 2020.
17 JUDGE SOTOLONGO: Of what year?
18 THE WITNESS: 2020.
19 JUDGE SOTOLONGO: 2020?
20 THE WITNESS: Yes. Excuse me.
21 JUDGE SOTOLONGO: September 13?
22 THE WITNESS: Yeah.
23 Q BY MR. PETERSON: And did you work at a particular Whole
24 Foods store throughout your employment with Whole Foods?
25 A Berkeley store on Telegraph and Ashby.

1 Q Is that -- is that two different locations?
2 A No. Those are the cross streets.
3 Q Got it. And what -- did you work in more than one
4 position during your time at Whole Foods?
5 A Yes.
6 Q Can you kind of walk us through your -- your history?
7 A I started in the grocery department, just a team member.
8 That was for about a year. And then I switched over to a
9 specialty department for the last two years of my career with
10 Whole Foods.
11 Q And so in summer 2020, were you in -- working in the
12 specialty department?
13 A Correct.
14 Q Can you describe what your duties were in the specialty
15 department?
16 A Yeah, I could summarize. It was maintaining and
17 organizing displays, replenishing shelves and products,
18 replenishing perishables like olives, paring cheese for the
19 day, scanning spoilage, greeting customers, being available for
20 customer service, making recommendations.
21 Q And where did you spend most of your -- your time at work,
22 like, front of the house, back to the house? Can you kind of
23 describe how you (indiscernible, simultaneous speech) --
24 A I would say majority was front of house, especially in
25 specialty departments.

1 Q Was there any back-of-the housework in the specialty
2 department?
3 A Only for organizing back stock or when I had more
4 responsibilities as a order writer, I was upstairs on a
5 computer, placing orders, checking schedules for suppliers and
6 deliveries.
7 Q Yeah, what's -- can kind of describe that order writer
8 position?
9 A Yeah. I am responsible for replenishing the products that
10 you see on the shelves and planning ahead throughout the week.
11 Being aware of, like, scheduled deliveries. And also, when I
12 have to place an order, for the delivery to be made on time.
13 As well as writing the pars for the day for the other team
14 members, scanning the spoilage, and checking dates, building
15 displays throughout the store, being the first point of contact
16 for the leadership, as well-being responsible for the whole
17 department in that way where I take on all of those -- I'm --
18 I'm -- I'm held accountable first for things that go right or
19 go wrong, actually.
20 Q Do you ever have any training responsibilities?
21 A Yes. I was also a team trainer briefly towards the end of
22 my career in 2020. I was responsible for also in-back-house
23 training team members, having them sign off, acknowledging I've
24 read and received this training, I understand, and making sure
25 that it's applicable, being available for team members and

1 their questions and helping them with, you know, whatever it
2 may be, as well as just generally showing them role modeling,
3 you know, our procedures.
4 Q What -- were you in -- so most -- most of these questions
5 are going to focus on the summer of 2020. Do you recall what
6 schedule you were working in the summer of 2020?
7 A The summer of 2020, I was an opener, mostly, if I recall.
8 Maybe I had one shift that was a closing, but if I remember
9 correctly, it was all opening shifts at that time. I did -- I
10 definitely had a different schedule throughout my three years
11 there, so --
12 JUDGE SOTOLONGO: And -- and when does opening shift start
13 and when does it end? When does it end?
14 THE WITNESS: My opening shift, depending on the day, the
15 delivery schedule and such, it could be as early as 7:00 or as
16 late as 9, and then it would be, like, and 8-hour shift.
17 Q BY MR. PETERSON: And were you working full time, part
18 time or something else?
19 A I was working full time.
20 Q Did you -- did you have a uniform at Whole Foods during
21 the summer of 2020?
22 A Yes.
23 Q Can you describe it?
24 A The uniform was an apron and comfortable clothes to wear.
25 Q And by apron, can you describe the apron?

1 A Whole Foods logo apron. For cheese department, it had to
2 be a -- a full bib versus the waist-tied aprons that you could
3 wear in grocery because you weren't working with food. And
4 then also a hat for behind the counter, working with food.
5 Q Was the hat -- did the hat have any -- was that a Whole
6 Foods -- did it have Whole Foods label on it or anything?
7 A Sometimes.
8 Q Did you see hats other than those with a Whole Foods
9 label --
10 A Yes.
11 Q -- being worn? What type of -- what type of labels did
12 you see on hats?
13 A Sports teams, like, the Oakland A's or Raiders. Yeah.
14 Q And how frequently would you see people wearing hats like
15 that at work?
16 A Sometimes for game days. Sometimes just sporadically.
17 Generally, more often than not.
18 Q Do you recall who -- what the store leadership was at your
19 store in the summer of 2020? Who did you report to and who did
20 they report to up to the top of the store?
21 A Sure. I reported to Cory Sevisky, my assistant team
22 leader. As well as Charles Shirtluv, my team leader, both for
23 specialty. They both reported to the ASTLs, assistant store
24 team leaders, Tanda Brown, Jessica Rodriguez, as well as the
25 store team leader, Kelly Fox.

1 Q Are you familiar with the term "Black Lives Matter"?
2 A Yes.
3 Q Are you aware of its acronym, BLM?
4 A Yes.
5 Q And how -- how -- what -- what's your source of
6 information about the term "Black Lives Matter"?
7 A It's an exclamation that's --
8 Q And I guess before -- it sounds like you're describing
9 what it is, and like, how do you know what it is? Like, how
10 you heard about it? How did you become aware of it?
11 A Just living in Oakland, there is a lot of, like, activism
12 as well as protests. And so I was aware -- made aware through
13 my community, through my friends, through word of mouth. I've
14 seen signs in people's windows. It's just a general statement
15 that you see around Oakland. There's a lot of diversity here,
16 too, as well. So it's just acknowledging that people have
17 different skin tones but that --
18 Q And --
19 A -- they --
20 Q Oh, sorry.
21 A -- they deserve to be, seen, felt, held because they're,
22 you know, scrutinized more, though, like, systematic oppression
23 as well as like police brutality, and just everyday life can
24 be -- talking with some of my black friends, you know, there's
25 lots of microaggressions that they face in a day-to-day life.

1 Q How -- did you ever wear anything at work with the phrase
2 "Black Lives Matter" or BLM on it?
3 A Yes.
4 Q About how many times?
5 A More than I can count.
6 Q Do you recall what time period this was?
7 A I started wearing Black Lives Matter I -- if I recall
8 correctly, early June of 2020.
9 Q Can you describe what -- what you wore with Black Lives
10 Matter or BLM?
11 A I would generally write it on my mask, BLM, or Black Lives
12 Matter. I also had stencils that I would spray on to T-shirts
13 and sweatshirts, as well as -- my partner, at the time, also
14 made a bedazzled mask -- a cloth mask that said, "Black Lives
15 Matter".
16 MR. PETERSON: May I approach the witness, Your Honor?
17 Your Honor, I'm -- I'm moving from -- I'm moving on to Exhibit
18 99; 98 will -- it is -- it will not be used. These were pre-
19 marked, so there will not be a General Counsel's 98.
20 JUDGE SOTOLONGO: Okay. Very good. Very well.
21 Q BY MR. PETERSON: Have you had a -- go ahead and look
22 through those four pages of General Counsel's 99. See on the
23 bottom, in that small print, it says GC Exhibit 99, and there's
24 a page 1 of 4? Let me know when you've had a chance to flip
25 through that.

1 A I've seen it.
2 Q And do you recognize the images that are depicted on
3 the -- on the exhibit?
4 A Yeah. Those are of myself.
5 Q And what -- are those the -- are those examples of the BLM
6 masks that you wore at work at Whole Foods?
7 A Yes.
8 Q Are there other masks or other Bla -- Black Lives Matter
9 messages that you wore at work that aren't included in these --
10 in this exhibit?
11 A Correct.
12 MR. PETERSON: Okay. I'm going to -- I'm going to come
13 back to the Exhibit, Your Honor, if that's okay, before
14 offering it. I just wanted to demonstrate what type --
15 JUDGE SOTOLONGO: All right.
16 MR. PETERSON: -- this exhibit.
17 Q BY MR. PETERSON: How did you get the idea to wear Black
18 Lives Matter at work?
19 A In solidarity with my black coworkers.
20 Q And why -- how, how is wearing Black Lives Matter at work
21 showing solidarity with your black coworkers?
22 A It was a visual representation that I was available to
23 listen to them, and just, like, again, hold them, hear them,
24 acknowledge them, you know, affirm them in that -- in that
25 space so that they could feel safer.

1 Q Had you -- prior to you wearing the Black Lives Matter at
2 work, had you seen any other coworkers wearing Black Lives
3 Matter at work?
4 A Yes.
5 Q About how -- how many coworkers had you seen wearing Black
6 Lives Matter at work?
7 A If I'm going to guess, from my recollection, at least
8 five, if not ten or 12.
9 JUDGE SOTOLONGO: All right. So that's -- that's an
10 estimate? You don't know --
11 THE WITNESS: That's an estimate.
12 MR. PETERSON: -- an exact headcount, obviously; is that
13 correct?
14 THE WITNESS: It's hard to recall.
15 JUDGE SOTOLONGO: Yeah. Yeah.
16 Q BY MR. PETERSON: And whe -- when -- can you kind of
17 describe what -- what you had seen your coworkers wearing
18 before you started wearing Black Lives Matter at work?
19 A Some coworkers would also write it on their masks. If I
20 remember correctly, one coworker had embroidered or sewn BLM
21 onto their mask. It's been -- it's been two years, so it is
22 hard to recall, but I was inspired, and I followed suit.
23 Q About how long -- for what -- like, how long of a time
24 period had you noticed your coworkers wearing Black Lives
25 Matter at work before you started?

1 A It took about a -- a week at least, or at the most.
2 JUDGE SOTOLONGO: And if I may interrupt for a second to
3 just clarify what -- these coworkers of yours, who you saw
4 wearing Black Lives Matter messaging, were they wearing, masks
5 with that message or other items of clothing, such as T-shirts
6 or pins, or -- or can you tell us what they were wearing?
7 THE WITNESS: At this point, I remember masks.
8 JUDGE SOTOLONGO: Just masks. Okay. Go ahead.
9 Q BY MR. PETERSON: Did you have any discussions with your
10 coworkers about their masks before you put on your mask?
11 A Just affirming each other. Simply saying, I like your
12 mask.
13 Q And once you began -- once you began wearing the Black
14 Lives Matter mask, did you wear it consistently or did you wear
15 it sporadically?
16 A Some weeks I would wear it every day. Some weeks I
17 wouldn't. It was back and forth.
18 Q Did you have any conversations with store leadership about
19 the Black Lives Matter masks or T-shirts that you were wearing?
20 A Yes.
21 Q About how many.
22 A How many leadership?
23 Q How many conversations?
24 A How many conversations? At least two that I could
25 recollect from my memory right now.

1 Q And when -- when did they occur in relation -- when did
2 the first one occur in relation to when you started wearing the
3 mask?
4 A First conversation was shortly after. I was pulled aside.
5 Q Do you recall where you were when this -- do you recall
6 the date?
7 A The date? Not the exact date. It was in June, sometime,
8 shortly after I started wearing the mask.
9 Q And what -- what -- what did -- where -- where did that
10 conversation take place?
11 A I was on the floor, and I was pulled aside into a private
12 room behind a closed door. Had a conversation.
13 Q And who -- who pulled you aside?
14 A Kelly Fox.
15 Q And where did that -- where did she pull you to?
16 A Upstairs to the store team leader office -- or as we call
17 it, the eagle's nest.
18 Q Was anyone else present?
19 A No.
20 Q Did she tell you why she was bringing you up there?
21 A Yeah. She wanted to talk about my mask.
22 Q And to the best you can recall, can you tell us, how did
23 the meeting begin and who said what?
24 A I was pulled aside. She told me she wanted to talk, and
25 we found a private space. And at this point, it's hard to

1 recall the whole conversation or how it started, but I do
2 remember, she compared it to the KKK. She said customers might
3 be offended by the messaging.
4 Q Did she indicate whether she had in -- whether she was she
5 was going to -- had any issue with you wearing that mask?
6 A In so many words.
7 Q Do you recall kind of what -- what-- what she said?
8 A She told me she was afraid of offending someone. And I
9 think I interpreted that as she was offended personally.
10 Q Anything else you can recall about that conversation?
11 A I was planning -- that's all I can recall.
12 Q Do you -- would you say your recollection has been
13 exhausted at this point about this conversation?
14 A A little bit.
15 Q Do you recall if she said anything about removing the
16 mask.
17 A Yeah. I was asked if I could remove it and I politely
18 declined at that time.
19 Q And by, "was asked to remove it," was that by Kelly Fox?
20 Was she the one that asked you to remove it?
21 A Yes.
22 Q Do you recall -- did she ask you why you were wearing the
23 mask?
24 A I think so.
25 Q Do you recall if you said anything to her about the

1 reasons why you were wearing the mask?
2 A I mentioned systematic oppression to her. So the -- in
3 her response, she was afraid of doing the wrong thing; I just
4 wanted to do the right thing.
5 Q Anything else you can recall about that conversation?
6 A That's all I can recollect.
7 Q Did you give an affidavit in the investigation of this
8 case?
9 A Yes.
10 Q Would looking at -- did you describe some of these events
11 that I've been asking you about in that affidavit?
12 A Yeah.
13 Q Which -- would looking at that help refresh your
14 recollection as to the --
15 A It could.
16 Q -- the remainder of this conversation?
17 (Counsel confer)
18 Q BY MR. PETERSON: Do you recognize this as an affidavit
19 that you provided in this investigation?
20 A Yes.
21 Q Those are your initials on the bottom of the page?
22 A Yeah.
23 Q Is that your signature?
24 A Yes.
25 Q Did you sign it on or about October 22nd, 2020?

1 A Yes.
2 Q Okay. So I'm just going to ask you to read this paragraph
3 to yourself, and -- and let us know when you're done, and I'll
4 take it back.
5 A I'm done.
6 Q Does that refresh your recollection about more contents of
7 that conversation?
8 A Yes.
9 Q And what -- what -- what do you now recall that you
10 haven't mentioned?
11 A Also talking about police brutality with her. Yeah.
12 JUDGE SOTOLONGO: What -- what was said about police
13 brutality and by whom?
14 THE WITNESS: Police brutality against black people and --
15 JUDGE SOTOLONGO: But who -- who mentioned police
16 brutality?
17 THE WITNESS: I did.
18 JUDGE SOTOLONGO: And what did you say?
19 THE WITNESS: I -- it's really hard to recall all the
20 words that I said.
21 JUDGE SOTOLONGO: Well, you don't have to -- as best you
22 can. I mean, do you -- the affidavit that you just read, did
23 it have --was there something in there about your mentioning of
24 police brutality?
25 THE WITNESS: Yes.

1 JUDGE SOTOLONGO: Were there any details as to what you
2 said in the affidavit?
3 THE WITNESS: Just that I mentioned it.
4 JUDGE SOTOLONGO: Okay. But you didn't discuss the
5 specifics?
6 THE WITNESS: I think it was assumed that we were both
7 aware of what was happening in the country.
8 Q BY MR. PETERSON: Do you -- do you recall in your -- in
9 your affidavit, saying that "I told her I was wearing the mask
10 in response to police brutality, and it was not a controversial
11 statement."?
12 A I remember telling her it was not a controversial
13 statement.
14 Q You don't remember saying that you were wearing it in
15 response to police brutality?
16 A I don't remember, but the affidavit reminds me.
17 Q Do you recall dating your affidavit --
18 MR. FERRELL: Objection. Leading at this point. This
19 witness's --
20 MR. PETERSON: His recollection --
21 MR. FERRELL: -- his recollection has been refreshed by
22 the affidavit. Let's just ask the question.
23 JUDGE SOTOLONGO: That's correct. Yes. You can ask him
24 what else he recalls if anything.
25 Q BY MR. PETERSON: What else do you recall if anything?

1 A That's the totality of what I remember of that
2 conversation going.
3 Q Do you recall telling her that you were --
4 MR. FERRELL: Objection. Leading.
5 MR. PETERSON: The witness's recollection has been --
6 JUDGE SOTOLONGO: Yes.
7 MR. PETERSON: -- refreshed and --
8 JUDGE SOTOLONGO: He's -- he's allowed, under the
9 circumstances, to specifically ask him about -- all right. Go
10 ahead.
11 Q BY MR. PETERSON: Do you recall telling her that you were
12 honoring your black customers and coworkers to say their lives
13 matter?
14 A Yes.
15 Q Do you recall telling her that, "Systemic oppression made
16 it difficult for them and they were treated differently, and I
17 was wearing the mask to support them."?
18 Q Yes.
19 Q Do you recall telling her whether you would remove the
20 mask or not?
21 A I told her I would not.
22 Q And how did the meeting end?
23 A She had probably said something about checking in with her
24 supervisors about what to do next. And I had refused to take
25 off my mask, and I wanted to keep wearing it to show solidarity

1 with my black coworkers and customers.
2 Q Did you continue to wear it for the -- did you work the
3 rest of your shift wearing the mask?
4 A Correct.
5 Q Did you continue wearing the Black Lives Matter items you
6 described to your -- to -- to work?
7 A Yes.
8 Q Do you recall any other conversations with store
9 leadership about what you were wearing?
10 A Yes.
11 Q Who do you recall having conversations with?
12 A When I would wear Black Lives Matter, Tanda Brown would
13 tell me whether it was on my shirt or my mask. Definitely, I
14 remember the shirt, she complimented my shirt that I had
15 stenciled and said Black Lives Matter.
16 Q Was this visible?
17 A It was -- it was visible on my uniform.
18 Q Visible on the front of the back of the uniform?
19 A On the back?
20 Q And was this before or after you had the conversation with
21 Kelly Fox, if you recall?
22 A That -- the stencil compliment was after my conversation
23 with Kelly Fox.
24 Q Any other conversations that you had with store leadership
25 about wearing Black Lives Matter that you recall?

1 A Yes. With Tanda Brown and Jessica Rodriguez after my
2 first corrective, over a dress code. They tried to convince me
3 that political statements don't have a place in the
4 corporation.
5 JUDGE SOTOLONGO: And before you go there -- before you
6 start describing that conversation -- can you tell us a little
7 more background about where this conversation you had with --
8 was it Jessica Rodriguez?
9 THE WITNESS: correct.
10 JUDGE SOTOLONGO: Okay. Where did this conversation take
11 place and -- and who, if anybody else, was present during this
12 conversation?
13 THE WITNESS: The conversation took place also in the
14 store team leader office.
15 JUDGE SOTOLONGO: Okay. And was there anybody else
16 present besides you and Jessica Rodriguez?
17 THE WITNESS: Tanda Brown
18 JUDGE SOTOLONGO: Okay. And that one -- and Tanda Brown
19 is the assistant store team le -- team leader, right?
20 THE WITNESS: Correct.
21 JUDGE SOTOLONGO: And about how -- how long after the
22 conversation you had with -- with Kelly Fox did this
23 conversation occur?
24 THE WITNESS: Maybe two weeks after.
25 JUDGE SOTOLONGO: All right. Now, you can proceed to tell

1 us who said what during this conversation.
2 THE WITNESS: Thank you. We -- after receiving my write
3 up -- my corrective for dress code violation -- they both tried
4 to convince me that it was a political statement. That it
5 didn't belong in a corporation and that other corporations that
6 I would work for after would also ask the same things of me.
7 And I politely disagreed because I didn't feel it was
8 political. I was talking about people's skin tones and
9 identities.
10 Q BY MR. PETERSON: Do you recall what you said about
11 people's skin tones and identities?
12 A I just left it at that; I thought it wasn't a political
13 statement.
14 MR. PETERSON: May I approach, Your Honor?
15 JUDGE SOTOLONGO: Yes.
16 Q BY MR. PETERSON: Directing your attention to the -- the
17 first few pages of the exhibit. Let me know if you've had a
18 chance to look at them and if you -- if you -- if you recognize
19 it.
20 A I recognize this.
21 Q And what is it?
22 A This is my first corrective for wearing a Black Lives
23 Matter mask.
24 Q Is that what you were just testifying about?
25 A Yes.

1 Q The -- the bottom box says on -- do you see where it says,
2 "On July 16th, 2020, Christopher arrived to work out of dress
3 code wearing a noncompliant face mask."?
4 A Correct.
5 Q The July 16th date is -- and -- and I guess your signature
6 is -- is that your signature on the second page on July 22nd,
7 2020?
8 A Correct?
9 Q Do you recall wearing a -- a mask on July 16, 2020, as
10 indicated on the first page?
11 A Yeah.
12 JUDGE SOTOLONGO: Now, was that -- just to clar -- just to
13 be clear, that incident on July 16th, was that your encounter
14 with Kelly Fox? Or was this --
15 THE WITNESS: No.
16 JUDGE SOTOLONGO: This was -- so Kelly Fox, in that
17 location -- the conversation you earlier described, she -- she
18 didn't give you a corrective -- corrective counseling at that
19 time; is that correct.
20 THE WITNESS: Kelly Fox never gave me corrective
21 counseling.
22 JUDGE SOTOLONGO: Okay. So this July 16th corrective
23 action refers to a second incident -- a second conversation you
24 had with a supervisor?
25 THE WITNESS: I'm a little confused, Your Honor.

1 JUDGE SOTOLONGO: Okay. So you said you had -- the first
2 conversation was with Kelly Fox. She told you to, essentially
3 that you shouldn't be wearing the Black Lives Matter mask; is
4 that correct? You described that earlier.
5 THE WITNESS: Correct.
6 JUDGE SOTOLONGO: Okay. Then you just told us that about
7 two weeks later you had a second meeting with store management.
8 And this time it was with Ms. Rodriguez, and -- what was the
9 name of the other person?
10 THE WITNESS: Tanda Brown.
11 JUDGE SOTOLONGO: All right. And -- all right. So does
12 this corrective action that we're talking about now, does that
13 refer to the encounter you had with Ms. Brown and Ms.
14 Rodriguez?
15 THE WITNESS: You are asking me if the conversation I had
16 with Tanda Brown and Jessica Rodriguez after my first
17 corrective, if this is the same day?
18 JUDGE SOTOLONGO: Well, I'm asking you, whether this
19 refers to who's -- who -- do you know who's signing this --
20 this -- who signed this corrective? Whose signature that is?
21 THE WITNESS: I can't read that, but it was either Tanda
22 or Jessica.
23 JUDGE SOTOLONGO: It sounds like -- it looks like a
24 Rodriguez name to me, but I -- I cannot be certain. All right.
25 Okay. I'm just trying to clarify whether this corrective

1 action was the result of the conversation you had with Ms.
2 Rodriguez and Ms. Brown. Are you foll -- do you follow me?
3 THE WITNESS: It's not the result. I had that
4 conversation with them after the corrective.
5 JUDGE SOTOLONGO: Oh, okay. So I can presume it happened
6 after? So you got this corrective action, and then after,
7 that's when you had a conversation with them, okay. Just to be
8 clear on the sequence of events here.
9 THE WITNESS: Yeah.
10 JUDGE SOTOLONGO: All right. Thank you.
11 Q BY MR. PETERSON: And if -- yeah. So that's what I was
12 going to -- I was going to -- I was going to ask you if -- if
13 you recalled -- so the July 16th incident, do you recall, in
14 your affidavit, describing that the -- that on July 16th, you
15 actually had a conversation with Jessica and Tanda?
16 A Yes.
17 Q Is that the conversation you were just --
18 A Correct.
19 Q -- just describing?
20 A Correct.
21 Q And so that July 16th is -- it's just not clear, because
22 July 16th is when, you know, that's what's mentioned in this
23 discipline. But it looks like you didn't receive it until July
24 22nd -- or that's when you signed it?
25 A Correct.

1 Q Does that refresh your recollection?
2 A Correct.
3 Q Okay. So -- yeah. July 16th -- do you recall anything
4 else about the conversation with Tanda Brown and Jessica
5 Rodriguez on July 16th?
6 A They let me know that continuing to wear the mask was
7 going to result in further write ups.
8 Q Do you recall them asking any -- about why you were
9 wearing the mask?
10 A They didn't ask why.
11 Q Do you recall if you gave them many reasons why you were
12 wearing the mask at that -- on July 16th?
13 A I believe we talked about it a bit.
14 Q Do you remember what you said?
15 A Again, it's hard to recall two years ago, but I probably
16 said something very similar as how I explained to Kelly in our
17 conversations is that I wanted to advocate for everyone in the
18 store, including black folks who face lots of microaggressions
19 and systematic oppression. I wanted to acknowledge them; make
20 them feel safer.
21 Q Do you recall them telling you at that point that you
22 would be getting a corrective action if you didn't remove the
23 mask?
24 A At that point in time, my impression was they were already
25 giving me the corrective action for wearing the mask. They

1 didn't ask me to remove it.
2 Q They did not ask you to remove it?
3 A I'm sure they asked me to remove it on the 16th.
4 Q Do you recall if you removed it or not on the 16th?
5 A I did not.
6 Q Did you continue to work the remainder of your shift
7 after?
8 A Yes.
9 Q And then just kind of backing up a little bit. Between
10 your first encounter with Ms. Fox that you described and July
11 16th, had you -- had you worn the mask during that interim
12 period?
13 A Could you repeat?
14 Q Yeah. So between the time that Kelly Fox first told you,
15 you couldn't wear the mask, and then July 16th when you -- when
16 you were -- had this conversation with Jessica Rodriguez and
17 Tanda Brown you were describing, did you wear any Black Lives
18 Matter in between that time period?
19 A I recall wearing Black Lives Matter on my mask between
20 that period.
21 Q Do you recall any -- anybody saying anything to you from
22 store leadership during that time period other than, I think
23 you talked about Tanda Brown once commenting on a shirt?
24 A That's hard to recall. I do remember Tanda Brown giving
25 me affirmations and compliments, definitely, for the stenciled

1 T-shirt. That was later, after my first corrective. But I
2 think before my first corrective, I remember Black folks in the
3 store telling me, I like your mask. Tanda Brown could have
4 been one of them. I could be mixing her up with someone else.
5 Q Tanda Brown, does she identify as black?
6 A Correct.
7 Q For the record, what race do you identify as?
8 A I'm white.
9 Q Okay. And then looking at the -- the second page of that
10 exhibit, is that -- do you recall actually receiving this and
11 signing it on July 22nd, the date next to your signature?
12 A Yeah, I do.
13 Q And did you understand it was in reference to the July
14 16th incident?
15 A Correct.
16 Q Do you recall who gave -- who gave you this on -- on July
17 22nd?
18 A Do I recall who gave me the disciplinary action?
19 Q Yes.
20 A I remember being in the room -- the store team leader
21 office with Tanda Brown and Jessica Rodriguez, together.
22 Q And do you recall any of that conversation?
23 A Yeah.
24 Q What -- can you tell us who said what?
25 A Just repeating what I said earlier. Jessica and Tanda

1 both tried to convince me that it was not a good idea because I
2 was attracting attention to myself, and that corporations have
3 rules against political statements, and they try to avoid
4 controversial topics and backlash. And that if I worked at
5 another location, not necessarily Whole Foods, but any other
6 corporation, that they would ask something similar of me.
7 Q And did you -- do you recall if you were wearing a Black
8 Lives Matter mask on -- on this occasion when you're signing
9 the -- the corrective action?
10 A I think so.
11 Q The handwritten portion of page 2, do you recognize that
12 handwriting?
13 A That's my handwriting.
14 Q And why did you -- why did you write what you wrote?
15 A It was definitely in anger for me at the time to remember
16 why I was doing what I was doing, as well as providing an
17 explanation for anybody else who might read the write up and
18 question my behavior, my intentions.
19 Q And you mention this is a racist policy. Can you tell us
20 what -- what you're referring to?
21 A Asking folks to cover up Black Lives Matter is racist, in
22 my impression, because we are talking about skin tone and
23 simply an explanation that their lives matter. So asking
24 people to remove that doesn't make sense to me.
25 Q Had you conveyed any of these sentiments to your store

1 leadership before writing it down?
2 A I had.
3 Q And what do you -- what do you mean by planning to
4 continue to strive for an anti-racist work environment at Whole
5 Foods market; the last line you wrote?
6 A My intention was to be inclusive and available for all of
7 my coworkers, no matter their skin tone, and advocating for
8 them in general.
9 Q Did you -- do you recall stopping wearing the Black Lives
10 Matter mask at any point?
11 A Briefly.
12 Q And what -- what led you to stop wearing the mask for a
13 brief period?
14 A I was listening to my black coworkers who, for example,
15 Ranita, as well as Brenda. Ranita worked in grocery. Brenda
16 worked the cashier. They were both black. And they told me
17 that they liked working with me; that I made them feel better.
18 That I acknowledged them, that I made them feel seen, that my
19 presence was welcome. And they were worried that I would be
20 separated for my actions; that I would be, you know,
21 spotlighted, made an example of. And they didn't want me to
22 leave because they liked working with me.
23 Q So at that point you stopped wearing the Black Lives
24 Matter to work for -- for a time period?
25 A For a time period.

1 Q And then did you resume again?
2 A I did.
3 Q What -- what led you to resume wearing the -- the Black
4 Lives Matter to work?
5 A I was just noticing white favoritism in the store. I was
6 noticing black coworkers being passed up for promotions when
7 they had -- had more veteran status in the store. For example,
8 working -- Ranita had worked at the store for years and we had
9 hired a new team member from Safeway, I believe that year,
10 2020, if I recall. Her name was Rachel (phonetic throughout).
11 They worked in the same department together -- grocery. They
12 both applied for the same position. Ranita was passed up for
13 the opportunity after Rachel had only been at Whole Foods for
14 probably less than a year.
15 I noticed, also, another white coworker who, same story
16 from Safeway. Probably hadn't worked with us more than a year,
17 was also quickly promoted. Meanwhile, I would hear from my
18 black colleagues that they were being written up for things
19 like time and attendance, or -- and Breonna's example, she told
20 me that she was written up for having an attitude problem or
21 maybe, as they put it, insubordination, or something. I found
22 that unfair. It didn't sit right with me, and I felt, like, we
23 weren't making progress in terms of being a more inclusive
24 store that made all skin tones feel safe and welcome.
25 Q And what -- what did you -- what Black Lives Matter

1 apparel did you res -- wear after you had stopped for that
2 brief period?
3 A I started writing it on my mask again.
4 Q Turning your attention back to General Council's Exhibit
5 100, turning to pages 3 and 4. Take a look at that and let me
6 know if you recognize it?
7 A I recognize this.
8 Q And what is this?
9 A This is a corrective for the expired products from the
10 Ever Clean product.
11 Q Did you receive it on or about September 6th? Is -- is
12 that your signature on the second page?
13 A It is.
14 Q Did you sign it on or about September 6th, 2020?
15 A Correct.
16 Q Do you recall who gave you this?
17 A Jessica Rodriguez, I -- if I recall correctly.
18 Q Yeah. Do you recognize the second signature there?
19 A That is, I think -- no, I don't recognize that signature,
20 honestly.
21 Q Do you recall if you were wearing a -- a -- a Black Lives
22 Matter mask when you received this write up?
23 A That's what I remember. Sorry. I'm going to silence my
24 phone. I realize I didn't do that yet.
25 Q Sure. Do you recall having a discussion with Kelley Fox

1 on September 6th about your Black Lives Matter mask?
2 A I recall a conversation with Kelly Fox --
3 Q Where do you --
4 A -- in September --
5 Q -- where do you recall that conversation taking place?
6 A That was on -- it was initiated on the sales floor, and
7 then, behind the closed door, again, her style.
8 Q And do you recall what she said when the conversation was
9 initiated?
10 A Something, like, it was supposed to be a transactional
11 conversation where she offered me a donut. I didn't want a
12 donut. It was early in the morning. I had just opened. I was
13 going about my daily responsibilities as an order writer,
14 replenishing the shelves, checking my back stock so that I
15 could have the correct numbers when I placed my orders for the
16 day. She was handing out donuts, offered me one, noticed my
17 Black Lives Matter mask. Asked me to remove it. I politely
18 declined. And then she wanted to have a private conversation
19 with me.
20 Q And is that the conversation that you were talking about,
21 that she pulled you aside?
22 A So the first conversation was before my first corrective.
23 And then the second conversation was a different conversation.
24 Q Okay. Yeah. I thought -- so we were talking about
25 September 6.

1 A Right.
2 Q And you described the incident with the donuts.
3 A Yes.
4 Q And then how --
5 A Continuing.
6 Q -- does that continue into Black Lives Matter at some
7 point? You said she noticed the mask.
8 A Just -- just generally what we've -- we've already
9 established with each other is that she was afraid of doing the
10 wrong thing, and I didn't feel the company was making the right
11 choice in terms of accommodating all skin tones.
12 Q Did you -- did you remove the mask at that point?
13 A No.
14 Q Directing your attention to pages 5 and 6 of General
15 Counsel's Exhibit 100, the next two pages.
16 A I've seen it.
17 Q Do you know what it is?
18 A It's my second corrective.
19 Q Second corrective, I guess we've already looked at --
20 A Second corrective for the dress code violation in response
21 to wearing Black Lives Matter on my uniform.
22 Q And did you -- is that your signature on the second page?
23 A Correct.
24 Q Did you sign it on or about September 7th?
25 A Correct.

1 Q And the first page, page 5 of the exhibit, the -- the
2 bottom box, you see where it says, "On September 6th,
3 Christopher arrived to work out a dress code wearing a
4 noncompliant face mask."?
5 A Sorry, what was your question?
6 Q Yeah. Just, do you see -- you see --
7 A Oh, I see it.
8 Q -- directing your attention to that.
9 A Yes.
10 Q Is that the -- is that describing the incident you just
11 testified about?
12 A Correct.
13 Q The incident from the day before? It mentions that you
14 were offered two alternative face masks but refused to make any
15 changes. Do you recall being offered that alternative?
16 A I do recall now. That refreshed my memory because not
17 only did Kelly ask me to remove it or switch masks, she came
18 back -- she circled back and offered me a black reusable mask
19 or a surgical disposable mask that were both blank.
20 Q And do you recall whether you accepted her offer?
21 A I declined.
22 Q Did you continue working wearing the Black Lives Matter
23 mask?
24 A Correct.
25 Q And then, so this -- do you recall -- do you recall who

1 issued this to you on September 7th.
2 A Kelly Fox.
3 Q And is that Jessica -- Jessica Rodriguez' signature as
4 well?
5 A Yes. Maybe that's Ms. J. Rod.
6 Q Who -- is there -- is there somebody -- is there another
7 team leader named J. Rod?
8 A I would imagine that would be her. I honestly don't know.
9 Q Do you recall any discussion-- do you recall where you
10 were when you received this September 7th corrective action?
11 A The store team leader's office.
12 Q And do you recall who was present?
13 A I don't. At this point, my memory is exhausted.
14 Q Is that your -- is that your handwriting there on page 6?
15 A Correct.
16 Q Why did you write that?
17 A I wrote that to document the mask that I was wearing. At
18 the time, I felt that my other correctives had summarized why I
19 was wearing the mask, and this was just to archive that I was
20 wearing Black Lives Matter, which as I've made clear to the
21 store team leadership before, doesn't feel like a political
22 statement; doesn't make sense.
23 Q Turning to the next two pages of the exhibit, pages 7 and
24 8. Let me know if you recognize what -- what those two pages
25 are.

1 A I recognize it.
2 Q And can you tell us what it is?
3 A It's my final corrective.
4 Q Is that your signature on page 8?
5 A Correct.
6 Q Did you sign it on or about September 9th, 2020?
7 A Correct.
8 Q And going back to the first page, page 7, the bottom box
9 references -- do you see where it references that on 9/7/2020,
10 9/8/2020, Christopher arrived to work out of dress code?
11 A Yes.
12 Q Were you wearing the Black Lives Matter mask on those
13 occasions?
14 A Correct.
15 Q Do you recall the -- any discussion -- do you recall who
16 gave you this corrective action dated September 9th?
17 A I see Kelly Fox's signature. At this point my memory's
18 exhausted; it's hard to remember being there.
19 Q Do you remember that -- any conversation connecting -- in
20 connection with this -- receiving this discipline?
21 A I don't recall at this point in time what conversations we
22 might have had during this encounter.
23 Q Would -- is -- is that your handwriting on -- on page 8?
24 A Correct.
25 Q And why did you write what you wrote?

1 A I wrote that because I realized my last statement was very
2 brief, and I wanted to summarize, again, why I was wearing it,
3 and what my goal was for the company.
4 Q What -- what did you mean by using your privilege to
5 advocate for your fellow black coworkers who are
6 systemically -- systematically oppressed and face
7 discrimination in their own workplace for expressing that their
8 lives matter?
9 A Yes. I realize that I am a white person, and just like I
10 noticed white favoritism in the store, I was also one of them
11 myself. I was promoted several times within a year into the
12 order rider position that I had. I received, you know, a pay
13 raise; I was always affirmed for doing my job well by store
14 leadership; being amiable; and people listened to me in the
15 store. So my privilege would be that using that to speak out
16 against, you know, racism, and striving to be antiracist was
17 what I was referring to with my privilege.
18 Q Do you recall raising any of the concerns that you just
19 described about -- about issues facing your -- your black
20 coworkers to any of your store leadership?
21 A I didn't spotlight any individuals for -- out of fear of
22 retaliation to them. I didn't want them to have more attention
23 when they were already being disciplined for things like
24 attitude or yeah, time and attendance, you know, having a more
25 watchful eye placed on them when they're already being

1 scrutinized didn't feel like the right thing to do for them,
2 that would make them safer.
3 Q I understand you didn't mention any of them by name, but
4 did you raise the concerns generally with any of your store
5 leadership?
6 A Generally.
7 Q Do you recall who you spoke to about those concerns?
8 A Definitely my team leader, Charles. We had multiple
9 conversations --
10 Q Over --
11 A -- about --
12 Q Go ahead.
13 A -- about coworkers and what they were facing, you know, in
14 their day-to-day life at Whole Foods when they were clocking
15 in.
16 Q Do you recall when these conversations were in relation to
17 when you were wearing the Black Lives Matter mask to work?
18 A It was when I was wearing the Black Lives Matter mask.
19 Q Do you recall any specific conversations you had with --
20 with Charles, is that who you said?
21 A Yes. Yeah. We -- I told him about a microaggression that
22 occurred to one of our team members on -- in specialty
23 department. We talked about how my team member, Lydia, who is
24 Mexican, she approached Kelly Fox -- this was -- I was told by
25 Lydia months after the encounter happened because she was

1 shaken up; she didn't know who to tell. But she finally told
2 me about this encounter she had with Kelly where she asked
3 Kelly, how do I build this display of White Claws. And Kelly
4 responded --
5 MR. FERRELL: Objection. Relevance as to what this has to
6 do with wearing BLM messaging at work.
7 MR. PETERSON: Yeah. Is there a connection with
8 wearing -- wearing --
9 MR. FERRELL: Counsel doesn't know the connection, and he
10 asked the question.
11 JUDGE SOTOLONGO: Yeah. What is the connection, if any?
12 MR. PETERSON: Yeah. Well, I mean, so this witness is
13 testifying about an incident involving a person of color. I
14 asked him generally if he raised issues -- the issues that he
15 had described, about concerns about promotion and closer
16 scrutiny. So I'm not sure if this is responsive or not.
17 Q BY MR. PETERSON: It -- does this -- does this -- what
18 you're talking about, does this relate to -- to the --
19 MR. FERRELL: I'm going to stand on my objection.
20 JUDGE SOTOLONGO: Sustained.
21 MR. PETERSON: Yeah.
22 MR. FERRELL: Would --
23 JUDGE SOTOLONGO: I think -- I think the answer was
24 nonresponsive, in my view.
25 Q BY MR. PETERSON: Yeah. So specifically about -- hey, I

1 was asking if you, you know, you talked about the -- what you
2 meant by systemic oppression that you wrote in this write up.
3 I was just -- I was asking if you ever communicated any of
4 those more detailed sentiments to your store leadership. And
5 you sa -- I think you said -- you testified that you hadn't
6 mentioned anyone by name, but I was ask --
7 A Correct.
8 Q -- I was asking if you brought up the general concerns
9 facing your -- your black coworkers without identifying by
10 name?
11 A Yeah.
12 Q And you said -- to -- to whom did you raise those
13 concerns; do you remember any specifics?
14 A I raised my concerns with my team leader, Charles, just
15 because I didn't feel like I would be received by store team
16 leadership.
17 Q And do you recall the specifics of what you told him about
18 those concerns?
19 A Just that a lot of people of multiple skin tones felt
20 unsafe to work at Whole Foods.
21 Q Do you recall if he responded?
22 A He agreed.
23 Q Moving onto the -- the last two pages of the exhibit,
24 pages 9 and 10, do you -- do you recognize either of them?
25 A Yes.

1 Q Where have you seen -- what -- what are they?
2 A This is my separation paperwork with Whole Foods.
3 Q Is that your signature on the bottom of page 9?
4 A Correct.
5 Q You signed it on or about September 13th, 2020?
6 A Correct.
7 Q And the -- with the second page; is that your signature?
8 A Yes.
9 Q Do you -- what do you -- do you recall how you received
10 this -- or the circumstances in which you signed these
11 documents?
12 A This was separation for wearing the Black Lives Matter
13 mask to work on my uniform.
14 Q And do you recall where -- where you were when you
15 received these?
16 A I was in the store team leader office.
17 Q Were you wearing a Black Lives Matter -- any Black Lives
18 Matter apparel at that time?
19 A Yes.
20 Q What were you wearing?
21 A Black Lives Matter mask.
22 Q And who was present when you were given these --
23 A Jessica Rodriguez.
24 Q And what do you -- what do you recall about that
25 conversation?

1 A It was very brief. She, afterwards, told me that because
2 I was separated for a minor infraction that I could apply to
3 another Whole Foods if I wanted to later on down the road in
4 the future.
5 Q Did you have a understanding of what violations you were
6 being separated for?
7 A It was for the correctives regarding the Black Lives
8 Matter masks and apparel.
9 Q And do you understand this to be -- mean that you were
10 being separated from employment?
11 A Correct.
12 MR. PETERSON: Move for the admission of General Counsel's
13 100.
14 MR. FERRELL: No objection to 100.
15 JUDGE SOTOLONGO: All right. General Counsel's Exhibit
16 100 is admitted.
17 **(General Counsel Exhibit Number 100 Received into Evidence).**
18 JUDGE SOTOLONGO: One -- one question I have, Mr.
19 Peterson, is, I'm not certain -- well, I'm sure the company
20 doesn't need to prove the authenticity of these documents. I'm
21 not certain what the relevance is of the second -- the first
22 corrective action involving the expired product. There's no
23 allegation or complaint that I can see regarding this, or -- or
24 is there a connection to the Black Lives Matter issue that
25 we've been dealing with here?

1 MR. PETERSON: So this is mainly offered for reference for
2 the -- for -- for -- to help with the date and about the
3 incident that he described, and it's --
4 JUDGE SOTOLONGO: All right.
5 MR. PETERSON: -- it's referenced in the -- well, the --
6 the date is referenced in the -- the --
7 JUDGE SOTOLONGO: So yeah.
8 MR. PETERSON: -- the write up on page 5. So it's mainly
9 for reference.
10 JUDGE SOTOLONGO: All right. So yeah. So I mean, because
11 it appears that this -- this corrective -- this pre-corrective
12 action involving the expired products is separate and
13 independent from the other, and it wasn't used as a basis for
14 the accumulation of -- of, you know, counseling -- corrective
15 counseling notices, which ultimately led to his -- to his
16 termination; isn't that correct?
17 MR. PETERSON: I mean -- so I don't know exactly what --
18 how the company applied this to, you know --
19 MR. FERRELL: That's -- that's correct, Your Honor.
20 JUDGE SOTOLONGO: Okay. All right. It's still an
21 exhibit.
22 Q BY MR. PETERSON: Do you recall having any conversations
23 with Human Resources about the -- about wearing Black Lives
24 Matter at work?
25 A Briefly.

1 Q Do you recall when that was?
2 A It is hard to recall exactly the date it was. It was
3 before -- shortly before my separation with Whole Foods. So
4 maybe, like, late August if I'm remembering correctly.
5 Q Do you recall stating in your affidavit that it was
6 shortly after you had received the final written warning on
7 September 9th?
8 A That sounds right.
9 Q Does that sound right? And with whom did you speak in
10 Human Resources?
11 A Jessica Charney.
12 Q And how did that -- how did that conversation come about?
13 Were you expecting new -- did you -- did you ask to speak with
14 her, or did someone tell you she wanted to speak with you? Do
15 you recall how the --
16 A Kelly approached me and said that Jessica would like to
17 speak with me in response to my statement on my corrective.
18 Q Is that the September 9th statement that you're referring
19 to?
20 A Correct.
21 Q On page 8?
22 A Yes.
23 Q And where -- and so after Kelly told you -- did you know
24 who this Regional -- or who this Human Resources person was
25 from before?

1 A Vaguely. Vaguely familiar.
2 Q And I -- excuse me if you already said it, but what was
3 the -- what was the Human Resources person's name?
4 A Jessica Charney.
5 Q And how are you familiar with Jessica Charney from before?
6 A I haven't interacted with her much outside of our phone
7 call that we had.
8 Q And how did the -- so after Kelly told you that -- that
9 Ms. Charney wanted to speak to you about your statement on your
10 September 9th corrective action, what -- what happened -- what
11 happened after she told you that Jessica Charney wanted to
12 speak with you?
13 A I went into the other office upstairs. It was the HR
14 office, or the -- the bookkeeper, I'm trying to remember their
15 position, but it was empty, at the time, so we used that office
16 as opposed to using the store team leader office. It was still
17 upstairs and there was, like, a phone in there that I spoke to
18 Jessica on -- on speakerphone.
19 Q Was anyone else present with you in the room while you
20 spoke to --
21 A Kelly Fox.
22 Q And to the extent that you can recall, can you tell us who
23 said what during that conversation?
24 A Yeah. Jessica Charney said that she saw my statement and
25 she wanted to ask me about it. And she asked, what did I mean

1 about discrimination in the workplace, and that if I had any
2 examples. I just responded with how I was noticing white
3 favoritism, black coworkers being passed up for promotion, as
4 well as receiving disciplinary action, while my white coworkers
5 were being promoted, including myself.
6 Q Anything else you can recall in that conversation?
7 A At this point, that's all I can recall.
8 Q Do you recall any discussion about the Black Lives Matter
9 masks?
10 A It's hard to recall.
11 Q Would looking at your affidavit refresh your
12 recollection --
13 A It could.
14 Q -- about the conversation?
15 MR. PETERSON: May I approach, Your Honor.
16 (Counsel confer)
17 Q BY MR. PETERSON: Okay. So look at your affidavit, just
18 read that paragraph, and let me know when you're done and I'll
19 take it back, see if that refreshes your recollection.
20 A This does refresh my memory.
21 Q What else -- I'll take that back -- what else do you
22 recall?
23 MR. FERRELL: Objection. Vague is the question.
24 JUDGE SOTOLONGO: Overruled. Go ahead.
25 THE WITNESS: I also mentioned that coworkers were being

1 approached to remove flags of national origin, as well as,
2 like, pride merchandise that we were given. And it also didn't
3 make sense, based on their identities, wasn't political, so I
4 didn't understand why they were being asked to erase
5 themselves.
6 Q BY MR. PETERSON: And do you recall saying anything about
7 the -- about Whole Foods asking you to remove your BLM masks?
8 A I just thought it wasn't a political statement and it
9 didn't make sense to ask me to remove it.
10 Q Do you recall from your -- stating in your affidavit that
11 you complained that it wasn't right that they had us remove our
12 BLM masks, or had others remove flag masks, which many
13 coworkers wore to express their national origin?
14 A I believe I made it clear to her at the time that I
15 thought -- I disagreed, and that --
16 Q Disagreed with what?
17 A Disagreed with asking people to remove Black Lives Matter
18 as well as flags of national origin, pride, rainbows, buttons,
19 masks.
20 Q And was -- did -- did she respond?
21 A No. She thanked me for my time.
22 Q Did you have any other follow-up conversations with
23 Jessica Charney?
24 A No.
25 Q Yeah. You talk about -- you -- you mentioned her flag

1 masks and -- and pride, what were you -- what are you referring
2 to?
3 A I was referring to two coworkers specifically that were
4 approached by leadership after they were targeting Black Lives
5 Matter. Then they started to target pride, as well as flags of
6 national origin. And they approached Gee, one of my team
7 members who worked in front of house, the cashier; he was asked
8 to remove his flag of national origin. I believe it was a
9 mask -- it was on his mask, as well as Lucy, who worked in
10 grocery, she was asked to remove her pride mask during work.
11 Q And how -- how did you become aware of those incidents?
12 A Oh, they -- they told me --
13 Q The coworkers told --
14 A -- in passing during -- during work.
15 Q You didn't actually see them being told to remove their --
16 their masks?
17 A No. But I saw them wearing their masks, and then I saw
18 them not wearing their masks.
19 Q And you recall this occurring at some point after you had
20 started wearing Black Lives Matter masks?
21 A Yeah.
22 Q Before you had seen anyone wearing Black Lives Matter in
23 the masks, what -- had you seen people wearing the national
24 origin and -- and pride paraphernalia you've been describing?
25 A Yes.

1 Q Over what time period?
2 A Definitely pride that was on uniforms. I had been in the
3 store for, like, years, and I believe that there were lanyards
4 that were even given by Whole Foods that had rainbows on them.
5 So I found it kind of ironic.
6 Q Prior to June of 2020, had you seen other -- had -- had
7 you yourself worn any logos, symbols, or messages to work?
8 A Yes.
9 Q Can you give us some examples of what you -- you wore?
10 A Yeah. I'm a skateboarder, and skateboarders love
11 branding. And so I was essentially a walking advertisement
12 whenever I'd wear a T-shirt that had a skate logo on it. Like,
13 one example would be, like, Quasi. I know I've worn that shirt
14 to work, as well as, like, Independent, which is, like, a
15 skateboarding truck company. If not other skate brands that I
16 know I have in my wardrobe.
17 Q And was this branding visible when you were wearing your
18 apron?
19 A Yeah. Most shirts that I have, like, are double printed
20 front and back, so I would have branding visible on the back of
21 my shirt.
22 Q Did anyone say any -- store leadership ever comment to you
23 about the --
24 MR. FERRELL: Object to relevance. I mean, now we're
25 do --

1 JUDGE SOTOLONGO: I -- I missed -- well, let -- first of
2 all let him finish the question. I didn't hear the entire
3 question. Will you repeat the question and I'll rule?
4 MR. PETERSON: Yeah. Did store leadership ever comment to
5 you about the -- the branded clothing that you were talking
6 about wearing prior to June 2020?
7 MR. FERRELL: I'll renew my objection. Now, we're into --
8 into skateboard branding. None of this has to do with whether
9 Black Lives Matter is protected workplace speech under the Act.
10 JUDGE SOTOLONGO: I agree.
11 MR. PETERSON: Your Honor, it has to do with their public
12 image defense, and -- and the extent that they're enforcing
13 their logos and messages.
14 MR. FERRELL: Yeah. But --
15 MR. PETERSON: I understand that there may be --
16 JUDGE SOTOLONGO: If something is unprotected -- I mean,
17 it remains unprotected. Okay. So an employer can whimsically
18 allow some unprotected activities to go on and not others, and
19 it's still unprotected in the end.
20 So just the fact, for example, the -- the employer is
21 allowing gay -- you know, gay pride or pride flags, okay,
22 because they felt like it one day. It's against the rules, but
23 today we're in a good mood; we're going to allow it, but we're
24 not going to allow Black Lives Matter. You're saying it's --
25 basically you're -- you're making the analogy of disparate

1 treatment, which is not applicable in this situation.
2 If one isn't protected and the other is protected,
3 they're -- they're separated. Okay. So if -- if -- if -- if
4 Black Lives Matter is protected and its -- and its -- and it is
5 disallowed -- not allowed -- its unlawful regardless what any
6 other -- if, on the other hand, it's unprotected, it doesn't
7 matter if the employer allowed other -- it -- I just don't see
8 the -- the -- the relevance.
9 It -- it -- and you know, you can argue to -- until hell
10 freezes over that -- that, you know -- that one -- that you
11 know, you're going to go down to basically the rabbit hole as
12 to whether one -- one activity, or one con -- type of conduct
13 is more harmful to the -- to the -- to the employer's image
14 than others. We don't go down -- we cannot go down that rabbit
15 hole.
16 And when -- are you -- are you going to then spend a lot
17 of time arguing as well, you know, gay -- you know, gay pride
18 or pride flags are -- are less harmful to the public -- to the
19 image of the company than Black Lives Matter or vice versa. I
20 can't -- I can't see us going down that rabbit hole; I really
21 can't.
22 MR. PETERSON: So -- may I, Your Honor?
23 JUDGE SOTOLONGO: Yes. Go ahead.
24 MR. PETERSON: So yeah, no. Your -- your point is well
25 taken regarding to -- the decision part of your decision is

1 whether wearing it is protected or not. Part of the complaint
2 allegations is that the rule, as written, is unlawful
3 regardless of, you know, the Black Lives Matter or not, because
4 it can be -- it can be reasonably construed to prohibit the
5 wearing of pins, buttons, union insignia that's already been
6 deemed protected, including union activity.
7 A defense to a -- an unlawful rule, one of them which
8 counsel has raised, is a public image defense, which is hard
9 for employers to make out. And particularly more difficult to
10 make out when they have history of -- of lax enforcement of a
11 rule.
12 JUDGE SOTOLONGO: I thought the reasonably -- the reason
13 would be construed, a prong of Wholefood Goods (phonetic) have
14 been done away with by the Board. Are you trying to resurrect
15 it in this? Are you trying to get the Board to resurrect it
16 here in this case?
17 MR. PETERSON: No. This is a rule that's unlawful on its
18 face because it prohibits all logos, symbols, and messages. It
19 doesn't -- it's not limited to political messages. It's not
20 limited to Black Lives Matter messages.
21 JUDGE SOTOLONGO: All right.
22 MR. PETERSON: Basically, a reasonable employee would
23 construe that. It is our argument that that would --
24 JUDGE SOTOLONGO: Sure.
25 MR. PETERSON: -- regardless of Black Lives Matter or not,

1 that that rule is unlawful on its --
2 JUDGE SOTOLONGO: Okay. I know --
3 MR. PETERSON: -- face to pro --
4 JUDGE SOTOLONGO: Mr. Brown -- Mr. Ferrell has the floor.
5 I don't want the argument from -- from the legalities as a
6 defense. All right. You know, I don't want to go down this
7 rabbit hole, quite frankly, and so I'm going to sustain the
8 objection.
9 MR. PETERSON: Okay. May I make an offer of proof, Your
10 Honor?
11 JUDGE SOTOLONGO: Make an offer of proof.
12 MR. PETERSON: If allowed to testify, the witness would --
13 would have -- would have testified that the examples of dress
14 code -- technical dress code violations based on the examples
15 that he has described, were -- were not -- were not prohibited
16 by the Employer for the time period he worked up until June of
17 2020.
18 JUDGE SOTOLONGO: All right. Very well.
19 Q BY MR. PETERSON: Did you ever -- do you recall ever
20 writing anything on your -- on your neck at work?
21 A Correct.
22 Q More than once?
23 A Just once.
24 Q And what did you -- what did you write on your neck?
25 A BLM.

1 Q Do you recall when that was?
2 A It's hard to recall. It was in the middle of my write-
3 ups. It was, if I remember correctly, after my first write up.
4 Q Do you recall stating in your affidavit that it was on
5 July 28th?
6 A Sounds about right.
7 Q And can you describe -- so you wrote BLM, where on your --
8 where on your neck?
9 A Visibly on the front of my neck.
10 Q And how big were the -- how big was the -- each letter?
11 A Each letter, anywhere from two to three inches, if I
12 remember.
13 Q And why -- why did you -- why did you do that?
14 A I was under the impression that my body was not part of my
15 uniform and so I wanted to advertise to anyone who could see
16 from the store Black Lives Matter.
17 Q And did you have any conversations with store leadership
18 about the BLM you had written on your neck?
19 A Yes.
20 Q Who did you speak with?
21 A Kelly Fox.
22 JUDGE SOTOLONGO: I'm sorry. What did you -- I'm sorry.
23 What did you write with on your neck? Was it a Sharpie or --
24 THE WITNESS: A Sharpie.
25 JUDGE SOTOLONGO: All right. Fine.

1 Q BY MR. PETERSON: And where did -- where did Kelly Fox
2 talk to you about the BLM on your neck? Do you recall where
3 you were?
4 A I recall she noticed when I was working the floor, and
5 I -- I remember us just having just a conversation briefly on
6 the floor. She left, and then she reapproached me again.
7 Q Do you recall what -- do you recall any of the
8 conversations in either of those encounters?
9 A She was unsure of how to proceed, so she said that she
10 would call somebody from her leadership in regional offices
11 somewhere else, and would get back to me --
12 Q And --
13 A -- about what I was doing, and whether that was, you know,
14 acceptable or not. And then when she reapproached me, she gave
15 me a sanitary wipe and said that it was a matter of cleanliness
16 and sanitation.
17 Q And -- and what happened next?
18 A I -- I wiped it with a sanitary wipe, and it smeared, and
19 then I kept wearing it.
20 Q Did she ever follow up with you about that -- about
21 writing BLM on your body?
22 A No. I don't recall.
23 Q Up to the time of your separation, had you noticed whether
24 your coworkers were continuing to wear Black Lives Matter face
25 masks or other adornments at work?

1 A I noticed my team members stopped wearing Black Lives
2 Matter.
3 Q About when did they stop in relation to your separation on
4 September 13th?
5 A I remember them stopping in June or July.
6 Q Did you attend any or participate in any protests at -- at
7 any Whole Foods locations --
8 A Yes.
9 Q -- related to Black Lives Matter?
10 A Yes. Related to the Black Lives Matter.
11 Q About how many?
12 A I remember going to three separate protests.
13 Q Do you recall which Whole Foods stores these protests were
14 at?
15 A The first was the Gilman store in Berkeley on Gilman
16 Street. And the second was my store in Berkeley on Telegraph,
17 and then the third was the Purcharo (phonetic throughout) store
18 in San Francisco.
19 Q And do you recall the approximate time period of these
20 protests?
21 A The first protest -- I know that there is a news article
22 about it that covered Jordan (phonetic throughout). I believe
23 that was in June, if not July, the first protest.
24 Q Who's Jordan?
25 A Jordan was a team member at the Whole Foods Gilman

1 location.
2 Q And what did you know about Jordan?
3 A Jordan was a black person who was asked to stop wearing
4 Black Lives Matter at work, and -- yeah, we met at the Gilman
5 store protest.
6 Q How did you find out about Jordan's situation?
7 A Through friends and social media. She shared posts about
8 what was happening to her.
9 Q And what was your purpose in -- in protesting at her
10 store?
11 A Oh, to give -- give more attention and light to the
12 situation for the -- for the community -- for the public to
13 see, because Whole Foods leadership was silencing team members,
14 and so we wanted to share publicly about what was happening.
15 Q And what would you -- what -- what were you hoping the
16 public would -- the public awareness would -- would lead to?
17 A I was hoping that folks would choose not to shop at Whole
18 Foods while they were accommodating race -- racist policies,
19 and silencing and erasing people's identities. Yeah.
20 Q And you said that was the first protest that you attended?
21 A Correct.
22 Q I have an article. I'm not sure if this is the article
23 you're referring to, but would looking at that help refresh
24 your recollection as to the date?
25 A Yes. Thank you.

1 MR. FERRELL: I think the date's on the front.
2 Q BY MR. PETERSON: Yeah, there's --
3 A It is.
4 MS. SCHAEFER: So why didn't --
5 MR. FERRELL: Isn't that the question?
6 MR. PETERSON: Yeah.
7 Q BY MR. PETERSON: Do you -- do you recognize this article?
8 A I do.
9 Q Does that refresh your recollection as to the date?
10 A Yes.
11 Q What's the -- what's the date of that protest?
12 A The date was July 17th.
13 Q Of 2020?
14 A Of 2020. Excuse me.
15 Q And what was the next protest at a Whole Foods? When was
16 that? The next protest, when and where in relation to the July
17 17 protest at the Gilman store?
18 A The next protest was at my store in Berkeley. It's hard
19 to recall the specific date. I have -- I really do have
20 terrible memory.
21 Q Yeah. Was it close in time to the -- the --
22 A It was --
23 Q -- Gilman protest?
24 A -- followed shortly after within a couple weeks if I
25 remember correctly.

1 Q What was your purpose in protesting at your store on
2 Telegraph?
3 A For the same reasons as Jordan, just to give more
4 visibility to the practices that felt unfair to us as team
5 members, and to, you know, be more vocal because we felt like
6 we were being silenced.
7 Q Were there any of your coworkers participating in the
8 protest at your store?
9 A Yes.
10 Q About how many?
11 A About 7 to 12.
12 Q And what about the Gilman store, were there any Whole
13 Foods employees participating in that protest?
14 MR. FERRELL: Objection. General Counsel chose not to put
15 Gilman in the claim. The store is not one of the ones at issue
16 in the trial.
17 MR. PETERSON: Yeah. This is, again, concerted activity.
18 The employees have the right to help each other at other
19 stores. They have the right to seek help from the public and
20 third parties.
21 MR. FERRELL: Your Honor, we -- you were very clear at the
22 outset that the trial was limited to the stores that were in
23 the complaint, to the people who were named in the complaint.
24 JUDGE SOTOLONGO: I mean --
25 MR. FERRELL: There's not -- there's no allegation --

1 JUDGE SOTOLONGO: Is there -- is there --
2 MR. FERRELL: -- about Gilman. We were not permitted --
3 JUDGE SOTOLONGO: I mean, is there an issue --
4 MR. FERRELL: -- discovery about Gilman.
5 JUDGE SOTOLONGO: -- at this point, after everything we
6 have heard that there -- that there were employees who were
7 engaged in concerted activity. Whether that was protected,
8 that's the issue here. I mean, employees all over the country
9 were communicating with each other, were engaging in these
10 protests.
11 Is there any doubt -- and you -- if you -- if any of you,
12 is going to think right now -- I'm going to tell you right now,
13 if I'm going to find there was a concerted activity here,
14 you're deluding yourself, okay. That's an established fact.
15 And don't waste any -- don't waste any time arguing in your
16 brief about concerted activity, because you're wasting your
17 time.
18 The question here -- or the issue here is whether this
19 activity is protected. I don't want to hear any more about how
20 concerted this was. I think that's -- that's a foregone
21 conclusion, quite frankly --
22 MR. PETERSON: Yeah. Well --
23 JUDGE SOTOLONGO: -- in my mind.
24 MR. PETERSON: Yeah, but --
25 MR. FERRELL: I appreciate that.

1 MR. PETERSON: I feel somewhat of an obligation to put on
2 some of this evidence because Whole Foods is constantly putting
3 on evidence of other protests that aren't even at the Whole
4 Foods --
5 JUDGE SOTOLONGO: But the --
6 MR. PETERSON: -- location.
7 JUDGE SOTOLONGO: No. But the -- let me -- if I
8 understand, I can recommend -- correct me if I'm wrong. The
9 purpose -- the purp -- the reason why Respondent has been
10 putting evidence on protest and what was -- what kind of signs
11 and masks, or other paraphernalia employees were wearing was
12 the message. It has to do with trying to show what the
13 objective purpose of their protests and/or activity was --
14 correct me if I'm wrong -- not to show that -- whether it was
15 concerted or not concerted.
16 It would be -- it would be shooting themselves in the foot
17 if it struck by -- putting evidence that other people were
18 having -- engaging in protests conservatively to try to argue
19 that this was a concerted activity. The purpose, if I
20 understand it, and the reason they're putting this evidence on,
21 is to show that in fact a purpose of employees -- the objective
22 purpose of wearing these messages had nothing to do with their
23 employment.
24 MR. PETERSON: Yes.
25 JUDGE SOTOLONGO: Am I wrong about that?

1 MR. FERRELL: No, you're right, Your Honor. It goes to
2 what's the objective understanding and the meaning of the Black
3 Lives Matter movement, and what -- what does the community
4 understand that the protest is about when we are protesting and
5 wearing BLM and Black Lives Matter in the movement in the
6 context of what's going on in the summer of 2020, and frankly,
7 since.
8 It's not about -- and there's no allegation that somebody
9 was disciplined for -- for protesting outside of work the dress
10 code. All the discipline in this case, including the discharge
11 of the parties --
12 JUDGE SOTOLONGO: So if that's what you're --
13 MR. FERRELL: -- with respect to working while they're --
14 JUDGE SOTOLONGO: -- trying to address, then be specific
15 about that, Mr. Peterson, because I don't see this going -- I
16 don't see that going in -- in the way that the questions have
17 been raised, because I don't see these questions addressing
18 that issue, which Respondent has tried to raise for the
19 defense.
20 MR. PETERSON: Yeah. I definitely don't see the relevance
21 in protests that are occurring apart from -- that aren't in the
22 context of the workplace, and -- and so these are protests that
23 are occurring in the context of the workplace. I would like to
24 ask the witness if he recalls any messages or -- or signs that
25 were displayed during those protests.

1 JUDGE SOTOLONGO: Okay. Go ahead.
2 Q BY MR. PETERSON: Do you recall any -- any messages or
3 signs that were displayed at the protests at the Whole Foods
4 locations that you attended?
5 A Yes.
6 Q What -- what -- yeah. What do you -- what do you recall?
7 A Whole Foods is racist was the most common one. That's --
8 at this point in time, that's the first thing I can remember.
9 After that, it was -- we summarized to shoppers who were coming
10 through to shop at Whole Foods, we would tell them about how
11 they were silencing team members, and asking us to remove
12 articles that said Black Lives Matter, and that -- yeah. We
13 didn't feel like we were safe and allowed to, you know, voice
14 our opinions.
15 JUDGE SOTOLONGO: Okay. So I -- I may -- perhaps I didn't
16 hear you correctly or misheard you. I -- are you saying
17 that -- did I hear you say -- maybe I'm wrong -- that you --
18 you or other employees had encounters with the mem -- with --
19 with shoppers, with -- with clients of Whole Foods? Customers?
20 THE WITNESS: Uh-huh.
21 JUDGE SOTOLONGO: Were they complaining or objecting to
22 you wearing messaging, "Black Lives Matters" -- the messaging,
23 or -- maybe I misheard you?
24 THE WITNESS: Yeah. Could you repeat that?
25 JUDGE SOTOLONGO: Yeah. I thought I heard you say

1 something to the effect that -- maybe I just misheard you --
2 that -- that you had -- you were concerned about encounters
3 that employees were having with customers. Did you say that or
4 did I mis --
5 THE WITNESS: I think you misheard me. What I was trying
6 to --
7 JUDGE SOTOLONGO: Okay.
8 THE WITNESS: -- say was that we were talking to customers
9 who were going into shop during the protests.
10 JUDGE SOTOLONGO: Okay. So when you were protesting
11 outside and customers coming in, you were addressing them? You
12 were talking to them; is that correct?
13 THE WITNESS: We were talking to them.
14 JUDGE SOTOLONGO: Okay. All right. And go ahead. And
15 why -- what were -- what was being said? And what did you say?
16 What did you hear others say, to --
17 THE WITNESS: We thought that the policies were racist,
18 and silencing team members, and erasing their identities,
19 and -- yeah.
20 JUDGE SOTOLONGO: Go ahead. Sorry. I'm -- I just
21 misheard you, sorry.
22 THE WITNESS: That's fine.
23 Q BY MR. PETERSON: Do -- were you guys passing out any
24 pamphlets or fliers in the protests?
25 A I personally was not. I can't speak for others.

1 MR. PETERSON: I have no further questions, Your Honor.
2 JUDGE SOTOLONGO: All right. Mr. Ferrell?
3 MR. FERRELL: Your Honor, I would request the Jencks
4 material, and some time just to review that and my notes.
5 JUDGE SOTOLONGO: All right. And do you know how long is
6 the affidavit?
7 MR. PETERSON: The affidavit is eight-and-a-half pages.
8 JUDGE SOTOLONGO: All right. How much time do you think
9 you'll need?
10 MR. FERRELL: Just to go over that and my notes, 11:20?
11 Half an hour, 30 minutes?
12 JUDGE SOTOLONGO: Half hour? Okay. So it is -- yeah. It
13 is now ten till 11, so let's reconvene at 11:20.
14 MR. FERRELL: Thank you, Your Honor.
15 JUDGE SOTOLONGO: Thank you. All right. Let's go off the
16 record.
17 (Off the record at 10:51 a.m.)
18 JUDGE SOTOLONGO: All right. Well, before we start with
19 cross-examination, Mr. Peterson has informed me that he forgot
20 to offer a couple exhibits into evidence. So go ahead, Mr.
21 Peterson.
22 MR. PETERSON: Thank you, Your Honor. So from yesterday's
23 testimony, I move to offer General Counsel's Exhibit 90.
24 JUDGE SOTOLONGO: Okay. Any objections to --
25 MR. FERRELL: From yesterday, from 90, we understood from

1 counsel that none of the redactions related to Charging Party,
2 so we have no further objection.
3 JUDGE SOTOLONGO: All right. So General Counsel 90 is
4 admitted.
5 **(General Counsel Exhibit Number 90 Received into Evidence)**
6 JUDGE SOTOLONGO: And you're also going to offer 99?
7 MR. PETERSON: Yes. Yeah, I -- yeah, I just needed a
8 couple quick follow-up questions with the witness.
9 **RESUMED DIRECT EXAMINATION**
10 Q BY MR. PETERSON: Do you have 99 in front of you?
11 JUDGE SOTOLONGO: Yes.
12 THE WITNESS: Not yet. Got it. Thank you.
13 Q BY MR. PETERSON: Yeah. You testified earlier those are
14 some of the masks that you wore at work. My question is, do
15 you recog -- is this -- do you recognize this -- what this is?
16 Is this a post of some kind?
17 A It is. It's an Instagram post.
18 Q And is -- are you the Buff_diva handle?
19 A I am. Yes.
20 Q Is your Instagram account public or private?
21 A It's public.
22 Q And did you make this post? It looks like it's the same
23 writing for each of the four pages, but all in different --
24 different photographs.
25 A Different photographs, same post.

1 Q Is that your -- your post, the written comments?
2 A Yes.
3 Q Why did you -- why did you post this?
4 A To share publicly with my community about what was -- what
5 I was seeing at Whole Foods.
6 Q And did you post it on or about July 24th, 2020?
7 A Yes.
8 MR. PETERSON: Move for the admission of General Counsel
9 99.
10 MR. FERRELL: No objection, Your Honor.
11 JUDGE SOTOLONGO: All right. General Counsel's 99 is
12 admitted.
13 **(General Counsel Exhibit Number 99 Received into Evidence)**
14 JUDGE SOTOLONGO: All right. Mr. Peterson, are you
15 resting --
16 MR. PETERSON: Yes. Thank you, Your Honor.
17 JUDGE SOTOLONGO: -- you resting? All right.
18 MR. FERRELL: Just one clarification on General Counsel's
19 99. My understanding, just to confirm, is the one that's
20 actually uploaded as the color --
21 MR. PETERSON: Correct.
22 MR. FERRELL: -- production from the Instagram account?
23 MR. PETERSON: That's correct.
24 JUDGE SOTOLONGO: All right. All right. Mr. Ferrell, the
25 ball is in your court.

1 MR. FERRELL: Thank you, Your Honor.

2 **CROSS-EXAMINATION**

3 Q BY MR. FERRELL: How would you prefer to be addressed?
4 Maddy or Mx. Michno?
5 A Mx. Michno works for me.
6 Q And I may get tongue-tied then, Mx. Michno, but I will do
7 my best.
8 A You can use Maddy as well if you want.
9 Q Mx. Michno, I believe you testified that the wearing of
10 the Black Lives Matter mask at the Telegraph Avenue store in
11 Berkeley where you worked for Whole Foods began in June 2020.
12 A Correct.
13 Q In fact, it began immediately after the police killing of
14 George Floyd, correct?
15 A Following that, yes.
16 Q Following the protests that came out of the killing of
17 George Floyd, right?
18 A It was after, yes.
19 Q But there was no wearing of Black Lives Matter messaging
20 on face masks before that?
21 A Correct.
22 Q And the face mask had been worn at the store since March
23 and April of 2020 due to the pandemic, right?
24 A Correct.
25 Q I think initially team members were allowed to wear masks,

1 right?
2 A Correct.
3 Q And then in April, it became a requirement. Whole Foods,
4 due to the pandemic, required face masks to be worn while team
5 members were working, right?
6 A Yes.
7 Q And you recall that early on in those days, masks were
8 hard to come by. People had a hard time getting ahold of
9 masks, and team members generally wore whatever type of mask
10 they could find. Does that sound about right?
11 MR. PETERSON: Objection. Calls for speculation.
12 JUDGE SOTOLONGO: Only if he knows.
13 THE WITNESS: I don't remember masks being hard to come
14 by.
15 Q BY MR. FERRELL: Okay.
16 A This was the only part.
17 Q But early on, when the rule came about, I think you even
18 stated in your affidavit, people were wearing all kinds of
19 masks when the rule came about --
20 A Correct.
21 Q -- right? When it first became a requirement to wear
22 masks, early in the pandemic, people were wearing all kinds of
23 masks is what you said, right?
24 A Correct.
25 Q What you remember. And then at some point, Whole Foods

1 began providing masks to people, right?
2 A Correct.
3 Q And I think you testified sometimes they would be a black
4 reusable mask, or it might be a blue surgical, disposable mask,
5 but they started providing clean masks to people, right?
6 A Correct.
7 Q And at some point, if you -- you learned that the company
8 applied the same rules it applied to its dress code, to its
9 uniform, to its apron, it also applied to the face mask, right?
10 A Correct.
11 Q Now, the -- the first time you were spoken to about
12 wearing a face mask was on July 16, 2020. Do you recall that?
13 A Correct.
14 Q And this is after -- Kelly Fox was the store team leader,
15 right?
16 A Correct.
17 Q And she had informed the team members that right around
18 that -- I think right around July 15, the store was going to be
19 enforcing the dress code, and messaging on face masks was not
20 going to be permitted, right?
21 A I don't recall.
22 Q Do you recall on July 16 having a meeting with the
23 assistant store team leader, Jessica Rodriguez?
24 A Correct.
25 Q Did you say also possibly Tanda Brown was in that

1 conversation?
2 A Correct.
3 Q And she was the other associate store team leader, right?
4 A Yes.
5 Q And they spoke with you about the fact that your -- you
6 were wearing a Black Lives Matter face mask?
7 A Correct.
8 Q And when I say that, you had handwritten BLM on your face
9 mask that you were wearing.
10 A Correct.
11 Q And they were speaking to you about the fact that it was
12 not in compliance with the dress code and asking you to remove
13 it, and replace it with a clean face mask, one that didn't have
14 a logo or lettering on it, right?
15 A Correct.
16 Q You declined to do so; is that right?
17 A Correct.
18 Q They gave you some time to think about it?
19 A Yes.
20 Q They -- they came back and asked you if you were still
21 declining to switch into a compliant face mask, right?
22 A Yes.
23 Q And -- and you declined again, right?
24 A Yes.
25 Q And -- and when you did so, you understood you were going

1 to be receiving corrective counseling, a first step of
2 progressive discipline for being out of dress code compliance,
3 right?
4 A Right.
5 Q But you -- you did stay on and continue to work your
6 shift, right?
7 A I did.
8 Q You were not sent home?
9 A Never.
10 Q And then that first corrective counseling for being out of
11 dress code for wearing the BLM on your face mask was -- you
12 talked about on direct -- actually dated July 22nd, 2020, it
13 was administered to you, right?
14 A Correct.
15 Q And if you look at General Counsel's Exhibit 100. Do you
16 have it in front of you?
17 A Yes.
18 Q This first page is -- is the first corrective counseling
19 you were administered, right?
20 A Correct.
21 Q And the description -- what we were just talking about
22 there -- is under the details prompting corrective counseling,
23 it says, on July 16, 2020. That's what we were just talking
24 about, right?
25 A Right.

1 Q And when this was administered to you -- if you look at
2 page 2 of that exhibit, it's lower right-hand corner. It's
3 marked WFM page 261. Do you see that?
4 A Yes.
5 Q When it was administered to you, you were given an
6 opportunity to write a statement in this team member statement
7 where it's printed, hand lettering, that's what you wrote,
8 right?
9 A Right.
10 Q And at the end of your statement you said, "I plan to
11 continue to strive for an antiracist work environment at WFM".
12 That's Whole Foods, right?
13 A Whole Foods Market.
14 Q In your view, is it -- an antiracist environment was one
15 that -- what you were saying here is an antiracist environment
16 was one where Whole Foods permitted the team members to wear
17 their Black Lives Matter messaging in support of the movement
18 while they were working?
19 A It includes that.
20 Q You were not at the time talking about or accusing anyone
21 at Whole Foods specifically of being racist, right?
22 A Right.
23 Q And you weren't at the time saying anybody at Whole Foods
24 was telling you or other team members not to be proud of who
25 you are?

1 A I don't think I agree.
2 Q Did you -- you gave a deposition in this case. Do you
3 recall that?
4 A I recall.
5 Q Not this case, actually; it's the Title 7 litigation,
6 right?
7 A Right.
8 Q You ended up joining an employment litigation over
9 essentially a lot of the same facts about wearing it, right?
10 A Right.
11 Q And that deposition you gave was September of 2021. Does
12 that sound right?
13 A Sounds right.
14 Q You were asked at that deposition, "Were there any
15 employees at Whole Foods you thought were racist?"
16 You answered: "No one specifically".
17 You were asked: "Okay. And was there anyone at Whole
18 Foods that was telling people they should not be proud of their
19 skin tone?"
20 And you answered: "No".
21 Do you -- do you recall giving that -- being asked those
22 questions and giving those answers?
23 A Yeah. Those answers, yeah.
24 Q But you felt, as you testified then, that Whole Foods by
25 not allowing team members to wear BLM messaging while they were

1 working in the store, was creating a space that was safe for
2 racists, right?
3 A Right.
4 Q And the racists you were talking about was potentially
5 customers, right?
6 A Customers and coworkers.
7 Q But you testified at your deposition, we just talked
8 about, there was no one specific at Whole Foods you were saying
9 was a racist?
10 A At the time, I didn't make public claims about
11 individuals.
12 Q Okay. When you testified in September 2021 at your
13 deposition, you testified there was no one specifically at
14 Whole Foods you were claiming was a racist --
15 A Correct.
16 Q -- correct? So the potential racist you didn't want to
17 feel comfortable in the Whole Foods store was directed at
18 customers who didn't agree with your BLM messaging?
19 MR. PETERSON: Objection. Asked and answered.
20 JUDGE SOTOLONGO: Overruled.
21 THE WITNESS: Could you repeat the question?
22 Q BY MR. FERRELL: The potential racists that you didn't
23 want to feel comfortable in the Whole Foods store were the
24 customers who didn't feel comfortable with your BLM messaging
25 on your face mask?

1 A Not just customers.
2 Q But including customers?
3 A Including customers.
4 Q And -- and at the time, what you've testified before is
5 that there was no specific racist you were trying to make feel
6 uncomfortable who was at Whole Foods, an employee, right?
7 A That's what I testified, yeah.
8 Q Okay. So there are those in the store who worked for
9 Whole Foods, right?
10 A Uh-huh.
11 Q And --
12 A Yes.
13 Q -- there are those who did not work for Whole Foods?
14 A Yes.
15 Q And most of those who do not work for Whole Foods, we call
16 customers, right?
17 A Right.
18 Q All right. They're the lifeblood of the business.
19 They're why we're open --
20 A Right.
21 Q -- right? And you wanted an environment that customers
22 who didn't feel comfortable with your BLM messaging felt
23 uncomfortable and unwelcome in the store?
24 A Could you repeat your question?
25 Q The people you didn't -- the racists you didn't want to

1 give space to feel comfortable was customers -- including
2 customers who felt uncomfortable by your BLM messaging, right?
3 A And coworkers.
4 JUDGE SOTOLONGO: Did any coworkers, any -- during the
5 times that you were wearing the Black Lives Matter masks that
6 you described earlier, did any coworkers express any
7 disapproval or any other derisive comments about you wearing
8 these masks or messaging?
9 THE WITNESS: Yes.
10 JUDGE SOTOLONGO: Okay.
11 Q BY MR. FERRELL: And the coworker you're referring to is a
12 coworker named Josie (sic)?
13 A Josay.
14 Q Josay. And Josay's comment to you in response to wearing
15 your BLM messaging is why don't -- why don't all lives
16 matter --
17 A Correct.
18 Q -- right? And you took that to be a disparaging comment
19 about your wearing BLM?
20 A I found it willfully ignorant.
21 MR. FERRELL: I think we're up to -- Respondent's
22 exhibit -- I think we're up to -- are we up to 91?
23 JUDGE SOTOLONGO: The last one was 90, I believe.
24 MR. FERRELL: Yes, Your Honor.
25 MS. SCHAEFER: This will be 91.

1 **(Respondent Exhibit Number 91 Marked for Identification)**
2 MR. FERRELL: Permission to approach, Your Honor.
3 JUDGE SOTOLONGO: You can go ahead.
4 Q BY MR. FERRELL: I've handed you what's been marked for
5 identification as Respondent's Exhibit 91. This is -- came off
6 of your Twitter account. You go by the handle up at the top,
7 Buff_diva?
8 A Correct.
9 Q Do you recognize this being your Twitter post or tweet by
10 Maddy@buff_diva?
11 A Correct.
12 Q And this is from -- it's dated July 16, 2020, right?
13 A Correct.
14 Q That's the same day that you had that first
15 conversation -- that first corrected counseling conversation
16 about wearing the Black Lives Matter mask at the store, right?
17 A Correct.
18 Q And just below your -- there's a photo. That photo is of
19 you, right? At the top left corner?
20 A Oh, yes, that's me.
21 Q That's you, and this is Maddy@buff_diva and it gives the
22 date, right?
23 A Yes.
24 Q And just below that it says, BLM with a heart on it.
25 That's for Black Lives Matter, right?

1 A Correct.
2 Q And it's just part of a -- you tag it as part of a
3 continuing story or thread when you're putting BLM with a heart
4 on it? You -- you put that designation there, right?
5 A I put Black Lives Matter, yes.
6 Q Okay. And the substance of your -- of your tweet here is
7 the -- is the photo below, right?
8 A Yes.
9 Q That's a Black Panther --
10 A Yes.
11 Q -- billboard or poster, whatever you want to call it, a
12 message, right?
13 A Yes.
14 Q From the Black Panther party, right?
15 A I don't know who painted it.
16 Q Okay. But are you familiar with the Black Panthers at
17 all?
18 A I am familiar.
19 Q Are you familiar with whether they're a hate group?
20 A I'm sorry?
21 Q Are you familiar with whether the Black Panthers are a
22 hate group?
23 A I'm not --
24 MR. PETERSON: Objection. Calls for speculation. Assumes
25 facts not in evidence.

1 MR. FERRELL: I asked -- I asked the witness a question
2 whether he knew.
3 JUDGE SOTOLONGO: He -- he can answer.
4 A To my knowledge, they are not a hate group.
5 Q BY MR. FERRELL: All right. Do you know whether they
6 espouse violence against white people?
7 A I'd never heard it.
8 Q Do you know if they espouse violence against Jewish
9 people?
10 MR. PETERSON: Objection. What is the relevance of this
11 line --
12 JUDGE SOTOLONGO: Yeah. We're start --
13 MR. PETERSON: -- of questioning?
14 JUDGE SOTOLONGO: We're straying from the theme here.
15 Q BY MR. FERRELL: Mx. Michno, are you willfully ignorant of
16 what Black Panther's organization is about when you post them?
17 MR. PETERSON: Objection. Argumentative. Relevance.
18 JUDGE SOTOLONGO: I'll sustain.
19 Q BY MR. FERRELL: Did you look into what the Black Panthers
20 stand for at all before you posted them in your tweet about
21 Black Lives Matter?
22 MR. PETERSON: Objection. Relevance. What does the Black
23 Panthers Party have to do with this?
24 MR. FERRELL: That's what we're asking --
25 MR. PETERSON: -- for him to know --

1 MR. FERRELL: -- him. This is what this witness is
2 tweeting to the entire world about what Black Lives Matter
3 means on the same day he has his first corrective counseling
4 session about where --
5 JUDGE SOTOLONGO: All right.
6 MR. FERRELL: -- he works.
7 JUDGE SOTOLONGO: You -- this is a photograph that you
8 didn't -- you didn't -- you didn't paint this line that's
9 depicted on the photograph, am I correct?
10 THE WITNESS: No.
11 JUDGE SOTOLONGO: Did you -- did you take a photograph
12 yourself or you just kind of found it on the internet?
13 THE WITNESS: I took the photograph.
14 JUDGE SOTOLONGO: You took the photograph, okay. When you
15 took the photograph of this image, did you -- did you have any
16 idea -- I mean, there's a written message here which speaks for
17 itself.
18 Did you have any knowledge of what the Black Panthers
19 stood for?
20 THE WITNESS: I have my own impressions.
21 JUDGE SOTOLONGO: Okay. And what was that impression?
22 THE WITNESS: My impression is that the Black Panthers are
23 for black liberation and against police brutality as they have
24 been throughout history.
25 JUDGE SOTOLONGO: Okay.

1 Q BY MR. FERRELL: In -- in the picture that you took and
2 tweeted out to the entire world on this same day, July 16,
3 2020, is "We want an immediate end to police brutality and
4 murder of black people", right?
5 A Right.
6 Q And that was the message -- that was the demand that you
7 tagged with Black Lives Matter, right?
8 A Right.
9 Q Now, you testified some -- you testified on direct that I
10 think the exhibit we just introduced came from your subpoena
11 production from your Instagram account.
12 A I'm not following you. Sorry.
13 Q The exhibit that we just introduced, the photos from your
14 Instagram account --
15 A Uh-huh.
16 Q -- General Counsel's I think 99.
17 A 99.
18 Q That came from your subpoena production. You received a
19 subpoena from Whole Foods and that was part of your response to
20 the subpoena, right?
21 A Right.
22 Q Because you were asked to produce your social media posts
23 that related to Black Lives Matter, correct?
24 A That related to my case about this.
25 Q Well, about Black Lives Matter. You had a subpoena -- a

1 subpoena that had very specific requests, including your social
2 media posts about Black Lives Matter. You produced Instagram
3 account photos in response to the subpoena, right?
4 A I had help with my counsel.
5 Q But you didn't produce Respondent's Exhibit 91 that you
6 tagged with Black Lives Matter. You didn't produce this photo
7 as part of your subpoena production.
8 A No.
9 Q Why not?
10 A It wasn't to me relevant to my case focus.
11 Q So in -- when you received a subpoena for your social
12 media posts relating to Black Lives Matter, you just decided on
13 your own that this one you wouldn't produce?
14 A I didn't remember this post.
15 Q Did you search for it?
16 A I searched my Instagram.
17 Q Nothing on your Twitter account did you search?
18 A No.
19 Q So you didn't provide this one to your counsel either?
20 A No.
21 MR. FERRELL: Your Honor, we would move to admit
22 Respondent's Exhibit 91 into evidence.
23 JUDGE SOTOLONGO: All right. Any voir dire or objection?
24 **VOIR DIRE EXAMINATION**
25 Q BY MR. PETERSON: Did you -- did you take this photo

1 before or after you received your corrective action, if you
2 recall?
3 A I recall taking it after.
4 MR. PETERSON: My -- my objection is relevance.
5 MR. FERRELL: Your Honor, one of the issues goes to what
6 is being promoted, and what is understood, and what is the
7 purpose of the protest. Charging Party is tweeting out to all
8 the world on the same day of his first corrective counseling
9 about what he thinks the Black Lives Matter protest is about
10 and supports. It's a demand to the immediate end of police
11 brutality and the murder of black people. That's what it was
12 about.
13 MR. PETERSON: There's -- there's no dispute in this case
14 that part of the Black Lives Matter message pertains to police
15 brutality and the murder of black people. There's been lots of
16 testimony that it's not the only reason and the motivation, and
17 this --
18 JUDGE SOTOLONGO: Okay. But it's --
19 MR. PETERSON: -- doesn't have a connection to --
20 JUDGE SOTOLONGO: But if it's part of the -- if it's part
21 of the reason, then isn't it admissible and relevant?
22 MR. PETERSON: I'm sorry. What was your question?
23 JUDGE SOTOLONGO: If it's part of the reason, then isn't
24 it relevant, then?
25 MR. PETERSON: We don't know if this is part of the reason

1 why he was --

2 JUDGE SOTOLONGO: I will -- I will admit it.

3 **(Respondent Exhibit Number 91 Received into Evidence)**

4 **RESUMED CROSS-EXAMINATION**

5 Q BY MR. FERRELL: Do you have General Counsel's 99 in front

6 of you?

7 A Yes.

8 Q Now, this is from your subpoena production. In fact, it's

9 not included in the General Counsel's 99, but this is actually

10 the first two pages were produced as Chris Michno Bates numbers

11 1 and 2 from your -- it's from your Instagram account, right?

12 A I'm sorry. General Exhibit 99?

13 Q Right. The first -- the first two -- the first page there

14 is from your Instagram account, right?

15 A Right.

16 Q It was included in your subpoena production to us in this

17 case.

18 A Correct.

19 Q And again, that's your handle, the Buff_diva handle,

20 right?

21 A That's my handle.

22 Q This particular post is from July 24 --

23 A Yes.

24 Q -- is that right?

25 A Um-hum.

1 Q Now, the mask you're pictured here with -- your actual
2 Instagram post is a color photo, right?
3 A Yes.
4 Q This actual mask is white with blue stripes with red
5 lettering that says BLM across the front of it, right?
6 A Correct.
7 Q Is that the mask you wore at the store on -- to the store
8 on July 16?
9 A I don't recall which mask I wore.
10 Q But this is a mask you wore at the store, right?
11 A That was a mask I would wear to work.
12 Q In fact, if you look at the second page of the exhibit,
13 that's a picture of you wearing the same mask inside the
14 Telegraph store in Berkeley, right?
15 A Right.
16 Q Now, what did you write the -- the BLM -- the red BLM
17 with? Is that with a marker or lipstick, or what is that?
18 A That was a spray paint stencil.
19 Q Spray paint stencil. Now, was there a reason you chose
20 the color red?
21 A It's a bright color.
22 Q And this is -- I think you testified part of your job is
23 customer service, right?
24 A Correct.
25 Q Customer -- helping customers if they're looking for a

1 particular specialty product, right?
2 A Correct.
3 Q And am I to understand, you didn't understand why -- why
4 Whole Foods didn't want while you were working certain
5 customers wearing the red BLM across your face while you were
6 serving them?
7 A Could you repeat the question?
8 Q You didn't understand why Whole Foods didn't want you
9 wearing a red BLM across your face while you were serving the
10 customers?
11 A I didn't.
12 Q In the bottom of this post, you say after Buff_diva, "I
13 work for WFM", right?
14 A Correct.
15 Q The reason you put that is because this -- your Instagram
16 account is open to the whole world, isn't it?
17 A It's public.
18 Q Right. So you're not just -- you don't have to tell your
19 coworkers that you work for Whole Foods, right?
20 A I don't have to tell my coworkers?
21 Q You don't have to tell your coworkers -- your coworkers
22 that I work for Whole Foods?
23 MR. PETERSON: Objection. Argumentative and relevance.
24 JUDGE SOTOLONGO: Overruled.
25 Q BY MR. FERRELL: You're telling -- you're saying that

1 because you're communicating to the outside world, right?
2 A Yes.
3 Q That outside world includes -- includes the customers of
4 Whole Foods, right? You're telling them, I work for Whole
5 Foods.
6 A Correct.
7 Q You say, "There's covert racism at work in the company's
8 policies and they are silencing team members".
9 Now, the covert racism and the silencing the team members
10 you're referring to is simply Whole Foods not wanting you to
11 wear that face mask while you're working in the store that has
12 BLM across the face of it, right?
13 A One of them.
14 Q That's the policy that you were saying was silencing you,
15 was that you wanted to be able to wear BLM messaging while you
16 were working in the store, right?
17 A Correct.
18 Q You never received discipline for wearing a BLM mask while
19 you were on break, right? Right?
20 A Correct.
21 Q You didn't receive discipline for wearing BLM messaging
22 outside of work, right?
23 A Right.
24 Q Or coming into the store with it, or for leaving the store
25 wearing BLM messaging, you weren't disciplined for that?

1 A No.
2 Q Even when you were disciplined, you weren't sent home,
3 right?
4 A Correct.
5 Q You were allowed to continue working and just received a
6 corrective counseling for it, right?
7 A Right.
8 Q In fact, on June 17 -- I'm sorry; July 17, you testified
9 on direct that you attended a protest at another store, at the
10 Gilman store in Berkeley, right?
11 A Right.
12 Q And to attend that, Jessica Rodriguez, the associate store
13 team leader, she -- you left work, and she allowed you to leave
14 work. You didn't receive any discipline for leaving work
15 early.
16 A I didn't recall that, but it's bringing back a memory.
17 Q A memory that you left work to go to the rally to protest
18 Whole Foods policy, right?
19 A Right.
20 Q And you didn't get any corrective counseling for that --
21 A No.
22 Q -- right? So the big silencing is while you're being paid
23 to help those customers and do your job is the only time you
24 were being asked not to wear BLM across your face?
25 MR. PETERSON: Objection. Argumentative.

1 JUDGE SOTOLONGO: Overruled. You can answer.
2 THE WITNESS: Could you repeat it one more time?
3 Q BY MR. FERRELL: The big silencing that you're complaining
4 about in this post is that just while you were serving those
5 customers and working in the store, they were asking you not to
6 wear BLM messaging across your face?
7 A That's how it started out.
8 Q Well, at the time of this post, that's what you're talking
9 about, right?
10 A Correct.
11 Q And then you have it, the statement -- we talked a little
12 bit about it a moment ago. You end with, "Do not let
13 corporations profit off granting space for racists to feel
14 comfortable".
15 And those racists again were customers coming into the
16 store. If they weren't comfortable with your BLM across your
17 face, you didn't want them to be -- if they were uncomfortable
18 with that message, you didn't want them to be comfortable in
19 the store?
20 A No, that was referring to people at Whole Foods as -- not
21 customers.
22 Q But you testified at your deposition that there wasn't
23 anybody specifically being racist at Whole Foods you were
24 concerned about.
25 A That's what I testified.

1 Q Well, you testified -- they do this strange thing like
2 they did today. You take an oath to swear the truth, right?
3 A Right.
4 Q You had that same oath when you were giving your
5 deposition, right?
6 A Correct.
7 Q I'm going to show you what we're marking as Respondent's
8 92.
9 **(Respondent Exhibit Number 92 Marked for Identification)**
10 MR. FERRELL: Permission to approach, Your Honor.
11 Q BY MR. FERRELL: Directing your attention to what's been
12 marked for identification as Respondent's Exhibit 92. This is
13 pulled off of your Instagram account?
14 A Yes.
15 Q And this is something you posted on your Instagram account
16 for -- for the whole world, right?
17 A I do see my icon.
18 Q Right. Your icon in the upper left corner, that -- that
19 it's your post, right?
20 A (No audible response).
21 Q And you marked it for BLM, for Black Lives Matter, right?
22 A Correct.
23 Q And you -- and your post -- your Instagram post for Black
24 Lives Matter -- did you take this photo or just post this
25 photo?

1 A I just posted it.
2 Q You got the photo from somewhere else, and you posted it
3 on your account?
4 A Yes.
5 Q In support of Black Lives Matter, right?
6 A Yes.
7 Q And in the text box at the bottom, where it says,
8 "verified" and continues, is that your writing, or is that --
9 is that also part of the photo that you posted?
10 A I don't recall.
11 Q Okay. So it could be your writing?
12 A I don't recall.
13 Q Okay. But what you posted in support of Black Lives
14 Matter was don't feed the police and you have an article here
15 or flier that says:
16 "It's completely legal to refuse service to law
17 enforcement, show solidarity with people of color in
18 your community by not providing food to cops. Talk
19 to your coworkers and organize, don't feed the
20 police".
21 And it has a pig with a police hat on, right?
22 A Right.
23 Q And this post in support of Black Lives Matter, you were
24 encouraging people to refuse service to police officers?
25 MR. PETERSON: Objection. Mischaracterizes testimony.

1 It's posted in support of Black Lives Matter.
2 MR. FERRELL: Your Honor, he testified moments ago, the
3 post --
4 JUDGE SOTOLONGO: Yeah.
5 MR. FERRELL: -- was made by him in support of the Black
6 Lives Matter movement.
7 JUDGE SOTOLONGO: Overruled.
8 Q BY MR. FERRELL: What you're asking people to do was to
9 support Black Lives Matter by refusing to serve police
10 officers, right?
11 A I included it in a thread, copion, because it was relevant
12 to the police brutality that was happening in the country, and
13 solidarity.
14 Q And now we looked at General Counsel's 99 a moment ago,
15 and that came from your Instagram account, right?
16 A Correct.
17 Q And this one came from your Instagram account, but this
18 was not included in your subpoena production. Why not?
19 A I didn't recall posting this.
20 Q Did you search your Instagram account?
21 A Yeah. I looked through my posts.
22 Q That's how we got General Counsel's 99. Where's this one?
23 A That was in a story thread.
24 Q That you did not produce?
25 A Correct.

1 MR. FERRELL: Your Honor, I move to admit Respondent's
2 Exhibit 92 into evidence.
3 MR. PETERSON: Objection on -- on relevance grounds.
4 There's nothing referencing Whole Foods. This is a post the
5 witness -- he doesn't recall very much detail about.
6 MR. FERRELL: Your Honor, he recalled all the details that
7 were on it. He posted it in support of the Black Lives Matter
8 movement.
9 JUDGE SOTOLONGO: Well --
10 MR. FERRELL: The issue is whether Black Lives Matter
11 messaging is protected activity.
12 JUDGE SOTOLONGO: I'll admit it.
13 **(Respondent Exhibit Number 92 Received into Evidence)**
14 MR. FERRELL: Permission to approach, Your Honor.
15 JUDGE SOTOLONGO: Okay.
16 **(Respondent Exhibit Number 93 Marked for Identification)**
17 Q BY MR. FERRELL: I'm handing you what's been marked for
18 identification as Respondent's Exhibit 93. This is another
19 post from your Instagram account. Do you recognize that?
20 A Right.
21 Q And this is another one you marked for your -- your story
22 thread for Black Lives Matter, right, in the upper left-hand
23 corner?
24 A Right.
25 Q And this is something you were -- you were re- --

1 reposting, right? It's somebody else's statement that they
2 posted that you reposted to your Instagram account; is that
3 right?
4 A (No audible response).
5 Q You wanted to promote the communication that you were
6 reposting -- to broaden its distribution, right?
7 A Correct.
8 Q And you do that because you're supportive of the message
9 that's in it, right?
10 A Right.
11 Q And this message you were rebroadcasting, reposting to
12 your Instagram account in support of Black Lives Matter, right?
13 A In response to the police brutality.
14 Q In the statement that you wanted to promote, we -- I'm
15 starting with the second sentence. "These anarchist kids are
16 in alignment with BLM and black radicals in understanding that
17 police are racist, oppressive agents of an authoritarian state,
18 and destroying commercial property is a form of RESISTANCE."
19 That -- that was the message you wanted to promote, right?
20 A Right.
21 Q Now, this one, too, was not included in your subpoena
22 production. Why not?
23 A It's not relevant to Whole Foods.
24 Q It's relevant to Black Lives Matter movement, right? And
25 that's what your subpoena asked for.

1 A It's relevant to police brutality.
2 Q You were given a subpoena, sir -- or Mx. -- you were given
3 a subpoena for your social media posts related to Black Lives
4 Matter. Did you ignore it?
5 A No.
6 Q Did you search your own Instagram account fully?
7 A I forgot about the thread.
8 Q But these were the posts that you were making about Black
9 Lives Matter, the summer of 2020.
10 A They were just about resisting systematic oppression.
11 Q Systematic oppression and police brutality, right?
12 A Right.
13 Q And that's what made them relevant to your story, to mark
14 them as BLM, right?
15 A Yes. It also -- there's a point in time when there was
16 Black Lives Matter marches and protests. So all the
17 information that was relevant to those protests and resistance
18 was put into this thread.
19 Q Yeah. And that -- and that point in time was the summer
20 of 2020, right?
21 A Right. The same time.
22 Q It's the same time we're here about, right?
23 A Same time.
24 Q If you go back to General Counsel's Exhibit 100. Do you
25 have it in front of you?

1 A Exhibit 100.
2 Q General Counsel's 100. It's the disciplinary packet.
3 A Got it.
4 Q If you go to the third page, I think, in the upper right-
5 hand corner it's marked effective date, September 7, 2020.
6 MR. PETERSON: Misstates the exhibit.
7 MR. FERRELL: What's that?
8 MR. PETERSON: Oh, it says September 6. You said
9 September 7.
10 MR. FERRELL: Oh, I'm -- I'm sorry.
11 Q BY MR. FERRELL: Go to the fifth page, maybe. Sorry.
12 Fifth page. September 7, 2020. Next page. You got it in
13 front of you?
14 A Fifth page?
15 Q In the lower right-hand corner, I believe it says WFM,
16 page 266. Are you on the right page?
17 A Yes.
18 Q And this was the corrective counseling -- the second
19 corrective counseling, I believe, you received for being out of
20 dress code, right?
21 A Correct.
22 Q For wearing Black Lives Matter messaging while -- while
23 working, right?
24 A Correct.
25 Q And it talks about -- in the description of the event --

1 that references you coming into work on September 6 of 2020 out
2 of dress code -- a noncompliant face mask, right?
3 A Correct.
4 Q Now, on September 6, that was the first day -- I think you
5 testified in direct -- in some time you had actually worn a
6 Black Lives Matter face mask, right?
7 A Could you repeat the question?
8 Q September 6 was the first day in some period -- you'd had
9 a gap after the first corrective counseling where you -- you
10 stopped wearing the -- the mask, right?
11 A On or about.
12 Q Right. And you stopped until September 6, correct?
13 A From my recollection.
14 Q Right. And when you were coming to work on September 6,
15 you actually knew you were receiving a corrective action that
16 day already for something else.
17 A For the spoilage.
18 Q For the spoilage, right. It was -- it was the prior week
19 on September 3. There had been an audit about spoilage, and
20 then it had come up that you'd missed a couple products that
21 were expired and had been left out, and -- and you missed,
22 right? You blew it.
23 A Yes.
24 Q And you got a corrective counseling on that. It was
25 issued to you on September 6, right?

1 A Correct.
2 Q In fact, that is page 3 and 4, I think, of -- of this
3 exhibit, right? It's September 6, corrective counseling?
4 A Right.
5 Q And that references it -- it from an event that happened
6 on September 3 coming out of that audit, right?
7 A Um-hum.
8 Q And you -- you didn't have any team members statement
9 about that because you understood that it was just product that
10 expired that you should have -- had pulled and you didn't,
11 right?
12 A Right.
13 Q But you had been told you were going to get the corrective
14 counseling on September 3. When you -- when you came September
15 6, you knew in advance. Your team leader had told you, you
16 were receiving the corrective counseling.
17 A Right.
18 Q So when you showed up on September 6, that first day you
19 decided to put the BLM mask back on, you were going to work
20 knowing you were receiving a corrective counseling that day?
21 A Correct.
22 Q And while you were meeting with Ms. Fox that day, you did
23 receive that corrective counseling, but also, she spoke with
24 you about the fact that you were, again, in the noncompliant
25 face mask, right? On the 6th?

1 A Correct.
2 Q And that's -- that's what this separate counseling is for.
3 The second is for dress code for the -- for the noncompliant
4 face mask.
5 If you turn to the -- the last two pages of this exhibit,
6 it's the -- not the last two pages. I'm sorry. The next two
7 pages. It's the final warning -- final corrective counseling.
8 It starts with WFM, page 264. Do you see that in the lower
9 right-hand corner?
10 A Yes.
11 Q This is the final warning you received, again, for the
12 wearing the BLM mask out of dress code, right?
13 A Correct.
14 Q And when you were, at this point, showing up the next day
15 after the corrective counseling wearing the mask out of
16 compliance, I mean, you -- you know you're going to work out of
17 compliance with the dress code, right?
18 A Correct.
19 Q And you know you're going to receive a corrective
20 counseling for it, right?
21 A Right.
22 Q And you know, the company's position is it's not in
23 compliance with the dress code, right?
24 A Right.
25 Q And your decision that you've made is you're simply going

1 to go to work in disregard of the company's dress code policy?
2 A Correct.
3 Q In fact, when you were meeting with Kelly Fox, the store
4 team leader, on September 6, she told you that that's what's
5 going to happen if you just come to work out of the dress code,
6 right?
7 A I don't recall her telling me that.
8 Q You recall telling her, at some point, on September 6 that
9 you need to find something else? That you were going to find
10 another job and move on anyway?
11 A I said I wasn't proud of Whole Foods Market.
12 Q Yeah. But did you say also to her, I need to find
13 something else?
14 A I don't recall.
15 Q Do you recall she asked you whether you were going to --
16 were you resigning and you -- and you said no?
17 A No, I'm not resigning.
18 Q Right. But she asked, because you had said, I'm -- I'm
19 just going to keep wearing this out of dress code, and I know
20 what's going to happen, right?
21 A I told her I wasn't proud of Whole Foods and that I was
22 going to strive for anti-racist work environment.
23 Q Well, going back to this exhibit, 264, your final
24 corrective counseling. Again, like every time, you were
25 offered an opportunity to change masks and be in compliance

1 with the dress code, and you declined, right?
2 A Correct.
3 Q You weren't sent home. You were allowed to continue
4 working, but you were going to receive a corrective counseling,
5 and you knew it.
6 A Correct.
7 Q On this one, when it's administered on -- on September 9,
8 you write another statement, right? You talked about some of
9 this on your direct?
10 A Correct.
11 Q You said that -- in part of your statement, "My fellow
12 black coworkers who are" -- they're one of the reasons you're
13 doing this -- "are systematically oppressed and face
14 discrimination in our own workplace for expressing that their
15 lives matter." With respect to systematically oppressed, you
16 were referring to the fact that the black coworkers and black
17 people in the community are seeing their -- I think your --
18 your word was their kinfolk murdered in the streets by police,
19 right? Isn't that what you described at your deposition as
20 what you meant by systematically oppressed?
21 A That's one of them.
22 Q But that's what you said, right? That they have cops that
23 murder their kinfolks in the streets. They fear for their
24 lives.
25 A Correct.

1 Q And when you talked about, "and faced discrimination for
2 expressing that their live matter in our workplace", you were
3 referring to the fact that the police at Whole Woo -- Whole
4 Foods was that they couldn't wear a BLM messaging on a face
5 mask or a pin while they were working?
6 A Correct.
7 Q Right. They weren't -- they weren't fearful of their --
8 of their lives from Whole Foods.
9 A I would argue that they were afraid of retaliation.
10 Q Not for their lives.
11 A But for their well-being.
12 Q For their physical well-being?
13 A I mean, if you need to make money to put food on the
14 table, that's probably your physical well-being as well as
15 being in the store.
16 Q But not of being murdered?
17 A You don't have to be afraid of being murdered to be
18 fearful for your job and for your income and your well-being.
19 Q Well, when -- your post about Black Lives Matter and your
20 testimony about what you meant by systematically oppressed was
21 about, they feared for their lives that the police were killing
22 them in their streets -- in the streets, right? That's not the
23 same type of fear we're talking about here about -- from Whole
24 Foods, right?
25 A No, I -- I've seen my black coworkers, and they were

1 afraid of leadership, and they were afraid of retaliation. And
2 that's why they stopped wearing masks.
3 Q Is it your -- is it your testimony they -- they were
4 afraid that they would be killed by Whole Foods?
5 A No.
6 Q They weren't afraid for their -- their physical lives from
7 Whole Foods?
8 MR. PETERSON: Asked and answered.
9 JUDGE SOTOLONGO: Yeah. This is getting repetitive.
10 MR. FERRELL: Well, it helps if I can get a straight
11 answer, Your Honor.
12 JUDGE SOTOLONGO: Well, I think the witness has testified
13 that -- well, answer the question. What -- what did you mean?
14 THE WITNESS: I meant that they were afraid of
15 retaliation.
16 JUDGE SOTOLONGO: You mean retaliation because they were
17 wearing Black Lives Matter masks?
18 THE WITNESS: And for their skin tone, for sticking out.
19 Q BY MR. FERRELL: You go on in your -- in your statement
20 here to say, "This is not political or controversial and purely
21 in exclamation of the sacredness of black lives", right?
22 A Right.
23 Q Not -- not -- not employment, but lives?
24 A I see what you did there.
25 Q Not what I did, sir. Are these your words?

1 A These are my words.
2 Q And when you use the word purely, you know what that
3 means, right?
4 A Yes.
5 Q Right. I mean, the definition of purely is entirely,
6 exclusively.
7 A Right.
8 Q Your separation -- the last -- the next page in this
9 exhibit. Your sep -- actual separation happens on September
10 13, right?
11 A Right.
12 Q And it comes from you, again, choosing to disregard the
13 dress code on September 9 and 10.
14 A Right.
15 Q That's what -- that's what the write up's for, is that --
16 I believe you were actually initially suspended at the store
17 and then called later by Jessica Rodriguez confirming that the
18 company was going to move forward with separation, right?
19 A That's not what I remember.
20 Q You don't remember being suspended and called back to
21 confirm that it would be a separation?
22 A No. I remember being separated that day and leaving.
23 Q Now, it's a week after this when you file your charge with
24 a -- an EEOC litigation, right?
25 A Right.

1 Q And a day after that when you file your charge -- unfair
2 labor practice charge in this case, September 21 of '20?
3 A Right.
4 Q And in your charge, you -- you gave a narrative about why
5 you were wearing the Black Lives Matter mask, right?
6 A Right.
7 Q And you talk about following the death of George Floyd and
8 demonstrations this spring around the country, police --
9 protesting police violence and other discrimination against
10 black folks, more folks -- more blacks -- against black, I'm
11 sorry. More people have been showing their support for the
12 Black Lives Matter movements. That was the inspiration, right?
13 And that's when it started?
14 A It's been starting.
15 Q And that's -- that's the inspiration you describe in the
16 charge?
17 A That's how it started.
18 Q In the charge, you talked about around June 2020, many
19 Whole Foods employees began wearing masks and other apparel
20 with the Black Lives Matter -- with the message Black Lives
21 Matter. And that's what we're talking about. That's -- that's
22 how it started, right?
23 A Right.
24 Q And the rest of your charge goes on to say, in response,
25 Whole Foods didn't allow the messaging, people got disciplined,

1 and more employees got -- started wearing messaging to protest
2 the policy -- the dress code policy, right? So the protest
3 about Whole Foods policy was enforcement of the dress code with
4 respect to Black Lives Matter messaging while you're working?
5 A Correct.
6 Q And that's in the charge that you filed on the September
7 21, 2020?
8 MR. FERRELL: And counsel, I'm looking at what's in
9 evidence as Exhibit 1-SSS.
10 MR. PETERSON: Thank you.
11 MR. FERRELL: Yeah. I - I'm done with the exhibit for
12 now.
13 Q BY MR. FERRELL: Now, you testified on direct that when
14 you started wearing the mask again, that you were at least
15 partially inspired or motivated by what you saw going on at the
16 store, right? In terms of promotions, for one, right?
17 A For one.
18 Q And your view was that you had seen yourself be promoted
19 and others not be -- the people of color not promoted as fast,
20 right?
21 A That's right.
22 Q In fact, in your -- you gave a Board affidavit in this
23 case, right?
24 A Correct.
25 Q October 22, 2020; does that sound right?

1 A That sounds right.
2 Q You said in that Board affidavit -- you -- you talked
3 about two black coworkers. I'm not sure I'll pronounce this
4 correctly, Ishak and Mamadou?
5 A Ishak and Mamadou.
6 Q Ishak and Mamadou. Both of them worked in produce, right?
7 A Right.
8 Q And -- and you -- you claimed that they were -- they were
9 written up for time and attendance issues, right?
10 A Right.
11 Q And then you said, "I had also been struggling with time
12 and attendance issues. I was never written up like they were."
13 That's what you said, right?
14 A That's what I said.
15 Q But that's not true, is it?
16 A I've been written up for time and attendance.
17 Q Yeah. So when you say I was never written up like they
18 were, you -- you were in fact written up for time and
19 attendance problems.
20 A That -- that statement was a comparison.
21 Q Well, let's just -- let's just stay with the comparison.
22 In fact, just a year prior in 2019, you'd been on a final
23 warning for time and attendance, right?
24 A Right.
25 Q You, white person, were on the cusp of being fired if your

1 time and attendance didn't improve, right?
2 A Right.
3 Q And when it came to Ishak and Mamadou, as you admitted at
4 your deposition, sir, you had no idea how many times they'd
5 been late, right?
6 A Right.
7 Q You had no idea how many times they'd been absent, right?
8 A Right.
9 Q You had no idea -- in fact, I think you actually in your
10 deposition admitted that as far you knew, the times they got
11 written up for being late, they were in fact late.
12 A Correct.
13 Q And when you talked about -- the other thing you talked
14 about was promotions, and you said that -- you said you'd been
15 promoted twice in the -- in the past two years, right?
16 A Correct.
17 Q And that's not really true either, is it? Your first
18 time, you -- you had a lateral move from one department to
19 another in a team member role, right?
20 A Correct.
21 Q Did you go from grocery to specialty?
22 A Correct.
23 Q But you didn't regard that in which you testified
24 previously as a -- as a promotion? It was just a lateral move.
25 A That's a lateral move.

1 Q Right. The promotion you received was in August of 2020,
2 right?
3 A That was one of them.
4 Q Well, that's the promotion you received a specialty order
5 writer, or buyer, right?
6 A That one.
7 Q Right. That's the promotion that you received?
8 A Yes.
9 Q And for that promotion, you were the only person who
10 applied.
11 A That wasn't my first time applying.
12 Q For the promotion you received --
13 A Um-hum.
14 Q -- you were the only one who applied.
15 MR. PETERSON: Objection. Calls for speculation. How did
16 the witness know who applied for --
17 MR. FERRELL: He testified that he knew he was the only
18 one who applied.
19 JUDGE SOTOLONGO: Did you know that for a fact?
20 THE WITNESS: At the time, yeah.
21 JUDGE SOTOLONGO: Okay.
22 Q BY MR. FERRELL: So your basis for alleging that you had
23 been promoted more rapidly than -- than black coworkers was
24 that you'd received a promotion that you applied for, for which
25 no one else applied?

1 A I just don't agree with that.
2 Q That's the promotion that you got in August of 2020,
3 right?
4 A Right.
5 Q You went to specialty order writer?
6 A Right.
7 Q And at your deposition in the -- in the Title VII case,
8 the only promotion you could think of a person of color -- an
9 African-American coworker, who you said had been passed over
10 for promotion was -- is it Ranita? Am I pronouncing that
11 correctly?
12 A Ranita.
13 Q Ranita. And in fact, what you admitted, sir, is you
14 didn't know who made the decision on Ranita's promotion, right?
15 A Right.
16 Q Or who interviewed her, right?
17 A Right.
18 Q What you knew was that somebody named Rachel got the job?
19 A Right.
20 Q And Rachel, while new to Whole Foods, had been hired from
21 Safeway.
22 A Right.
23 Q Another grocery chain, right?
24 A Right.
25 Q And you're not familiar at all with what Rachel's

1 qualifications were coming into the job, were you?
2 A No.
3 Q And -- and the other person you referenced, by the way,
4 Mamadou --
5 A Mamadou.
6 Q Mamadou is somebody who actually had been promoted at the
7 store within the last year, right?
8 A He was.
9 Q Mamadou was an African-American who was promoted to pro --
10 produce buyer from team member.
11 A He was.
12 Q And in your Board affidavit -- and by this time, you'd
13 obviously already filed your charge in this case, right? By
14 the time you gave the affidavit?
15 A Right.
16 Q All right. And you -- you were a plaintiff in your Title
17 VII litigation, right?
18 A Right.
19 Q And -- and you had legal -- legal counsel you'd been
20 speaking to at that time for some period, right?
21 A Right.
22 Q So while -- with all this help, you decided this time and
23 attendance thing and promotions now is your new inspiration for
24 wearing the -- the Black Lives Matter messaging, for resuming
25 it. The message you put on your face was the same one that

1 you'd been wearing before.
2 A Right.
3 Q It was the same BLM message that you were wearing back in
4 June and July, right?
5 A Right.
6 Q And in your Board affidavit, you even said, "I wanted to
7 wear it for the same reasons that I originally wore the BLM
8 mask."
9 A Right.
10 Q And we're talking about September 6. I -- your full quote
11 here. "I decided to wear my BLM mask in" -- "in or about
12 Sunday, September 6." And it was for the same reasons as you
13 wanted to wear it originally.
14 A Including those two.
15 Q But what you said is, "I wanted to wear it for the same
16 reasons that I originally wore the BLM mask."
17 A That's what I said.
18 Q And in that same affidavit, you said, "I wore the BLM in
19 protest of the murder of George Floyd and to support my black
20 coworkers." Right?
21 A Correct.
22 Q That was the original reason you put it on?
23 A Right.
24 Q You talked some in direct about national flags -- some
25 team members wearing national flags to show their nation

1 origin.
2 A Correct.
3 Q And do you equate the two?
4 A Equate Black Lives Matter with national origin?
5 Q The right that you contend that people have to wear flags
6 of national origin? That that also should be protected.
7 A I thought it was discriminatory to go after people based
8 on their identity and race.
9 Q So I guess my question was do you equate the two?
10 A Equate -- what am I equating when you say the two?
11 Q Wearing Black Lives Matter, BLM messaging, and the right
12 to wear a national flag mask, that that's an equally protected
13 right?
14 A Yes.
15 Q You testified on direct about attending some rallies or
16 protests against Whole Foods and their dress code policy,
17 right? Their enforcement of the --
18 A Right.
19 Q -- no BLM messaging in the dress code, right?
20 A Correct.
21 Q Did you attend any Black Lives Matter rallies or protests
22 that were outside of work or away from a Whole Foods store?
23 A Yes.
24 Q Did you wear Black Lives Matter masks to those rallies?
25 A I believe I wore my shirt.

1 Q That said, "Black Lives Matter"?
2 A Yeah.
3 Q Did you carry any signs?
4 A I can't recall.
5 Q Did -- did you see signs at the -- at the other Black
6 Lives Matter rallies away from the Whole Foods store? Did
7 other people have signs?
8 A Yeah.
9 Q Did any of those signs reference George Floyd?
10 A Yes.
11 Q Did they say thing -- did you see a sign that said, "Say
12 his name"?
13 A I saw multiple signs saying, "Say her name" and "Say
14 their" --
15 Q Who did you -- who did you understand that to reference,
16 "Say her name"?
17 A "Say her name" is referencing Breonna Taylor.
18 Q Okay. Did you see a "Say his name"?
19 A I don't recall.
20 Q Okay. Did you see signs that said, "Defund the police"?
21 A Yes.
22 Q Did you see signs that said, "I can't breathe"?
23 A Yes.
24 Q Did you understand that to be a reference to George Floyd?
25 A Yes.

1 Q Did you see signs about ending police brutality?
2 A Yes.
3 Q And at those rallies, did you see any signs about Whole
4 Foods?
5 A I don't recall.
6 Q When you were wearing a Black Lives Matter shirt at those
7 rallies, did the BLM, or Black Lives Matter, have a different
8 meaning than it did when you wearing it in the store?
9 A I don't know how to answer that.
10 Q It was the same message, wasn't it? Same words on your
11 shirt?
12 A Same words.
13 Q And what does the Black Lives Matter movement mean to you?
14 A It means a lot of things. Black Lives Matter movement
15 means ending police brutality. And to achieve that, the only
16 way is to defund the police, in my opinion. It also means
17 affirming black people and honoring them, listening to their
18 stories. When I say -- when I say Black Lives Matter, I mean,
19 also listen to black people. Make space for them.
20 Q In your view, is it bigger than the police brutality and
21 injustice done to black people within the justice system or
22 policing?
23 A Yes.
24 Q Does it include inequities in housing in this country?
25 A Totally.

1 Q Does it include inequities in banking in this country?
2 A Totally.
3 Q Education?
4 A Yes.
5 Q Access to health care?
6 A Yes.
7 Q Voting rights?
8 A Yes.
9 Q All of the above, correct?
10 A Yes. Correct.
11 Q And calls for changes in all of those societal areas.
12 Would you agree with me, sir, that's a -- a call for political
13 reform?
14 A The protests are a call for political reform.
15 Q And -- and the protests are done under the flag or the
16 banner of Black Lives Batter movement, right?
17 A The protests I attended were in response to police
18 brutality, and Black Lives Matter was a slogan that existed
19 before George Floyd's murder, and it is inclusive of all black
20 people and their status and that their lives matter.
21 Q It's interesting that you say existed before George
22 Floyd's murder. You -- you are correct. Do you recall when it
23 started?
24 A If I can recall the year, maybe it was 2016, if not 2014.
25 Q Yeah. 2014, '13. Trayvon Martin. Have you heard of that

1 name?
2 A Yes.
3 Q Do you recall that it started after Trayvon Martin's
4 murder?
5 A I -- I am ignorant there.
6 Q But that it had its origins in the -- the killing of an
7 unarmed African-American teenager?
8 A I knew that it existed before the murder of George Floyd.
9 Q But the activity at the Telegraph store in Berkeley did
10 not exist or commence before the killing of George Floyd,
11 right?
12 A The activity at the Berkely store was in response to
13 Darnelle being told he couldn't have his poster in the
14 backhouse that said Black Lives Matter.
15 Q And Darnelle, you're referring to the team leader?
16 A The team leader.
17 Q And he was team leader for prepared foods, right?
18 A For prepared foods.
19 Q And he was member of -- of the store management?
20 A Yes.
21 Q And he had a -- a small sign, I think, that somebody had
22 given him that said Black Lives Matter. It was on his desk?
23 A It was on his desk.
24 Q And that was after -- it was in -- in June of 2020?
25 A Right.

1 Q Shortly after the killing of George Floyd?
2 A Right.
3 Q And that's when all the activity at the store started,
4 right?
5 A Darnelle was then approached by store leadership and asked
6 to take down the sign.
7 Q And -- and who told you that?
8 A I remember in passing coworkers told me that.
9 Q So that's your understanding from some hearsay about what
10 happened with Darnelle?
11 A I think I also checked in with him afterwards and just
12 confirmed.
13 MR. FERRELL: Your Honor, I'd like to take a few minutes
14 we start again.
15 JUDGE SOTOLONGO: Okay. Let's go off the record for five
16 minutes.
17 (Off the record at 12:44 p.m.)
18 JUDGE SOTOLONGO: Mr. Ferrell?
19 MR. FERRELL: I have no further questions at this time.
20 JUDGE SOTOLONGO: All right. Mr. Peterson?
21 MR. PETERSON: Thank you, Your Honor.
22 **REDIRECT EXAMINATION**
23 Q BY MR. PETERSON: Mx. Michno, just some follow-up
24 questions based on the cross-examination there. Counsel's
25 asking you about at the start of the pandemic, people were

1 wearing all kinds of masks, and then at some point, Whole Foods
2 provided masks. Do you recall that testimony?
3 A Yes.
4 Q When Whole Foods began providing masks, did they still
5 permit employees to wear their own masks, at least before the
6 Black Lives Matter restrictions?
7 A Correct.
8 Q And you were also asked about your -- your statement on --
9 on one of your corrective act -- actions that you -- what you
10 meant by anti-racist, and you said that it includes wearing a
11 mask; do you recall that?
12 A I recall that.
13 Q What else did the statement anti-racist include if
14 anything?
15 A It means creating a work environment that is inclusive,
16 all skin tones and people, whatever their origin is, creating
17 fair opportunities for them.
18 Q That's something you were hoping would occur at Whole
19 Foods?
20 A I was hoping.
21 JUDGE SOTOLONGO: And by the way, I noticed you're --
22 you're sitting really low. If you want to raise your chair,
23 there's a -- there's a little lever that you can use that to --
24 THE WITNESS: Thank you.
25 JUDGE SOTOLONGO: I don't know if that was way --

1 THE WITNESS: I was lounging a bit.
2 JUDGE SOTOLONGO: Yeah.
3 Q BY MR. PETERSON: You recall counsel asking you about what
4 you meant by silen -- silencing employees? And I think you
5 said that it started out about not being allowed to -- being --
6 being -- not -- not being allowed to wear the Black Lives
7 Matter mask; do you recall that?
8 A I recall that.
9 Q And you said it started out -- did it -- did your
10 understanding of what silencing meant evolve after that?
11 A Yes.
12 Q How did it evolve?
13 A Just the impression, again, that black coworkers were
14 scolded, disciplined, not chosen for the same opportunities as
15 white coworkers. And I -- I don't know. I find it silencing
16 around the same time that you're passed up for a promotion
17 you're also given a write up for having an attitude, because
18 that's very broad and kind of goes with the stereotype of being
19 black as well.
20 Q And what -- what are you referring to about being passed
21 over for a promotion and issued a -- issued something about
22 attitude?
23 A I'm referring to Ranita.
24 Q Those are based on comments that she -- are those based on
25 comments she reported to you?

1 A Yes.
2 Q The Respondent's Exhibit 92 and 93, do you have those?
3 A 92, 93.
4 Q Did -- do you recall -- do you recall when you posted
5 either of those?
6 A It -- it's hard to recall.
7 Q Did you --
8 A But this -- this does say 61 weeks ago whenever this
9 screenshot was taken.
10 Q Okay. Did you communicate either of those messages to
11 store leadership at Whole Foods?
12 A Never.
13 Q Do you know if store leadership was following you on
14 Instagram?
15 A No store leadership was following me on Instagram or
16 Twitter.
17 Q And how -- how -- like how can you tell if somebody's
18 following you or not?
19 A Oh, I can check the list.
20 Q Did you check --
21 A My followers. Yeah.
22 Q And if your post is public, can people access it even if
23 they're not your followers?
24 A Correct.
25 Q But you had no -- did you have any reason to believe that

1 Whole Foods was watching your posts?
2 A I had no reason to believe.
3 Q Counsel was asking you about -- by the time of your
4 September write up, you had at least realized that Whole Foods
5 considered wearing a Black Lives Matter mask a violation?
6 A Could you repeat the question?
7 Q Yeah. I guess I'll just rephrase it. When did you --
8 when did you first realize that Whole Foods considered wearing
9 the Black Lives Matter mask a violation of the dress code?
10 A To me, that happened in June, from my recollection.
11 Q And was that one of --
12 A Or July.
13 Q And was that -- was one of the incident -- I think the
14 first incident you described was with Kelly Fox; was that --
15 was that the first time that you were told specifically that
16 you couldn't wear a Black Lives Matter mask?
17 A So the first incident where Kelly approached me and spoke
18 to me privately, she asked me personally to remove the mask but
19 did not bring up dress code violation.
20 Q And prior to Kelly asking you to remove the mask, did you
21 have reason to believe that the -- wearing the Black Lives
22 mask -- Black Lives Matter was against any of Whole Foods'
23 policies?
24 A Sorry. Could you rephrase the question?
25 Q Yeah. Prior to that conversation with Kelly Fox, did you

1 have reason to believe that Whole Foods considered wearing the
2 Black Lives Matter against any policy?
3 A No.
4 Q And counsel asked you if you were -- if you, you know,
5 decided to disregard the prohibition of -- against wearing the
6 mask by -- by continuing to wear the mask; do you recall that
7 testimony?
8 A Correct.
9 Q Was your disregarding of the rule a form of protest?
10 A It was.
11 Q And why were you -- why do you consider it a form of
12 protest?
13 A Because you -- some folks can't ignore the message that
14 Black Lives Matter.
15 Q Did you think the rule was fair?
16 A No.
17 Q Why -- why not?
18 A It think it was exclusive and --
19 Q And what do you mean by exclusive?
20 A -- and racist.
21 Q What do you mean by exclusive?
22 A It means that if you're not allowed to say my life matters
23 because I'm black, that seems like you're picking a side.
24 Q And you were asked about your comments about the Black
25 Lives Matter being purely an exclamation of the sacredness of

1 black lives; do you recall being asked about that?
2 A Correct.
3 Q Does the Black Lives -- does the lives component of -- of
4 Black Lives Matter, the message, mean anything to you beyond
5 the ability to not be killed by police?
6 A Totally. Because in killing, there's death. You're no
7 longer living, but having a life means that, like, you could
8 either be suffering or you could be healthy. But -- so in
9 saying Black Lives Matter, you have the -- they have the right
10 to, you know, the pursuit of happiness just as much as anyone
11 else.
12 Q And I think, you -- you were asked earlier about -- that
13 obviously, counsel was asking you about -- that Black Lives
14 Matter was bigger than the police, and he -- he was asking you
15 about inequities and housing, banking, health care, voting
16 rights; do you recall him asking you that?
17 A I recall that.
18 Q Do you think -- do you believe it also addresses
19 inequities in -- in the context of employment?
20 A Yes.
21 Q When you were asked about Ishak and --
22 A Mamadou.
23 Q Mamadou, and the -- a comment you'd said about you'd never
24 been written up like they were regarding time and attendance;
25 do you recall that testimony?

1 A I recall that.
2 Q What did you -- what did you mean by written up like they
3 were?
4 A I meant at the time. I was tardy on multiple occasions,
5 and leadership looked the other way. It was never brought to
6 my attention that I was being written up for a corrective for
7 being late or tardy. But at the same time during that -- that
8 period, they were being written up for time and attendance. So
9 it felt like they were being looked at more closely than I was.
10 Q And is that based on reports that they had provided to you
11 and your coworkers?
12 A Yes.
13 MR. PETERSON: Nothing further, Your Honor.
14 JUDGE SOTOLONGO: Mr. Ferrell?
15 **RECROSS-EXAMINATION**
16 Q BY MR. FERRELL: Mr. Michno, the -- you just talked about,
17 I think it was Brineta (phonetic throughout) again, with
18 respect to --
19 A Ranita.
20 Q Ranita. I'm sorry. With respect to a -- a write up for
21 attitude.
22 A Correct.
23 Q The promotion you -- you raised two issues with Ranita.
24 One was a -- what she felt was a pass up for a promotion that
25 went to someone else named Rachel, right?

1 A Right.
2 Q And as we testified, you -- you talked about earlier on
3 cross, you don't actually know any of the details about that
4 promotion decision at all?
5 A Ranita was in grocery department, and I was in specialty,
6 so I was listening to Ranita's account.
7 Q All right. But that -- that's full stop. That's the
8 limit on what you know about that decision.
9 Q Correct.
10 Q Right. And with respect to her write up, you also don't
11 know any of the facts about that.
12 A I didn't see it.
13 Q Right. You -- you've never seen it, right?
14 A No.
15 Q With respect to protesting the dress code policy by
16 disregarding it, would you agree with me that the dress code
17 policy requires you to wear a shirt? You can't come to work
18 shirtless just to protest dress code policy?
19 A I was protesting something I thought was unfair.
20 Q If you thought it was unfair that you had to wear a shirt
21 while working, you couldn't just protest it while working
22 shirtless?
23 A Maybe I would, but maybe I wouldn't.
24 Q Be it the same thing.
25 A I've never had that happen.

1 Q That the -- the two would equate to you?
2 A I don't think it's unfair to have somebody wear a shirt to
3 work.
4 Q So your view is if -- if you think the employer's policy
5 is unfair, you can disregard it as a form of protected protest?
6 MR. PETERSON: Objection. Calls for a legal conclusion
7 with the protected.
8 JUDGE SOTOLONGO: Sustained.
9 Q BY MR. FERRELL: You think it's a -- an appropriate form
10 of protest to disregard any employer policy that you don't
11 think is fair?
12 A At the time, I thought so.
13 MR. FERRELL: No further questions.
14 MR. PETERSON: Nothing, Your Honor.
15 JUDGE SOTOLONGO: All right. Thank you very much for your
16 testimony. You are excused. Please, do not discuss your
17 testimony with any other witness or potential witness in this
18 matter until this whole case is over, all right? Thank you.
19 THE WITNESS: Okay. I won't.
20 JUDGE SOTOLONGO: Have a good day.
21 THE WITNESS: Thank you, Your Honor.
22 Right here?
23 MR. PETERSON: Yeah. You can leave those.
24 JUDGE SOTOLONGO: All right. We're going to take a lunch
25 break now. But before we do, let -- let me -- let me get just

1 an idea -- some housekeeping -- where we're -- we're at. Let
2 me get an idea of where we're at.
3 Mr. Peterson, am I doing this -- do you have any further
4 witnesses or am I to understand that you are resting your case?
5 MR. PETERSON: Yeah. The General Counsel is resting.
6 JUDGE SOTOLONGO: Your entire case? You don't have any
7 more witnesses?
8 MR. PETERSON: Are we going anywhere else? Are we
9 travelling anywhere else? No.
10 MR. PETERSON: We are -- yeah. I have no more witnesses.
11 Yeah. We have no more -- no more witnesses.
12 JUDGE SOTOLONGO: Please, don't surprise me. All right.
13 MR. BROWN: Your Honor, we have two witnesses today who
14 will be ready to go one-by-one as soon as --
15 MR. FERRELL: Post lunch.
16 MR. BROWN: -- we -- we return.
17 JUDGE SOTOLONGO: Okay.
18 MR. FERRELL: But Your Honor, we think we can finish them
19 both this afternoon.
20 JUDGE SOTOLONGO: Okay. So all right. It is 5 after 1.
21 Why don't we resume at -- in an hour, at 2:05.
22 MR. BROWN: Thank you.
23 JUDGE SOTOLONGO: All right. Thank you.
24 MR. FERRELL: Thank you, Your Honor.
25 (Off the record at 1:06 p.m.)

1 JUDGE SOTOLONGO: All right. Well, we broke for lunch,
2 and General Counsel has rested its case-in-chief.
3 And if I recall correctly, Mr. Brown, when this case
4 started in May back in Boston, I believe that you or the
5 Employer opted to make its opening statement at the beginning
6 of its case-in-chief.
7 MR. BROWN: That's correct.
8 JUDGE SOTOLONGO: You're now beginning your case-in-chief.
9 Are you ready to make your opening statement?
10 MR. BROWN: No. No. We did our opening statement in
11 Boston.
12 JUDGE SOTOLONGO: You did?
13 MR. BROWN: It was very memorable, Your Honor. Because --
14 JUDGE SOTOLONGO: Apparently -- apparently not.
15 MS. SCHAEFER: Very long.
16 MR. BROWN: We had graphics. We had -- Judge, I know you
17 remember every minute of it. It was only an hour and a half.
18 JUDGE SOTOLONGO: All right.
19 MR. BROWN: So no, we -- we're not going to do that again,
20 but --
21 JUDGE SOTOLONGO: Okay. I -- I stand corrected. I'm
22 getting my cases mixed up. All right.
23 Are you -- Mr. Brown, are you ready to call your first
24 witness?
25 MS. SCHAEFER: Just a bit of housekeeping.

1 JUDGE SOTOLONGO: Sure.

2 MS. SCHAEFER: Our 93 has not moved in. Mr. Ferrell will

3 be back here this afternoon, and can argue it then if it needs

4 to be argued, if General Counsel's going to object to it,

5 otherwise, we can just move it in.

6 JUDGE SOTOLONGO: Excuse me. Oh, and 93 is the photo --

7 okay -- from the Instagram or Twitter.

8 SCHAEFER: It is the -- the Instagram.

9 MR. PETERSON: Yeah. I have a relevance objection.

10 MR. BROWN: Okay. We'll deal with that when Mike gets

11 back if that's all right.

12 MS. SCHAEFER: That's fine.

13 JUDGE SOTOLONGO: All right. We'll deal with it when

14 we -- is that -- was that the photo with the Black Panther?

15 SCHAEFER: No. It's the words on the -- it's I think Bae

16 Guevara's tweet that is --

17 JUDGE SOTOLONGO: Oh, I see. Yes. I -- I found it. All

18 right. All right. So we'll wait for Mr. Ferrell to return to

19 make his arguments.

20 MR. BROWN: Thank you.

21 JUDGE SOTOLONGO: So Mr. Brown, are you ready to call your

22 next witness?

23 MR. BROWN: I am.

24 (Counsel confer)

25 JUDGE SOTOLONGO: Let's go off the record.

1 (Off the record at 2:13 p.m.)

2 JUDGE SOTOLONGO: Mr. Brown?

3 MR. BROWN: Thank you. Whole Foods Market calls Frank

4 Avila.

5 JUDGE SOTOLONGO: Mr. Avila, please take a chair. All

6 right. Let me swear you in. Please raise your right hand.

7 Whereupon,

8 **FRANK AVILA**

9 having been duly sworn, was called as a witness herein and was

10 examined and testified as follows:

11 JUDGE SOTOLONGO: Thank you. Please take a chair, and

12 please spell your name for us and give us your address. Your

13 business address will suffice.

14 THE WITNESS: All right. My name is Frank Avila,

15 F-R-A-N-K A-V-I-L-A. Address is -- it's 621 East Washington

16 Street in Petaluma, California.

17 JUDGE SOTOLONGO: Thank you. Please proceed, Mr. Brown.

18 MR. BROWN: Thank you.

19 **DIRECT EXAMINATION**

20 Q BY MR. BROWN: Frank, who is your employer?

21 A Whole Foods Market.

22 Q And how long have you worked for Whole Foods Market?

23 A 15 years.

24 Q And just briefly, if you could share with the judge, the

25 positions you've held with the company, and where you've been

1 located throughout your career.
2 A When I started with the company, I started as a -- like
3 a -- it's called FASTL, future associates store team leader.
4 It's like a training to be assistant store manager. And I
5 started in Petaluma in 2007, and then I was tran -- as I became
6 an ASTL, which is an assistant store team leader, I went to
7 Santa Rosa, and then I went to Sebastopol, opened a lot of
8 stores, and then I became store team leader in Sonoma, and
9 then -- and now, I'm still team leader back in Petaluma.
10 Q I see. And how long have you been the store team leader
11 in the Petaluma store?
12 A Eight years.
13 Q Okay. Briefly, what are your duties and responsibilities
14 as the store team leader of the Petaluma Whole Foods Market?
15 A Everything. Everything you can think of. From floor to
16 the bottom. Hiring, margins, labor, product quality, customer
17 relations, team member relations. That's -- pretty much I
18 answer for everything in the store.
19 JUDGE SOTOLONGO: Well, Mr. Avila, the only thing I'm
20 going to ask you to do is that, you know, these microphones do
21 not amplify your voice, they simply record. So I want you to
22 project your voice so that they can hear you, okay?
23 THE WITNESS: Yes. You got it.
24 JUDGE SOTOLONGO: Go ahead.
25 MR. BROWN: Okay. Thank you.

1 Q BY MR. BROWN: I'd like to take you back to the summer of
2 2020. You were the store team leader in Petaluma that summer,
3 correct?
4 A Correct.
5 Q Okay. And I want to ask you about the leadership in the
6 store. You're the store team leader. Did you have associate
7 store team leaders?
8 A I did.
9 Q And who -- or -- who were they?
10 A Alvina Layden and Sean McNiff.
11 Q Sean is a white male?
12 A Correct.
13 Q And Alvina Layden is a Latina woman?
14 A Correct.
15 Q And who did you report to directly in the summer of 2020?
16 A I reported directly to Christopher Ross.
17 Q Okay. And what region -- what Whole Foods Market region
18 is the Petaluma store located in?
19 A We're in the Northern California region.
20 Q Is that also called NorCal?
21 A Yeah.
22 Q Okay. Do you know -- or did you know Cassidy Visco?
23 A Yes, I did.
24 Q Okay. And who -- who was Cassidy Visco with regard to
25 the -- the Petaluma store?

1 A Cassidy Visco was a team member that worked in prepared
2 foods and in other departments sometimes.
3 Q Okay. And in the summer of 2020, if you know, what --
4 what type of team member was Cassidy Visco? Was she seasonal,
5 part-time, full-time?
6 A She was seasonal.
7 Q Okay. And what is a seasonal team member in terms of
8 assignment, hours, and -- and -- and things like that?
9 A At -- at -- 2020, a seasonal team member could work
10 anywhere from 0 hours up to 40 hours. It was based on a three-
11 month seasonal program, so it was like to hire for the holidays
12 and stuff. Things like that. Now, if the -- seasonal
13 employees has changed since then.
14 Q Okay. And I think you -- you said that Cassidy Visco was
15 in the prepared foods team?
16 A Prepared foods team, correct. And she also worked
17 specialty.
18 Q Okay. Any issues with her as a team member with regard to
19 her performance at any time?
20 A Never.
21 Q As a prepared foods or specialty team member, what was Ms.
22 Visco's uniform in the summer of 2020?
23 A She had to wear a Whole Foo -- Whole Foods provided hat.
24 She had to wear safety shoes. In those departments she had to
25 wear like a short, black chef's coat. Kind of like garage-

1 style -- tee -- button-up shirt. She had a name badge and any
2 safety cut gloves or anything like that that she needed.
3 Q Okay. Was a mask part of the uniform in the summer of
4 2020?
5 A We did provide masks and -- yeah, at that time the mandate
6 of the State that we have masks. Correct.
7 Q Okay. With regard to the hat she -- she was assigned to
8 wear; did it have the Whole Foods Market logo on it?
9 A It did.
10 Q What color was it?
11 A It was a green logo.
12 Q Okay. And did it say Whole Foods Market on it?
13 A Yeah. Right.
14 Q Okay. And what was the color of the hat?
15 A They were black hats.
16 Q Okay. And was that the color of the store or the Whole
17 Foods location?
18 A That was the color of the uniforms at that time.
19 Q Okay. With regard to the chef's coat that she wore, was
20 it short sleeved?
21 A Yes, it was.
22 Q Okay. And did it cover her entire torso?
23 A It did.
24 Q Okay. Was there a Whole Foods Market logo or name on the
25 chef's coat?

1 A Yes, there was, and I believe it was right above the
2 pocket.
3 Q Okay.
4 JUDGE SOTOLONGO: Let the record reflect that the witness
5 pointed to -- to the left side of his upper chest.
6 THE WITNESS: Yes.
7 JUDGE SOTOLONGO: So -- all right.
8 Q BY MR. BROWN: And with -- with regard to the prepared
9 foods and specialty teams, was that a customer facing position,
10 meaning the team member like -- like Ms. Visco would interact
11 with customers?
12 A It was.
13 Q Okay. Was that a significant part of -- of a prepared
14 food or specialty team member's day?
15 A Yes, it was.
16 Q Okay. In the summer of 2020, who were the team leaders of
17 prepared foods and -- and the specialty team?
18 A Of prepared foods, the team leader was John Abbott, and
19 the specialty team leader was Sterling Cathala.
20 Q I want to bring you back to the summer -- stay in the
21 summer of 2020 and bring you back to the murder of George Floyd
22 on May 25th of 2020 and ask you whether you recall that event
23 and the protest that erupted after?
24 A Yes, I do.
25 Q Okay. How do you -- how did you learn about it? How did

1 you know about it? And what did you know about it?
2 A Through the news and through internet, seeing the protests
3 that were happening and seeing how George Floyd was murdered.
4 That's how I learned about it. And what I knew about it was
5 that it was a protest happening because of black people, and a
6 lot of people were tired of seeing black people die at the
7 hands of police officers.
8 Q With regard to the Petaluma store and -- and your tenure
9 as the store team leader for the last eight years, are you
10 aware of any complaints or even allegations of race
11 discrimination in that store?
12 A No, I am not.
13 Q Okay. Do you, Frank, support the Black Lives Matter
14 movement as you understand it?
15 A I do support it. I believe that everyone should be
16 treated fairly at the hands of police, whether -- whatever race
17 you are.
18 Q Okay. Other than Cassidy Visco, did any team member in
19 the Petaluma Whole Foods Market store wear any Black Lives
20 messaging on any part of their body, hat, coat, nametag, shoes,
21 whatever?
22 A No, they did not.
23 Q Okay. And as a long-time team member and store team
24 leader, were you familiar and aware of the dress code policy in
25 place in the summer of 2020?

1 A Yes, I was.
2 Q Okay. And was that the same dress code that had been in
3 place for many years?
4 A Yes, it was.
5 Q Okay. And what, if anything, did the dress code say about
6 logos, messaging, and advertising on -- on clothing during
7 working time?
8 A Only a Whole Foods approved messaging could be allowed on
9 the uniforms. Other than that, no other messaging could be
10 allowed on any part of your uniform.
11 Q Okay. So I want to ask a little bit about that. When you
12 say Whole Foods approved messaging, were there T-shirts or
13 other clothing that Whole Foods had blessed, so to speak, and
14 given to team members to wear?
15 A We have, like, team member appreciation week shirts that
16 sometimes the company would buy, or sometimes venders would
17 allow -- their shirts would be given to team members to wear.
18 Q Okay. And so -- so those would be Whole Foods Market
19 approved apparel?
20 A Correct.
21 Q Okay. That would otherwise violate the dress code if you
22 had not approved it, correct?
23 A Correct.
24 Q Okay. And with regard to pins, for example, were their
25 Whole Foods Market approved pins? And now I'm talking, sort of

1 all the way up to the summer of 2020, because I know it
2 changed, but --
3 A Yes.
4 Q So the summer of 2020 and before, were there any Whole
5 Foods Market approved pins, like "cool beans"?
6 A Yeah.
7 Q Yeah.
8 A We had "cool beans." That was like an award you got if
9 you received a compliment or from a fellow team member or a
10 customer, and you could put that on your -- it was a -- a
11 round -- like a sew on pin that you could put on your uniform.
12 And a -- I believe that was the only one after -- at 2020 that
13 we had.
14 Q Okay. With regard to lanyards, were their Whole Foods
15 Market lanyards as well?
16 A At -- at that time?
17 Q Yes.
18 A Yeah, there were pride lanyards that were out.
19 Q Okay. Yeah, I'm talking about the summer of 2020, and --
20 and before.
21 A Oh, okay.
22 Q I'll move forward.
23 A Okay.
24 Q So with regard to the pride lanyard, was that a Whole
25 Foods Market branded lanyard?

1 A It was.
2 Q Okay.
3 A It was.
4 Q Was it Whole Foods approved?
5 A It was approved by Whole Foods.
6 Q Okay. With regard to pride, were there -- were there
7 approved pride pins -- Whole Foods Market approved pride pins?
8 A There was.
9 Q Okay. And when, if you can recall, were those permitted
10 to be worn by team members?
11 A During pride month.
12 Q Okay. And was it only the Whole Foods Market approved
13 pride pins that were permitted?
14 A Corr- --
15 Q That was hard to say. I'm not going to say it again.
16 A Yes. Correct.
17 Q Yes. Okay. You had -- in the summer of 2020, you had
18 black team members, correct?
19 A Correct.
20 Q Okay. Did any black team member complain that they had
21 been treated in any way differently or adversely, compared to
22 their nonblack team members?
23 A No.
24 Q Okay. Do you recall a team -- an African-American team
25 member named David?

1 A Yes, I do.
2 Q Okay. And what position did David hold?
3 A David was a cashier.
4 Q Do you remember any incidents with regard to cashier,
5 David, in the summer of 2020 relating to face masks?
6 A Yes, I do.
7 Q Okay. What -- what is it that you recall, and what do you
8 know about that?
9 A I got a call up to the front. There was a customer
10 complaining that David was requesting her to keep her mask up
11 because she was at his register, and he said she kept pulling
12 it down to talk to him. We had the plexiglasses up, so a lot
13 of times the people, like myself, mumble and she -- she -- he
14 couldn't hear her, so she was very upset that he told her to
15 pull her mask up. So I spoke with her for -- a lot of times it
16 diffuses the situation. I spoke to David. He said please call
17 the shift leader or your team leader, anyone on your
18 leadership. Don't take these things on for yourself. That's
19 why they -- they act like that. That's why we're here, is to
20 diffuse these kinds of situations.
21 Q So -- and so to be clear, it wasn't customers telling
22 David to pull up his mask, it was David telling customer to --
23 to -- to pull up her mask?
24 A It was David.
25 Q Okay.

1 A He had a couple of issues like that.
2 Q What? I missed that last part.
3 A He had -- he had a second time, another issue when -- when
4 he had another, separate customer, besides the one where he
5 told her to pull the mask up.
6 Q Okay. With regard to Cassidy Visco wearing Black Lives
7 Matter messaging, I want to ask you about the first time that
8 you learned that Ms. Visco was wearing Black Lives Matter
9 messaging. Do you recall when that was?
10 A Yes. I believe it was -- I saw an email later on in the
11 day. I was home already, but I had opened the email on my
12 phone. It was on July 7th, and I saw an email stating that she
13 was wearing Black Lives Matter.
14 HEARING OFFICER SOTOLONGO: So you got an email from one
15 of your team leaders in the store?
16 THE WITNESS: My associates.
17 HEARING OFFICER SOTOLONGO: Associate team leader?
18 THE WITNESS: Yeah. And --
19 HEARING OFFICER SOTOLONGO: Informing you that she was
20 wearing a Black Lives Matter mask?
21 THE WITNESS: In --
22 HEARING OFFICER SOTOLONGO: In --
23 THE WITNESS: Insert, yeah.
24 HEARING OFFICER SOTOLONGO: Insert. Okay.
25 MR. BROWN: Your Honor, I'd like to --

1 (Counsel confer)
2 MR. BROWN: I would like to approach, Your Honor.
3 HEARING OFFICER SOTOLONGO: Please do.
4 Q BY MR. BROWN: Mr. Avila, I'm showing you what has been
5 marked for identification as Respondent's Exhibit 94, which is
6 a one-page email dated June -- July 7th, 2020, with a subject
7 line, "Cassidy;" do you see that?
8 **(Respondent Exhibit Number 94 Marked for Identification)**
9 A I do.
10 Q BY MR. BROWN: Okay. Do you recognize this email?
11 A I do.
12 Q Okay. I see that it's from somebody named Ricki,
13 R-I-C-K-I, McCarthy. Who is Ricki McCarthy?
14 A She was our TMSG generalist, HR representative for the
15 store.
16 Q Okay. So as the team member service's associate
17 generalist, she's like your onsite HR associate; is that right?
18 A Correct.
19 Q Okay. And I see that she sends -- she sent this email to
20 Sterling Cathala, who is the -- you testified, the team leader
21 of this specialty team?
22 A Correct.
23 Q Okay. On the cc, I see NCPET (phonetic throughout) store
24 leadership. What does that alias refer to?
25 A That alias refers to myself, Alvina, at the time, and

1 Sean, the three store leaders, our NCPET leadership.
2 Q Okay. And do you recall receiving this email?
3 A I do.
4 Q Okay. And I see that in this email, it references that
5 Cassidy had been sent home because she was wearing Black Lives
6 Matter on her nametag; do you see that?
7 A I do.
8 Q Okay. In the next paragraph, Ricki McCarthy writes that,
9 "We looked at the schedule and saw that you're also here at
10 9:00 a.m." I assume she's referring to Sterling Cathala; is
11 that right?
12 A Yeah. Correct.
13 Q Okay. Do you know why this was addressed to Sterling
14 Cathala, this email?
15 A I -- I think it was for him to observe to see if Cassidy
16 was wearing that insert in her name badge again.
17 Q Okay. And what was the direction, if -- if -- if Sterling
18 had seen that?
19 A Sterling was to bring her to my office because I was in
20 that day.
21 Q When you received this email, or the next day, did you
22 have a conversation with Ricki McCarthy about this?
23 A I did.
24 Q Okay. And what did you learn?
25 A I learned that Ricki and Sean spoke to Cassidy. They --

1 they asked her to take a -- take the insert out. She refused.
2 They told her that, you know, if she wanted to think about it
3 for 30 minutes, because that's the direction we were given, to
4 think about it for 30 minutes and she said -- I believe the
5 first time she did, and then she said she wouldn't take it out,
6 so then they sent her home for the day.
7 Q Okay. And when you say Sean, is that Sean McNiff?
8 A Sean McNiff.
9 Q The associate store team leader?
10 A Associate store team leader, sorry.
11 Q Okay. Yeah. You -- I need to ask you and then you got to
12 wait a second because we have a court reporter.
13 A Oh, okay. I'm sorry.
14 Q Okay.
15 A Yes.
16 Q With regard to that conversation about the Black Lives
17 Matter insert, before July 7th, had you, as the store team
18 leader, had any discussions with anyone in the region about
19 Black Lives Matter messaging?
20 A Yes. In late June we had a -- a regional phone call going
21 over Black Lives messaging -- any messaging that would be on
22 uniforms and stuff and how we were going to handle all of that;
23 what processes we were supposed to -- to take if we see -- saw
24 it in our stores.
25 Q Who -- who led that call?

1 A I believe it was Omar Gaye, who's our regional president,
2 and Chuck Abramo, who was the head of human resources for Whole
3 Foods NorCal at the time.
4 Q What was the direction that you were given about Black
5 Lives Matter messaging being worn by team members on the job?
6 A That it was not allowed on the clock, that they were --
7 that we were to call TMS if we saw it, which is our HR, and
8 partner with them, and give the team member 30 minutes to think
9 about it, and if they didn't change or -- or take it off, they
10 were to be sent home.
11 HEARING OFFICER SOTOLONGO: So the -- this policy -- did
12 this policy address employee -- only employees wearing this
13 messaging, Black Lives -- Black Lives Matter messaging, only
14 during the work time -- during working time, or -- or what
15 exactly was the policy?
16 THE WITNESS: They -- from what I recall, sir, it was
17 while they were on the clock or working.
18 HEARING OFFICER SOTOLONGO: So for example, if they were
19 on break in the back room somewhere, were they allowed to wear
20 such messaging?
21 THE WITNESS: They were.
22 HEARING OFFICER SOTOLONGO: Okay.
23 Q BY MR. BROWN: With regard to -- well, let me ask you
24 this, who was your primary human resources contact in the
25 region?

1 A Laurie Suter.
2 Q Okay. And did you, after learning about the incident on
3 July 7th with Cassidy Visco being sent home, did you, at any
4 point, contact Laurie Suter?
5 A Yes, the next day, the 8th, I spoke with Laurie to see how
6 we would handle this going forward because it happened on
7 Friday, so I wanted to make sure that were handling it
8 correctly. Being that it was such a sensitive matter, I wanted
9 to make sure that I was doing it correctly.
10 Q What, if any, direction, or instruction did Ms. Suter
11 provide you?
12 A Stuck to the policy. The policy was there. It's like,
13 have the conversation with Cassidy, let her know that it was
14 out of dress code, and let her know that, you know, she had 30
15 minutes to think about it on the clock, and if she didn't
16 change, that she was to be sent home.
17 Q Okay. With regard to --
18 HEARING OFFICER SOTOLONGO: Are you going to be offering
19 94?
20 MR. BROWN: I am. Thank you, Your Honor. I'm offering
21 94.
22 MR. PETERSON: No objection.
23 MR. BROWN: Okay.
24 HEARING OFFICER SOTOLONGO: All right. Respondent's 94 is
25 admitted.

1 **(Respondent Exhibit Number 94 Received into Evidence)**
2 MR. BROWN: Thank you.
3 Q BY MR. BROWN: The next scheduled shift for Ms. Visco on
4 July 10th, the Friday that you referred to, were you in -- in
5 the store that morning?
6 A I was.
7 Q Okay. And at any point did you learn that Ms. Visco was
8 out of dress code?
9 A Yes. About 20 minutes into her shift, Sterling, her team
10 leader, brought her to my office.
11 Q Okay. And what is it --
12 MR. BROWN: Let me -- let me, if I could, Your Honor,
13 approach, and I'd like to show what I've marked as Respondent's
14 Exhibit 95 to the witness.
15 HEARING OFFICER SOTOLONGO: Go ahead.
16 **(Respondent Exhibit Number 95 Marked for Identification)**
17 Q BY MR. BROWN: I'm showing you what's been marked for
18 identification as Respondent's Exhibit 95, which is a one-page
19 email dated Friday, July 10th, 2020, with the subject line PET
20 (phonetic throughout) Cassidy Visco; do you see that?
21 A I do.
22 Q Okay. I see that this is an email from your TMS associate
23 generalist, Ricki McCarthy, to Laurie Suter, L-A-U-R-I-E,
24 Suter, S-U-T-E-R; is that correct?
25 A That's correct.

1 Q And are you copied on this email?
2 A Yes, I am.
3 Q Okay. And is this email an accurate, sort of overall
4 summary of the communications that you had with Ms. Cassidy on
5 that morning?
6 A Yes, it's accurate.
7 Q Okay. What do you recall about the conversation, or the
8 interaction that you had with Ms. Cassidy about the dress code?
9 What did you say? What did she say?
10 A You know, she -- like I said, she was a good team member,
11 so we had a nice conversation. I felt like we had a good
12 relationship, so we had a nice conversation. I spoke to her, I
13 said, as a Latino man, I -- I really appreciate it that you're
14 standing up for someone that doesn't look like you. I -- I --
15 that's really awesome. I -- I just let her know that work was
16 not the place to do it. There's rules and -- and stuff that we
17 have. We have policies that we -- we couldn't put our views on
18 other customers and other team members, you know, that are --
19 that -- that's not a Whole Foods policy. I let her know that
20 that's also there for protection because you can have an
21 opposing view that could, you know, get upset that she's
22 wearing something like that. And so, yeah, we just had a nice
23 conversation about that. She said she -- she saw my point, but
24 she still felt strongly about, you know, her -- her views and
25 refused to take it off, so she said she did not want to work

1 the half hour, and -- because she wasn't going to take it off,
2 so it didn't make sense for her to stay on the clock if she
3 wasn't going to work.
4 HEARING OFFICER SOTOLONGO: Mr. Avila, where -- where did
5 this conversation take place?
6 THE WITNESS: This conversation took place in my office
7 with Ricki McCarthy present, too.
8 HEARING OFFICER SOTOLONGO: And who else was present?
9 THE WITNESS: Ricki. Ricki McCarthy.
10 HEARING OFFICER SOTOLONGO: So it was you, Mr. (sic)
11 McCarthy, and Ms. Visco, the three of you?
12 THE WITNESS: Correct.
13 HEARING OFFICER SOTOLONGO: Okay.
14 Q BY MR. BROWN: Ms. -- Ms. McCarthy?
15 A She was present.
16 Q Okay.
17 A Yeah.
18 Q Yeah. All right. Was there a policy in place that
19 meeting with a female team member, there should be another
20 female person of leadership?
21 A Yes.
22 Q Very good. And did that happen?
23 A That did.
24 Q Okay. With regard to Exhibit 95 in front of you --
25 Respondent's Exhibit 95 in front of you, did Ms. Cassidy ask

1 you what would happen if she kept violating the dress code?
2 A I said, yes, it could lead to further corrective
3 counseling, and she asked if there was a higher-up besides
4 Ricki that she could speak to.
5 Q Okay. And -- and what, if anything, did you do or say in
6 response to that?
7 A I told her I would reach out to Laurie Suter and see if
8 she would get back to her.
9 Q Okay. Did you do that?
10 A I did.
11 HEARING OFFICER SOTOLONGO: And who is -- who is Ms.
12 Suter?
13 THE WITNESS: Ms. Suter is Ricki's -- who she would answer
14 to, her -- her HR point.
15 HEARING OFFICER SOTOLONGO: Was she in the store, or was
16 she in the regional office?
17 THE WITNESS: Regional office.
18 HEARING OFFICER SOTOLONGO: Regional office, okay.
19 Q BY MR. BROWN: She -- is she the regional human resource's
20 representative that you communicated with?
21 A Yeah, she had about 12 stores under her, so this one fell
22 under her store.
23 Q Okay.
24 MR. BROWN: I'd like to move Respondent's Exhibit 95 into
25 evidence.

1 MR. PETERSON: Just one quick voir dire.

2 HEARING OFFICER SOTOLONGO: Go ahead.

3 **VOIR DIRE EXAMINATION**

4 Q BY MR. PETERSON: There's attachments. Do you see it says

5 attachments and there's an image, jpeg; do you have any idea

6 what that is?

7 MS. SCHAEFER: It's the -- it's the annoying thing on the

8 bottom.

9 MR. PETERSON: Oh, it's the --

10 MR. BROWN: It's the TMS.

11 Q BY MR. PETERSON: Is that your understanding?

12 A That's my understanding.

13 Q Okay. You don't remember a picture or anything?

14 A No.

15 Q Or images?

16 A No.

17 MR. PETERSON: Okay. Yeah, no objection.

18 HEARING OFFICER SOTOLONGO: All right. Respondent's 95 is

19 admitted.

20 **(Respondent Exhibit Number 95 Received into Evidence)**

21 MR. BROWN: Thank you.

22 **RESUMED DIRECT EXAMINATION**

23 Q BY MR. BROWN: Did Ms. Visco ever tell you why she was

24 wearing Black Lives Matter messaging?

25 A She just said it was really important to her.

1 Q Okay.
2 A She never said why.
3 Q Did you understand? Did you have a personal understanding
4 of why she was wearing it?
5 A Other than the fact that it was important to her,
6 that's -- that's --
7 Q Okay. At the time that you spoke to Ms. Cassidy on July
8 10th, had you seen her wearing any other Black Lives Matter
9 apparel, T-shirt?
10 A I saw her wearing the Black Lives Matter T-shirt, a black
11 one with white -- white lettering.
12 Q Okay. And when did you see her -- what time of day, or --
13 or -- or where in the store did you see her wearing that T-
14 shirt?
15 A I -- I saw her exiting through produce as she was leaving.
16 I don't know if she was leaving on a break or lunch, but she
17 was not on the clock. And then I saw her another time in the
18 breakroom having the same -- the same shirt.
19 Q Okay. And with regard to Ms. Visco wearing a Black Lives
20 Matter T-shirt on break time or leaving -- leaving the store,
21 was that a violation of the dress code?
22 A No, it was not.
23 Q Did you address Ms. Visco for wearing a Black Lives Matter
24 T-shirt while she was not working?
25 A I never mentioned it to her at all, no.

1 Q Okay. Did you discipline her in any way for that?
2 A No.
3 Q Okay. I'd like you to look at the picture in front of
4 you, which is an exhibit that's in evidence that's General
5 Counsel Exhibit 94, and ask you whether this is the exact
6 nametag that you recall seeing Ms. Visco wearing on July the
7 10th?
8 A It is not the exact nametag that I recall seeing.
9 Q Is this a pre-printed -- or a -- a -- a Petaluma nametag?
10 A Yes, it is. At that time, it was.
11 Q I see in the lower left corner, sort of an inch -- an
12 inch-and-a-half by an inch-and-a-half, it says Black Lives
13 Matter; do you see that?
14 A I do.
15 Q Okay. Was that insert in the nametag present on July 10th
16 when you met with Ms. Cassidy?
17 A It was.
18 Q Okay. I see a flower. This pink flower on -- on the
19 nametag; was that on the nametag when you met with Ms. Cassidy
20 on July 10th?
21 A It was.
22 Q Okay. Did -- did the flower, I guess, technically violate
23 the -- the dress code in any way?
24 A Technically, it did, but it wasn't political messaging or
25 anything, so I didn't see it as a --

1 Q Okay. What about the crown; did you see the crown?
2 A I did not see the crown.
3 Q Okay. And then to the right, it looks to be about two-
4 and-a-half inches. There are four pride flags; do you see
5 that?
6 A I do.
7 Q Okay. Were those present and on her nametag when you met
8 with Ms. Cassidy on July 10th?
9 A They were not.
10 Q Okay. How do you know that?
11 A Because I do not recall -- I do not remember seeing those
12 at all.
13 Q Okay. Would those -- would those flags have been within
14 dress code?
15 A No, they would not.
16 Q And had you seen them, would those have been addressed?
17 A They would have.
18 Q Okay. And did you ever address any such flags on -- on
19 Ms. Visco's nametag or -- or clothing at -- at any time?
20 A I did not.
21 Q Okay. Did Ms. Visco, at any point, in any conversation
22 with you, reference gay pride flags or -- or a position that
23 Whole Foods was taking with regard to pride?
24 A In one conversation, I think she said it was -- why is
25 allowed on the -- on some things, and I said because it was

1 Whole Foods branded items and it was allowed on them.
2 Q Okay.
3 HEARING OFFICER SOTOLONGO: Did you see those pride flags
4 in her nametag at any other point?
5 THE WITNESS: I never saw them, sir.
6 HEARING OFFICER SOTOLONGO: Okay.
7 MR. BROWN: Okay. May I approach?
8 Q BY MR. BROWN: I'm showing you Respondent's Exhibit 96,
9 which has been marked for identification, which is a three-page
10 document, and the first page has the date of Sunday, July 26th,
11 2020. Subject matter is Cassidy Visco; do you see that?
12 **(Respondent Exhibit Number 96 Marked for Identification)**
13 A Yes, I do.
14 Q BY MR. BROWN: Okay. And this is from yourself to Laurie
15 Suter?
16 A It is.
17 Q Okay. What were you forwarding or sending to Ms. Suter on
18 July 26th, 2020?
19 A I was sending her what happened when Alvina, on Saturday,
20 had her interaction, or meeting with Cassidy and how it
21 happened -- and what happened in that meeting.
22 Q Okay. How did you learn what had occurred on Saturday,
23 July 25th with Alvina Layden, your associate store team leader,
24 and Cassidy Visco?
25 A Alvina called me shortly after it happened and just walked

1 me through it. And then I was closing that day, so I came in
2 at 2:00 p.m. on Saturday. They were working early shifts
3 together, so Alvina addressed it when Cassidy came into work.
4 Q Okay. What do you understand occurred on July 25th?
5 A That she came in and -- and Alvina asked her of she'd like
6 to take off the sticker. She -- she wanted more time. She
7 wanted more info on time and attendance system, so Alvina
8 explained to her. I don't -- I don't remember anything about a
9 resignation from her position, but she was giving her
10 corrective counseling for time and attendance and what she
11 attached here.
12 Q Okay. And so I'd like to show you the two pages that are
13 attached, which is date -- also dated July 25th, 2020, and the
14 title is corrective counseling notes; do you see that?
15 A Yes, I do.
16 Q Okay. Had you approved or reviewed or reviewed and
17 approved this document before it was issued?
18 A Yes, we did, on -- on Saturday -- I'm sorry, on Friday,
19 the 24th, we had a conversation with -- Laurie Suter was on
20 vacation, so Ms. Desarae (phonetic throughout) was taking her
21 stores -- so we had a conversation with Desarae, Alvina and
22 myself, because this was going to be the first time that Alvina
23 had dealt with this situation, so she wanted to make sure
24 everything was said in case -- so we were walking through
25 exactly what to do and how to write the corrective counseling

1 as -- as well.
2 Q Okay.
3 A If there was a -- if Cassidy refused to take off the mask.
4 Q And then she -- actually, she did refuse to take it off,
5 so this corrective counseling had been issued to her?
6 A It was.
7 Q Okay. Did you review it after Ms. Cassidy had written --
8 Ms. Visco had written her -- her response on -- on the second
9 page of the corrective counseling?
10 A Yes, I did.
11 Q Okay. The -- the next day, or later that same day, was
12 this corrective counseling issued to Ms. Visco rescinded?
13 Revoked?
14 A It was.
15 Q Okay. Who -- who revoked it?
16 A I revoked it after speaking with Chuck Abramo.
17 Q Okay. Why did you revoke it?
18 A Because Chuck said that we did not follow the playbook at
19 the time.
20 Q And what was the playbook at the time?
21 A How to handle the situation when -- when a team member
22 came in and refused to take off --
23 Q What was it that you were supposed to have done that you
24 didn't do?
25 A At -- at the time, he said that it shouldn't have been

1 time and attendance, it should have been for dress code.
2 Q Okay. So you -- did you speak to Ms. Visco yourself?
3 A I called her myself when I -- Alvina, my assistant, was
4 pretty upset because we did walk through it on Friday, so I
5 called when I got in at 2:00 and I spoke to Cassidy and said,
6 Cassidy, we're going to get rid of that write up. She was --
7 she was fine with it.
8 Q Okay.
9 THE COURT REPORTER: Judge, can we go off the record?
10 HEARING OFFICER SOTOLONGO: Let's go off the record.
11 (Off the record at 2:50 p.m.)
12 HEARING OFFICER SOTOLONGO: All right. We had a slight
13 technical problem with one of the microphones that has now been
14 fixed, so let's proceed.
15 MR. BROWN: Your Honor, I'd like to move for admission of
16 Respondent's Exhibit 96.
17 HEARING OFFICER SOTOLONGO: Mr. Peterson.
18 MR. PETERSON: No objection.
19 HEARING OFFICER SOTOLONGO: Respondent's 96 is admitted.
20 **(Respondent Exhibit Number 96 Received into Evidence)**
21 **RESUMED DIRECT EXAMINATION**
22 Q BY MR. BROWN: Do you recall, Frank, an incident on -- I
23 guess the last incident on August 2nd with Ms. Visco wearing
24 her Black Lives Matter messaging?
25 A I do not.

1 Q Okay. Did you learn about any other incidents with Ms.
2 Visco wearing this Black Lives Matter messaging?
3 A Through everything -- I spoke with Ms. Visco twice, and
4 everything else was either through my assistants or through
5 emails.
6 Q Okay. I'm going to show you what we're going to mark for
7 identification as Respondent's 97.
8 **(Respondent Exhibit Number 97 Marked for Identification)**
9 Q BY MR. BROWN: I'm showing you Exhibit Respondent's 97,
10 marked for identification. Is this an email that you received
11 from Sean McNiff on August 2nd, 2020?
12 A Yes, it is.
13 Q Okay. Just take a moment and review that. When you're
14 finished, let me know.
15 A Okay. I read it.
16 Q Do you recall receiving this email?
17 A Yes, I do.
18 Q Do you recall talking to Sean McNiff about this incident?
19 A Yes, I do.
20 Q What do you recall about the situation?
21 A I just recall Sean pretty much, as he stated here on the
22 email, that he said that -- that he spoke to Cassidy.
23 MR. PETERSON: Objection. The -- the document speaks for
24 itself.
25 MR. BROWN: Well, it -- it -- this witness testified he

1 didn't have any recollection of it until I showed him the
2 email, and now he's reviewed it; I'm asking what he recalls
3 about the discussion he had with -- with the associate store
4 team leader about this incident.
5 HEARING OFFICER SOTOLONGO: Yes. Go ahead.
6 THE WITNESS: I -- I just remember Sean pretty much
7 telling me everything that's in here, but also saying, you
8 know, he was -- the fact that she didn't wear it for -- in his
9 mind -- in his opinion, she didn't wear it because the team
10 would be shorthanded one time, so he was like -- in his -- in
11 his opinion, he was like, why would she not wear it sometimes
12 and now -- now she wants to wear it. So yeah, it was just
13 another thing where we followed up with team member services;
14 as soon as the team member -- we saw it on -- on -- on her, and
15 we -- at this time it was Desarae that we spoke to, and gave
16 her the 30 minutes and, yeah, then she wouldn't -- and she --
17 she refused to take it off and would go home.
18 MR. BROWN: I'd like to move to admit Respondent's Exhibit
19 97 into evidence.
20 MR. PETERSON: Quick voir dire, Your Honor.
21 HEARING OFFICER SOTOLONGO: Go ahead.
22 **VOIR DIRE EXAMINATION**
23 Q BY MR. PETERSON: Who -- who's Desarae?
24 A So Desarae was another regional HR that covered another 12
25 stores. And I believe Laurie was off at this time, and so --

1 or it was the weekend. Sometimes they did weekend -- covered
2 the stores on the weekend. Yeah, it was a Sunday, so prob- --
3 Desarae was probably doing weekend coverage of human resource
4 problems.
5 MR. PETERSON: No objection.
6 HEARING OFFICER SOTOLONGO: All right. Respondent 97 is
7 admitted.
8 **(Respondent Exhibit Number 97 Received into Evidence)**
9 MR. BROWN: Thank you.
10 **RESUMED DIRECT EXAMINATION**
11 Q BY MR. BROWN: Frank, can you take a look at what is in
12 front of you as General Counsel's Exhibit 97?
13 A Okay.
14 Q And I'm referring you to pages 3 and 4 out of 4.
15 A 3 and 4, correct.
16 Q Okay. Now, looking at page 3, it says corrective
17 counseling, first -- first corrective counseling, and it's
18 dated August 14th, 2020; do you see that?
19 A I do.
20 Q Okay. And the second page, there's signatures for Ms.
21 Cassidy Visco and Alvina Layden, dated August 15th, 2020, yes?
22 A Yes.
23 Q Okay. Is this the second first corrective counseling that
24 Ms. Visco received?
25 A It was.

1 Q Is this the only corrective counseling that actually Ms.
2 Visco had ever received that -- that stuck?
3 A This -- this was one, yes, correct, sir.
4 Q Okay. And with regard to --
5 HEARING OFFICER SOTOLONGO: When you say this one, will
6 you clarify which date?
7 THE WITNESS: August 15 -- August 14th.
8 HEARING OFFICER SOTOLONGO: Okay.
9 THE WITNESS: We signed it on the 15th, but they wrote it
10 on the 14th.
11 HEARING OFFICER SOTOLONGO: Okay.
12 Q BY MR. BROWN: Is this, meaning the August 14th/August
13 15th corrective counseling notice, is this the only corrective
14 counsel in her personnel file?
15 A Yes.
16 Q Okay. After August 2nd, 2020, did Ms. Visco wear Black
17 Lives Matter messaging on her uniform or body on working time
18 ever again?
19 A Not that I -- not that I could recall.
20 Q Okay. And with regard to the enforcement of the dress
21 code policy, in the summer of 2020, was there, like a refresher
22 or a reset in terms of what will be permitted to be worn while
23 on the clock, while working by team members?
24 A Yes, there was.
25 Q What was that reset or refresh?

1 A Just for all of us to make sure we were watching our
2 stores and making sure that people were wearing only Whole
3 Foods Market approved, and the hats are all the same, the black
4 hats in every store, and you couldn't put your name on the hats
5 anymore. Like, we used to have Petaluma on the back of them.
6 It was just the Whole Foods from one vendor. We got the same
7 hats, same aprons, same name badges because some team members
8 didn't have name badges. Those name badges were no longer,
9 sort of different name badges, so it was a refresher of the --
10 making sure everyone was doing the -- the same thing every
11 store.
12 MR. PETERSON: Counsel, I'm sorry, I missed the date.
13 MR. BROWN: Summer of 2020.
14 MR. PETERSON: Summer of 2020. Okay.
15 Q BY MR. BROWN: Mr. Avila, do you recall a team member
16 wearing a Blue Lives Matter logo on her -- her -- her shirt or
17 sweater?
18 A Yes. The -- I recall the incident.
19 Q Okay. When was that; do you recall?
20 A It was in -- in the summer of 2020 as well.
21 Q Okay. And what is it that you recall about that?
22 A So I got a complaint on the -- kind of the tip line -- a
23 customer tip line that's dated, so it comes straight to us, and
24 it said that we -- a customer said that we should not be
25 putting political views out there. I met with the team member,

1 who was still a team member of Whole Foods, spoke to her about
2 it. She had no problem taking it off.
3 Q Did you tell her -- what did you tell her about why she
4 had to take it off?
5 A I just said it goes against our dress code and it goes
6 against Whole Foods' policy.
7 Q Was this before or after the first time you saw Ms. Visco
8 wearing Black Lives Matter?
9 A It was after.
10 Q Okay. With regard to any other political pins or
11 messaging, do you recall an incident with a team member wearing
12 a Bernie Sanders pin?
13 A Yes, I do.
14 Q Okay. Was this in the fall or November of 2020?
15 A It was right -- right during election time.
16 Q Okay. What, if anything, happened with regard to that?
17 A I asked him to remove it, and he had no problem, and took
18 it off.
19 Q Why did you ask him to remove it?
20 A Because it was not approved Whole Foods messaging on our
21 uniforms.
22 Q During that -- that same period of time, were there team
23 members who wore stickers that said I voted, or something like
24 that on their -- on their uniforms?
25 A There were a few.

1 Q And what, if anything, did you do about that?
2 A We asked them to remove.
3 Q Why?
4 A Because it was not in Whole Foods' dress code policy --
5 Q Okay.
6 A -- the messaging.
7 MR. BROWN: I don't have any further questions, except --
8 that's it.
9 HEARING OFFICER SOTOLONGO: All right. Mr. Peterson.
10 MR. PETERSON: Thank you, Your Honor.
11 HEARING OFFICER SOTOLONGO: Actually, let's take a five-
12 minute break.
13 MR. BROWN: Thank you.
14 (Off the record at 3:05 p.m.)
15 HEARING OFFICER SOTOLONGO: All right. Mr. Peterson.
16 MR. PETERSON: Thank you, Your Honor.
17 **CROSS-EXAMINATION**
18 Q BY MR. PETERSON: Good afternoon, Mr. Avila.
19 A Good afternoon.
20 Q I'm Matt Peterson. I'm the lawyer for the National Labor
21 Relations Board. I just have some -- some questions for you
22 about your -- your testimony today.
23 A Okay.
24 Q First of all, what did you do to pre- -- prepare for your
25 testimony today?

1 A I spoke with my lawyer, met over Zoom, and then met with
2 him at the regional office.
3 Q How many times did you meet with your lawyer?
4 A Twice.
5 Q When was the most recent meeting?
6 A Monday.
7 Q Do -- talk to your -- talk to your lawyer before your
8 testimony today?
9 A We had lunch, yeah, lunch. I was --
10 Q Were you given any information about who had testified
11 previously in this case?
12 A In -- in terms of --
13 Q Yeah.
14 A No.
15 Q You weren't told of -- told about the testimony of any of
16 the witnesses either?
17 A No, none of the witnesses, sir.
18 Q So you don't know what anybody said --
19 A No.
20 Q -- prior to you?
21 A No.
22 Q You mentioned that you reported to Christopher Ross?
23 A Yes.
24 Q Who's Christopher Ross?
25 A He's our executive leader. Kind of like a district

1 manager.
2 Q Is that the region -- is that the -- is that regional
3 management, or --
4 A Yeah. Yeah. He's in, like, the region, so it would be
5 like -- Chris Ross would be like a district manager, and then
6 there's like two other district managers, and then we have a
7 vice president and the president.
8 Q And Cassidy Visco, you said she's a seasonal employee?
9 A Correct.
10 Q How -- how long -- how long did you -- had you known her?
11 A I'd say at least a few years. She had been with -- with
12 us for a little while, since like high school.
13 Q Do you have a practice of -- obviously you have many hats.
14 As the store team leader, do you spend time on the floor
15 interacting with your -- your team members?
16 A I do, sir.
17 Q How often did you interact with Cassidy Visco in, say, a
18 given month?
19 A You know, it really depended on our shifts. Maybe -- in a
20 given month, maybe ten minutes in a month.
21 Q Not very -- those are like various -- various occasions?
22 A Yeah, just like, hello, how's it going? I'm here. I'm
23 here. I'll be in my office if you need anything. Walking by,
24 you know, as -- as you walk by, she's in the department walking
25 by, kind of looking at the counters and seeing how they look

1 and stuff like that. Quick -- really quick check-ins.
2 Q Yeah. Did you get to know her fairly well as far as an
3 employee goes?
4 A Not really.
5 Q You were asked about the -- the -- the George Floyd
6 protests that were taking place in the summer of -- of 2020; do
7 you recall that testimony?
8 A Yes.
9 Q And you -- you said that one of your understandings of
10 Black Lives Matters is that people should be treated fairly?
11 A At -- at the hands of the police.
12 Q At the hands of the police.
13 A Yes.
14 Q Yeah, that was actually my next question is do you -- do
15 you understand that Black Lives Matter messages being limited
16 to police -- police conduct?
17 A That's what I understand it to be, sir.
18 Q Have you heard of systemic racism?
19 A I have heard of it.
20 Q What -- what's your understanding what systemic racism is?
21 A Just how things sometimes in this country are -- are made
22 easier for certain races and for other races it's harder.
23 Q And that -- you don't -- you don't understand that as
24 being a component of -- of the Black Lives Matter message?
25 A I do not, sir.

1 Q Do you know that other people view things differently than
2 you?
3 MR. BROWN: Objection. He's about to testify to hearsay.
4 He's being asked to testify about hearsay.
5 MR. PETERSON: There's been a lot of testimony about
6 people's understanding and -- and other people's understanding.
7 MR. BROWN: He's testified to what his understanding is.
8 MR. PETERSON: Whole -- Whole Foods counsel has asked more
9 witnesses questions about other -- if other people -- if they
10 have an understanding that other people view the messages
11 political, as controversial. That should be allowed.
12 HEARING OFFICER SOTOLONGO: I'll -- I'll allow it. Go --
13 go ahead.
14 Q BY MR. PETERSON: Yeah. Are you aware that there are
15 people that view the Black Lives Matter messages addressing
16 systemic racism, as you described?
17 A Yeah. There's different views on a lot -- a lot of
18 things, sir.
19 Q So you are aware that people do associate -- that other
20 people associate Black Lives Matter with systemic racism?
21 A Yes, I am aware.
22 Q You just don't personally see that connection?
23 A I don't, sir.
24 Q The pride lanyards that you were describing, were -- were
25 those -- did people continue to wear those outside the month

1 of -- of pride month, which I believe -- what month is pride?
2 A I -- to be honest with you, sir, I forget. It just -- all
3 of the sudden they would say we could order them. It's like an
4 order number.
5 Q And you -- you said there was -- was it limited to pride
6 month where people could wear the pride lanyards?
7 A It was supposed to be, but sometimes people would wear
8 them, maybe a little bit longer than that. But it was Whole
9 Foods -- had Whole Foods on the -- on the lanyard.
10 Q And were they told to remove them if they were wearing it
11 past pride month?
12 A I can't speak for the stores. In my stores, I can just
13 tell you that there was only like two members, and they would
14 wear it for the month and that was it.
15 Q Oh, so you didn't have any experience seeing -- noticing
16 store members at your store wearing pride lanyards outside of
17 pride month?
18 A I did not.
19 Q What about the pride buttons that you had mentioned?
20 A We did not get any of the buttons.
21 Q So you -- you never saw any pride buttons at your store?
22 A I did not, sir.
23 Q But you're aware that at other stores, that there -- there
24 were pride buttons issued?
25 A Yes, I am. Yeah.

1 Q And how -- what's your basis of -- of knowledge of pride
2 buttons being distributed at other stores?
3 A Just through emails and -- and seeing photos of people,
4 like our San Francisco stores participated in parades and
5 stuff, so you can see that they have pride buttons.
6 Q And you're not sure if those were Whole Foods issued or
7 not?
8 A They were Whole Foods issued, I would say.
9 Q How do you know that?
10 A Because they have the Whole Foods Market logo with the
11 rainbow color.
12 Q All the buttons that you saw?
13 A That I saw, yeah -- I saw.
14 Q The -- the first time that you had heard about Cassidy
15 wearing the -- the Black Lives Matter nametag was July 7th; is
16 that right?
17 A Correct, sir.
18 Q And that was based on reports from Ricki and Sean?
19 A Correct.
20 Q And in your testimony, you said the instruction was to ask
21 her to remove it and then to think about it for 30 minutes
22 and -- and circle back; do you recall that?
23 A I do.
24 Q And you said that was the direction that we were given?
25 A That is correct.

1 Q Direction from whom?
2 A That phone call that I got in June.
3 Q Okay. That was the June call with -- who was that phone
4 call with?
5 A Omar Gaye, our regional president and Chuck Abramo, the
6 head of human resources.
7 Q And was it reported to you in that June phone call that
8 the -- that Black Lives Matter was becoming an issue at some of
9 the other stores around the country?
10 A They said that on the east coast that they had some
11 issues, but yeah, that's -- that's what I can recall.
12 Q When was that in relation to the dress code reset that you
13 described?
14 A I don't know the exact date, sir.
15 Q You're not sure if that was before or after the
16 conversation with Omar Gaye and Chuck Abramo?
17 A I'm not sure.
18 Q It was a long time ago, right?
19 A I'd say. That was two years.
20 Q One of the -- one of the options -- wasn't it -- wasn't it
21 also part of the protocol that an employee could continue to --
22 continue to -- if they chose not to remove the mask rather than
23 go home, they could continue to work and receive a -- a -- a
24 dress code violation?
25 A That was later on, not -- not in -- in July 7th.

1 Q When did -- when did that come about?
2 A I -- I don't know the exact date, but it happened later
3 on. That's why some of the write ups were, I believe,
4 rescinded.
5 Q How do you know -- yeah, how do you know that that policy
6 changed? It sounds like the employees were to be given the
7 option --
8 A Through -- through phone calls.
9 Q Is that through regional --
10 A Regional calls.
11 Q -- management?
12 A Store -- store team leader calls that we would have.
13 Q You don't remember specifics or --
14 A I don't remember specific dates and times.
15 Q -- dates, or --
16 A No, sir, I don't.
17 Q Even who you spoke with? Or --
18 A It would have been Chuck. Chuck handled all the calls
19 like -- of -- of serious nature like that.
20 Q Do you know if -- if Cassidy was given the option to
21 continue to work and face a dress code violation?
22 A In the -- in the first -- later dates, I don't know. The
23 one that I spoke with her directly, there wasn't an option at
24 the time, so she had her 30 minutes to think about it.
25 Q Do you have Respondent's 97 up there in front of you?

1 It's got an R-97 in the bottom corner. It's probably one of
2 those that you already looked at. Maybe it's on the other one.
3 A Oh, I got it. With Sean?
4 Q Yes, it's the email dated August 2nd. Do you see it?
5 Yeah, do you see that?
6 A Yeah, I'm reading it.
7 Q Yeah, I'll just direct your attention to -- and this is a
8 report from Sean, the -- I guess kind of the last paragraph of
9 the main body where it starts with --
10 A Okay.
11 Q -- "I let her know she could continue to work, and if she
12 chose to go home, she would accrue points according to the time
13 and attendance policy"?
14 A Yes, I see it. She said she may leave early today because
15 she wasn't expecting to leave her work shift.
16 Q And so is that -- that was August 2nd, so I guess by that
17 point, does that refresh your recollection as to whether the
18 policy had changed August 2nd?
19 A Yeah, it must have changed. That -- that was the
20 direction that he had gotten from Desarae.
21 Q The discipline -- as I understand it, the -- the
22 discipline that was -- that you said was rescinded --
23 Respondent's 96. The July 25th discipline.
24 A Correct.
25 Q Where Cas- -- Cassidy wrote her comments on?

1 A Uh-huh.
2 Q Was there any -- was there any written notice that this
3 had been rescinded, that you're aware of?
4 A Not -- not written. Verbal.
5 Q Is --
6 A I called Cassidy that day.
7 Q The conversation, you recall having with Cassidy?
8 A Yes, sir.
9 Q And who -- who instructed you to rescind the discipline?
10 A That was Chuck Abramo.
11 Q And I -- can you just remind me who -- what's his position
12 with --
13 A At the time he was the head of human resources for Whole
14 Foods NorCal.
15 Q And what did -- as I understood your testimony, the
16 instruction was to change it to a dress code violation?
17 A I think we rescinded it all together because it wasn't
18 listed on the other dates.
19 Q Yeah. I thought in your testimony you said that part of
20 the reason it was rescinded is because it should have been a
21 dress code violation. Maybe I misheard you.
22 A You -- you -- you know, like I said, it was two years ago.
23 I believe you're correct, sir.
24 Q Okay. And then do you have GC-97 up there? General
25 Counsel's 97? At the bottom it's -- it's labeled -- it is --

1 it is a discipline. I don't actually have an extra copy. I
2 have it on my computer, but --
3 A I've got R-94, 95, got that. 96, 97. Okay.
4 Q I think it's up there.
5 A Okay. Okay.
6 Q And the first two pages appear to be identical to the --
7 to the attachment to the email on Respondent's 96; is that
8 correct?
9 A Yeah, that is correct.
10 Q And then the next few pages of General Counsel's 97, it
11 has -- it's dated August 14th, signed August 15th; do you see
12 that?
13 A Yes, I do, sir.
14 Q And in it, it repeats -- well, it has some of the same
15 dates from the -- from -- from Respondent's 96, from the
16 earlier discipline from July 20- -- 25th; July 10th, for
17 example, is in both?
18 A Are you talking about the second one or the first one?
19 Q The second one.
20 A Yeah. The 10th is in there, and then the 20- -- 25th,
21 26th.
22 Q The 25th, yeah. Well, it looks like the 25th changed to
23 the 26th?
24 A Yeah, you're correct.
25 Q Yeah. Do you know why -- do you know why those dates were

1 changed?
2 A I -- I don't recall, sir. Maybe they had the wrong date?
3 I -- I can only suggest that. I -- I don't know.
4 Q And the second -- the pages 2 and 3, they appeared to me
5 to be also attendance violations, and I don't see any reference
6 to dress code.
7 A On 2 and 3?
8 Q Yep.
9 MR. BROWN: 2 and 3?
10 MR. PETERSON: Pages 2 and 3 of General Counsel's 97, the
11 August 15th discipline that supposedly supplanted the July
12 25th.
13 MR. BROWN: It's 3 and 4.
14 Q BY MR. PETERSON: Sorry, 3 and 4.
15 A Okay.
16 MR. BROWN: I don't know what you mean by that comment.
17 The wit- -- the witness testified that there's only one
18 discipline that she got.
19 Q BY MR. PETERSON: I'm trying to understand your testimony
20 because you said that the reason that the -- the earlier
21 discipline was rescinded was in part because of her comments
22 that it should have been a dress code violation.
23 A It wasn't her comments. It's what -- with the regional,
24 Chuck, speaking with him, that he --
25 Q Yeah. So -- okay. So your regional management advised

1 you that it should be a dress code violation?
2 A At that time, yes.
3 Q Okay. That's my question is the -- the August 14th/15th
4 discipline doesn't appear to be a dress code violation, but it
5 appears to be time and attendance violation?
6 A Correct.
7 Q So do you know why the directive from Chuck wasn't
8 followed to change it to a dress code?
9 A We -- we partnered with them on all of my -- I believe it
10 was switched back to time and attendance when they -- when they
11 reset to their higher-ups. I believe it was -- it was -- it
12 went back to time and attendance.
13 Q You're not -- are you sure about that?
14 A I'm not sure, but I -- that's -- looking at it, that's
15 why -- my memory coming back, sir, that's what I -- I remember
16 happened.
17 Q So at one point it was make -- change it to time -- or
18 change it to dress code, and then it got changed again back to
19 just go ahead and do the time and attendance?
20 A Correct.
21 Q Cassidy asked you if she could speak to some higher-ups
22 about the issue?
23 A Correct, sir.
24 Q And you -- you said you reached out to Laurie Suter?
25 A Correct, sir.

1 Q Did Suter ever get back to you?
2 A I don't know. Oh, to -- to me?
3 Q Yeah.
4 A We -- we spoke. She said she would reach out to Cassidy,
5 and I did provide Cassidy with Laurie's phone number as well.
6 Q You don't know if -- if the two ever communicated?
7 A I don't know, sir.
8 Q Do you have the nametag there in front of you?
9 A Yeah. I have it in color and the other way.
10 Q What -- do you -- do you know what the -- the flags are on
11 the nametag?
12 A I don't, sir.
13 Q You don't?
14 A I don't. I -- I -- it looks like the top one could be a
15 pride, but I do not know the other three.
16 Q Did -- there was some testimony about this name tag being
17 voted on by employees at some point, not the modifications,
18 but -- were you aware of that --
19 A Yeah.
20 Q -- when you were (indiscernible, simultaneous speech) --
21 A Yeah. For sure. That was one of the things that we were
22 allowed to do, pick out, like, a Petaluma themed name badge.
23 So what's actually behind that, it's like one of the oldest
24 train stations in Petaluma.
25 Q Is that the same name tag that all the employees in the

1 Petaluma store wore?
2 A At that time, yes.
3 Q So like even if somebody started in April of 2020, they
4 would have -- they would have gotten that name tag?
5 A Yes.
6 Q So you've seen the sticker -- the -- you recognize seeing
7 the flower sticker before on the name tag?
8 A I did.
9 Q You don't rem -- you don't remember seeing the crown?
10 A I don't remember seeing the crown.
11 Q You don't remember noticing those flags on there?
12 A I don't, sir.
13 Q Which you -- so I think as I understand your testimony,
14 there were two times when you spoke to Cassidy about her name
15 tag?
16 A Correct.
17 Q The -- which -- what were those dates again? I know you
18 testified about, I believe, July 8th, or?
19 A Yeah, because the first one was the 7th so it was, I
20 believe, the Wednesday the 8th we spoke to her.
21 Q And what was the second occasion?
22 A It was just -- it wasn't even like a -- like a
23 conversation in terms of like a counseling, I guess, it was
24 just a conversation on the sales floor.
25 Q Was that -- and was that -- was she wearing the name tag

1 at that time of that conversation, or do you remember?
2 A I believe it's when she was walking out with her Black
3 Lives Matter shirt, and it was just a brief conversation.
4 Q So there was only one time that you --
5 A Formally sat down with her and with Ricki.
6 Q Do you recall seeing her name tag before -- before July
7 8th?
8 A To be honest with you, no.
9 Q Okay. Probably not something you paid that close of
10 attention to?
11 A No, sir.
12 Q But the Black Lives Matter jumped out at you?
13 A Well, I didn't even see it. It was brought to my
14 attention by Ricki.
15 Q Oh, wasn't she -- wasn't she wearing it when you talked
16 with her?
17 A No – yeah, that day I saw it, but I'm saying I did not see
18 it on the sales floor at all, at any time.
19 Q You -- you were looking for it because it had been
20 reported to you that she was --
21 A Correct. When she came into the office, correct.
22 Q And the second time you saw her after that she was not
23 wearing her name tag presumably, she was just wearing the
24 shirt?
25 A Correct, sir.

1 Q The customer -- or the, I guess, the employee that was
2 wearing a Blue Lives Matter something -- what was the -- what
3 was the Blue Lives Matter?
4 A So that was a blue sweatshirt -- which he showed me a
5 photo of because I didn't see it and it had the patch of the
6 flag with the blue line through it.
7 Q Oh, you didn't actually see the employee wearing it?
8 A I didn't see the employee, but I did speak to her because
9 I saw the comment on the -- on my email. And so I just waited
10 for her to come in and I spoke to her. She said, yeah, she did
11 wear it when it was a little colder in the evening. I said you
12 know we have some Whole Food sweaters here in the store that
13 you can wear but you cannot wear that. And so she was fine
14 with that.
15 Q And I think you said it was a customer complained about
16 it?
17 A It was a customer complaint through the customer comment
18 line.
19 Q And their complaint -- was it about it being political?
20 A Correct, sir.
21 Q The -- the GIG book, it just bans outright slogans,
22 symbols, and messages, is that your understanding of -- of --
23 at least as of summer of 2020?
24 A Correct, sir.
25 Q Like it doesn't say political -- only political, it just

1 bans everything; is that correct?
2 A Any messaging, yeah, unless approved by Whole Foods
3 Market.
4 Q You mentioned the political nature of the message, Black
5 Lives Matter, in your testimony a couple times. Do you recall
6 that?
7 A No, I don't, sir.
8 Q Oh, did -- do you view the Black Lives Matter message as
9 being political?
10 A I do not, sir.
11 MR. PETERSON: Okay. Nothing further.
12 MR. BROWN: No questions.
13 JUDGE SOTOLONGO: All right, Mr. Avila, thank you very
14 much for your testimony. You're excused.
15 THE WITNESS: Thank you, sir.
16 JUDGE SOTOLONGO: Please do not discuss your testimony
17 with any other witness or potential witness in this matter
18 until this whole case is over. All right?
19 THE WITNESS: Okay.
20 JUDGE SOTOLONGO: Thank you very much.
21 THE WITNESS: Thank you, sir.
22 JUDGE SOTOLONGO: Let's go off the record.
23 (Off the record at 3:05 p.m.)
24 JUDGE SOTOLONGO: All right. Mr. Ferrell, are you ready
25 to call you next witness?

1 MR. FERRELL: We are, Judge. Before I do that, I do want
2 to move in Respondent's Exhibit 93 which I should have done --
3 JUDGE SOTOLONGO: Yes.
4 MR. FERRELL: -- earlier, right before lunch but I did
5 not.
6 JUDGE SOTOLONGO: Okay. Very well, and that was
7 Respondent's 93 here. Oh yeah, I see it, it's this one, right?
8 MR. FERRELL: No, I don't believe so.
9 JUDGE SOTOLONGO: Oh no, sorry, that's not it --
10 MR. FERRELL: Yeah. It was -- it was the third. I moved
11 in that one, which I think was 91 and 92, and 93 was the third
12 of the Instagram.
13 JUDGE SOTOLONGO: Yes, hold on, I'll -- I got it here
14 somewhere. It was a -- that's okay. I'll find it. Any
15 objection to 93?
16 MR. PETERSON: Yeah. object to the relevance of the
17 repost by one of the witnesses. It does have -- raise BLM, but
18 I don't see the connection to this case.
19 MR. FERRELL: The connection is this is what the witness,
20 the Charging Party was tweeting out or posting on Instagram in
21 support and promoting Black Lives Matter and what he understood
22 it to mean and to be about, as he testified.
23 JUDGE SOTOLONGO: All right. I'll allow it and give
24 whatever weight I think is appropriate.
25 **(Respondent Exhibit Number 93 Received into Evidence)**

1 MR. FERRELL: Thank you, Your Honor.
2 JUDGE SOTOLONGO: What platform was that was that Twitter,
3 or?
4 MR. FERRELL: That one was Instagram.
5 JUDGE SOTOLONGO: Instagram, thank you. All right. Are
6 you ready to call you next witness?
7 MR. FERRELL: We are. Respondent calls Jessica Rodriguez.
8 JUDGE SOTOLONGO: All right. Ms. Rodriguez, will you
9 raise your right hand? You can remove your mask, by the way.
10 Whereupon,
11 **JESSICA RODRIGUEZ**
12 having been duly sworn, was called as a witness herein and was
13 examined and testified as follows:
14 JUDGE SOTOLONGO: Thank you. Could you please spell your
15 name for us and give us your address?
16 THE WITNESS: Yeah, it's Jessica Rodriguez, J-E-S-S-I-C-A
17 R-O-D-R-I-G-U-E-Z. And my -- like my home address?
18 JUDGE SOTOLONGO: Your business address is fine.
19 THE WITNESS: Business address -- 3000 Telegraph Avenue,
20 Berkeley, California, 94705.
21 JUDGE SOTOLONGO: All right. Please proceed.
22 **DIRECT EXAMINATION**
23 Q BY MR. FERRELL: Ms. Rodriguez, do you mind if I call you
24 Jessica today?
25 A Not at all.

1 Q Jessica, where do you work?
2 A Whole Foods market on Telegraph in Berkeley.
3 Q Telegraph, is that Telegraph Avenue?
4 A Yeah, Telegraph Ave.
5 Q In Berkeley, California?
6 A Yes.
7 Q The address you just gave, that's the store there?
8 A Yes.
9 Q What is your position at that store?
10 A Currently, store team leader.
11 Q How long have you been the store team leader at the
12 Telegraph Berkeley location?
13 A It's been about a year and a half.
14 Q Sorry, did you say year and a half?
15 A Yes.
16 Q What position did you hold before being the store team
17 leader?
18 A ASTL, associate store team leader.
19 Q And how long were you the associate store team leader at
20 the Telegraph Avenue?
21 A Three years.
22 Q Now, at that location, how many ASTLs are there?
23 A Two, typically.
24 Q Do you have two currently?
25 A Yes.

1 Q Okay. In the summer of 2020, you were the ASTL?
2 A I was.
3 Q Was there another ASTL at the time?
4 A There was.
5 Q And who was that?
6 A Tanda Brown.
7 Q So -- and I'll come back to the rest of the store
8 leadership in a minute -- but before you were at the Telegraph
9 store, did you work at any other stores?
10 A I have. Yeah. I've worked in Dublin.
11 Q Dublin, California?
12 A Dublin, California; Walnut Creek, California; San Ramon,
13 California.
14 Q So three other stores before Telegraph?
15 A Um-hum.
16 Q When were you first hired by Whole Foods?
17 A August of '20 -- 2004.
18 Q 2004?
19 A Yes.
20 Q What was the position to which you were hired?
21 A Courtesy clerk. A bagger.
22 Q A bagger?
23 A Um-hum
24 Q So if you could, can you summarize the positions you've
25 held from bagger up to STL?

1 A Yeah. Bagger, cashier, supervisor, ATL for the front end,
2 team leader for the front end, ASTL, and then STL.
3 Q And ATL, is that assistant team leader?
4 A Yes.
5 Q And I used the acronym ASTL, that's the associate store
6 team leader, right?
7 A Correct.
8 Q And what's the level at which we consider someone to be
9 part of -- what I'm going to -- store leadership is the Whole
10 Foods term, but management for those coming from outside?
11 A Store leadership would be anybody who's salaried.
12 Q Is that the store team leaders and above?
13 A It would be ASTLs and above -- associate store team
14 leaders and above.
15 Q And immediately below the ASTL, you have the team leaders?
16 A Um-hum.
17 Q And they run the departments?
18 A Correct.
19 Q And they'll -- will they handle discipline and performance
20 issues at the department level?
21 A Yes.
22 Q Have you -- you're familiar with the term "huddles"?
23 A Yes.
24 Q The team leaders use huddles to communicate with their
25 departments?

1 A They do.
2 Q The other ASTL you mentioned in the summer of 2020, Tanda
3 Brown, right?
4 A Yes.
5 Q Do you know what race Ms. Brown identifies as?
6 A Yeah, she's African-American.
7 Q And how about yourself?
8 A Mexican-American.
9 Q The store team leader at -- in 2020, who was that?
10 A Kelly Fox.
11 Q Do you know what race she identifies as?
12 A She was white.
13 Q A white female?
14 A Um-hum.
15 Q So in the top three managers or leaders at the store would
16 have been all females or all --
17 A Yes.
18 Q -- white, Mexican and African-American?
19 A Yes.
20 Q Can you describe for the judge the makeup of the -- the
21 workforce at the Telegraph store in terms of its diversity,
22 team members and store leadership?
23 A Yeah. In my 18 years, the most diverse store that I've
24 ever seen both from the team leader base to the -- down to the
25 team member base. I mean we have literally a representation of

1 every race, nationality, gender.
2 Q Just how many team leaders do you have at that store?
3 A There's 8 team leaders.
4 Q Okay. Just for example, is it -- in total I mean, how
5 many team -- how many people work at the store, total?
6 A About 160.
7 Q Okay. So without pie graphing 160, if you just look at
8 the 8 department leads --
9 A Yeah.
10 Q -- can you describe kind of the diversity -- the diverse
11 makeup of the 8 team leaders?
12 A Yeah. Like currently in this moment?
13 Q Well, 2020.
14 A Okay. 2020, there would have been a female African-
15 American, male African-American, female Mexican-American, I
16 want to say two white team leaders, Filipino female -- I'm
17 struggling on the last one. Who am I leaving out? Oh, I'm
18 sorry, another African-American male.
19 Q Now, what -- what region does the -- the Telegraph
20 Berkeley store fall into?
21 A Northern California.
22 Q Northern California region?
23 A Um-hum.
24 Q Who's the regional president for the northern Californian
25 region?

1 A Omar Gaye.
2 Q You've met Mr. Omar Gaye?
3 A Yes.
4 Q Do you know what race Mr. Gaye is?
5 A He's African; he's from Senegal.
6 Q From Senegal?
7 A Um-hum.
8 Q Do you if he's a naturalized American from Senegal?
9 A That's what I believe to be the case.
10 Q I want to talk to you a little bit about dress code.
11 We're going to talk about dress code more than you probably
12 want to talk about dress code but that's what the case is
13 about. As an ASTL what's your role or responsibility in
14 enforcing/administering dress code at the store?
15 A Yeah. Most of the day-to-day enforcement of dress code
16 comes from the team leader group, you know, just because
17 they're the ones that are working alongside most of the team
18 members. But overall, I mean, it's -- it's all of us, so when
19 it comes down to it, you know, the team leaders mostly handle
20 correctives, but they always consult with us before moving
21 forward with any sort of a corrective. But if it's something
22 on the floor and we see, then we address it.
23 Q So if a team leader identifies a dress code issue, what
24 would the team leader typically do?
25 A They would come -- they would come to us first, and then

1 they would say, hey, you know, this person is wearing this,
2 this or that and they're out of dress code, you know, how do we
3 proceed, and we would give them whatever the direction may be.
4 You know, if it came to like T-shirts, we have Whole Food
5 Markets T-shirts. So if they were out of dress code, we'd hand
6 them a Whole Foods shirt, a Whole Foods hat. We typically have
7 something to give them to put them in compliance, so that way
8 they didn't have to go home or anything like that.
9 Q And when you say they come to us, are you referring to
10 store leadership?
11 A Store leadership, correct.
12 Q And that would include the ASTLs and the STLs; is that
13 right?
14 A Yes.
15 Q Do you remember in the -- somewhere in the spring of -- of
16 2020, if Whole Foods began requiring team members to wear face
17 masks -- face coverings?
18 A Yeah, I remember that.
19 Q And that was -- was that in response to the pandemic?
20 A Correct.
21 Q All right. Do you recall about when you started requiring
22 face masks?
23 A No. I -- I know it was spring. I -- I couldn't give you
24 a date though.
25 Q Did there come a --a time when we communicated to -- you

1 all communicated to the team members that the face masks that
2 we are now requiring fall under the dress code for the store?
3 A Yeah.
4 Q How was that communicated to team members?
5 A So we had a written policy which was the -- I don't know
6 if it's considered national or global dress code policy that
7 included the face masks, and then we had huddles. So we would
8 do AM and PM huddles. We would do team huddles. We did it
9 over the course of several weeks with lots of different groups
10 just to make sure we got everybody the same information.
11 Q Over the several weeks you're catching people as they're
12 scheduled to work type thing?
13 A Correct, yeah.
14 Q Did the dress code permit team members to wear slogans or
15 political statements on their uniform or on their clothing or
16 their face mask?
17 A No, it did not.
18 Q Now, there's the national and regional dress code
19 that's -- I think it's basically the same or are they exactly
20 the same?
21 A They're exactly the same.
22 Q And they're located in what's referred to as the GIG?
23 A Correct.
24 Q And that stands for General Information Guide, right?
25 A Yes.

1 Q At the Telegraph store was there also, at least for a
2 time, a local store dress code?
3 A Yeah. When Kelly came to the Berkeley location as STL she
4 rolled out a Berkeley store specific dress code policy which
5 was essentially the GIG book dress code policy with an added
6 line regarding sports teams.
7 Q And what was the -- the added line about sports teams?
8 A That you could wear local sports teams on home game days.
9 Q On home game days?
10 A Yeah.
11 Q So the sanctioned teams would be like the Bay area teams?
12 A Correct.
13 Q Those were approved?
14 A Um-hum.
15 Q A Raiders or a 49ers if it's a home game day type thing?
16 A Um-hum.
17 Q San Jose Sharks, did they fall in that too?
18 A Yeah.
19 Q Oakland A's that --
20 A Yes.
21 Q And you were at the -- were you at the store before Kelly
22 Fox came?
23 A I was, yeah.
24 Q Okay. So this is something Kelly brought with her?
25 A Yep.

1 Q Do you recall in June of 2020, there had come a time when
2 you saw any team members wearing BLM or Black Lives Matter
3 messaging on their face mask or elsewhere on their uniform?
4 A Yeah, I do.
5 Q What -- what do you recall seeing and about how many team
6 members do you recall?
7 A I would say it was five to six team members. It would
8 either say Black Lives Matter or just BLM across the face mask.
9 I think a couple people had pins. And then at -- at a certain
10 point as things were no longer allowed, then they got a little
11 more creative and it would be like nail polish on their nails
12 or Sharpie on their skin.
13 Q Initially, when you first saw some team members wear it on
14 their face masks or on their pin, how did the store leadership
15 react? What did you all do?
16 A As far as towards the team member, there was no action
17 taken, initially.
18 Q Well, what did you do without taking action against a team
19 member? Behind the scenes what are you doing?
20 A Kelly sent -- and I don't know if it was an email or if
21 she had a phone call conversation, but Kelly communicated with
22 the team member services group at a regional level of what she
23 had seen or what we had seen at the time, and then ask for
24 direction. And the direction at that point was to just pause.
25 Like let us look into it a little bit more. So and sometime

1 passed --

2 MR. PETERSON: Objection to the extent this is hearsay.

3 JUDGE SOTOLONGO: Well, the question was what -- what

4 action did management take, right?

5 MR. FERRELL: Right.

6 JUDGE SOTOLONGO: She's a member of management, right?

7 MR. PETERSON: Well, right, but she's describing something

8 that Kelly did. There's no foundation as to whether she was

9 there or how this was reported to her.

10 THE WITNESS: Well, Kelly told me --

11 MR. PETERSON: Right, but --

12 THE WITNESS: -- that that was our directive moving

13 forward.

14 MR. FERRELL: It's not a statement being offered for the

15 truth of the matter asserted. We're asking how did management

16 respond? What did -- what did they do?

17 JUDGE SOTOLONGO: That's correct.

18 MR. PETERSON: If it's not being offered for the truth,

19 then I don't have an objection.

20 JUDGE SOTOLONGO: Okay. Well, please proceed.

21 MR. FERRELL: Right and there's not been a statement

22 that's been offered by the witness, really but.

23 Q BY MR. FERRELL: So I'm -- I'm sorry. Go ahead, Jessica,

24 in terms of the actions management was taking.

25 A So we were told to pause and that they would give us more

1 direction later. So at that point, we didn't address it with
2 anybody. We just allowed it.
3 MR. PETERSON: Objection as to foundation. Who told who
4 to pause. This seems to be -- now it's describing
5 conversations -- something somebody told is obviously a
6 conversation. I don't have any foundation.
7 JUDGE SOTOLONGO: All right why don't you tell us a
8 foundation. That's fair.
9 MR. FERRELL: Okay.
10 Q BY MR. FERRELL: Jessica, what was your direction you got
11 back from Kelly about whether you would be addressing with team
12 members at this time, in June, the fact that some are wearing
13 Black Lives Matter on their mask or on a pin?
14 A Kelly's direction to Tanda and myself were to not take
15 action, and that when team member services got back to her, on
16 what we would be doing moving forward, she would let us know.
17 Q And so for that time, no action was taken with respective
18 team members, right?
19 A Correct.
20 Q Did there come a point when it was communicated to team
21 members that the company would start to hold them accountable
22 for being out of compliance with the dress code?
23 A Yes.
24 Q And out of compliance with the dress code because they
25 were wearing Black Lives Matter on their face mask or on the

1 buttons while they were working in the store?
2 A Yes.
3 Q How was that communicated to the team members; do you
4 recall?
5 A Through huddles -- we utilized the same huddles.
6 Q And the huddles are the small group meetings, department
7 by department?
8 A Yes.
9 Q At that time, with the pandemic, were you holding any
10 large, like, all-store meetings?
11 A Not at all.
12 Q What was -- do you recall the timing of when team members
13 were told we're going to start holding you accountable?
14 A Yeah, I believe it was mid-July. I couldn't give you a
15 date, but I believe mid-July.
16 Q I'm going to show you what's been marked for
17 identification as Respondent's 98.
18 MR. FERRELL: May I approach, Your Honor?
19 JUDGE SOTOLONGO: Yes.
20 Q BY MR. FERRELL: Jessica, looking at what I've handed you
21 is Respondent's Exhibit 98. It's a two-page document. On the
22 lower right-hand corner, it's been Bates stamped WFM pages 868
23 and 869. Do you see those Bates stamp numbers?
24 A Yes.
25 Q The first page is a July 9, 2020, email regarding subject,

1 dress code update. Do you see that?
2 A Yes.
3 Q And this if from Kelly Fox, correct?
4 A Correct.
5 Q That was the store team leader at the time?
6 A Um-hum.
7 Q It's addressed to NCBRK (phonetic throughout) all
8 leadership, do you know who that is?
9 A That's every team leader.
10 Q All team leaders?
11 A Um-hum.
12 Q At the Berkeley store?
13 A Correct.
14 Q And then it's cc'd, that's you, Jessica Rodriguez?
15 A Yes.
16 Q It looks like Tanda Brown's also copied?
17 A Yes.
18 Q Who's Scott McCabe?
19 A He was our Shift Leader at the time.
20 Q The email Kelly references is the updated dress code that
21 follows the GIG for shirts and hats. If you turn to the second
22 page, can you tell me if you recognize that document?
23 A Yes.
24 Q Can you tell us what it is?
25 A It's the dress code policy.

1 Q Now, it says at the top Whole Foods Market BRK dress code.
2 Does that stand for Berkeley dress code?
3 A Yes.
4 Q Before you talked about how Kelly implemented special
5 Berkely dress code that allowed sport teams -- local sports
6 teams, right?
7 A Yes.
8 Q And was that with respect to like shirts and hats?
9 A Yes.
10 Q So what's the difference between this Berkely dress code
11 and the nat -- or the Berkeley dress code that was in place
12 before, anything?
13 A Prior to this, so this is just the exact same thing, just
14 omitting the sports teams.
15 Q So this is the same as the national and regional dress
16 code?
17 A Yes.
18 Q But it dropped the exception for local sports teams?
19 A Yes.
20 Q And in her July 9 email, on the first page of the exhibit,
21 it looks like Kelly's directing team leaders to review with the
22 team members?
23 A Yes.
24 Q And -- and they would do that in -- in what format?
25 A Huddles.

1 Q The huddle meetings?
2 A Um-hum.
3 Q Do you recall if it was long after this that -- or about
4 how long after this, that the store began holding team members
5 accountable for dress code compliance?
6 A I would say within maybe two weeks.
7 Q Do you remember having a conversation with a team member
8 Anna Belen Del Rio Ramirez?
9 A Um-hum. Yes.
10 Q Do you remember having a conversation with her on July 15?
11 A Yes.
12 (Counsel confer)
13 Q BY MR. FERRELL: Do you remember what you spoke with Ms.
14 Belen on July about -- on July 15?
15 A Yeah. She was wearing a button or small pin on her -- I
16 don't know if it was her apron -- that said Black Lives Matter
17 and her team leader had notified me that she had it on and he
18 asked, you know, what we should be doing.
19 Q Who was her team leader?
20 A Angel Ruiz.
21 Q And so I let Angel know that we needed to ask her to
22 remove it, but that I would have the conversation with her. So
23 Angel went and got her, brought her to our office, and Angel
24 and I spoke to her together.
25 Q And you say our office, is that what's called the store

1 team leader office?
2 A Yes.
3 Q And you were going to ask her to remove it?
4 A Yes.
5 Q So she comes to the office and it's just the three of you?
6 A Yes.
7 Q Do you recall about what time of day it was?
8 A I want to say it was just after 9 a.m.
9 Q So morning at some point?
10 A Yep.
11 Q Did she typically work mornings?
12 A She did, yeah. She was an order writer, which the shift
13 is typically like a 5 a.m./6 a.m. start time.
14 Q So can you tell us, during that meeting, you said three of
15 you --
16 A Um-hum.
17 Q -- what you said to her and what -- what she said to you?
18 A Yeah. I asked her to remove the -- the button and she
19 said that she would not. She did give me her take on the
20 reason why she wanted to wear it, which she felt like she
21 needed to advocate for the Black Lives Matter -- Matter
22 movement, and that -- you know, that her convictions were
23 strong, and that this is what she felt, you know, she needed to
24 do. And I told her that I understood that, but at this time,
25 the direction that we've been given is that we need to send

1 people home if they're not willing to remove the buttons or
2 whatever is outside of dress code. And I asked her one more
3 time if she would remove it, she said no, she would be keeping
4 it on. So I let her know I would have to send her home for the
5 day. She said okay.
6 At that point, I also explained to her that this was the
7 direction. So if she came in the following day, it would
8 follow the same suit. We would ask her to remove it; if she
9 didn't, she would be sent home. At that point, she had given
10 her two-week notice -- or she had given her resignation in
11 writing already, and her last day was I believe three shifts
12 from then. So at that point I also told her, your last day is
13 in just a few shifts. We're going to do this every single day.
14 It's up to you, what you'd like to do, but if you don't want to
15 be sent home every day, you could just be done today, no harm,
16 no foul. We have -- we have your resignation in writing, there
17 would be no repercussions for it, you're eligible for rehire.
18 But it's up to you. You know, I -- I understand.
19 And she said she -- she was standing strong with her
20 convictions, they were not going to change from today to
21 tomorrow, so she would just go ahead and be done, and this
22 would be her last day. And I said okay, and that's where we
23 parted ways, she went home.
24 Q Now, -- and that conversation was on July 15th, right?
25 A Um-hum.

1 Q In that case, had -- had you received a direction in --
2 from Ms. Fox and/or TMS that at least as of July 15, we were
3 holding team members accountable?
4 A Yeah. I believe it was that same morning when I spoke to
5 Kelly, and she notified me that we needed to send folks home if
6 they were refusing to comply with dress code. And I had that
7 conversation with Belen, sending her home. And then after she
8 left, I called T -- Jessica Charney from team member services
9 to let her know that I --
10 Q Okay. I was -- I was going to ask you. So after Ms.
11 Belen leaves --
12 A Um-hum.
13 Q -- you said you -- you spoke to Jessica Charney. And who
14 is -- who is Jessica Charney?
15 A She was our team member services bus -- business partner.
16 So she was our point for the store.
17 Q And in Whole Foods world, it's called team member
18 services, in the rest of the world, they refer to it as human
19 resources; is that right?
20 A Yes, yes.
21 Q So it's your human resources point of contact --
22 A Yes.
23 Q -- in -- in common parlance? So you reached out to
24 Jessica. Was that -- why did you reach out to Jessica?
25 A At that point we just needed to stay -- keep everyone in

1 the loop of what was happening. So just to stay in
2 communication to let her know what steps we had taken. So I
3 did that. I called her.
4 Q And what did Jessica -- you -- did you tell Jessica what
5 happened?
6 A Yeah. I told her -- I let her know that Belen -- I had
7 asked her to comply with dress code, she refused to take off
8 the button. I notified her that if she didn't, she would have
9 to go home for the day. She said that she would just be done.
10 And Jessica said, no, we're not sending people home. And I
11 said, well I -- I literally had spoken to Kelly that morning
12 telling me that we are sending people home. And she was, like,
13 no, things have changed. I'm sorry if you didn't get that.
14 You were supposed to be communicated that, I'm sorry if no one
15 told you. I was, like, okay, well, she's gone now. Like, I've
16 already done it.
17 So I asked her, would you like me to call her and let her
18 know because she had decided to just let that be her last day,
19 that if she wanted to come back, she could for her last few
20 shifts. And she said sure. So I did that -- or I'm sorry, I
21 asked -- and I'm having trouble, I can't remember who I asked
22 to do that. It could have been Tanda Brown because of, you
23 know, our jobs. Like, it would make sense that it would be
24 Tanda, but I -- I can't say for certain. But I asked Tanda to
25 call Belen and let her know that she actually could come back

1 if she wanted to because direction had changed.
2 And I was told -- again, I can't remember who it was but
3 they did follow back up with me and let me know that, like,
4 hey, we reached back out to her, she said she's good. So we
5 just moved on from there. We never had another follow-up
6 conversation.
7 Q And have you ever spoken to Ms. Belen again?
8 A No.
9 Q Or was that the last time you spoke to her?
10 A That was the last time.
11 Q At that time, as -- as far as you're aware, had any other
12 team member been sent home for not being compliant with dress
13 code at the Telegraph store?
14 A Not that I'm aware of.
15 Q Are you familiar with an employee named Bella?
16 A Yes.
17 Q Do you know what Bella's last name is?
18 A Something that I can't pronounce.
19 Q Okay.
20 A It's -- it's very long, and it starts with an S though.
21 Q Do you recall if Bella had -- had -- are you aware if
22 Bella had an incident where she was wearing a -- and had been
23 spoken to by Kelly Fox for wearing a Black Lives Matter mask,
24 or BLM written on her facemask?
25 A It's nothing that I was aware of, but it -- it could have

1 definitely happened when I wasn't there. I wasn't there all
2 the time.
3 Q Are you aware whether Bella was sent home after speaking
4 with Ms. Fox, or whether she just chose to leave because she
5 was upset?
6 A We were good at communicating with one another, and I
7 don't recall anyone else being sent home other than Belen, so I
8 don't -- I don't think that she was sent home.
9 MR. FERRELL: Your Honor, I would move to admit
10 Respondent's Exhibit 98.
11 JUDGE SOTOLONGO: Mr. Peterson?
12 MR. PETERSON: Yeah, just a quick voir dire?
13 JUDGE SOTOLONGO: Okay. Go ahead.
14 **VOIR DIRE EXAMINATION**
15 Q BY MR. PETERSON: So this -- you're saying -- you're
16 saying that this dress code update updated a previous dress
17 code?
18 A Yes.
19 Q Was the previous dress code in writing?
20 A Yeah, it was.
21 Q Was it, like, the same format?
22 A Yeah.
23 Q And you said, just, I -- I haven't seen that, so I'm just
24 curious. What -- the only changes that you recall were to the
25 shirts and hats?

1 A Yeah. We allowed sports -- local sports teams to be worn
2 on shirts and hats on home day -- home game days.
3 Q And that was -- those were just sentences that were
4 added --
5 A Were added to the original national policy.
6 Q And omitted from --
7 A Yes.
8 Q -- this one?
9 MR. PETERSON: No objection, Your Honor.
10 JUDGE SOTOLONGO: All right. Respondent's 98 is admitted.
11 **(Respondent Exhibit Number 98 Received into Evidence)**
12 Q BY MR. FERRELL: Jessica, are you familiar with a former
13 team member, Christopher Adam Michno, who also goes by Maddy?
14 A Yes.
15 Q Or I think goes by Maddy. But you're familiar with Adam
16 Michno -- Maddy Michno?
17 A Yes.
18 Q Do you recall having a conversation with Michno on July 16
19 regarding Black Lives Matter facemask or writing he put on his
20 facemask?
21 A If that was the day that we delivered the corrective, then
22 yes.
23 Q Is -- looking at General Counsel's 100, which --
24 (Counsel confer)
25 Q BY MR. FERRELL: Jessica, you have what's in evidence

1 as --
2 (Counsel confer)
3 Q BY MR. FERRELL: -- General -- General Counsel's Exhibit
4 100. I'm trying not -- I'm trying not to write on it. Do you
5 have corrective counseling -- is -- do you recognize this as
6 corrective counseling forms that you use at the store?
7 A Yes.
8 Q Is that yes?
9 A Yes.
10 Q All right. If you look at this first page -- the first
11 couple of pages, and -- and tell me if you recognize this form?
12 A Yes, I do.
13 Q So the first one -- you see the effective date's Ju --
14 July 22?
15 A Yep.
16 Q But down in the description at the bottom of the page,
17 it -- it talks about a July 16?
18 A Yeah. So the 16th was the day that I actually spoke to
19 him about removing the -- the mask.
20 Q Okay. So on the 16th, can you tell us how it came to
21 your -- how this conversation came to be with -- between you
22 and -- and Adam or Maddy Michno?
23 A Yeah. I -- I walked by the department. I saw that Adam
24 had it on his mask, had -- I believe it was BLM on his mask. i
25 asked him if I could see him upstairs. So we went upstairs to

1 the SCL office. I asked him to remove it to comply with the
2 dress code policy, and he said that he would not. He very
3 similar to his statement here --
4 Q And you're looking at the second page there?
5 A Yeah.
6 Q Okay.
7 A Expressed these exact things to me. At that time, I let
8 him know that -- that there would be accountability, you know,
9 for not complying. But we did allow him to work. He went back
10 downstairs, and he continued his shift.
11 Q And by accountability you mean the -- the issuance of a
12 corrective counseling form?
13 A Yes, correct.
14 Q Is that the first step in the progressive discipline at
15 the store?
16 A Yes.
17 Q So then the form is actually dated July 22nd.
18 A Yeah.
19 Q Is that when you administered it?
20 A Exactly. Yeah.
21 Q And is that your signature under store facility
22 leadership?
23 A Yes.
24 Q Was there any further conversation or -- at that time, or
25 just -- did Michno just write these statements and sign?

1 A He wrote the statement and signed. Yeah, no, there was no
2 further conversation.
3 Q Now, this was on July 16 that the conversation you had
4 with Adam -- Adam Michno took place, right?
5 A Um-hum. Um-hum.
6 Q And that was one day after the conversation you had with
7 Ms. Belen?
8 A Yes.
9 Q And Michno was allowed to continue and work the rest of
10 the shift, right?
11 A Yes.
12 Q And that difference, is that because of the conversation
13 you alluded to a moment ago that you had with Jessica Charney?
14 A Exactly. Yeah. This was immediately the -- the following
15 day, so we were no longer sending folks home.
16 Q Now, and this was, again, July 16. On July 17, do you
17 recall Adam Michno leaving work early?
18 A Yes.
19 Q Do you recall why?
20 A To attend the protests at the Gilman Whole Foods location.
21 Q Was -- was Adam alone, or somebody also --
22 A I believe there was one other team member that also
23 attended, that left their shift.
24 Q Does the name Sarah Bruno sound like it could be --
25 A Yes.

1 Q Do you think it was the two of them?
2 A Yes.
3 Q Was there any repercussions -- adverse action taken
4 against either one of them for leaving work early go to attend
5 a -- a protest at the other Whole Foods store?
6 A No.
7 MR. PETERSON: Objection, there's no foundation. How does
8 the witness know -- how does the witness know that these
9 employees left to attend --
10 THE WITNESS: I -- I was there. I was working that shift.
11 I'm the one that allowed them to leave.
12 MR. PETERSON: Okay.
13 MR. FERRELL: Does that satisfy the foundation question?
14 MR. PETERSON: I mean yeah, I -- I guess so. Did they
15 report to you that they were --
16 THE WITNESS: Yeah. Yes.
17 MR. PETERSON: -- that's the reason that they wanted to
18 leave?
19 THE WITNESS: Yes.
20 MR. PETERSON: Okay.
21 JUDGE SOTOLONGO: And this is before their shifts ended?
22 THE WITNESS: Yes.
23 JUDGE SOTOLONGO: Okay. And so you gave them -- you gave
24 them permission to go?
25 THE WITNESS: Yeah. We were given direction from our

1 executive leader, Chris Ross, ahead of time, because we knew
2 that the protest was going to be taking place. So they
3 contacted us -- I think I spoke to Chris directly -- and Chris
4 said, if -- if any team members would like to attend, there
5 would be no time and attendance points, or anything being given
6 to anybody who leaves early to attend this.
7 And so the two of them came, said we want to go, I said
8 okay, great. They left.
9 Q BY MR. FERRELL: And that was July 17. You said the next
10 day after --
11 A Um-hum.
12 Q -- you'd spoken to Adam, right?
13 A Yeah.
14 Q Now, at the time, in July, do you recall what Adam
15 Michno's job was in specialty?
16 A He was just a specialty team member.
17 Q Okay. Did his job title change in August?
18 A Yeah. He got a promotion.
19 Q He got a promotion to what position?
20 A Order writer.
21 Q Order writer. And what's the responsibilities in order
22 writer in specialty?
23 A So they -- they place the orders for all of the -- his --
24 his sub team in particular was cheese, so he would write all of
25 the cheese orders. But that also included rotating products,

1 you know, stocking it, ensuring that dates were -- what we call
2 first in/first out, making sure that things were rotated
3 properly so that we wouldn't have any expired product. And so
4 it's like, managing your inventory I guess would be the best
5 way to summarize it.
6 Q So for that promotion in August of 2020 to order -- from
7 team member to order writer, do you recall if Mr. Michno, when
8 he applied for that job, was in competition with others, or was
9 he the only one who applied?
10 A He was the only one that applied.
11 Q Was that unusual for the specialty department at that
12 time?
13 A No, the team -- because of the pandemic, the team was down
14 to, I want to say three team members, Adam being one of the
15 three. There was no team leader at the time. The team leader
16 was out on an LOA -- a leave of absence because of the
17 pandemic. So there was quite literally just an -- an associate
18 team leader, Adam, and the beverage buyer. So he was really
19 the only team member that worked on the team at all.
20 Q All right. So and -- and when did Adam start in this new
21 role if you recall?
22 A I think it was, like, mid-August.
23 Q Now, the next page in that exhibit that you have is a
24 counseling form dated from September 6th, 2020. Do you see
25 that?

1 A Yes.
2 Q And it references in the description at the bottom, it's
3 coming -- it's arising from a -- an audit on September 3; do
4 you see that?
5 A Yes.
6 Q Do you remember this -- this audit, the -- the result and
7 the counseling form?
8 A I do, yeah.
9 Q Can you -- can you tell us what the -- what the corrective
10 counseling is for?
11 A Yeah. Our food safety auditor, Everclean, had come and
12 conducted an audit, and found two expired Vermont Creamery tubs
13 on the shelf, and they were, I mean, over a week expired. So
14 you know, in typical fashion, when we have food safety audits,
15 when there are violations found, once we do our homework and we
16 find out the root cause of the violation and who was
17 responsible, or -- or missed a step, then the -- that person
18 would be held accountable for -- you know, our work performance
19 expectations. So that's what this was. He -- he missed
20 rotating the dates and pulling the product in time. And this
21 is something that should be checked daily, so really, he had
22 missed it for a week.
23 Q And that's what he's getting the corrective counseling
24 here for on September 6th?
25 A Yes.

1 Q What's the typical protocol? Would he have known that
2 this corrective counseling was coming after the audit?
3 A Yes.
4 Q Had that been communicated to him?
5 A Yes.
6 Q And at that time, he would have been in this -- the new
7 promoted job for a couple weeks or so?
8 A Yeah, I would -- I would say three -- three to four weeks,
9 at that point.
10 Q The next page in General Counsel's 100 is dated September
11 7. Do you recognize this one?
12 A Yes.
13 Q It -- it comes -- it's describing an incident in the
14 bottom-half of that page on September 6th. Do you see that?
15 A Um-hum.
16 Q Can you tell us what you recall about this corrective
17 counseling?
18 A Yeah. It was the same situation as before. Adam was
19 wearing a mask that had BLM on it. We approached him, asked
20 him to speak to us at the -- in the SPL office. Asked him to
21 remove the mask, he would not, and so we went through the same
22 steps where we let him know that he would be held accountable
23 for it. He went back to the sales floor and finished his shift
24 again.
25 Q There's one -- there's a final corrective, if -- if you

1 turn another couple pages in the same exhibit, dated September
2 9, for incidents on September 7 and 8. Is there anything
3 different about the process that was involved here?
4 A Not at all. It was the same thing.
5 Q On this one -- it's administered on September 9, and --
6 and on the next -- or the last page of that particular
7 discipline, page 265, Adam's written another handwritten
8 description.
9 A Um-hum.
10 Q Did he say anything more different than -- than this
11 when -- when you all were meeting with him?
12 A No. I mean, our verbal conversation, when he wrote this,
13 did not involve any discrimination or oppression in the
14 workplace, so that was a little surprising to me, because this
15 isn't something that we talked about. He had just talked about
16 using his white privilege to advocate for Black team members in
17 terms of Black Lives Matter movement or to as what he
18 understood it to be. But not in the workplace. So that was a
19 little different than what he actually had verbalized to me.
20 Q When you'd had the verbal discussions with him at the
21 time?
22 A Yeah. Yeah.
23 Q All right. If you turn to the final -- or the next page
24 in the Exhibit. It's dated September 13. Do you recognize
25 this document?

1 A Yes.
2 Q What is it?
3 A It's his separation form.
4 Q Are you the one who communicated Adam's separation to him?
5 A Yes.
6 Q And how did that communication happen? What's the
7 protocol?
8 A When he received the final -- or yeah, on 9/9, after that,
9 when he continued to wear the mask, and then wore it the
10 previous day, he was suspended on the 10th, and then we had
11 to -- similar to our -- our regular process we always do, any
12 time we're going to separate somebody, we follow up with team
13 member services so that they can look over all of our documents
14 and okay it, essentially give their support in moving forward
15 with the separation.
16 So that's what we did, we suspended him. And then once we
17 got the okay from team member services to move forward with
18 separation, I called him on the phone, notified him that we
19 would be separating him. It was a very quick conversation; I
20 do remember that. He just said, okay, and we ended there.
21 Q And you can put that exhibit away. Thank you. All right.
22 We talked about the Charging Parties, Michno and Belen. I want
23 to speak to you now about some of the African-American team
24 members at the -- at the store. Do you know a team member at
25 the time named -- I may not get this right -- [Ra-netta] --

1 Ranita?
2 A Ranita, yes.
3 Q Do you know what Ranita's last name is?
4 A I think it's Pagianna.
5 Q Do you have any idea how to spell that one?
6 A No.
7 Q Okay. Pa -- Pagianna?
8 A Yeah it was, like --
9 Q Okay.
10 A -- P-A-G-I-A-N-N-A, if I remember right, but I could be
11 wrong.
12 Q Okay. And was she an African-American female?
13 A She was half African-American and half some sort of
14 Latino. She spoke Spanish, I remember that.
15 Q Okay.
16 A I think Puerto-Rican, something like that.
17 Q What was her position in summer of 2020?
18 A She was the grocery team trainer.
19 Q Do you recall if she applied for any sort of promotion in
20 2020, or any time like that?
21 A She never did.
22 Q She did not?
23 A No.
24 Q Do you recall an employee named Rachel?
25 A Yes.

1 Q Do you know who -- what Rachel's last name is?
2 A Oh, gee. I can't think of it right now.
3 Q Well, let me ask you this. What position did Rachel hold?
4 A Rachel was the grocery team leader. So she was Ranita's
5 team leader.
6 Q Grocery team leader?
7 A Yes.
8 Q Okay. So she's over the department of groceries?
9 A Yes.
10 Q Do you know where Rachel came to Whole Foods from, and how
11 long she'd been at Whole Foods?
12 A She came from Safeway. I think she had just started,
13 like, probably within six or -- yeah, I would say within six
14 months of that summer of 2020.
15 Q And was she -- and was she hired, into what position?
16 A Into grocery team leader.
17 Q Okay. When she was hired into grocery team leader, is
18 that a position that Ranita would have been applying for?
19 A No. She was just a team member at that point, so she
20 would have -- that would be, like, three steps above the
21 position she was holding.
22 Q All right. Do you recall Ranita expressing any interest
23 in some other job other than the team trainer for grocery?
24 A Yeah. She was interested in our -- our p.m. supervisor
25 position in grocery, which had become vacant around that time.

1 However, we -- with the pandemic and sales volume going down, a
2 new thing came out for Whole Foods which was our staffing
3 guidance, which essentially gave each store and each team a
4 number of team members that were allotted per position based
5 off of sales volume. And for our store, we no longer warranted
6 a p.m. supervisor or any supervisors at all within the grocery
7 team. So that position was never posted.
8 Q All right. Never -- never posted, never filled?
9 A No.
10 Q Does that mean Ranita would not have applied for it?
11 There -- nobody would have applied for it?
12 A Nobody would have applied for it; it was never posted.
13 Q You said she was interested in the position had one -- had
14 it become available?
15 A Yes.
16 Q Did she communicate that to you?
17 A Yeah. I -- I've heard her -- I had heard her speak about
18 wanting to move up. And that was from team trainer. Team
19 trainer was the step right below a supervisor role. So that
20 would have been the logical step in order for her to move
21 forward.
22 Q Do you recall there being any issue of discipline -- or
23 incident of discipline that was issued to Ranita for something
24 that might be described as attitude?
25 A Yeah. There was an incident where she had called the

1 store to call out for her shift but called out late. You have
2 to call out two hours in advance at minimum. And when she
3 spoke to Kelly and Kelly notified her that she was not within
4 that time frame , and that she would be held accountable for
5 not meeting that time frame , she was really upset and she --
6 she yelled at Kelly on the phone.
7 MR. PETERSON: Objection, is -- is this something -- this
8 sounds like hearsay. How does this witness know this?
9 Q BY MR. FERRELL: How -- how do you know she --
10 A That's what she was given the corrective for.
11 Q The corrective action was for -- for yelling at --
12 A Yeah.
13 Q -- a store team leader?
14 A Yes.
15 Q On the phone?
16 A Yes.
17 Q And did you see the corrective action form?
18 A I mean I -- I -- I can't say for certain?
19 Q That's what you understand from Ms. Fox, why she was being
20 given a corrective --
21 A Ye.
22 Q -- was for yelling at her on the phone?
23 A Yes.
24 Q And the issue was over not wanting the time and attendance
25 for --

1 A Not calling off in time.
2 Q -- calling off late?
3 A Yes.
4 Q Do you know a team member -- a team member at the store at
5 the time named Mamadou?
6 A Yes.
7 Q Do you know Mamadou's last name?
8 A Gueye.
9 Q Gay, G-A-Y?
10 A It's G-U-E-Y-E.
11 Q Okay. What is Mamadou Gueye's position?
12 A Produce team member.
13 Q Are you aware of any -- in the summer of 2020, the time
14 frame, any time and attendance discipline issued to Mamadou
15 Gueye?
16 A No. Mamadou, to my knowledge, has never had a time and
17 attendance problem.
18 Q Do you know a team member named Ishak -- Ishak, that's all
19 I got.
20 A Yes.
21 Q Do you know Ishak's last name?
22 A Yeah, it's Haile, H-A-I-L-E.
23 Q And what is Ishak Haile's last name (sic)?
24 A What is his position?
25 Q Yes. Sorry.

1 A He's -- he's a produce supervisor.
2 Q Do you -- are you aware of any time and attendance
3 discipline issues with -- with Ishak Haile?
4 A No. Ishak also never had a time and attendance problem.
5 Q Now, who chiefly in the first instance, administers time
6 and attendance issues at the store?
7 A Team leaders administer them, but store leadership reviews
8 all of them. So we would be aware that they were being
9 delivered.
10 Q You mentioned earlier that the specialty area, where
11 Charging Party Michno worked, did not have a team leader at
12 this time?
13 A Correct.
14 Q And that -- that is, the team leader was on leave of
15 absence, I think you said?
16 A Yes.
17 Q Would that potentially impact how stringently time and
18 attendance might be enforced especially?
19 A Absolutely. Yeah.
20 Q Okay. And how -- how so. Can you describe it?
21 A Because the ATL, Cory, he would have been doing the job of
22 multiple positions at that point and been by himself in
23 leadership. So it's not just handling the responsibilities of
24 the floor, but the admin. And quite naturally, when it gets
25 like that and you're in the middle of a pandemic, the floor

1 comes first, and the admin work comes second. And so it -- it
2 would make absolute sense that they were just not able to get
3 to time and attendance as another team would that was fully
4 staffed in leadership.
5 Q Was there also, do you recall earlier, at -- at some point
6 at the start of the pandemic, when time and attendance was --
7 enforcement or accountability was suspended at the store?
8 A Yeah. Yeah. We suspended it.
9 Q Do you recall about when that was? When it began and when
10 it ended?
11 A I want to say it went through, like, August. Something
12 like that. Maybe mid-August.
13 Q So Jessica, besides speaking to Ms. Belen and Adam Michno
14 regarding the administration discipline for wearing -- being
15 out of dress code with the BLM messaging, did you speak to any
16 other team members who were wearing BLM about why they were
17 wearing BLM messaging?
18 A Yeah. Darleene Hernandez and -- and Bella were the two
19 that had come to me to --
20 Q Do you remember Bella's last name?
21 A It's, like --
22 Q Oh, this is the same one we talked about earlier?
23 A Yeah. It's, like, Slasenberg (phonetic throughout) or
24 something like that. I don't know, it's very long.
25 Q So and Bella Slasenberg --

1 A Yeah.
2 Q -- what -- what race did she identify as?
3 A She was white.
4 Q And you mentioned Darleene Hernandez. Latino?
5 A She was half white, half Latino.
6 Q When did you recall speaking to -- to Bella about why she
7 was wearing her BLM messaging that she was wearing?
8 A Yeah. Bella, after we started holding people accountable,
9 no longer wore the mask. So I -- just based off of that time
10 line, I would say it was probably earlier in July that we had a
11 conversation.
12 Q And what do you recall her saying about -- and would this
13 be on the -- on the sho -- on the store floor?
14 A No, she came upstairs to talk to me. Quite sim --
15 Q Upstairs being then the store team leader office?
16 A Yes, in the STL office. Quite similar to the other team
17 members that we've -- we've already discussed. It was the
18 same -- same message as in she wanted to utilize her privilege
19 to advocate for Black team and wanted to use her voice in
20 support of BLM movement.
21 Q Did she elaborate on what she understood Black Lives
22 Matter movement to be about, or no?
23 A She didn't, no.
24 Q What did you understand supporting the Black Lives Matter
25 movement to be ab -- about, or the purpose?

1 A Me personally?
2 Q Right.
3 A Social inequity. Police brutality. You know, the protest
4 of, you know, Black men and women being killed unarmed. That's
5 what I understood it.
6 Q What did you understand the Black Lives Matter movement to
7 have to do with change in employment conditions at Whole Foods?
8 A Nothing. I mean, no one had ever -- any conversation that
9 ever took place around Black Lives Matter had never been
10 brought to my attention in conjunction with Whole Foods Market.
11 MR. FERRELL: May I have just a minute, Your Honor?
12 JUDGE SOTOLONGO: Sure.
13 (Counsel confer)
14 JUDGE SOTOLONGO: Let's take a break. Go off the record.
15 (Off the record at 4:37 p.m.)
16 MR. FERRELL: Thank you, Your Honor. Just a few more
17 questions.
18 Q BY MR. FERRELL: Jessica, do you know a team leader at the
19 store named Darnelle Sledge (phonetic throughout)?
20 A Yes.
21 Q Can you tell us who Darnelle Sledge is?
22 A He at the time was a prepared foods team leader.
23 Q Do you remember at some point in -- in June of 2020, if
24 Darnelle was asked to remove a Black Lives Matter sign from his
25 desk?

1 A Yeah. Tanda had thought she saw it above his desk, and
2 she asked Kelly what we should do. Kelly told her that he
3 couldn't have it, so she went and asked him to take it down.
4 He took it down, he put it in his backpack. There was never a
5 further conversation after that.
6 Q Now, was there any direction at the time -- because in
7 June, you were still -- we had -- we had team members who were
8 wearing stuff on their facemask or their pins without any
9 accountability, right?
10 A Yeah.
11 Q Was there a communication at the time with respect to just
12 team leadership and cleaning up personal affects in their desk?
13 A Yes. Team --
14 Q Can you -- can you describe for us what that was?
15 A Yeah. Team member services had -- had asked that any --
16 anybody who uses a -- a Whole Foods market computer, so any
17 workspace, especially those that are shared, that we not have
18 any of our personal artifacts, like anything at all. So
19 everybody cleaned up their desks. There were no photos,
20 nothing other than work-related material that was allowed to
21 be, like, posted up on the walls and stuff.
22 Q And this is for the team leaders and store leadership?
23 A Yeah.
24 MR. FERRELL: No further questions.
25 JUDGE SOTOLONGO: All right. Mr. Peterson?

1 MR. PETERSON: Thank you, Your Honor.
2 Good afternoon, Ms. Rodriguez.
3 THE WITNESS: Thank you.
4 MR. PETERSON: I'm Matt Peterson, the lawyer for the NLRB.
5 I just have some questions -- not very many -- about your
6 testimony.
7 **CROSS-EXAMINATION**
8 Q BY MR. PETERSON: The one is the -- Kelly -- when did
9 Kelly start working at the store? Kelly Fox?
10 A I believe it was around March or April of 2019.
11 Q 2019?
12 A Yeah.
13 Q And so it's your understanding that store team leaders
14 have the ability to modify the national and regional dress
15 code?
16 A At that point, yes, because it wasn't -- there wasn't a --
17 a hard line, I guess, set across the region.
18 Q And when did that change?
19 A Around this time, 2020.
20 Q And was that -- is that the change that you described, as
21 far as regional management --
22 A Yeah.
23 Q -- changing its policy?
24 A Yeah.
25 Q And it was your understanding, that was in relation to the

1 Black Lives Matter masks that were being worn around the days?
2 A Yeah, it -- it was all around the same time. So I mean,
3 it was never, like, exclusively said, but I would assume.
4 Q The -- the sports -- do you follow sports yourself?
5 A Yeah.
6 Q Like, you know, there's a lot of baseball games --
7 A Right.
8 Q -- like, I mean, tons of baseball games.
9 A Yeah.
10 Q I guess I'm imagining that they -- they were pretty --
11 that strict about this towards -- because it's almost every
12 day, at least in the summer, is a baseball game, and there's a
13 lot of basketball?
14 A Yeah. I mean, I would just assume that if somebody -- I
15 wouldn't go, like, check a schedule. I would just assume,
16 like, if they were wearing it, it was a home game.
17 Q Did people -- was there -- were employees -- were any of
18 them wearing pride-related buttons or T-shirts or slogos --
19 slogans?
20 A The only thing that I can think of is that there were
21 lanyards at the time. Not a lot -- I would say maybe two or
22 three people had them.
23 Q Were you guys very strict about, like, branding on T-
24 shirts, like, skateboard branding, or things that people could
25 see --

1 A So when Kelly came out in 2019 when she rolled out the --
2 her Berkeley version of the dress code policy, we were very
3 strict on dress code every -- like, the -- the sports teams was
4 the exception. But outside of that, like, we made sure people
5 were in dress code. Prior to that though, no, at that store,
6 people pretty much wore whatever they want.
7 Q And do you recall what -- what's your gu -- what's your
8 best recollection of when you first became aware of -- of the
9 employees wearing Black Lives Matter at your store?
10 A It was sometime in June. I mean I -- I don't -- I don't
11 remember a date. But --
12 Q And that was at a time where Kelly -- Kelly told you not
13 to take any action until TMS got back to you guys?
14 A Correct. Yeah.
15 Q And I guess you don't remember when she had made a request
16 to TM -- to TMS about the -- about the Black Lives Matter?
17 A No, I don't remember a particular date.
18 Q But --
19 A But it did take --
20 Q Oh, go ahead.
21 A -- probably, you know, 10 or more days to get an answer
22 back. I do know that there was -- it -- it felt like a long
23 time period that we waited.
24 Q And is that -- were you part of those -- I don't know if
25 they were phone conversations or email discussions?

1 A No, I was not.
2 Q So what you -- what you know, you learned from Kelly?
3 A Yes.
4 Q And the huddles, I -- I -- do you participate as an ASTL
5 in huddles?
6 A Yeah. So every morning, the ASTL that opens the store
7 will administer the -- the first huddle of the day. And then
8 team leaders usually take on their own team huddles.
9 Q Okay. So you guys don't participate in all of the team
10 huddles?
11 A No, not in all of the team huddles, no. But the a.m. and
12 the p.m. huddles we do.
13 Q When -- and the only -- you only recall one incident with
14 Ana?
15 A Yeah, that I was there for. I -- I never spoke to her
16 outside of that.
17 Q Had you seen her wearing the -- the Black Lives Matter pin
18 or mask?
19 A I had not, but the pin was very small. So like, even that
20 day, had Angel not told me, I don't know that I would have
21 noticed on my own.
22 MR. PETERSON: I'm sorry. Just a second. Permission to
23 approach, Your Honor?
24 JUDGE SOTOLONGO: You can go ahead.
25 MR. PETERSON: This is just General Counsel's 89.

1 MS. SCHAEFER: Yep.
2 MR. FERRELL: Gotcha.
3 Q BY MR. PETERSON: Directing your attention to page 3 of
4 General Counsel's 89. It's already in evidence. Is that the
5 date you recall?
6 A Yes.
7 Q And I guess, was -- what -- do you recall what type of
8 apron that Ana wore?
9 A I believe she used to wear the half ones, the ones that
10 just went around your waist. They didn't go all the way up, so
11 it was down below.
12 Q But I think you said the pin was on her apron?
13 A Yeah.
14 Q Do -- do you remember it being on --
15 A It -- no, it was not like that.
16 Q It was on her apron?
17 A That day, it was on her apron, it was down below -- below
18 the apron.
19 Q So it sounds like, yeah, you got some strange information
20 after you called Jessica Charney after letting her know.
21 When -- when did Kelly tell you -- I guess, you thought it was
22 July 15th, the same day?
23 A Yeah, it was definitely the same day. That morning is
24 when Kelly and I spoke on the phone, and then Angel had told me
25 that, you know, Belen had it on, so that's the reason why we

1 had the conversation that same day.
2 Q And what -- what was the conversation that you had with
3 Kelly on the phone?
4 A Kelly said that her -- per team member services, that the
5 direction was now to -- if a -- if a team member was wearing
6 something, to ask them to remove it. If they did not comply,
7 to send them home for the day, but to not -- there was no other
8 direction past that.
9 Q And so that's what you --
10 A Yeah.
11 Q -- you -- you did? When you spoke with Jessica Charney,
12 what -- yeah, what -- what did she say exactly?
13 A I -- I told her about what had happened with Belen, and
14 told her that I had sent her home and she had already left, and
15 she was, like, no, that's not what we're doing. So I told her,
16 well, it had already been done, because that was what Kelly had
17 communicated to me, and she apologized and said that things had
18 changed that same day, and that unfortunately, somebody dropped
19 the ball there in calling the store to notify us that that had
20 changed.
21 Q Did you follow up with Kelly about that conversation?
22 A Yeah. Yeah.
23 Q And what did Kelly say?
24 A She was frustrated, I think, like the rest of us.
25 Q With the -- the -- so I guess, are you aware -- do you --

1 as an ASTL, I -- I imagine, I mean, I guess there were two of
2 you typically, did you -- if I understand your testimony
3 correctly, did you review every -- every corrective action?
4 A Yeah.
5 Q So both, like -- both you and the other ASTL, or would you
6 guys assign one -- you know, some to the other, and --
7 A No, whoever was in the room. Like, if somebody had it in
8 the moment, like, they'd come into the office. And whichever
9 one of the three of us that was available. On more than
10 several occasions, though, like, if we're not in the middle of
11 something, we would all look at it, just to get another set of
12 eyes to make sure that we were good.
13 Q But obviously, there could be --
14 A Yeah.
15 Q -- there could be corrective actions that another ASTL
16 handled but you wouldn't have known about, or be --
17 A Well, we sent pass downs every day. So we sent a.m. and
18 p.m. pass downs, which included any correctives that we signed
19 off on, any schedules that we approved, just to notify the
20 other person of what was going on.
21 Q Were those, like, actually copies of the -- the write ups,
22 or --
23 A It would never be copies of the write up. The pass down
24 was just our notes of what happened for the day.
25 Q And do you read all those every -- every day religiously?

1 A Yeah. Yeah. Because otherwise you would -- yeah, you
2 would -- you wouldn't know what was happening in the store.
3 Q You mentioned that Maddy was suspended?
4 A Yes.
5 Q How was that -- do you -- were you -- did you communicate
6 that to him?
7 A Yeah.
8 Q Where were you when you communicated that to him?
9 A So same as all of the other days. If he had the -- the
10 mask on, then we would ask him to come to the ASTL office. We
11 had the conversation in the ASTL office. You know, he was
12 wearing it again after the final had been administered. So at
13 that point, we said okay, I'm going to ask you to remove it.
14 He refused, so then we let him know we'd have to suspend him
15 for the day.
16 And that we would let him -- we would notify him of what
17 the steps were, moving forward.
18 Q Did you put that in writing at all?
19 A Suspensions are not put in writing, no.
20 Q They're not put in writing?
21 A No, they're just typically given verbally.
22 Q And then you said you spoke -- you spoke with him by phone
23 and told him about the separation?
24 A Yes.
25 Q Did you tell him to come in?

1 A Yeah. We had him come in to sign the separation
2 documents.
3 Q And I noted, like, some of the -- some -- some of the
4 documents in some of Michno's write ups and even his separation
5 forms, you -- you didn't sign all of those, even though you
6 were present? Is that -- is that right, or do you want to look
7 at them, or --
8 A Yeah. I know that I signed -- so the -- the first one,
9 page 2, that's my signature.
10 Q Yep.
11 A Page 4 is not mine. I was not present for it. Page 6 was
12 my signature. And page 8 I didn't sign, but I was there.
13 Q Yeah, that's what I -- I guess that's what I was curious
14 about.
15 A Yeah.
16 JUDGE SOTOLONGO: So for purposes of clarity, which
17 exhibit are you referring to? The number of the exhibits.
18 MR. PETERSON: General Counsel's 100.
19 JUDGE SOTOLONGO: Okay.
20 MR. FERRELL: Oh, if -- if we could just have the witness
21 look at the last -- look at the separation form. It's page 9
22 of 10, General Counsel's 100. That's where it's got the
23 signatures.
24 THE WITNESS: Um-hum. That is also my signature.
25 MR. FERRELL: Sorry.

1 MR. PETERSON: Thank you.
2 Q BY MR. PETERSON: Did you -- you mentioned Darleene
3 Hender -- Hernandez, I believe --
4 A Yes.
5 Q -- believe? What -- you -- you saw her wearing a Black
6 Lives Matter --
7 A Yeah. At the beginning. So I would say, you know, June,
8 early July, she would wear a Black Lives Matter, BLM mask. But
9 she -- once the dress code policy was enforced and everything
10 was communicated that there would be accountability if they
11 were not in compliance, she stopped. So there was never any
12 accountability for her.
13 Q Do you recall her communicating for any reasons why she
14 wanted to wear the Black Lives Matter?
15 A Yeah. Again, similar to all of the other team members
16 that we've already discussed. It -- it was the same, wanting
17 to be an advocate for, I guess, just black people in general.
18 Black team members, around racial inequalities.
19 Q Do you recall her saying she wanted to -- part of the
20 Black Lives Matter was to -- to make sure that they could work
21 in a space that's welcoming and supportive of black team
22 members?
23 A She never said that to me.
24 Q Did you get an email from Darleene?
25 A Yeah. Well, it wasn't to me. I believe I was just cc'd

1 on that.
2 Q You're part of the NCBRK store leadership?
3 A Yeah. Yeah.
4 (Counsel confer)
5 MR. PETERSON: May I approach, Your Honor?
6 (Counsel confer)
7 Q BY MR. PETERSON: Do you recognize that --
8 A Yes.
9 Q -- that communi -- what is this?
10 A An email that Darleene had sent to Chris Ross, who's our
11 executive leader, and our point for the Telegraph location at
12 that time.
13 Q And you're -- you were copied as part of NCBRKs store
14 leadership?
15 A Yes. Um-hum.
16 Q Is this the email that you were testifying about that --
17 that -- that I had asked you about?
18 A Yes.
19 MR. PETERSON: Move for the admission of General Counsel's
20 101. And I guess I should say, it looks like they're --
21 they're --
22 MR. FERRELL: They're identical.
23 MR. PETERSON: They look to be identical, so --
24 MR. FERRELL: No objection.
25 MR. PETERSON: -- remove -- remove the second page.

1 MS. SCHAEFER: They're different dates.
2 MR. FERRELL: Oh, they're different dates.
3 MS. SCHAEFER: They're different dates.
4 MR. PETERSON: Oh.
5 MR. FERRELL: The substance is the same.
6 MR. PETERSON: Okay.
7 MR. FERRELL: But they're about a month apart.
8 MR. PETERSON: Okay.
9 MR. FERRELL: No, they're three weeks apart.
10 JUDGE SOTOLONGO: General Counsel's 101 is admitted.
11 **(General Counsel Exhibit Number 101 Received into Evidence)**
12 Q BY MR. PETERSON: And was this, I guess, August 27th and
13 September 18th -- I guess by August 27th, that -- to your
14 knowledge, Darleene stopped wearing the -- the Black Lives
15 Matter?
16 A Yeah. Yeah.
17 Q And then lastly, the -- the -- the incident with Darnelle
18 Sledge.
19 A Yeah.
20 Q Were -- did you -- how -- how did you know what transpired
21 with regard to that?
22 A I -- I was sitting in the office. Tanda's the one that
23 actually saw it, so she's the one that reached out to Kelly
24 about direction. So I didn't participate in the conversation,
25 but I was, you know, 20 feet away from them.

1 Q So you -- you -- you overheard the conversation?
2 A Yeah. Yeah.
3 Q Do you remember if this was before or after you first
4 observed employees wearing Black Lives Matter at work, if you
5 recall?
6 A I don't recall. I just, I -- I'm not certain on the time
7 line, so I don't want to misspeak.
8 Q Okay. And my last question is mainly out of curiosity.
9 But the -- the discipline -- the Michno discipline for the
10 expired product --
11 A Um-hum.
12 Q -- one of them mentions Quark. What's Quark?
13 A It's just a type of cheese. It was, like, from -- fromage
14 blanc, or something like that. It's just the -- the name of
15 the actual cheese itself.
16 Q Okay. Yeah. I was just curious about it. Nothing
17 further.
18 THE COURT REPORTER: Can you spell that for us?
19 MR. PETERSON: Quark?
20 THE COURT REPORTER: Q-U-A-R-K?
21 THE WITNESS: Yeah.
22 MR. PETERSON: Q-U-A-R-K.
23 THE WITNESS: Yeah.
24 JUDGE SOTOLONGO: All right. Any further questions?
25 MR. FERRELL: Just a couple.

1 JUDGE SOTOLONGO: Okay.
2 MR. FERRELL: I'd like to show the witness General Counsel's --
3 next to it -- General Counsel's 3.
4 (Counsel confer)
5 MR. FERRELL: Permission to approach, Your Honor?
6 JUDGE SOTOLONGO: All right.
7 MR. PETERSON: And -- and -- I guess re -- this seems to
8 exceed the scope of cross?
9 MR. FERRELL: Oh no, you -- you -- you asked about -- it's
10 the deal with the dress code.
11 MR. PETERSON: Oh, fair enough.
12 **REDIRECT EXAMINATION**
13 Q BY MR. FERRELL: If you're looking at the excerpt you have
14 at General Counsel's 3, the first page is Bates number WFM --
15 what's the page number?
16 A It's on the -- you're talking about the actual page
17 number?
18 Q Lower right-hand corner. Lower right-hand corner has
19 WFM --
20 A Oh, this?
21 Q Yep.
22 A 87?
23 Q 87?
24 A Um-hum.
25 Q And the next page is 88.

1 A Um-hum.
2 Q And if you're looking at the front page of that document,
3 what's it called?
4 A General Information Guide, Northern California Region,
5 revised May 2020.
6 Q Okay. If you look at the first page in, page 88 -- WFM
7 Bate stamped 88, what's that document?
8 A This is life at work, our dress code policy.
9 Q Is this the regional dress code for northern California?
10 A Yes.
11 Q And there's one sentence there that's -- that's
12 highlighted, I think in the first paragraph there. Can you
13 read that sentence, please?
14 A "Each region or store facility leadership group has the
15 prerogative to set standards stricter than the minimum
16 guidelines established by the company."
17 Q And this is from the -- the dress code that was in place
18 at the -- the regional dress code that was in place at the
19 time?
20 A Yes.
21 Q Okay.
22 (Counsel confer)
23 MR. FERRELL: All right. Let me just get one more second,
24 for --
25 THE COURT REPORTER: Just for the record --

1 MR. FERRELL: From GC's exhibit -- from GC Exhibit 3,
2 that's pages 50 -- 51, and 52 of 158, just for the record.
3 Bear with me one second, Your Honor.
4 Q BY MR. FERRELL: If I could also just ask you to -- to
5 read the first sentence of the next paragraph under the dress
6 code for the region.
7 A The final determination, that one? "The final
8 determination on the acceptability of your personal appearance
9 at work is up to the leadership of your store facility. Please
10 understand that if your store facility team leader asks you to
11 tone down your wardrobe or appearance, they aren't being
12 arbitrary or unreasonable. They are simply trying to create
13 the most pleasant and safe atmosphere possible for our
14 customers and team members."
15 Q The -- the sports teams exception that Kelly Fox
16 implemented at the Telegraph, Berkeley store, do they extend to
17 any sports teams, or just the local sports teams?
18 A Just the local sports teams.
19 Q Local meaning Bay area?
20 A Yes.
21 MR. FERRELL: No further questions, Your Honor.
22 JUDGE SOTOLONGO: Mr. Peterson?
23 **RECROSS-EXAMINATION**
24 Q BY MR. PETERSON: Yeah. I guess just based on -- on that,
25 did you understand the -- the -- Kelly's allowance of the

1 sports -- the sports team logo to be stricter than the
2 minimum -- minimum policies?
3 A No, but that was prior to the -- it was implemented in
4 2019. This came out later, 2020.
5 Q Was it different -- was the GIG different before that?
6 A Yeah. Yeah, it didn't -- that sentence was not a part of
7 it. It was not.
8 MR. PETERSON: Nothing further.
9 MR. FERRELL: Nothing further.
10 JUDGE SOTOLONGO: All right. Thank you very much for your
11 testimony. You -- Ms. -- Ms. Rodriguez, you're -- you're
12 excused. Please do not discuss your testimony with any other
13 witness or potential witness in this matter until this whole
14 case is over, all right?
15 THE WITNESS: Got it, thank you.
16 JUDGE SOTOLONGO: Thank you very much.
17 THE WITNESS: I appreciate it.
18 MR. FERRELL: Thank you.
19 MR. PETERSON: Thank you.
20 JUDGE SOTOLONGO: All right. Okay. Let's -- let's go off
21 the record.
22 (Off the record at 5:04 p.m.)
23 JUDGE SOTOLONGO: All right. We will resume tomorrow at 9
24 a.m. The Respondent has informed me they're going to call the
25 first -- the expert witness tomorrow morning, and then we'll

1 have a schedule. And the best estimate is that we should be
2 wrapping up his testimony by the end of the day. And that
3 should complete our proceeding this week, and then we'll have
4 one more witness next week. It will be next Tuesday; is that
5 correct?
6 MR. FERRELL: It is, Your Honor.
7 JUDGE SOTOLONGO: All right. All right. Let's go off the
8 record. Thank you.
9 MR. FERRELL: Thank you.
10 **(Whereupon, the hearing in the above-entitled matter was**
11 **recessed at 5:06 p.m. until Thursday, August 11, 2022 at 9:00**
12 **a.m.)**
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1 **C E R T I F I C A T I O N**

2 This is to certify that the attached proceedings before the
3 National Labor Relations Board (NLRB), Region 20, Case Number
4 01-CA-263079, 01-CA-263108, 01-CA-264917, 01-CA-265183, 01-CA-
5 266440, 01-CA-273840, 04-CA-262738, 04-CA-263142, 04-CA-264240,
6 04-CA-264841, 05-CA-264906, 05-CA-266403, 10-CA-264875, 19-CA-
7 263263, 20-CA-264834, 25-CA-264904, 32-CA-263226, 32-CA-266442,
8 Whole Foods Market Services, Inc. and Savannah Lynn Kinzer,
9 Suverino Frith, Leea Mary Kelly, Ana Belen Del Rio Ramirez,
10 Camille Tucker-Tolbert, Truman Read, Abdulai Barry, Haley
11 Ashley Evans, Cassidy Visco, Justine O'Neill, Sarita Wilson,
12 Lyla Marcella Styles, Yuri London, Christopher Michno, Kirby
13 Burt, and Kaeleb Rae Candrill, held at the National Labor
14 Relations Board, Region 20, National Labor Relations Board,
15 Region 20, Ronald V. Dellums Federal Building, 1301 Clay
16 Street, 2nd Floor, Conference Room A, B, and C, Oakland,
17 California 94612, on August 10, 2022, at 9:02 a.m. was held
18 according to the record, and that this is the original,
19 complete, and true and accurate transcript that has been
20 compared to the reporting or recording, accomplished at the
21 hearing, that the exhibit files have been checked for
22 completeness and no exhibits received in evidence or in the
23 rejected exhibit files are missing.
24 Amanda Self
AMANDA SELF
25
Official Reporter

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 20

In the Matter of:

Whole Foods Market Services, Inc.,	Case No.	01-CA-263079
		01-CA-263108
		01-CA-264917
Respondent,		01-CA-265183
		01-CA-266440
and		01-CA-273840
		04-CA-262738
Savannah Lynn Kinzer, Suverino Frith, Leea Mary Kelly, Ana Belen Del Rio Ramirez, Camille Tucker-Tolbert, Truman Read, Abdulai Barry, Haley Ashley Evans, Cassidy Visco, Justine O'Neill, Sarita Wilson, Lyla Marcella Styles, Yuri London, Christopher Michno, Kirby Burt, and Kaeleb Rae Candrill, As Individuals,		04-CA-263142
		04-CA-264240
		04-CA-264841
		05-CA-264906
		05-CA-266403
		10-CA-264875
		19-CA-263263
		20-CA-264834
		25-CA-264904
		32-CA-263226
		32-CA-266442

Charging Parties.

Place: Oakland, California

Dates: August 11, 2022

Pages: 3357 through 3567

Volume: 19

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Phoenix, AZ 85020
(602) 263-0885

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

In the Matter of:		
WHOLE FOODS MARKET SERVICES, INC.,	Case No.	01-CA-263079
		01-CA-263108
		01-CA-264917
RESPONDENT,		01-CA-265183
		01-CA-266440
and		01-CA-273840
		04-CA-262738
SAVANNAH LYNN KINZER, SUVERINO FRITH, LEEA MARY KELLY, ANA BELEN DEL RIO RAMIREZ, CAMILLE TUCKER-TOLBERT, TRUMAN READ, ABDULAI BARRY, HALEY ASHLEY EVANS, CASSIDY VISCO, JUSTINE O'NEILL, SARITA WILSON, LYLA MARCELLA STYLES, YURI LONDON, CHRISTOPHER MICHNO, KIRBY BURT, AND KAELEB RAE CANDRILL, AS INDIVIDUALS,		04-CA-263142
		04-CA-264240
		04-CA-264841
		05-CA-264906
		05-CA-266403
		10-CA-264875
		19-CA-263263
		20-CA-264834
		25-CA-264904
		32-CA-263226
		32-CA-266442
CHARGING PARTIES.		

The above-entitled matter came on for hearing, pursuant to notice, before **ARIEL SOTOLONGO**, Administrative Law Judge, at the 1301 Clay Street, Oakland, California 94612, on **Thursday, August 11, 2022, 9:02 a.m.**

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1 **I N D E X**

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3 WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
4 Donald Davison	3368	3513	3552	3556	3382
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1 **E X H I B I T S**

2

3 EXHIBIT	IDENTIFIED	IN EVIDENCE
4 **Respondent:**		
5 R-99	3362	3367
6 R-100	3371	3378
7 R-101	3404	3412
8 R-102	3414	3421
9 R-103	3426	3436
10 R-104	3437	3442
11 R-105	3448	3455
12 R-106	3455	3464
13 R-107	3465	3467
14 R-108	3467	3469
15 R-109	3469	3474
16 R-110	3477	3478
17 R-111	3482	3484
18 R-112	3484	3486
19 R-113	3487	3488
20 R-114	3491	3499
21 R-115	3499	3500
22 R-116	3505	3509
23 **General Counsel:**		
24 GC-102	3515	3520
25 GC-103	3514	3535

1 **P R O C E E D I N G S**

2 JUDGE SOTOLONGO: Good morning. This is Judge Sotolongo.
3 We are now resuming. We're now Thursday, August 11th. And we
4 are resuming our proceeding of Whole Foods Market.
5 Before we start testimony this morning, I -- I believe
6 there was something that the party wanted to discuss on the
7 record?
8 MS. SCHAEFER: Yes, Your Honor. I am going to give you
9 what we've marked as Respondent's 99. There we go. General
10 Counsel has a copy as well, though electronically.
11 JUDGE SOTOLONGO: Okay, so -- this is a --
12 MS. SCHAEFER: So --
13 JUDGE SOTOLONGO: This is a FOIA request that -- that was
14 submitted to the General Counsel; is that correct?
15 MS. SCHAEFER: Yes. Well, so it was -- the FOIA request
16 made to the Board, but yes.
17 JUDGE SOTOLONGO: To the Board, excuse me.
18 MS. SCHAEFER: Yes.
19 JUDGE SOTOLONGO: Right.
20 MS. SCHAEFER: So this is a -- we -- we submitted a -- we
21 submitted a motion to dismiss. And attached during the
22 pendency of that motion to dismiss we submitted a FOIA request.
23 And at was -- the FOIA request was responded to after we filed
24 the motion. What this FOIA document contains is the compliance
25 documents in the FOIA -- I'm sorry, in the Board's files

1 related to the 2013 case and settlement condition.
2 JUDGE SOTOLONGO: That was the one that was settled?
3 MS. SCHAEFER: Correct. So it -- just to walk you through
4 the documents we provided, the FOIA office provided us over a
5 thousand pages of documents, most of which were the
6 certifications that the store signed certifying postings. So
7 each Whole Food store had to sign a posting. So the first
8 document is just --
9 JUDGE SOTOLONGO: Was -- was this a nationwide posting,
10 or?
11 MS. SCHAEFER: Yes.
12 JUDGE SOTOLONGO: Okay.
13 MS. SCHAEFER: Yes, Your Honor.
14 JUDGE SOTOLONGO: Okay.
15 MS. SCHAEFER: So the first page is just the page
16 certifying that these documents came from FOIA. As they came
17 from FOIA, they are now available publicly on the public-FOIA
18 website. The second page -- or the second, sort of, document
19 is the settlement agreement from 2013. Then, there are two
20 notices. So one notice is from the 2013 settlement agreement.
21 There was one matter that was held open for litigation. So
22 there is a second settlement -- or there's a second notice
23 posting that was the result of that subsequent litigation. But
24 that issue was related to a discreet outstanding issue in the
25 dress -- or in the handbook related to recording. I don't know

1 if you remember that case.

2 So then, we also selected for you just a couple, a

3 sampling of the notice of the certifications of compliance of

4 notice from stores at issue in this case to the extent we can

5 notice some. You'll see South Street (phonetic throughout) in

6 there. You'll see Petaluma in there. And then, the final

7 document that we didn't have but we filed the motion is the

8 closing letter signed by Regional Director Paul Murphy in 2019

9 certifying that Whole Foods complied with its obligations in

10 closing the matter.

11 JUDGE SOTOLONGO: And what region was this that the

12 Regional Director Murphy was?

13 MS. SCHAEFER: Regional Director Murphy was Region 1.

14 JUDGE SOTOLONGO: Correct. Okay. Very good.

15 MS. SCHAEFER: Which is actually where this case's lead

16 case is, despite this potentially being out of San Francisco.

17 So this is -- we'd offer this in support of our motion to

18 dismiss and to potentially to be the issue of the 2020 dress

19 code, which is the same as the 2013 dress code, is precluded.

20 The settlement agreement has never been satisfied. And that

21 therefore, we ask you that you dismiss that --

22 JUDGE SOTOLONGO: And this --

23 MS. SCHAEFER: -- portion of the complaint.

24 JUDGE SOTOLONGO: And I recall, this -- this goes through

25 your argument that the language in -- in the, I guess, in the

1 GIG, or the what's approved by the General Counsel pursuant to
2 the settlement, and that therefore General Counsel should be
3 precluded at this point from litigating the issue in as much
4 that language is approved; is that -- is that correct? Is that
5 a -- did I understand the -- the gist of your argument?
6 MS. SCHAEFER: That's correct.
7 JUDGE SOTOLONGO: Okay.
8 MS. SCHAEFER: So we'd move for the admission of this
9 exhibit.
10 JUDGE SOTOLONGO: So you're -- you're going to mark this
11 as Respondent's Exhibit 99, correct?
12 MS. SCHAEFER: That's correct.
13 JUDGE SOTOLONGO: All right. Any objections to the
14 receipt of Respondent's 99?
15 MR. PETERSON: Yes, Your Honor. As pointed out both in
16 the brief and in earlier argument of the motion to dismiss, the
17 language approved in the settlement agreement differs from the
18 language in the GIG at issue. General Counsel had
19 subpoenaed -- it's based on its anticipation of the Respondent
20 using this as an affirmative defense, subpoenaed all -- all
21 versions of the GIG and the dress code from -- from 2013
22 forward in order to see when the language changed from that
23 approved by the settlement. And Your Honor, exclude -- Your
24 Honor, quash that portion of the subpoena on the grounds that
25 it wasn't -- it wasn't relevant.

1 And the language does -- so the settlement agreement shows
2 the Employer's previous dress code language. It said, it
3 stated, "No message, slog -- slogan, advertising, or logo
4 clothing or hats may be worn, except those advertising the
5 Employer or Employer's affiliated entit -- entities".
6 Region -- the Region -- Region -- there's a Regional
7 determination that this was un -- unlawfully overbroad in the
8 settlements, as -- as the settlement states that you must wear
9 shirts or tops without any visible slogan, message, logo, or
10 advertising printed on them. And then at some point the
11 current GIG removed the word printed, so now it just says on,
12 so "no message, slogans, or anything on". So that is a -- they
13 are -- they are the same. And this is therefore irrelevant.
14 JUDGE SOTOLONGO: All right. Well, I'm going to admit it,
15 because I -- I need to -- to basically read this and take this
16 matter into consideration. Now, I don't recall that I quashed
17 the subpoena on relevant grounds. So I think I -- as I recall,
18 I -- I -- I quashed it on -- on -- on the fact that it was
19 the -- the Board and the General Counsel which have -- which
20 was privy to -- to the FOIA. And that it would -- I believe
21 that it was premature at that point. In any event, if I want
22 to consider this issue, because this is after all is an
23 affirmative offense by -- by the Respondent, no, I have to have
24 the language. And the document's relevant to -- to -- to that
25 argument before me. And I can't -- I will not have those if

1 I -- if I refuse to admit this.

2 In other words, you're asking me to make a ruling right

3 now that it's -- and I'm not ready to do that. I have to

4 review this -- this issue. In order for me to review this

5 issue, I need to look at all the relevant -- the documents and

6 relevant evidence. So I will admit it for that purpose.

7 **(Respondent Exhibit Number 99 Received into Evidence)**

8 JUDGE SOTOLONGO: All right. Thank you.

9 MS. SCHAEFER: Thank you.

10 JUDGE SOTOLONGO: Okay. Go -- go head. Get your -- let's

11 go off the record for a second while Respondent gets situated.

12 (Off the record at 9:09 a.m.)

13 JUDGE SOTOLONGO: All right, Mr. DeLorme? I'll go

14 ahead -- Carter DeLorme has rejoined us. He's going to be

15 lead counsel for Respondent this morning.

16 Mr. DeLorme, are you ready to call your next witness?

17 MR. DELORME: We are, Your Honor. The Respondent calls

18 Dr. Donald Davison.

19 JUDGE SOTOLONGO: Dr. Davison, could you please raise your

20 right hand?

21 Whereupon,

22 **DR. DONALD DAVISON**

23 having been duly sworn, was called as a witness herein and was

24 examined and testified as follows:

25 JUDGE SOTOLONGO: Thank you. Dr. Davison, could you

1 please tell your name for us and give us your address, your
2 business address will suffice.
3 THE WITNESS: Okay. Excuse me. Donald Davison,
4 D-A-V-I-S-O-N. And my address is Department of Political
5 Science for Rollins College, R-O-L-L-I-N-S, Winter Park,
6 Florida, 32789.
7 JUDGE SOTOLONGO: All right. Thank you very much.
8 Please proceed, Mr. DeLorme.
9 MR. DELORME: Thank you, Your Honor.
10 **DIRECT EXAMINATION**
11 Q BY MR. DELORME: Good morning, Dr. Davison.
12 A Good morning.
13 Q Dr. Davison, what is your profession?
14 A I am a professor of political science.
15 Q And before we get into your professional career, where did
16 you attend college?
17 A I attended undergraduate school at Saint Louis University.
18 I received my bachelor's in political science. I then went to
19 the University of Notre Dame. And I have a master's degree --
20 actually, I was at the PhD level, but I -- my interest changed,
21 I have a master's degree in international relations, from the
22 University of Notre Dame. And then, from the University of
23 Notre Dame, I have a master's, another master's degree and PhD
24 from Washington University in St. Louis.
25 Q In any of those education environments, did you receive an

1 award associated with your degree?
2 A Yes. I received -- well, I graduated -- this is going
3 back, either magna cum laude or summa cum laude from Saint
4 Louis University, Phi Beta Cappa, from Saint Louis University.
5 And in Washington University in St. Louis, I was awarded -- if
6 you would include this, I was awarded teaching fellowships as
7 part of my -- you know, once you -- once I reached the PhD
8 qualification stage.
9 Q By who are you currently employed?
10 A Rollins College.
11 Q And what is your title at Rollins?
12 A Cornell distinguished faculty professor of political
13 science.
14 JUDGE SOTOLONGO: How do you spell Rollins?
15 THE WITNESS: R-O-L-L-I-N-S.
16 JUDGE SOTOLONGO: Okay.
17 THE WITNESS: It -- it's in Winter Park, Florida, which is
18 a suburb of Orlando.
19 JUDGE SOTOLONGO: Right. Thank you.
20 Q BY MR. DELORME: Dr. Davison, did you teach anywhere prior
21 to Rollins College?
22 A I did. I taught for four years at the University of
23 Central Florida. University of Central Florida is part of the
24 State University System of Florida, my first four years out of
25 graduate school.

1 Q Okay. So how many years in total have you been a
2 university-level professor?
3 A 36.
4 Q Do you have any particular areas of expertise within the
5 field of political science?
6 A I do. My -- my PhD examining areas at Washington
7 University are formal theory and methodology. Formal theory
8 and methodology is a -- is actually a distinctive subfield.
9 All graduate programs actually require -- all PhD programs
10 require their students to take one or two courses in
11 quantitative analysis and methodology. Washington University
12 is -- is very distinct. Washington University's program is
13 very distinctive in that formal theory and methodology is
14 actually a separate specialization. So actually, I had like
15 seven or eight graduate-level courses in that field. Just sort
16 of like real quickly what that means is, you know, well, what
17 is -- what's formal theory in methodology? It's a -- it's a
18 sum field where we are focused on you developing and using
19 mathematical and statistical models to describe and explain
20 political behavior. The other areas are American politics,
21 specializing in political behavior. And my third area is
22 public policy and political economy.
23 MR. DELORME: Your Honor, may I approach?
24 JUDGE SOTOLONGO: Yes.
25 Q BY MR. DELORME: Dr. Davison, I'm handing you what's been

1 marked as Respondent's Exhibit 100. Do you recognize this
2 document?
3 A Yes.
4 Q Can you tell us what it is?
5 A This is my updated DiDa cur -- curriculum DiDa,
6 abbreviated. I only go back -- I don't list absolutely
7 everything. But this is sort of a summary of my professional
8 activities.
9 Q And is this the most updated version of your CV?
10 A Yes.
11 Q I want to point you to the scholarship section, which is
12 at the bottom of page 1.
13 A Yes.
14 Q And --
15 JUDGE SOTOLONGO: I'm sorry. Sorry. This -- you're
16 marking this as Respondent's 100, correct?
17 MR. DELORME: Yes.
18 JUDGE SOTOLONGO: All right. Please proceed.
19 Q BY MR. DELORME: There's a section where you have
20 "Scholarship", and then below that, "Publications: Refereed
21 Journals". Do you see that?
22 A Yes.
23 Q Can you explain to the Court what refereed journals mean?
24 A Yes. In academia, you have to, of course, you know, just
25 part of professional development and part of the expectation

1 and part of what we enjoy doing is conducting scholar -- is
2 conducting research and publication. A referee -- a
3 publication and a referee journal, which is usually all -- all
4 that is counted in terms of your career, are articles that are
5 submitted to a journal, professional journal, in political
6 science. And those articles are then peer reviewed, or
7 refereed. In other words, they send those articles out to
8 experts in the substantive fields to review the -- to review
9 the article. The article will either come back, or the
10 recommendation will come back with -- from the reviewers
11 published as is, revise and resubmit, or you know, simply they
12 just feel like it's -- it's not worthy yet, or it's not in a
13 state that can be published, and so it's rejected. It's
14 also -- you know, so it's a rigorous review, professional
15 review process. The peer-review process is usually requi -- or
16 peer-reviewers is usually like two to four, two to four
17 experts.
18 Part of this protocol in political science is, all of
19 our -- you -- all of our documentation -- all of our data, and
20 results, output, programs are also data files are also
21 submitted with the article for review. So the -- you know, so
22 the professional reviewers are not just simply reading the
23 article, in particularly if it's a quantitative case, which is
24 what my research is. But they also -- I'm just going to call
25 her transparency protocol, they also have the -- the original

1 data file and the programs, the program statements that the
2 researcher used, the output that we obtained and are using for
3 our -- for our research and as part of their evaluation.
4 Q And a couple of other sections within your CV you make
5 reference to a book chapter and proceedings that were also
6 refereed. Is -- did -- were those similar processes to what
7 you just described?
8 A Largely. So for instance, like a book publication -- the
9 book public -- or the -- the book chapter, for instance, is an
10 aca -- it was an academic press -- or is an academic press.
11 And so there's a difference between an academic press and a,
12 you know, sort of, commercial press. A commercial press is,
13 they'll use their -- usually, they're going to use their own
14 in-house review process. An academic press is going to largely
15 follow the same -- or a similar review process as journal
16 articles. They might rely on faculty experts at their
17 university, or they, you know, they will very -- you know, very
18 well can send it out to a couple of other people.
19 The -- also the other one that you referred to is like
20 proceedings. Also, what happens -- or one -- one of the things
21 that's typical is that you're -- some faculty are invited to
22 present papers at particular conferences. So I have had -- I
23 had been invited to present papers in conferences in Europe and
24 in Spain and Portugal. They're sponsored by -- so these were
25 international conferences, they're sponsored by specialists in

1 the field across Europe, actually across the world. And they
2 convene on a particular -- on that particular topic. And we
3 present papers and exchange ideas. Then, oftentimes what will
4 happen is the univer -- the sponsoring university will publish
5 a book of the -- that contains selected articles, the best
6 articles in their view, or the best papers that were presented
7 at the -- at the conference. They have to be revised again
8 and -- and changed. But it -- but again, it's a -- it's a
9 review -- it's a professional review process.
10 JUDGE SOTOLONGO: Let me -- if I may ask a question.
11 Going back to -- you briefly had touched upon the subject of
12 academic review, this article versus commercial --
13 THE WITNESS: Um-hum.
14 JUDGE SOTOLONGO: -- in the public's commercially. And
15 you -- you -- you stated that when you publish an -- an
16 article -- an article commercially, the publisher just uses his
17 own, it's house-review process, whereas a university
18 publication is reviewed by other experts in the field. Would
19 that be correct?
20 THE WITNESS: Yes. I mean, I don't want to say that it's
21 impossible that a commercial press would not, you know, send it
22 out to others in the field. But it's a -- there's a different
23 goal. There's, you know, there's a different ob -- there's a
24 different objective. Oftentimes it's textbooks, for instance,
25 at commercial -- you know, at commercial presses. Whereas,

1 university presses will rely on other experts in the field,
2 yes.
3 JUDGE SOTOLONGO: And that's also yes, that it is a
4 stricter or a more exacting review?
5 THE WITNESS: Yes.
6 JUDGE SOTOLONGO: Okay.
7 THE WITNESS: Yes, sir.
8 JUDGE SOTOLONGO: Okay. Please proceed.
9 MR. DELORME: Thank you, Your Honor.
10 Q BY MR. DELORME: Dr. Davison, have you ever been asked to
11 provide expert test -- or expert testimony in your career?
12 A I have. 25 or 30 years ago I was retained by the City of
13 St. Louis to evaluate a charge by -- it was right after
14 redistricting, and they wanted me to evaluate their
15 redistricting plan in terms of conformity with the -- with the
16 Voting Rights Act. I'm -- one of the areas of specialization,
17 or my scholarship is in voting rights. I was -- I prepared an
18 expert affidavit evaluating the St. Louis redistricting
19 system -- or the redistricting -- redistricting plan and
20 submitted that. The -- the case ended on behalf of the City of
21 St. Louis on summary judgment, so I never testi -- so I
22 actually never testified. But I -- I don't know how you count
23 this, but I -- but I was an expert.
24 Q I jumped ahead of myself a little bit. I want to ask you
25 about whether or not you have won any awards in connection with

1 your teaching?
2 A Yes.
3 Q Can you provide a brief summary of those? I -- I think
4 that they are listed, or some of them are listed starting on
5 page -- at the bottom of page 5. I see they --
6 A Yes. I have received a teaching award -- actually, I have
7 received several awards at -- from Rollins College, Cornell
8 Distinguished Faculty Award, which is the current title that I
9 hold of distinguished faculty professor, is sort of like --
10 sort of like a temporary endowed share. The -- I've also
11 received awards for, you know, like an Arthur Vining Davis for
12 teaching. These awards that I've received are -- it has to be
13 in two of the three fields of -- for the college awards, or the
14 university-level awards, it has -- faculty are typically
15 evaluated in three areas, teaching, scholarship, and service.
16 And to the -- to receive one of these awards, you have to
17 demonstrate excellence in two of the three. I also have had --
18 I've also received from, I guess, like the student body, okay,
19 through the student government association, their award for
20 distinguished teaching.
21 Q Dr. Davison, do you have any experience with public
22 surveys?
23 A Yes.
24 Q Can you --
25 A I work --

1 Q Can you give us, sort of, a high level at this point
2 discussion about what that experience is?
3 A Well, I'm -- my -- as I mentioned earlier, you know, one
4 of my primary areas is formal theory and methodology. So I'm
5 working with -- with surveys, developing surveys, conducting
6 research with surveys, teaching with surveys, you know, sort of
7 virtually every day of the week. So I -- and in -- in fact, I
8 with a colleague, we are starting -- we are in the process of a
9 very -- of -- launching a very large survey project as a course
10 in -- and it begins in two weeks, where we're bringing
11 students -- or teaching students how to conduct focus groups,
12 formulate questions, develop the entire survey, through to
13 the -- through to the level of an -- of level of analysis.
14 You know, my research uses, not exclusively, but a great,
15 you know, a large percentage of my research uses survey data.
16 I also have -- have been one of -- I also have been a
17 professional reviewer for peer review -- you know, for I would
18 say one of the two premier peer-review journals in methodology,
19 political behavior. So you know, so those are -- you know, to
20 be the reviewer, I'm actually then evaluating the reliability,
21 and the validity, the method, the technique, the analysis, and
22 so forth of the, you know, the research that -- that was
23 submitted.
24 MR. DELORME: Your Honor, I -- I would move for the
25 admission of Respondent's Exhibit 100.

1 JUDGE SOTOLONGO: Any objection?
2 MR. PETERSON: No.
3 JUDGE SOTOLONGO: All right. Respondent's Exhibit 100 is
4 admitted.
5 **(Respondent Exhibit Number 100 Received into Evidence)**
6 MR. DELORME: Thank you, Your Honor.
7 Q BY MR. DELORME: Dr. Davison, are there scientific methods
8 associated with conducting public surveys?
9 A Oh, absolutely. It is a very rich, technically --
10 technically rich field.
11 Q Can you describe some of the scientific methods that are
12 required to conduct a reliable public survey?
13 A I think what -- I think maybe the best way to understand
14 this is, to think about what the metrics are of about, you
15 know, that are used to evaluate what are good, you know, what
16 is a good survey, so the sampling method, the weighting, the
17 sophistication of the sampling method, the sophistication of
18 the weighting method that the researchers are using. The
19 samples, is the sample size appropriate for the research
20 question? The -- the wording of the questions, you know, all
21 of these are actually, sort of, you know, subfields -- or -- or
22 intensive areas to evaluate -- or to evaluate surveys.
23 Q Have you served as a principal investigator or co-
24 principal investigator for any public surveys?
25 A Yes. I have -- well, I mean, the one that I just con --

1 you know, that I just conducted, obviously, through these
2 proceedings. But I have -- you know, like a few years ago, I
3 was a co-PI, a co-principal investigator, with two colleagues,
4 for instance, at Ball State University. We conducted a
5 deliberative democracy assembly. Deliberative democracy
6 assemblies are where we try to measure public knowledge, the
7 public's knowledge of issues or their information level. I was
8 the -- the methodologist for the, you know, for the project.
9 I guess my most recent publication, evaluating, you know,
10 which was a couple -- two or three years ago, evaluating the
11 consequences of Shelby County, Alabama. The holder uses survey
12 data from the cooperative election studies.
13 Q Dr. Davison, how often would you say that you work in some
14 form or fashion with public surveys?
15 A Virtual -- virtually every day. I use survey data for my
16 teaching, for my research and wri -- and writing, so I am,
17 regularly, immersed in quantitative information and survey
18 data.
19 Q What were you asked to do in connection with this case?
20 A I was asked to -- to investigate, or to explore, actually
21 a very specific empirical question which is, what does the
22 public identify to be the goals of Black Lives -- of the Black
23 Lives Matter movement.
24 JUDGE SOTOLONGO: What are the public -- I -- what was
25 the --

1 THE WITNESS: What does the public identify as the goals
2 of the Black Lives Matter movement?
3 JUDGE SOTOLONGO: Go ahead.
4 MR. DELORME: Thank you, Your Honor.
5 Q BY MR. DELORME: Did -- did you create a survey seeking
6 the public's opinion regarding the goals of Black Lives Matter
7 for this case?
8 A Yes.
9 Q Without providing your opinion, did you reach an opinion
10 as to what the public believes the goals of Black Lives Matter
11 are?
12 A Based upon the results of the survey, yes.
13 Q Did this poll also ask the public's opinion on whether
14 terms and conditions of employment was the goal of Black Lives
15 Matter?
16 A Yes.
17 Q Did this poll also ask the public's opinion on whether
18 union organizing was a goal of Black Lives Matter?
19 A Yes.
20 MR. DELORME: Your Honor, the Respondent would like to
21 tender Dr. Donald Davison as an expert in the field of public
22 opinion, generally, and to opine on what the goals of Black
23 Lives Matter is objectively understood to mean by the public.
24 MR. PETERSON: May I have some voir dire, Your Honor?
25 JUDGE SOTOLONGO: Go ahead.

1 **VOIR DIRE EXAMINATION**

2 Q BY MR. PETERSON: Good morning, Mr. Davison.

3 A Good morning.

4 Q I'm Matt Peterson, the lawyer for the National Labor

5 Relations Board.

6 A Yes.

7 Q I just have some questions about your -- your experience

8 and qualification in relation to this case. What's your --

9 prior to being retained for -- to provide your opinion in this

10 case, had you ever published any works that related to Black

11 Lives Matter?

12 A No.

13 Q Had you ever taught any classes related to Black Lives

14 Matter?

15 A Can you clarify that?

16 Q Did the topic of Black Lives Matter -- has that come up in

17 your teaching in any way?

18 A In some of my courses -- well, in my courses I teach

19 theory, and the articles, you know, in the professional

20 articles that they read are theoretical -- are theoretical

21 pieces. In some of the courses the -- some of the content will

22 include, you know, it includes Black Lives Matter, as well as

23 other -- lots of other things as well. I have not taught a

24 specific course on -- I mean -- are you are asking me if I

25 was -- a particular course, I --

1 Q Yeah, I mean very generally I think you're answering.
2 A Okay.
3 Q In the course where it did come up -- how -- and can you
4 just recall the context in which it came up in your teaching?
5 A You know, it was -- you know, as I would -- you know, as
6 I -- I guess as I said before, it would be -- it -- it was
7 information, or it was references, that were imbedded in lots
8 of other information on a theoretical, you know, on -- on
9 more -- from more theoretical pieces.
10 Q Can you tell us in layman's terms what -- how --
11 A What that means?
12 Q How typically, yes. What -- how does -- how does the term
13 Black Lives Matter come up?
14 A Well, for instance, I mean, this can come up in a variety
15 of -- of a variety of different ways. One of the courses that
16 I teach, for instance, is introduction to American politics.
17 So introduction to American politics is a broad survey of the
18 founding, the Constitution, political institutions, you know,
19 political behavior, civil rights, civil liberties. So it's a
20 broad survey course. So in that course Black Lives Matter
21 would emerge in a few paragraphs in the textbook when we're
22 talking about the chapter on civil rights, along with, for
23 instance, educational opportunity, and affirmative action, and
24 Brown v. Board of Education, and so forth.
25 Q And those are --

1 A So that would be the way -- that would be a -- sort of the
2 way in which it emerges.
3 Q And is that -- those are textbook cites, I assume not that
4 you wrote yourself?
5 A Correct.
6 Q Have you done any research on Black Lives Matter prior to
7 being retained for this case?
8 A I have not.
9 Q And so is my understanding the basis of your opinion is
10 based on the survey that you conducted, that's the --
11 A Correct.
12 Q -- is that the entirety of your basis? Were you given any
13 more context in -- as far as what was happening in this case
14 other than to respond to that -- that basic question?
15 A Actually, I -- I have not been provided with very much
16 specific or particular information about the case and the
17 dynamics of the case. I know the -- you know, I was provided,
18 you know, sort of the general question that they wanted re --
19 or the specific question that they wanted researched. The
20 general context, you know, sort of like a 40,000-foot-altitude
21 context of the -- you know, I guess, of this issue, or this
22 question, but -- or these proceedings, but I have not been
23 provided with any particular information.
24 Q You haven't spoken to any of the employees involved?
25 A No.

1 Q Do you understand that there are employees involved in
2 this case?
3 A At the -- I don't know the particulars. You know, I
4 actually did not pursue the -- this kind of information.
5 JUDGE SOTOLONGO: First of all, have you -- have you
6 looked at the pleadings, for example, the complaint and the
7 answer, and so forth in this case?
8 MR. BROWN: Okay. You have to answer verbally.
9 THE WITNESS: Oh, no.
10 JUDGE SOTOLONGO: Yes. Okay.
11 THE WITNESS: Sorry.
12 Q BY MR. PETERSON: So did you -- did you have any idea that
13 there were employees involved, that this is an employment-
14 related situation?
15 A Well, from the context of the -- or the specific question
16 that I was asked to research, I -- yes, I mean that would be
17 fairly obvious.
18 Q And what -- yeah, I guess, which part of the question that
19 you were asked -- I mean, I understand the question you were
20 asked was what does the public identify to be the goals of the
21 Black Lives Matter movement?
22 A Correct.
23 Q What was the -- what gave you an indication that employ --
24 I guess you mentioned the working conditions issue?
25 A Yes. I was asked to examine what are the goals of Black

1 Lives Matter and does the public understand -- have -- or
2 associate employment-related questions or issues with the Black
3 Lives Matter movement.
4 Q So did -- did you have any idea that the employees
5 involved here were trying to -- were wearing Black Lives Matter
6 in -- in their workplace?
7 A Well, this wasn't part of my survey, but that was -- that
8 that was part of the controversy, or part of the question, or I
9 guess part of the dispute, you know, kind of general level,
10 yes.
11 Q So how -- yeah, what -- what was your knowledge, or what
12 was your understanding of -- of what the employees were doing?
13 MR. DELORME: Your Honor, I'm going to object that this is
14 beyond voir dire. We're not asking questions --
15 JUDGE SOTOLONGO: This is beyond voir dire. This is
16 turned -- this is now more akin to cross-examination, and so
17 what we're examining here is -- are Dr. Davison's credentials,
18 and his qualifications as a, you know, expert witness in
19 this -- in the field that he's being presented on, which is the
20 field of certain methodology and surveys; is that -- would that
21 be correct?
22 MR. DELORME: Correct.
23 JUDGE SOTOLONGO: Okay.
24 MR. PETERSON: Was -- I guess I'm trying to understand
25 what the survey was about since we haven't seen the survey, and

1 we don't know anything about the survey.
2 JUDGE SOTOLONGO: I -- I presume we will. And I think
3 that -- that obviously, you could do it on cross-examine all
4 you want when the time comes, Mr. Peterson, but right now
5 the -- this whole question in voir dire is basically getting
6 the -- questioning, or examining, the credentials of Dr.
7 Davison in this particular field.
8 Q BY MR. PETERSON: So you conducted a single survey on this
9 issue that we'll, I assume, hear about if you're qualified as
10 an expert?
11 A Correct.
12 Q Was that subject to peer review?
13 A Sir, I didn't produce a report or an article off of it, so
14 it would not have been sent out for peer review.
15 Q What -- what format did you use, or what platform did you
16 use to conduct the survey?
17 MR. DELORME: Objection, Your Honor. I'm going to ask him
18 a whole bunch of questions about the survey, and then Mr.
19 Peterson will be more than happy to cross-examine.
20 JUDGE SOTOLONGO: Sustained.
21 MR. PETERSON: I -- I would think that it would be more
22 appropriate to know more about the survey before he's qualified
23 to give -- give his opinion, I mean we're entitled to --
24 JUDGE SOTOLONGO: I -- I agree. I think -- I think what
25 the assignment here is the -- is credentials as a expert in the

1 field of survey and the methodology behind it. You can
2 certainly question all you want when the time comes as to the
3 specifics of how the survey was conducted, and therefore, test
4 whether, you know, it's -- you know, it's valid, or how much,
5 you know, weight it should be given. But I think that's --
6 that's the proper -- that is a proper role of cross-examination
7 and not voir dire.
8 MR. PETERSON: Yeah, I mean the expert witness context is
9 unique, but I understand your -- I understand your -- I
10 understand your ruling.
11 Q BY MR. PETERSON: The -- and so I'm just -- to understand,
12 the basis -- the entire basis of your opinion is the survey
13 that you conducted, it was not subject to peer review, the
14 survey?
15 A The basis of my opinion is on the empirical results from
16 the survey.
17 Q And not from any other articles, or research, that you --
18 you've performed, or -- or done; it's all about this survey.
19 Is the -- are surveys -- is there, typically, a peer review
20 process, or some way of -- how do you -- how do you confirm the
21 reliability of a survey? How -- how -- how does your field
22 determine whether a survey is reliable or not?
23 MR. DELORME: I -- I'll object again, Your Honor. That's
24 going to be a part of his direct testimony about this
25 particular survey. And again, Mr. Peterson is free to ask all

1 of these questions once I'm done with the direct examination.
2 JUDGE SOTOLONGO: I -- I -- I agree.
3 MR. PETERSON: Well -- and I would say under Rule 7 --
4 702, before a witness can be qualified, they must demonstrate
5 that their testimony is -- can be helpful, and -- and -- and
6 relevant, and reliable, and so these questions are going to
7 the -- to the reliability. How do we determine whether this
8 survey that we haven't seen is reliable, so that's why my
9 questions are coming now before --
10 JUDGE SOTOLONGO: Well, the -- the survey is not before us
11 at this point, and so that is to be determined at a later
12 point.
13 MR. PETERSON: I'm asking, generally, about the field. Is
14 there -- is there a qualification -- is there a way to
15 determine reliability of a survey without analyzing what the
16 exact survey is since we don't have it yet, so those are my --
17 those are my current questions.
18 JUDGE SOTOLONGO: Okay. I think that's a proper question
19 for cross-examination. I think the question before me is
20 whether Dr. Davison is an expert in the field of post-survey,
21 and you know, and sample methodology and so forth, and I
22 believe he is. Whether this particular survey -- and we will
23 explore that -- will be useful or relevant in addressing the --
24 the issue that is ultimately before me, that is something that
25 we will have to determine after we find out -- get details of

1 the survey, and he already had testified that surveys, or I
2 guess, this was not something that was published, it's not
3 subject to peer review, because unless an article is
4 published -- peer review -- as I understand it, is a process of
5 that -- that is -- that takes place before an article is
6 published. There was no publication; is that correct?
7 THE WITNESS: Right. No publication.
8 JUDGE SOTOLONGO: Saying that you were then, I guess,
9 privately for the -- for the -- for the purpose of this case;
10 is that correct? All right.
11 MR. PETERSON: So my questions are to that process -- the
12 survey process is that, I mean, obviously we've heard about
13 peer review for publication, I feel -- I think I should be
14 entitled to ask if -- what the survey's methodology based on
15 his expertise and experience is, if there is a methodology
16 for -- for reviewing, or determining reliability, and also
17 if -- if he, in fact, followed that methodology.
18 JUDGE SOTOLONGO: Okay. Well, you -- you can ask that.
19 MR. DELORME: Your Honor, two quick points before Mr.
20 Peterson begins.
21 JUDGE SOTOLONGO: Okay.
22 MR. DELORME: One, he keeps saying the survey -- we
23 haven't seen the survey. It was provided as part of the
24 subpoena response by Dr. Davison. Second of all, the party
25 stipulated here to not having any requirements of any expert

1 reports or anything else prior to actual testimony. And so I
2 would, once again, point out that what we are doing here is
3 determining, at this phase, is determining whether or not Dr.
4 Davison is an expert in the field of conducting public surveys,
5 and he hasn't provided an opinion yet, we haven't talked about
6 the survey yet, we're going to do so in detail with even more
7 questions that, you know, Mr. Peterson might have after we do
8 that --
9 JUDGE SOTOLONGO: Yep.
10 MR. DELORME: -- when he might be more informed.
11 MR. PETERSON: Yeah, I'm not asking -- I understand the
12 ruling on this -- it's the specifics of the survey I'm asking
13 about the survey process, generally, and people heard about his
14 teaching and publications, and how they've been subject to peer
15 review. We haven't heard about the survey that is what this
16 whole basis of this opinion is based on, and whether -- what is
17 the standard and practice in his field for -- for -- for
18 creating surveys and for determining their reliability, if they
19 are. I don't -- I don't know if they're typically subject to
20 review or not, that's what I'm asking -- that's why I'm --
21 JUDGE SOTOLONGO: Well, you've already -- you've already
22 asked and that question has been answered.
23 MR. PETERSON: Well, I think the answer was they weren't
24 published, so they weren't -- so they didn't go through that
25 publishing process. I'm -- I'm asking if -- is -- are

1 surveys -- is there a -- other -- apart from -- apart from the
2 publishing process, is there a practice in his area of study
3 to -- for some type of peer review or other way to determine a
4 survey's reliability, and if there is, did he follow that in --
5 in -- in creating this survey that he's going to testify about.
6 JUDGE SOTOLONGO: I -- I think those are proper
7 (indiscernible) for cross-examination not voir dire.
8 MR. PETERSON: All Right. Understand your ruling, Your
9 Honor.
10 JUDGE SOTOLONGO: Okay. Let's proceed.
11 MR. DELORME: Thank you, Your Honor.
12 **RESUMED DIRECT EXAMINATION**
13 Q BY MR. DELORME: Dr. Davison, did you perform research
14 into what the Black Lives Matter movement is objectively
15 understood to mean by the public, including the primary goals
16 and/or purposes the public associates with Black Lives Matter?
17 A Yes.
18 Q Okay.
19 MR. PETERSON: Just a quick objection. I -- I asked that
20 question and you said no.
21 MR. DELORME: No, you didn't.
22 MR. PETERSON: I asked if you did any research apart from
23 conducting this survey --
24 MR. DELORME: This -- that's what the research is.
25 MR. PETERSON: The survey?

1 MR. DELORME: Yes.
2 JUDGE SOTOLONGO: Okay. Okay. You know I -- I would
3 appreciate it if you don't so -- cross talk here. If you have
4 an objection, make it to me, and I'll make a ruling. I didn't
5 hear the entire question, so if you would, please, repeat it?
6 MR. DELORME: Yes, sir.
7 Q BY MR. DELORME: Did you perform research into what the
8 Black Lives Matter movement is objectively understood to mean
9 by the public, including the primary goals and/or purposes the
10 public associates with Black Lives Matter?
11 A Yes.
12 Q Did that research lead you to form an opinion as to what
13 the Black Lives Matter movement is objectively understood to
14 mean by the public?
15 A Yes. I drew conclusions based upon the empirical results.
16 Q And what is that opinion?
17 A The -- generally, there -- there's actually several --
18 several conclusions that are -- emerge from the empirical
19 results. The one is -- the first is the public sees a very,
20 very large difference between the goals of Black Lives Matter
21 being associated with, I would say racial justice, criminal
22 justice types of issues, and workplace.
23 More specifically, the overwhelming majority, or the large
24 majority of the American population, identifies criminal
25 justice issues with the Black Lives Matter movement, and a

1 minority, relatively small minority, identifies it, or connects
2 the Black Lives Matter movement to workplace issues.
3 Q Dr. Davison, how did you reach that opinion?
4 A I constructed, as I mentioned, I -- I -- I constructed a
5 survey, but I approach this as --
6 THE WITNESS: Can I have like a few minutes to explain
7 this?
8 JUDGE SOTOLONGO: Yes.
9 THE WITNESS: Okay.
10 MR. DELORME: That's why you're here.
11 THE WITNESS: I approach this as an academic research
12 project. And an academic research project follows very precise
13 steps, you know. And the first, of course, is to just simply
14 identify, see what is the state of current knowledge regarding
15 what are the goals of the Black Lives Matter movement? What
16 are -- at least what are the goals understood to be at the
17 Black Lives Matter movement and -- by the American public?
18 So I conducted a secondary research -- I mean a -- a
19 review of secondary materials, so journal articles and so
20 forth. That review of literature produced large literature on
21 Black Lives Matter, but no literature that I could find that,
22 specifically, is studying Black Lives Matter, or what the
23 public identifies to be the goals of the Black Lives Matter
24 movement.
25 I next identified and looked to see -- or I next looked at

1 what are the nature surveys, public surveys that have been
2 conducted in the United States. And so these would be American
3 National Election study, Pew, the general social -- or American
4 National Election studies conducted out of the University of
5 Michigan of the Institute for Social Research, Pew Research
6 Center, the general social survey which comes out of NORC,
7 National Opinion Research Center at the University of Chicago;
8 the Democracy Fund. They produce a -- a large report, or a
9 large survey called the American Trends. They're affiliated
10 with UCLA.
11 The cooperative election studies which is, again, these
12 are all benchmark surveys. Cooperative election studies
13 associated with Harvard, MIT, and -- and Tufts. These are, you
14 know, what would be indisputably considered to be world class,
15 world-renown surveys and research -- research firms. I found
16 no questions related to Black Lives Matter in those -- in those
17 surveys.
18 I also conducted a -- an examination of studies at the
19 International Consortium for Political and Social Research, the
20 ICPSR -- the ICPSR is the world's largest data archive; it is
21 affiliated with the University of Michigan -- to see if there
22 were any empirical studies that were, you know, that recently
23 have been submitted to the IC -- to the ICPSR. And I found,
24 again, I found no surveys related to this -- to this particular
25 question.

1 Finally, I also searched the Roper public opinion archive,
2 which is at Cornell University. The Roper archive is an
3 archive of sort of timely polls, you know, national opinion,
4 public opinion polls. They're published -- I mean, they're
5 produced by you know, like NBC News -- NBC News, Wall Street
6 Journal, Fox, Monmouth, Quinnipiac, Siena College, and so
7 forth.
8 So there were lots of questions. There were lots of
9 questions -- or many surveys. There was like 95ish surveys
10 that helped -- that included questions dealing with Black Lives
11 Matter. However, none included questions connected to the --
12 identifying what are the goals of the Black Lives Matter
13 movement or what are understood to be the goals of the Black
14 Lives Matter movement by the American public.
15 The questions that were asked were questions like, do you
16 have a favorable or an unfavorable opinion of Black Lives
17 Matter? Do you oppose -- or do you support or oppose the Black
18 Lives Matter movement? Do you see the Black Lives Matter
19 movement as helping or harming racial issues in the United
20 States? There were some questions that were -- like, for
21 instance, have you considered purchasing a gun over Black Lives
22 Matter, and -- or -- and then or over white supremacist groups?
23 So the -- these batteries of questions were, you know,
24 were along those themes, you know, I interpret those themes as
25 being, you know, by -- what the pollsters are looking at are

1 these are questions that, you know, that indicate there's sort
2 of -- like a sort of a controversial nature of what Black Lives
3 Matter elicits in the -- in the public. But again, there are
4 not -- there were no questions that were related to the
5 specific question that I was -- that I was asked. Now --
6 Q BY MR. DELORME: I believe you mentioned -- mentioned in
7 your testimony that you constructed the survey.
8 A I did.
9 Q When you say construct; what does that mean?
10 A Okay. So I construct -- indeed -- so I wrote the
11 questions relating -- relating to the examination of Black
12 Lives Matter. And some of the -- and some of the -- some of
13 the other questions are -- just a standard sort of bank of like
14 10 or 15 demographic questions that are simply included in
15 the -- by the survey organization, YouGov.
16 All right. However, I -- I think it's really important to
17 understand the -- the research design -- okay, for the -- the
18 strategy of the research design. It was very, very purposeful.
19 So I constructed, you know, what is typically referred to as a
20 multi-modal research design. So what that means is within
21 the -- within the survey, I try to -- within the survey the
22 researcher constructs multiple different ways to test, or
23 answer, the same question to see if there's more infor -- to
24 see if there's continuity, or if I'm getting the same kinds of
25 results.

1 So for instance, you know, so for the first part of the
2 survey, the very -- is an open-ended question that asks what is
3 the, you know, would you please paraphrase in a few words, what
4 you understand to be the goals of the Black Lives Matter
5 movement. Now, it's very important to understand something
6 about open-ended questions.
7 Open-ended questions are considered to be the most -- you
8 know, by researchers, are considered to be -- survey
9 researchers, to be exceptionally rich, valuable forms of
10 information. They are considered to be the most reliable, and
11 that's for several reasons. Because the -- the respondent is
12 not being prompted to give any type of answer as what might
13 happen with -- you know, what potentially could happen with
14 a -- with a closed-ended question. The respondent is given the
15 opportunity to write, in his or her own words, what they think,
16 or what they identify to be the goals of the Black Lives Matter
17 movement, or whatever the open-ended question -- whatever the
18 open-ended question would be in the survey. Okay.
19 So open-ended questions are exceptionally high-quality
20 data, exceptionally high-quality information. They provide
21 both -- I mean they provide a richness because they provide
22 both the original unfiltered views of respondents and as well
23 as, they provide a qualitative context to also understand -- or
24 to better understand the -- the other quantitative
25 results. Okay.

1 The second part of the research design that I constructed
2 was a series of -- or battery of nine closed-ended questions,
3 four questions related to racial justice/criminal justice
4 topics, two questions related to the workplace: one on
5 promoting unionization, the other question asked encouraging or
6 improving working conditions at the actual employer. And then
7 I also included three national issues: Do you support
8 educational opportunity, access -- increased access to
9 healthcare, and voting rights. These are three national issues
10 that are -- you know -- that have been in the public con -- the
11 public's consciousness for decades, so they are well aware of
12 what the -- you know -- that the public has heard of these
13 issues. It's not something that's new.
14 Now, why am I doing this? Okay. So the questions that I
15 created -- okay -- the question -- I'm in my classroom
16 mode. I'm sorry. Okay, but why am I doing this? Okay, I'm
17 doing it for a really important reason. It is because -- okay,
18 so look, there's two -- there's multiple things going on
19 here. The first is I created these atti -- I created these
20 nine questions, okay? It's on a scale from one to ten. Okay,
21 these are called attitudinal scales or Likert scale. Okay, so
22 where one means absolutely not a goal, ten means absolutely
23 primary. It's the primary goal of the organization or of the
24 Black Lives Matter movement.
25 Now, why does one do this? Because not only does the

1 scale require a little more thought and reflection from the
2 respondent -- okay, so it's -- it's a higher quality -- again,
3 it's a higher quality data, but it also shows direction as well
4 as attitudinal strength. So as you move towards one of the two
5 polls, then individuals are holding these attitudes very, very,
6 very strongly and very, very clearly. Okay?
7 Now, the second part of this. Okay, there's three
8 clusters of issues that I use. Okay? So on the one hand is
9 the criminal justice questions. On the other hand is the two
10 employment questions, and then I have three national
11 issues. All right. Now, best example I think that I can
12 use -- that I can use to maybe try to explain what I'm doing
13 here is sort of think back to college and your science
14 classes -- okay -- and you were taking a class, you know, like
15 in your biology class, and you had the control group and the
16 treatment group.
17 JUDGE SOTOLONGO: I always killed the frog.
18 THE WITNESS: Okay. Okay, well, chemistry then. Okay?
19 So you use the control rate, so in other words -- okay --
20 Pfizer -- this is what Pfizer did. Okay. Pfizer -- right --
21 you have, does this medicine work? Does the vaccine
22 work? Okay, so you create a control group, and you give it --
23 a group of individuals who agree, of course, to a saline
24 injection or something that is benign, totally benign. Then
25 you inject somebody, you know, then the treatment group are the

1 individuals who use the -- you know, who receive the vaccine.
2 All right. And then you compare outcomes or the incidence of
3 disease, right?
4 So in other words, that's what I'm doing with the national
5 issues. If everybody -- since everybody is aware of national
6 issues -- of these three national issues, if respondents also
7 provide scaled responses that are located similar to the
8 national issues, then they don't see very much
9 difference. However, if the responses are different, in
10 different locations, from the national issues, what that
11 indicates is there's a certain -- is that there is clarity
12 among the public in distinguishing among these three types --
13 these three clusters of issues. All right. So it's really,
14 you know -- so it's also a test of, you know, so I'm
15 incorporating attitudinal strength.
16 And then the third part of the test is -- you know, of the
17 research design -- is I'm incorporating then a -- a way to
18 determine or you know -- or a way to compare, you know, do
19 citizens see these, you know, racial justice employment-type
20 issues with Black Lives Matter differently than they see well-
21 known, salient national issues, or do they see them the same?
22 So again, it provides -- it -- it provides a certain clarity,
23 and to -- to the results.
24 If all the modes -- okay, so I said this was a multimodal
25 research design. If all -- and the reason why one does this,

1 of course, is if all of the parts, basically, showed the same
2 thing, you can be very, very confident then that the results
3 are very -- are very strong. Okay, so that's what I'm --
4 that's what I'm doing. That's the logic.
5 Q BY MR. DELORME: So Dr. Davison, you told us about how you
6 constructed the survey. Did you administer the survey?
7 A I did not.
8 Q Who administered the survey?
9 A The survey was administered by YouGov, Y-O-U-G-O-V.
10 JUDGE SOTOLONGO: Y?
11 THE WITNESS: Y -- capital Y-O-U, capital G-O-V.
12 Q BY MR. DELORME: Why did you select YouGov?
13 A YouGov is a very -- YouGov has a very good reputation --
14 it's a very good survey research firm. They are
15 particularly -- they have a particular ex -- area of expertise
16 in policy issues, for instance, and -- and political issues.
17 Many of -- you know, there's a great deal of
18 specialization in survey research now, and so for instance,
19 there are some firms that -- like Westat, for instance. Westat
20 is a very, very good survey research firm, but their
21 specialization is almost exclusively, for instance, healthcare
22 policy -- Health and Human Services use -- uses Westat for a
23 lot of their policy studies.
24 So YouGov -- I selected YouGov for a variety of
25 reasons. YouGov, for one, has a very good reputation

1 professionally. They're known for producing relia -- highly
2 reliable, accurate surveys. Going back to the metrics that I --
3 that I mentioned or that I identified earlier, YouGov performs
4 very well when one evaluates the -- when you evaluate their
5 polling organization and their operation against the metrics
6 that are commonly used to evaluate polling firms.
7 Q So is YouGov considered to be a reliable survey research
8 firm?
9 A Yes.
10 Q Are there any publicly available rankings of survey firms?
11 A The only publicly available -- the only sort of public
12 ranking that I know of is -- you know, that actually sort of
13 gives a report card on polling organizations is
14 FiveThirtyEight. FiveThirtyEight is Nate Silver's shop that he
15 started -- it's an organization started by Nate Silver maybe
16 2008, I think. And you know, he sort of achieved fame
17 predicting that presi -- that Barack Obama would win 2000 and
18 2008. More particularly, FiveThirtyEight is a website or --
19 well, it is a website, but their -- their articles, and their
20 podcasts are actually focused on trying to -- are -- are
21 focused on evaluating polling organizations. And they use
22 criteria -- a set of criteria -- to evaluate polling
23 organizations.
24 MR. DELORME: Your Honor, may I approach?
25 JUDGE SOTOLONGO: Yes.

1 Q BY MR. DELORME: Dr. Davison, I'm handing you what's been
2 marked as Respondent's Exhibit 101; do you recognize this
3 document?
4 A I do.
5 Q Could you tell us what it is?
6 A This is the last pollster ratings by a report card -- or
7 you know, FiveThirtyEight's pollster ratings of a number of
8 polling organizations in the United States.
9 Q Did you review this at any point as you were making your
10 decision as to who to administer the survey?
11 A This was -- I -- this was one of many criteria that I used
12 when deciding to recommend YouGov.
13 Q And I think I got the gist of this, but is FiveThirtyEight
14 considered to be a reputable publication in the area of
15 surveying public opinion polls?
16 A Yes, they're -- I would say that they are also considered
17 to be sort of like a pioneering -- methodologically pioneering
18 organization. You know, he did -- Nate Silver as well and
19 his -- you know -- the other modelers in his organization, have
20 developed a way -- you know, a formula to weight or ex -- a
21 formulate to evaluate and then sort of rank or score polling
22 organizations.
23 The algorithm is proprietary, but two of the important
24 characteristics are -- one is they look at sort of the historic
25 performance -- okay -- or in other words, historic accuracy --

1 predicted accuracy of the polling organization of their
2 predictions. So in other words, what were their prediction and
3 how close or how far away is it from the actual outcome, let's
4 say, of the presidential -- of the presidential election.
5 And then the other is -- and partially, sort of a function
6 of this, you know, is they look at how much predictive error is
7 in the -- can be determined in the survey. So what you see
8 here -- if you want me to just hurry.
9 Q Yeah, turn to page 2 if you would. And I think YouGov is
10 this the first poll --
11 A Right.
12 Q -- reference on page 2, and sort of walk us through --
13 A Yes.
14 Q -- what you think is meaningful.
15 A Yes. So below the gray -- I'm actually going to go to
16 predictive polls analyzed and mean reverted bias. So "polls
17 analyzed," what that means is they analyzed 455 surveys or 455
18 polls from YouGov. Okay. So they have a very, very large --
19 they have a very, very large sample size of polls that they are
20 use -- that they are using to evaluate YouGov.
21 Predictive plus or minus, what this really means is a --
22 this is really a scale -- okay -- where -- that they use to
23 determine the predicted -- the predicted accuracy for a future
24 poll. In other words, based on 455 polls, what's the
25 predictive accuracy of the 456th poll for instance, okay? So

1 zero -- and the -- the scale -- the scale actually is not
2 intuitive. A negative number actually means very good
3 predictions, okay. So that is very accurate. Okay. So the
4 zero to negative is actually a very good score. Zero and
5 positive, you want to be a little more careful of.
6 Q And what -- what predictive plus minus did YouGov have
7 according to this document?
8 A YouGov has a -0.3.
9 Q So that's a good thing?
10 A Yes.
11 Q Okay.
12 A Okay, so the other piece of this is the mean -- what he --
13 what they call "mean reverted bias". Okay, another way of
14 thinking about this is like the in -- what I call the in-house
15 effect. It says d + 0.7. All right. So what that means is
16 that if you add up -- or if you take the average of all the
17 predictions from the 455 polls from YouGov and subtract the --
18 it from the true value -- or in other words what was the --
19 what was the actual outcome, the average error -- okay -- the
20 average that it was off -- that YouGov's estimates or
21 predictions were off by was 0.7 of one percent.
22 Okay, so it's a very -- obviously, it's a very, very small
23 error mar -- or predictive error, but also, importantly, this
24 is also when sample size becomes something that's important to
25 think about. 0.7, you know, the -- the error margins for

1 most -- you know, for a typical national survey -- let's say
2 like Quinnipiac or Monmouth -- they usually have a sample size
3 of maybe around 800, and you have a margin of error of maybe
4 plus or minus four percent. Even for those polls, 0.7 percent,
5 in other words, is well within the margin of error of the --
6 you know, of most national surveys, so this is a very good --
7 very good results for YouGov.
8 MR. DELORME: Your Honor, I move for the admission of
9 Respondent's Exhibit 101.
10 JUDGE SOTOLONGO: All right. Any voir dire or any
11 objection?
12 MR. PETERSON: Quick voir dire.
13 JUDGE SOTOLONGO: Okay.
14 **VOIR DIRE EXAMINATION**
15 Q BY MR. PETERSON: Dr. Davison, the -- so some of this
16 analysis goes to the ability of a poll to accurately to predict
17 some future event, is that -- is that what you mean by
18 predictive?
19 A Well, it's predicting what the out -- it -- it -- it's --
20 it is a test of or it's an evaluation of the -- what the true
21 value or what the outcome value is compared to what the
22 estimate is from the survey.
23 Q What -- and you're saying --
24 A So it's predictive in the sense -- it -- it's predictive
25 in the sense of how accurate is it or how -- how -- you know,

1 how close is it coming to the true outcomes.
2 Q And what -- like what are the outcomes, I guess, that --
3 that you're describing?
4 A Well, gee, I don't know all 455 polls that YouGov used in
5 their analysis -- you know, in their analysis -- I mean that
6 FiveThirtyEight used in their analysis of -- of YouGov.
7 Q I get -- yeah, I guess the prediction, like what are
8 they -- is it trying to predict some future event? Like I
9 assume some of these are related to elections --
10 presidential --
11 A Yeh.
12 Q -- elections --
13 A Right.
14 Q -- taking polling, and you can analyze it by seeing how
15 close were the actual percentage of voters that actually voted
16 one way or the other.
17 A Um-hum.
18 Q My question is, is your survey trying to -- was your
19 survey you conducted trying to predict something?
20 A Well, my survey -- I'm not predicting an election
21 outcome.
22 Q Right.
23 A My survey is -- my survey is reporting -- okay -- what the
24 American public -- well, my survey is a representative sample
25 of the American -- of the -- of the American public and what

1 percentage they -- and how -- how they identify or what they
2 identify to be the goals of Black Lives Matter.
3 Q So I guess it sounds like it's not -- it's just trying to
4 capture a moment in time -- the time that the survey is taking
5 what the general consensus is rather than trying to predict the
6 outcome or predict the result of something?
7 A I -- I don't understand your question.
8 Q Well, (indiscernible) I mean this analysis looks like it
9 goes to surveys, how good are they at predicting an outcome,
10 and I wondered --
11 A Well, how accurate are they?
12 Q How accurate are they at predicting outcome?
13 A Okay, it's not -- the key here is how accurate it is.
14 Q And I guess, how does that relate to your survey that was
15 not trying to predict an outcome?
16 A I am measuring -- and what -- and what I'm concerned about
17 is accuracy, and what this is, is a measure of accuracy.
18 JUDGE SOTOLONGO: In other words, what this is showing, if
19 I understand you, is how -- how accurate -- how accurate the
20 methodology of the different surveys are.
21 MR. DELORME: You have to answer verbally.
22 THE WITNESS: Oh, I'm sorry.
23 JUDGE SOTOLONGO: Was that a yes?
24 THE WITNESS: Yes.
25 JUDGE SOTOLONGO: Go ahead, (indiscernible).

1 Q BY MR. PETERSON: Yeah, so that's what -- so your survey
2 wasn't trying to predict anything; is that correct?
3 A Well, you know, I have to -- I guess I just have to
4 disagree with what you're -- with what you're trying to say.
5 Q Sure.
6 A You were trying -- it seems to me that you're trying to
7 sort of differentiate or separate accuracy from predict -- you
8 know, from predicting some kind of future outcome.
9 Q I'm trying to understand (indiscernible).
10 A Okay. This is -- this is an evaluation -- okay -- of --
11 and one of many metrics that I used to evaluate the
12 reliability, the desirability, the accuracy of recommending
13 YouGov as the -- as the polling organization. All right. So
14 I -- I guess I just don't understand why -- you know, how
15 you're -- how or why you're separating accuracy from prediction
16 because it's right -- these are two peas in the same pod. It's
17 how accurate is the -- how accurate is the results or how
18 accurate is the record of YouGov.
19 Q And I guess this analysis -- predictive analysis for
20 determining the accuracy of a poll wouldn't apply to your -- to
21 your survey because there's no outcome that can be compared
22 against what the -- what the survey sought to obtain or the
23 information gathered by the survey?
24 A No. My survey -- my survey has an N of 2000 with a plus
25 or minus marked error margin of 2.6 percent from a survey

1 organization that uses an exceptionally sophisticated sampling,
2 weighting, and fielding experience. And so it is a -- this is
3 a -- this is an accurate poll. I don't know what else -- I
4 don't -- I don't know how else to answer your question other
5 than I just -- I don't -- I think you're wrong.
6 JUDGE SOTOLONGO: So let me ask -- let me ask you this. I
7 guess what I'm trying to say is that -- so this FiveThirtyEight
8 sample or rating system that you're saying --
9 THE WITNESS: Um-hum,
10 JUDGE SOTOLONGO: -- in a way, uses past results --
11 THE WITNESS: To evaluate.
12 JUDGE SOTOLONGO: -- to evaluate how precise the
13 methodology is; is that -- would that be correct?
14 THE WITNESS: How precise the results are from the
15 methodology that YouGov uses, yes.
16 JUDGE SOTOLONGO: So not to predict how it will be in the
17 future, but based on past results, how does that reflect on the
18 methodology I created or how precise the methodology is?
19 THE WITNESS: Oh, okay. So in that sense, yes, it is --
20 if the same survey was replicated again at some point in the
21 future, would it produce the same sort of results? Yes. They
22 won't be identical, but they'll be very, you know, -- but they
23 will be very similar -- but they would be very similar.
24 Okay, so it -- so the accuracy is also a measure then of
25 the reliability of the -- of the survey and of the record of

1 the survey organization.
2 Q BY MR. PETERSON: And so I guess it's my understanding
3 that the -- even though your survey wasn't trying to predict
4 some future event or future results, the fact that YouGov has a
5 good track record on predicting future events, then that
6 indicates to you that it's accurate for the purpose of your
7 poll, which was even though it was not to predict the future
8 events or outcome?
9 A My poll is reporting what the American public identifies
10 to be the goals of Black Lives Matter.
11 Q Yeah, I understand that, and so it's not trying to predict
12 anything, and this is all about the --
13 MR. DELORME: Your Honor, if I may. I'm happy for --
14 JUDGE SOTOLONGO: (Indiscernible).
15 MR. DELORME: -- Mr. Peterson to --
16 JUDGE SOTOLONGO: Somebody, get that door, please.
17 MR. DELORME: -- engage in --
18 MR. PETERSON: Yeah, I'm just trying to understand the
19 relevance of a survey's ability to predict a future event when
20 that's not -- wasn't the intent of your --
21 MR. DELORME: The relevance is that this is one of many
22 things that Dr. Davison relied on in selecting YouGov. There's
23 more to be discussed about that. I know Mr. Peterson is
24 chomping at the bit to do cross-examination --
25 JUDGE SOTOLONGO: Yeah.

1 MR. DELORME: -- but we --

2 JUDGE SOTOLONGO: I think we're sort of -- I think it's --

3 it's, basically, -- you probably do different things. I can

4 see where this is relevant, so you're offering -- and your

5 offering?

6 MR. PETERSON: Yes.

7 JUDGE SOTOLONGO: I'll admit it.

8 **(Respondent Exhibit Number 101 Received into Evidence)**

9 MR. DELORME: Thank you, Your Honor.

10 MR. DELORME: Going back to the --

11 JUDGE SOTOLONGO: Let's take a five-minute break.

12 MR. DELORME: Okay, Judge.

13 (Off the record at 10:23 a.m.)

14 JUDGE SOTOLONGO: All right. Please proceed.

15 MR. DELORME: Thank you, Your Honor.

16 **RESUMED DIRECT EXAMINATION**

17 Q BY MR. DELORME: Going back to the survey that you

18 constructed, when was that survey actually conducted?

19 A It was conducted the last week in January, first week of

20 February 2022. I think the precise dates were January 28th to

21 February 7th.

22 JUDGE SOTOLONGO: To February?

23 THE WITNESS: February 7th.

24 JUDGE SOTOLONGO: 7th, okay.

25 Q BY MR. DELORME: Is there a document that summarizes the

1 methodology you and YouGov used to conduct the survey?
2 A Yes.
3 Q Dr. Davison, I'm handing you what's been marked as
4 Respondent's Exhibit 102; do you recognize that document?
5 A I do.
6 Q Can you tell me what it is?
7 A This is a -- a summary of the survey methodology that's
8 used by YouGov.
9 Q Okay. Who created this document?
10 A I did.
11 Q Can you sort of walk us through, with the assistance of
12 this document, the survey methodology that you were briefly
13 discussing earlier in your testimony?
14 A Yes. I think it's important to understand this, if I
15 could just for a moment go back to my earlier comments when I
16 was talking about using metrics to evaluate surveys. I didn't
17 rely on a single item -- okay -- to evaluate or recommend, you
18 know, or to recommend YouGov. Instead, you rely on, you know,
19 good -- good survey practice is to -- is to rely on whatever --
20 what are recognized as a series of metrics for evaluating
21 surveys, so -- or evaluating polling survey methodology. So
22 those metrics are the -- for instance -- are the sophistication
23 of the sampling method, the sophistication of the weighting
24 method -- of the method -- the sophistication of the weighting
25 methodology, the sophistication of the -- what variables and

1 how many variables are being used to draw the -- to draw the
2 random sample. All right. So YouGov is very sophisticated in
3 all of these -- in all of these regards.
4 So what I'll do is I'll just try to go through and maybe
5 identify what I think are probably the big -- you know, these
6 important concepts that maybe are a little confusing.
7 Q Please do.
8 A Okay. The first is the 2,239 respondents -- 2,239
9 respondents. So there's a couple -- who were then matched down
10 to a sample of 2,000. So a couple of things need to be -- you
11 know, I think are important here. The first is in a national
12 survey or a national sample of -- of the American public, N of
13 2 -- N equals sample size of 2,000 is a very large -- very good
14 sample size. As I said, national surveys -- nationally
15 representative surveys like, you know, Quinnipiac, Monmouth,
16 use 800. The sort of the sweet spot for exceptional -- you
17 know, for very, very good nationally representative surveys, is
18 actually somewhere between like 1,600, 1,500, up to 1,800,
19 2,000 max.
20 So one -- so number one, this has a very lar -- this
21 actually has a very large hand. Now, what does it mean if they
22 interview 2,239 respondents, and then they're matched down to a
23 sample of 2,000? All right. So what YouGov does is YouGov
24 draws a random sample from the American community.
25 JUDGE SOTOLONGO: I don't want to -- when you're hitting

1 the table, I think it's making a chirping -- there was a
2 chirping on the --
3 THE WITNESS: Oh, I'm sorry.
4 JUDGE SOTOLONGO: -- on the -- on the -- on the
5 microphone, so yeah.
6 THE WITNESS: I'm sorry.
7 JUDGE SOTOLONGO: I was hearing a chirping sound. I was
8 wondering what it was, and I think when you hit the table, the
9 microphone, so I'm sorry, but yeah, don't -- don't --
10 THE WITNESS: I'm used to having a blackboard, Your Honor.
11 I'm sorry --
12 JUDGE SOTOLONGO: Okay.
13 THE WITNESS: -- and different-colored chalk. Okay. So
14 I'll just step -- I'll move back.
15 JUDGE SOTOLONGO: Good.
16 THE WITNESS: So my apologies.
17 A All right. So -- so one, the sample size is very, very
18 good. Secondly, so what does it mean that they interview 2,239
19 respondents and ma -- and then match down to a survey of N
20 equals 2,000? Okay. So the methodology that YouGov does
21 for -- uses or follows for drawing their sample is quite
22 sophisticated. The first step that they use is they draw a
23 simple random sample from the American Community Survey. The
24 American Community Survey is from the census, so it's
25 exceptionally high-quality data. They're interested in drawing

1 a sample of all adults, and so that -- so the population is the
2 American Community Survey, which is the census of the entire
3 Uni -- which is the census of the population of the United
4 States.
5 They then use a series of variables, so like gender, race,
6 education, age. Whether an individual considers themselves to
7 be a born-again Christian, political ideology, voting behavior,
8 voting history in other words, and so forth, to -- from that
9 American Community Survey to estimate what a truly random
10 sample looks like.
11 They use those characteristics, and one by one, okay, they
12 match that sort of randomly drawn person from the community
13 survey from -- they have a panel or a pool of over 2 million
14 respondents, okay. And what they estimate then is what is
15 called a Euclidity -- Euclidian distance. They minimize the
16 Euclidian distance. In other words, what they do is then they
17 try to identify -- or they identify the ones -- the individuals
18 who come closest to the ideal -- or actually to the population.
19 Okay. Are you with me? All right. Sorry.
20 All right. So then how do you get from 2,239 down to
21 2,000? Okay. So what they do is actually they exclude then
22 the 239 who are the furthest away, or who are the least
23 representative.
24 Next step, okay, then, is the weighting process. How do
25 you sort of close the rest of the gap, okay. All surveys --

1 all surveys are weighted. You have some series of weights.
2 Now, the way to think about a weight is -- the American
3 population is -- right -- is 50 percent male, 50 percent
4 female. Let's say that I drew a sample that is 60 percent
5 female, okay. For any number of reasons -- logistical reasons,
6 or whatever, okay. It -- it -- it doesn't matter. All right,
7 but -- but the problem here -- the potential problem is that,
8 obviously, that ten percent produces a little bit of a
9 distortion, okay. So the -- in other words, the -- the views,
10 the opinions, the attitudes of women, are a little -- are
11 augmented a little. They're a little bit high -- higher than
12 what their presence is in the United -- than what their
13 presence is in the country. So you weight. And so therefore
14 women would be weighted by five cents to bring it back into
15 balance to the rest of the United States.
16 So that's sort of a simple example of the logic of why
17 surveys weight. Every survey weigh -- uses weights, uses a
18 system of weights, okay.
19 YouGov uses what's known as a -- what they call a -- or
20 what is called a propensity score, okay. So what that means
21 is -- what that means is this. Based upon that sample drawn
22 from the -- that random sample drawn from the American
23 Community Survey, okay, then along these different
24 characteristics, okay, so it's not only age, race, education,
25 et cetera, but they use like, you know, political ideology,

1 voting history and -- you know, as I said before, you know,
2 whether the individual considers themselves to be a born-again
3 Christian and several other variables.
4 What they estimate is, well what's the -- what is the
5 probability that an individual with all those characteristics
6 are in the -- or excuse me, what is their presence in the
7 population, and what's the probability of those people or
8 individ -- of respondents with X set with those characteristics
9 are in the sample. Those probabilities, okay, is how they come
10 up with their weights, okay. So it's a very -- it's a very
11 sophisticated weighting mechanism to close the last sort of bit
12 of distortion, okay.
13 Now, so they match down to the 2,000, as I said, is -- is
14 a very large -- is a -- is a very, very large end. It produces
15 a margin of error of 2.6 percent. Now, is there anything else
16 or did I do anything else -- you know, just so you might -- a
17 question that you might ask is -- or might be thinking about,
18 did I do anything else just to also sort of verify, or did I
19 perform any other additional tests of external validity, okay?
20 Yes.
21 JUDGE SOTOLONGO: You have a squeaky table, I'm afraid,
22 so. All right.
23 THE WITNESS: Okay, so yes.
24 A So look, it's -- it's really easy, right, for a -- and
25 this is what some polling firms do, and they're not very good

1 polling firms, to be perfectly honest, okay. The Hispanic
2 population in the United States is 16 percent, okay. So I
3 produce -- I -- I have a sample of -- that has 16 percent
4 Hispanics. That says nothing about whether that 16 percent is
5 representative of the fascinating diversity of the Hispanic
6 population in the United States, okay.
7 So it's not enough to just simply match sort of like the
8 aggregate level demographics. You have to have the rest of the
9 demographics als -- you want the rest of the demographics to be
10 representative.
11 So what are other ways in which one can perform what are
12 known as tests of external validity, or in other words,
13 externally check to see if, oh, is the survey really -- is the
14 survey really truly representative, okay. So anything I did.
15 So not only did I look at just sort of, you know, the
16 distributions of, you know, male/female, education, age, and so
17 forth in -- in a general sense, but for instance, you know, and
18 is -- you know, is -- is the -- the percentage of people in
19 the -- for instance, this is one of the tests that I perform,
20 one of the checks that I perform, is the percentage of born-
21 again Christians in the United States. Not only does it, you
22 know, sort of -- I mean, in the survey, not only does it match,
23 you know, roughly the -- the population, but are they located
24 in the right places? In other words, the majority should be in
25 the South, okay. The South should have about 32, 33, 34

1 percent of -- 35 percent of born-again Christians. The
2 Northeast should have the least. The Northeast should have
3 somewhere around 16 or 17 percent. Midwest, West are going to
4 be in between. Actually it's not East -- it's going to be the
5 South, Midwest, West and then East from the most to the -- from
6 the most to the least.
7 You know, so in other words, checking for regional
8 representation, okay, and -- and proper balance, okay. And so
9 indeed, if perf -- this -- this performs correctly or the
10 results correspond to what one would expect from, you know,
11 other benchmark -- or what one receives from other benchmark
12 surveys.
13 I also check, though, using other benchmark surveys, for
14 instance, and -- and the one I used is actually the American
15 National Election Study, the 2016 and 2020. The American
16 National Election Study I mentioned before is from the
17 University of Michigan. It is a -- a world-renowned -- the
18 ANES, you know, are world-renowned surveys. This is the ANES
19 or the National Election Studies, you know, have been conducted
20 every two years since 1948 at the -- at the center.
21 So then what -- you know, so what I did was I checked to
22 see are there -- you know, are the relationships between other
23 variables in the YouGov survey, do they correspond to the
24 relationships in benchmark surveys like the American National
25 Election Study? For instance, as someone attends church or

1 worship service more frequently, from rarely, you know, or not
2 at all, to weekly, they increasingly should vote Republican in
3 presidential elections, okay. This is a well-established
4 relationship that has been true for a very, very long time.
5 So indeed, in YouGov the pattern is the same. I mean, and
6 not only is the pattern the same, but the magnitudes are
7 really -- you know, the magnitudes are only off by a couple of
8 percentage points compared to the ANES, all right. So in terms
9 of external validity, and the tests of external valid --
10 validity that I performed, the YouGov data -- the You -- are --
11 the YouGov sample, you know, performs quite well, is quite
12 representative.
13 Q BY MR. DELORME: So based on your experience, do you
14 believe the methodology used by YouGov is one that would
15 produce a reliable survey?
16 A Yes, very much so.
17 MR. DELORME: Your Honor, I'd move for the admission of
18 Respondent's Exhibit 102.
19 MR. PETERSON: No objection.
20 JUDGE SOTOLONGO: All right. Respondent's 102 is
21 admitted.
22 **(Respondent Exhibit Number 102 Received into Evidence)**
23 JUDGE SOTOLONGO: And you said this was conducted January
24 28th and February 7th of -- of 2022, or --
25 THE WITNESS: Correct.

1 JUDGE SOTOLONGO: Okay. Go ahead.
2 Q BY MR. DELORME: Dr. Davison, now, let's turn to the
3 questions asked in this survey. Who developed those questions?
4 A I did.
5 Q And can you explain again the -- the research design for
6 the survey?
7 A Yes. Briefly I had a -- I developed a multimodal research
8 design, or in other words, that embeds multiple tests into
9 the -- into the questionnaire. So I developed -- I used an
10 open-ended question, which is considered to be -- open-ended
11 questions, you know, are considered to be exceptionally high
12 quality, you know, really sort of like the highest form of
13 data, of information, about respondents, because they're
14 putting into their own words what they believe, what they
15 think, to give you the answer to the -- to the question.
16 I developed a series of nine closed-ended questions. I --
17 that examined four racial justice questions, two workplace
18 questions, and then three national issues. Those nine
19 questions were on a scale from one to ten, okay, so I used an
20 attitudinal scale to measure both direction as well as
21 intensity, okay, or strength of their answer.
22 And then, finally, the final piece was, of course, the
23 reason why I used the three national issues, and I used the
24 three national issues as, you know, sort of my control, or in
25 other words, as a comparison. You know, are citizens able to

1 distinguish any sort -- or can citizens distinguish the
2 difference between racial justice and workplace issues as goals
3 of Black Lives Matter from national issues, from the three
4 national issues.
5 Q Okay. I want to go into the results of the survey now,
6 and I want to start with the open-ended question. What did the
7 survey reveal when you look at the data from the open-ended
8 question?
9 A The open-ended questions -- so the open-ended question --
10 or -- I asked YouGov or -- to -- using any word that referred
11 to the workplace -- so work, workplace, workers, employer,
12 jobs, employment, harassment. Any type of reference that could
13 be plausibly connected to the workplace, okay, was coded as a
14 response to identifying the workplace as a goal of the public
15 respond -- or excuse me, a Black Lives Matter. What the
16 results showed was --
17 MR. PETERSON: Sir, I'm -- I'm -- I'm going to make an
18 objection on foundation grounds. We don't know what the open-
19 ended question was.
20 JUDGE SOTOLONGO: That's true. I think we need -- we
21 should know what the open-ended question was, and then go from
22 there.
23 MR. DELORME: I'm pretty sure he testified to it, but I'll
24 ask him directly.
25 Q BY MR. DELORME: Dr. Davison, what was the open-ended

1 question? I believe you testified to it.
2 A Yeah. The open-ended question actually -- the entire
3 survey, is -- is in my -- I included in my subpoena documents,
4 and the open-ended question is, "In a few words, would you
5 describe what you believe to be the goals of Black Lives
6 Matter?" So it's -- I mean, it's very straightforward and
7 clear.
8 JUDGE SOTOLONGO: And there was one of them -- there was
9 the one open-ended question?
10 THE WITNESS: There was only one open -- there was only --
11 yes, Judge. There was only one open-ended question, and it
12 also occurred -- I should also add this. It also occurred
13 early in the survey, okay. So the way in which -- you know,
14 the proper way to conduct a survey like this, you know, with an
15 open-ended question is the first couple of questions are
16 very -- you know, are very descriptive. They're asking, you
17 know, some demographic information or factual information about
18 respondent. So how old are you, what state do you live in, you
19 know, information like -- information like that. Then the
20 open-ended question is asked, okay. The open -- so in -- in --
21 the point that I'm making here is very important. The open-
22 ended question precedes any closed-ended question, so there's
23 no prompting. The only thing that they have seen so -- they
24 haven't seen the entire survey. They only see one question at
25 a time. And so the only questions that they answered prior to

1 the open-ended question were --

2 JUDGE SOTOLONGO: Demographic?

3 THE WITNESS: -- biographic.

4 JUDGE SOTOLONGO: Demographic?

5 THE WITNESS: Yeah, abso -- absolutely.

6 JUDGE SOTOLONGO: The sex, gender, age, nationality, or so

7 forth of the person?

8 THE WITNESS: Exactly.

9 JUDGE SOTOLONGO: Okay.

10 THE WITNESS: Exactly.

11 JUDGE SOTOLONGO: Go ahead.

12 MR. DELORME: Go on.

13 THE WITNESS: Okay.

14 A So the next -- all right. So I used -- I used any -- any

15 reference in the survey -- I mean, excuse me, in the -- in the

16 comments -- any reference to jobs, work, workplace,

17 unionization, working conditions, improving working conditions,

18 employers, employees, et cetera, okay, so it was as broadly

19 compassing as possible -- would be classified as a reference to

20 the workplace is a -- a goal -- a major goal of the Black Lives

21 Matter movement. 27 respondents fell into that category, or

22 1.3 percent.

23 Q BY MR. DELORME: What -- what percentage of the 2,000 in

24 the survey actually responded to the open question?

25 A 89 percent. It was 1,700, 800 and -- I mean, 1,785 I

1 think, to be exact. But it's -- it was an 89 percent response
2 rate from the open-ended question, which is a very, very, very
3 high -- a very, very good response rate.
4 So 27 respondents fell into -- fell into this category,
5 where they used some kind of reference on their -- on their own
6 volition, without any prompting. They made some kind of
7 reference to the workplace for -- it was 1.3 percent.
8 MR. DELORME: May I approach, Your Honor?
9 JUDGE SOTOLONGO: Yes.
10 MR. DELORME: Dr. Davison, I'm handing you what's been
11 marked as Respondent's Exhibit 103.
12 THE WITNESS: Yes.
13 Q BY MR. DELORME: Do you recognize that document?
14 A Yes, sir.
15 Q Could you please tell us what it is?
16 A Yes. I compiled a list, okay, so the -- the first column
17 of numbers is just simply the -- you know, the numerical, you
18 know, count up to 27. The next number is simply the case ID.
19 It -- it's an internal for the computer system or for -- you
20 know, to identify each record in the -- in the columns. But
21 what I included is also the text response for each of the 27
22 respondents who were classified or were organized into making
23 some sort of reference to the workplace or jobs, et cetera. So
24 these are the -- this is the real-time, literal commentary.
25 JUDGE SOTOLONGO: So tell me -- I -- I -- I have -- wh --

1 exactly -- I -- I missed something. What are the 20 -- so out
2 of the 2,239, seven -- 1,700 and something actually responded
3 to the open-ended question?
4 THE WITNESS: Out of the 2,239, that was matched down,
5 okay.
6 JUDGE SOTOLONGO: To 2,000.
7 THE WITNESS: So they threw out --
8 JUDGE SOTOLONGO: To 2,000. Okay.
9 THE WITNESS: -- the least appropriate response --
10 JUDGE SOTOLONGO: Down to 2,000.
11 THE WITNESS: -- to 2,000. Out of the 2,000, 1,008 --
12 1,785 --
13 JUDGE SOTOLONGO: Responded --
14 THE WITNESS: -- responded or answered the --
15 JUDGE SOTOLONGO: Okay, so --
16 THE WITNESS: -- open-ended question, which is about 1.3
17 percent of the sample -- I mean, of those who responded.
18 JUDGE SOTOLONGO: Okay. So -- and -- and -- and
19 exactly -- and what are these 27 samples again?
20 THE WITNESS: The -- this is -- this is literally the raw
21 data. This -- this -- this is literally the copy of their
22 comment -- of their commentary with typos, grammatical errors,
23 improper use of possessive, and so forth. I mean, so it -- I
24 mean, it -- it is the -- the live, raw data, or the live, raw
25 comments from the 27 individuals.

1 Q BY MR. DELORME: Okay. And I -- I want to point to just
2 one example in this document to understand the context of how
3 you asked YouGov to extract any commentary that might be
4 related to the workplace, and that would be number 9. It says,
5 "Black people think they are discriminated against, but they
6 need to work like the rest of us do and contribute to society",
7 and all caps "All Lives Matter". Did I read that correctly?
8 A Yes.
9 Q Is the use of work here in this particular response
10 adequately correlated with workplace issues?
11 A Not in my view, but it is included in this -- it -- it's
12 included in the 27 because I instructed YouGov to use as
13 inclusive a definition as possible, okay. I wanted to -- I
14 wanted to not have -- I wanted to -- I wanted to move on the
15 side of a very conservative or very cautious approach to
16 collecting -- you know, to -- or to collecting the data.
17 JUDGE SOTOLONGO: So in this -- make sure I understand.
18 So of all the responses, that is the 1,700 --
19 THE WITNESS: And 85.
20 JUDGE SOTOLONGO: -- and 85 responses, you picked the 27
21 examples of where people actually used a word or phrase that
22 you connected to employment?
23 THE WITNESS: Right. That was -- that had some --
24 right -- that was in -- in some --
25 JUDGE SOTOLONGO: Okay.

1 THE WITNESS: -- way connected to the workplace or
2 employment.
3 JUDGE SOTOLONGO: Which means that whatever 1,800 -- 1,785
4 minus 27 of the others did not mention anything about
5 employment or work or jobs or anything?
6 THE WITNESS: The other -- you mean the 225, the 11
7 percent who did not answer the question?
8 JUDGE SOTOLONGO: Okay --
9 MR. DELORME: No. He's referring to, if there were
10 1,785 --
11 THE WITNESS: Right.
12 MR. DELORME: -- put something as an answer in the open
13 question.
14 THE WITNESS: Oh, right. The other --
15 JUDGE SOTOLONGO: Whatever --
16 THE WITNESS: Yeah, I should be able to do -- the other
17 1,752 -- 58 -- 50 -- yeah, something like that, put something
18 else.
19 JUDGE SOTOLONGO: Did they not -- use no wording or
20 phrasing for -- no words or anything that was in any way
21 connected to jobs or employment or work?
22 THE WITNESS: Any -- any word, you know, and -- and I use
23 a -- I -- you know, I asked YouGov to use -- I mean, actually,
24 I gave it to them -- con -- added -- and they added a few
25 others -- any word that re -- would re -- that would -- could

1 possibly or plausibly be included in a reference to the
2 workplace, like --
3 JUDGE SOTOLONGO: Okay, okay, I -- I understand it.
4 THE WITNESS: -- harassment, discrimination.
5 JUDGE SOTOLONGO: All right. Okay, I understand that.
6 THE WITNESS: I guess I'd also add -- maybe, Judge, maybe
7 this will also help. I separately conducted my own, you know,
8 sort of like a -- just a -- this is a robu -- what's called a
9 robustness check, just to make sure that, you know, more than
10 one way -- again, I like doing things multiple times to have
11 confidence in the results. I -- I conducted actually my own
12 word search separately on all of the literal comments in the --
13 in the data file using, you know, again, the same word search
14 just to see if there was -- just to see if there was a
15 discrepancy, and I came up with 25 hits. You know, so I mean,
16 it's a trivial -- it was a trivial difference.
17 Q BY MR. DELORME: So just so the record is clear. Other
18 than these 27 --
19 A Um-hum.
20 Q -- the other 1,758 responses to the open question did not
21 make any reference to work or employment?
22 A Correct.
23 Q Now Dr. Davison, did you run a word search for any other
24 terms from the open-ended responses?
25 A Well, I connected a -- we -- we did a similar comparison

1 of reference -- of any sort of reference that was made
2 towards -- to the police, courts, police brutality, and so
3 forth. In other words, any -- any word that made reference to
4 the -- for defund the police, for instance, or just defund,
5 before criminal justice question that I constructed in the
6 closed-ended inventory.
7 Q And what was the result of that search?
8 A There were 782 matches, or roughly, 44 percent of the
9 sample. So it's obviously a much larger number than made
10 reference to the workforce. It's about 30 times larger.
11 JUDGE SOTOLONGO: Just -- I guess -- I'm sure you're going
12 to get into this, but just out of curiosity, since this is a
13 text response, was this survey conducted via text to people's
14 cell phones, or how --
15 THE WITNESS: No. It -- it's conducted online.
16 JUDGE SOTOLONGO: Online.
17 THE WITNESS: Okay. And so what they --
18 JUDGE SOTOLONGO: Okay.
19 THE WITNESS: -- on a computer screen. And so they only
20 see one question at -- at a time. They don't see -- they
21 don't -- they don't see the -- they don't know what the entire
22 survey is until they have finished the last question. Then
23 they see, thank -- and then they have, "Thank you".
24 JUDGE SOTOLONGO: Okay. All right. Moving on. All
25 right. We'll -- I'm sure we'll get into how -- how this is

1 conducted.

2 MR. DELORME: Well, let's -- let's go there now.

3 THE WITNESS: Okay.

4 Q BY MR. DELORME: Can -- can you walk us through,

5 mechanically, how the survey was conducted by YouGov?

6 A Yes. So it -- and the survey goes back -- you know, part

7 of this goes back to the -- you know, to the -- to the survey

8 or the sampling methodology that -- that YouGov uses. The

9 survey was conducted online, okay. And so -- as actually the

10 vast majority of surveys are conducted today. And the -- the

11 respondent sees one question at a time. The respond -- the --

12 the respondents are picked from a pool of respondents, or a

13 panel of respondents, or of -- of people from YouGov -- or

14 excuse me, who have agreed to take YouGov surveys. This is a

15 pool of, like -- I don't know, in the United -- well, YouGov is

16 an international survey research firm. I think

17 internationally, you know, they have a pool of, you know, over

18 10 million. Just in the United States it's more than -- it's

19 in excess of 2 million.

20 Q And just to be clear, only United States residents over

21 the age of 18 were part of the YouGov sample?

22 A Right. One of the -- correct.

23 Q Or 18 or older?

24 A Right. What -- panels, yes.

25 JUDGE SOTOLONGO: So are the -- are these people who are

1 contacted ahead of time and said, would you be willing to
2 participate in a YouGov poll, without mentioning the subject
3 or -- or is the subject mentioned?
4 THE WITNESS: No. It's actually -- it actually works a
5 little bit different -- a little bit differently than that. To
6 be in the -- to be in the -- in the pool, they're in the, like,
7 the 2 million panel. YouGov -- I mean, some people will, you
8 know, voluntarily, you know, contact YouGov and say, I'm
9 willing to part -- you know, be included in your panel and be
10 randomly drawn.
11 YouGov also goes out and actively recruits individuals
12 from underrepresented demographics to make sure that they have
13 a -- to make sure that they have a diverse pool.
14 JUDGE SOTOLONGO: Okay. But are they -- are they -- so
15 these are people -- because you've been saying --
16 THE WITNESS: And then you agree to -- oh, I'm sorry. And
17 then you agree to -- you know, I might -- you know, yes, I'm
18 willing to be contacted to complete, you know, two surveys in
19 the next year.
20 They're not -- they do not know what the content of the
21 survey is in advance.
22 JUDGE SOTOLONGO: Okay. But I mean, are they approached
23 or -- all right. So obviously this -- this -- this means that
24 these are people who have access to computers or tablets or a
25 phone, so that -- basically access to the internet, and can

1 answer phone -- can answer questions and polls accordingly,
2 correct?
3 THE WITNESS: Um-hum.
4 JUDGE SOTOLONGO: I see -- is that a yes?
5 THE WITNESS: Yes.
6 JUDGE SOTOLONGO: Okay.
7 MR. DELORME: Thank you, Your Honor.
8 Q BY MR. DELORME: What opinions have you drawn from the
9 results of the open-ended questions?
10 A Well, as I said, the open-ended questions -- or an open-
11 ended question is considered to be, you know, very rich, very
12 valuable data -- very valuable information. And clearly,
13 the -- only a very, very small percentage of the American
14 population, when unprompted, offer a response that included
15 workplace, okay. So the -- you know, the -- the -- the
16 conclusion is that a very small percentage of the American
17 population -- a very small minority of the American population
18 connects workplace issues with Black Lives Matter.
19 MR. DELORME: Your Honor, I move for the admission of
20 Respondent's Exhibit 103.
21 MR. PETERSON: Voir dire, please, Your Honor?
22 JUDGE SOTOLONGO: Go ahead.
23 **VOIR DIRE EXAMINATION**
24 Q BY MR. PETERSON: So what -- do you know what the specific
25 search terms -- what those were? If they were used to -- to

1 segregate out these responses?
2 A Yes. I said that.
3 Q Yeah. Please specify. I mean, I -- you said -- I -- what
4 I understand is, anything connected to the workplace, that
5 you -- you were very general. I -- is that -- is that -- yeah.
6 So I'm asking for, specifically --
7 A Work.
8 Q -- what were the -- what -- okay. Work.
9 A Workers. Employer. Employment. Union. Unionization.
10 Workplace. Occupation. And --
11 Q Are --
12 A -- and -- you know, honestly there are others. I mean, I
13 don't remember the entire -- I would have to go back and
14 consult my notes for the entire inventory, but it was a -- it
15 was a very large inventory.
16 Q Are those -- would looking at your notes help refresh your
17 recollection as to what the specific terms were?
18 A I don't have my notes with me, but I've given you a lot of
19 the -- a lot of the search terms.
20 Q Yeah. If I give them to you, would that help refresh your
21 recollection as to what the search terms were?
22 MR. DELORME: Why is this relevant to the admissibility of
23 the document, Your Honor?
24 MR. PETERSON: He's talking about, you know, pulling --
25 MR. DELORME: He can cross-examine him with respect to

1 whether or not this document accurately reflects the responses
2 to the open questions, but we're just talking about the
3 admissibility of the document.
4 MR. PETERSON: Yeah. I'm trying to understand what the --
5 what the inputs were used to create the document. I think
6 that's fair voir dire.
7 JUDGE SOTOLONGO: No, I think -- I -- I think that's
8 something you should do during cross-examination.
9 It's true, too -- I think he testified that he used
10 every -- any term -- or as I understood it, almost every term
11 he could think of that was in any way related to workplace,
12 employment, jobs, and -- and then through -- throughout the --
13 the examples.
14 So -- and if you want the -- the exact list -- if you
15 think, somehow this list was not -- insufficient, then
16 certainly you can bring that up during cross-examination. And
17 then I'll -- you know, and I'll judge it accordingly.
18 MR. PETERSON: Okay. Well, I -- yeah. I understand.
19 **RESUMED DIRECT EXAMINATION**
20 Q BY MR. DELORME: Dr. Davidson, did you comp --
21 MR. DELORME: Oh, I'm sorry, was it admitted, Your Honor?
22 JUDGE SOTOLONGO: Yes. So 103 is admitted.
23 **(Respondent Exhibit Number 103 Received into Evidence)**
24 UNIDENTIFIED SPEAKER: Good catch.
25 JUDGE SOTOLONGO: I hadn't heard you offer it. That's --

1 it would have been -- I'm sorry I missed it.
2 MR. DELORME: That's all right.
3 JUDGE SOTOLONGO: Go ahead. Okay. Go ahead. Proceed.
4 Q BY MR. DELORME: Dr. Davidson, did you compare the results
5 of the open-ended questions with other national polling on
6 attitudes about the Black Lives Matter movement?
7 A I compared the -- the results from the YouGov survey to
8 survey results that I mentioned earlier. The major -- you
9 know, the benchmark national surveys, like, Pew, and the ANES,
10 and so forth. As well as the polls that were -- that were
11 included -- that are included in the Roper archive.
12 Q Okay.
13 MR. DELORME: May I approach, Your Honor?
14 JUDGE SOTOLONGO: Go ahead.
15 Q BY MR. DELORME: Dr. Davidson, I'm handing you what's been
16 marked as Respondent's Exhibit 104. Do you recognize that
17 document?
18 A Yes.
19 Q Can you tell me what it is?
20 A Well, the top part is actually the list of the surveys
21 that were -- the surveys that I -- and research centers that I
22 used looking for questions or studies for Black Lives Matter.
23 At the bottom paragraph is a -- a summary of the major
24 themes that I found. You know, I -- I guess as I had mentioned
25 before, none of the -- or at least as I think I mentioned

1 before, none of these studies had open-ended questions. None
2 of the studies asked questions -- that I could find, none of
3 the studies asked questions connecting Black Lives Matter to --
4 or asking what the public considered to be goals of the Black
5 Lives Matter movement.
6 The Roper Center polls -- and there were, I don't know,
7 90 -- 95 polls that -- or surveys I found that were in Roper
8 poll. There were certain themes that were -- that emerged from
9 their -- from their questions. Many of the questions were, "Do
10 you have a favorable or an unfavorable view of Black Lives
11 Matter? Do you support or do you oppose Black Lives Matter?
12 Do you have a positive or do you have a negative view of Black
13 Lives Matter?" These questions are not in relation to any
14 specific topic, okay. They're general -- these are questions
15 that really are sort of, like, general popularity -- general
16 favorability questions.
17 There are -- you know, then there's also a -- a number of
18 surveys that had, you know, a battery of questions that
19 reflected -- well, or that asked questions such as, do you see
20 a difference between Black Lives Matter movements and white --
21 the groups in Black Lives Matter and the groups in white
22 supremacist organizations? Do you think that the Black Lives
23 Matter organization contributed -- or helps racial issues or
24 does it -- or has it hindered, you know, racial -- racial
25 issues in the United States? There was -- you know, so these

1 are themes that -- these are themes that kept, you know, sort
2 of emerging throughout the -- throughout the archive.
3 Q And in reading those polls and in reading the responses to
4 the open-ended questions, did you formulate any opinions about
5 how the public is divided in its opinion of Black Lives Matter?
6 A Well, I looked at the -- I also looked at some of the
7 distributions. There -- or the -- the results to some of these
8 questions. And my impression is that, you know, these polls
9 that -- you know, that are of these results, and actually sort
10 of the crux of the questions, you know, they're usually
11 embedded in -- protests immediately are -- oftentimes, they're
12 embedded in questions or in sur -- a battery of questions
13 immediately related to a protest, or immediately following a
14 protest or make reference to, for instance, George -- George
15 Floyd, you know.
16 So my -- my interpretation is many of these questions
17 perceive, I guess, the Black Lives -- or at least they're
18 asking questions to determine, or -- or how controversial
19 citizens see the Black Lives Matter movement.
20 Q And when you read through -- well, let me back up.
21 Did you read every open-ended question that was answered
22 by the respondents?
23 A I did.
24 Q In reading that, did that inform you in any way about how
25 the public is divided about Black Lives Matter?

1 A There are --
2 MR. PETERSON: Objection.
3 A -- when you're reading the --
4 MR. PETERSON: Your Honor, this also goes beyond the scope
5 of what the -- the expert was asked to form his opinion, as far
6 as the notice that was provided. That --
7 MR. DELORME: He's clearly discussing what the public's
8 view is of Black Lives Matter.
9 MR. PETERSON: Well, I don't --
10 JUDGE SOTOLONGO: Go ahead.
11 Q BY MR. DELORME: Go ahead, Dr. Davidson.
12 A So yes. I read through all of the responses. All of the
13 verbatim -- verbatim comments. And there are -- there's not
14 an -- there is a not insignificant number, okay. There are a
15 number of responses that are quite disturbing. They embrace
16 racial stereotypes, racial epithet -- or pejorative racial
17 stereotypes.
18 JUDGE SOTOLONGO: Excuse me. Are you talking about the 27
19 responses, or all the 1,785 total --
20 THE WITNESS: 1,785.
21 JUDGE SOTOLONGO: Okay. Go ahead. Sorry.
22 A So many of the -- you know, some of the responses, for
23 instance, you know, would fall into a category of seeing Black
24 Lives Matter as very destructive. For instance, comments -- or
25 you know, some of the comments would be, they're just --

1 they're trying to destroy the American family. They're
2 communists and they're destroying American society.
3 MR. PETERSON: Your Honor, I'd make -- make an objection
4 on the best evidence rule. He's describing what's in a written
5 document, and the written document is the best evidence of what
6 the contents are, as opposed to what his recollection of
7 selective --
8 JUDGE SOTOLONGO: We will -- we will get -- I assume we're
9 going to get to the survey and all the responses, or are we?
10 MR. DELORME: Well, we produced them all. We weren't
11 going --
12 JUDGE SOTOLONGO: Yeah. Okay.
13 MR. DELORME: -- to bog down --
14 JUDGE SOTOLONGO: Yeah, you can testify about it. I mean,
15 we -- we'll -- you know. So you -- you can go ahead.
16 A So -- you know, and -- you know, there are also comments,
17 you know, that are, you know, I -- I guess I would -- I would
18 categorize or organize that classify as empathetic to the
19 issues of Black Lives Matter movement. There are questions --
20 or excuse me, there are responses that would fall into a
21 category of -- you know, that are reform oriented, you know.
22 But there's also, you know, a set of responses that describe
23 the Black Lives Matter movement as a very destructive
24 organization to American society. It's destructive to the -
25 fam -- I mean, these are, specifically, destructive to the

1 family, destructive to the workplace; communist organization,
2 for instance.
3 Q BY MR. DELORME: Thank you, Dr. Davidson.
4 MR. DELORME: I'd move for the admission of Respondent's
5 Exhibit 104.
6 MR. PETERSON: No objection to 104.
7 JUDGE SOTOLONGO: Excuse me, which one is -- which one is
8 104?
9 MR. DELORME: The one -- it -- it should be marked in the
10 upper right-hand corner. It's the one-page, Republican
11 Committee survey associating Black Lives Matter and labor
12 issues. I handed you a copy before I handed the witness a
13 copy.
14 JUDGE SOTOLONGO: Can you just -- it looks like, again,
15 I -- I've -- somehow I've missed -- unless I've misplaced it.
16 Excuse me. I think -- I think I've looked at it. I -- I mean,
17 I have 102, I have 103, and I have 100 -- I have this one. Oh,
18 yeah. Okay. Sorry. Yes, I --
19 MR. DELORME: Did I not mark it?
20 JUDGE SOTOLONGO: Yeah, no -- no, you -- you -- I have it
21 here somewhere, I think. All right. Here we go.
22 UNIDENTIFIED SPEAKER: There it is.
23 JUDGE SOTOLONGO: All right. 104 is admitted.
24 **(Respondent Exhibit Number 104 Received into Evidence)**
25 MR. DELORME: Thank you, Your Honor.

1 Q BY MR. DELORME: Dr. Davidson, I'd now like to turn to a
2 discussion of what the survey revealed through the closed-ended
3 questions. How did you parse the data from those results?
4 A So I -- as I said -- you know, as I said before, I looked
5 at the -- I looked at the results -- or excuse me, I
6 constructed nine attitudinal scales for -- or an attitudinal
7 scale for each of the nine items that were asked in the survey.
8 I might also add, I -- I -- pardon me, I probably should
9 have included this before. The -- the inventory of the nine
10 questions, when they were -- when I was talking about what --
11 you know, what respondents see, those were also randomized,
12 okay. So they appeared in -- they appeared in a random order,
13 which again, is best practice. Proper -- proper procedure.
14 So I checked the -- I -- you know, I -- I looked at the --
15 at the -- at the distributions. Looking for, you know, what is
16 the direction of responses by -- you know, or where is the --
17 you know, sort of the predominant trend of responses by
18 citizens for each of the -- well, each of the issues, as well
19 as then each of the nine items, as well as then the three-issue
20 clusters that I created. The racial justice is -- the four
21 racial justice issues, the two emp -- workplace employment
22 questions. And then the three national -- national issues.
23 I also had a series of other questions. I asked
24 questions -- I -- you know, I sort of -- or a question was
25 asked about, do you believe that you -- do you believe that you

1 have a lot of information, or that you know a lot about the
2 Black Lives Matter, or not very much at all?
3 MR. PETERSON: Your Honor, I'm going to make a review of
4 best evidence objection. I -- we think we should need to see
5 the survey if he's talking about the survey questions. We --
6 the -- the best evidence is the survey itself. I assumed that
7 Respondent was intending to offer it. I haven't seen it yet.
8 I think this is -- we're getting a lot of testimony from
9 recollection when it's based on a written document, and the
10 best evidence rule would require the production of the -- the
11 document.
12 MR. DELORME: Except for all of it was produced. So if
13 you --
14 MR. PETERSON: It was produced to me by subpoena, but it's
15 not in the record and it's not for the Court. That's --
16 MR. DELORME: Well, the --
17 MR. PETERSON: -- that's the best evidence rule.
18 MR. DELORME: The expert can certainly testify. And there
19 are going to be documents forthcoming that show the actual
20 results with respect to these questions. But we're just
21 talking now about how he constructed the closed-questions, why
22 he did it the way he did it, and what his opinions are from
23 that. And then there will be other documents that Mr. Peterson
24 can use for cross-examination or what other -- whatever
25 purposes.

1 JUDGE SOTOLONGO: Well, I -- I assume that the -- I -- I
2 assume the survey itself and the responses thereto -- it'll
3 be --
4 MR. DELORME: I mean, they -- we're talking about
5 thousands of pages of documents. I was trying to be judicious
6 and present through Dr. Davidson's testimony what he learned.
7 JUDGE SOTOLONGO: Okay. Well, he's --
8 MR. DELORME: If -- but if ultimately, he wants to --
9 JUDGE SOTOLONGO: -- well, he's creating -- you know,
10 potentially, he's creating a summary, and I -- I'm -- and
11 I'm -- I'm fine with that, you know.
12 You know, the best evidence rule was produ -- was to
13 protect, you know, virgin juries, basically. That's what it
14 comes down to. Just like a hearsay rule. I'm not a virgin,
15 okay, legally speaking, so I'm not going to have my virgin ears
16 destroyed by having somebody summarize. If his summary is --
17 if his summary is -- let me put it this way. If his summary is
18 contrary to what the survey shows, it's going to reveal if he's
19 wrong.
20 So you might want him to go ahead and -- and -- because
21 if -- if there's a conflict with what he's saying now, and what
22 they cover, then his credibility is going to -- it's going to
23 suffer.
24 So I have no problem with him summarizing what his
25 findings were. And I will see for myself later when I see the

1 actual survey and the results, you know, to what extent --
2 provided evidence and his testimony is accurate, so.
3 MR. PETERSON: It seem -- it seems to me that the
4 proponent of this evidence should be the one that produces the
5 exhibit -- the exhibits and documents that support it.
6 JUDGE SOTOLONGO: I -- I mean, I don't -- this testimony
7 is going to be used. Plain and simple, right. I -- I don't --
8 I don't think for a second that the Respondents aren't going to
9 produce the actual survey and the actual response because then
10 his testimony basically is for naught.
11 I mean, that -- you're going to introduce them. I mean, I
12 want --
13 MR. DELORME: I -- I have a series of exhibits we're about
14 to go through right now. So theirs was only --
15 JUDGE SOTOLONGO: I -- I -- I mean, it's, like -- it's,
16 like, why are we here? Why don't you just submit the
17 documents, and then let's all go home. That's not the way this
18 works. I want to hear the testimony. I want to hear his
19 opinion. And I want to see, you know, whether his opinion
20 ultimately is supported by -- by the documentation that's going
21 to be produced. I absolutely expect it to be produced. I will
22 be -- it would be the big -- biggest shock of my legal career,
23 and I've been -- I've done this for 45 years -- if after all of
24 this, this is not produced.
25 I mean -- so in any event, please proceed.

1 Q BY MR. DELORME: We were talking about, Dr. Davidson, how
2 you parsed the data --
3 A Okay.
4 Q -- that you received from the results to be able to
5 formulate an opinion as to what the American public views in
6 terms of Black Lives Matter.
7 A Okay. So I looked at -- I -- I looked at the -- the --
8 simply, the raw distributions of the responses to each one of
9 the inventory -- inventory questions. I also -- what I also
10 did as a way of trying to simplify, you know, or sort of zero
11 in on, what is the common trend, I did the following.
12 And -- and I should first mention that surveys or -- can
13 produce overwhelming amounts of information and data. And so
14 what I did is I adopted basically what is considered sort of
15 a -- a sort of hardest test approach, okay, or a very
16 conservative approach to studying the inventory -- or the
17 results from the inventory.
18 So if you remember back to the attitudinal surveys, when I
19 was talking about them; this goes from 1 to 10, okay. So it's
20 a scale. As you go to each end of the poll -- okay. Then
21 attitudes are exceptionally strong. They're -- they're very
22 strongly held. They're very resistant to change. They're
23 exceptionally -- they are exceptionally stable, all right.
24 So it -- it -- and as a way to try to sort of get to the
25 point I followed a -- you know, this -- I -- I followed a very

1 conservative strategy, and I organized 1, 2, and 3 as, "not a
2 goal"; 8, 9, 10 as, "a major goal". Or in other words, those
3 who hold the strongest opinions at each end of the scale. And
4 so I used that information to -- or -- or used that as one
5 way -- one of the ways in which -- not the only method, of
6 looking at the -- you know, or trying to summarize trends in
7 the data.
8 I also looked at informa -- I also looked at the data
9 across all ten scales, okay. So I did -- I -- so the analysis
10 actually was conducted both ways.
11 Q So Dr. Davidson, I want to start showing you --
12 MR. DELORME: Well, strike the question.
13 Q BY MR. DELORME: Did you create any charts to visually
14 depict the results of the closed-ended questions?
15 A Yes.
16 Q I'm going to start showing you a series of those.
17 MR. DELORME: If I may approach, Your Honor?
18 JUDGE SOTOLONGO: Yes. This is 10 -- 105?
19 MR. DELORME: 105.
20 JUDGE SOTOLONGO: Okay.
21 MR. DELORME: Yes.
22 Q BY MR. DELORME: Dr. Davidson, I've handed you what's been
23 marked as Respondent's Exhibit 105. Do you recognize this
24 document?
25 A Yes.

1 Q Can you tell us what it is?
2 A Yes. This is a summary chart that I produced -- or a -- a
3 chart, as a way of trying to summarize the data. Summarize the
4 major trends in the data. And so this is the percent
5 difference between "a major goal" and "not a goal". Or in
6 other words, I mentioned before that I organized top three,
7 bottom three categories. I collapsed anybody who responded a
8 1, 2, or a 3 in to not a goal. 8, 9, 10 into a major goal
9 category. And I simply took the difference. So large -- so if
10 an issue has a large positive number, okay -- if an issue has a
11 large positive number, then that means that there were more --
12 or positive numbers mean that there are more respondents who
13 are saying it is a major goal than the number of respondents
14 who are saying it's not a major goal.
15 As the number gets larger, okay, big -- big positive
16 numbers means there is a big difference. Negative numbers mean
17 that there are more respondents who are responding -- or more
18 respondents who are saying that the issue is not a goal than
19 those saying it is a major goal.
20 So what you can see is, I guess -- you know, paraphrase,
21 you know, defund the police, excessive use of force by the
22 police, racism in the courts, and police killings, as the four
23 racial justice issues. Not only are they positive, but they
24 are very strongly positive. I mean, these are -- these are --
25 in public opinion, these are very, very large differences.

1 Work conditions and union organization are negative, which
2 means that there are more people saying that work conditions
3 and improving work conditions, and some kind of, you know,
4 promoting unionization or union organizing activities, there
5 are more people who are saying that it is not a goal than it is
6 a goal.
7 And then the other three -- the national issues, voting
8 rights, education, and health care -- voting rights and
9 educational opportunity, you know, they're pretty clustered,
10 you know, like around zero. Voting rights is a little
11 positive, equal -- or educational opportunity is, you know,
12 slightly negative, but it -- as it approaches zero -- in other
13 words, what that means is they're balancing out, right. About
14 the same number of people who are saying it is a major goal are
15 also saying it's not a major -- major goal.
16 Health care, you know, as you can see, is a little bit
17 more negative in this -- in the results.
18 Q Did you -- well, let me make sure I understand your
19 testimony. So health care, work conditions, and union organize
20 on Exhibit 105 are all charted at minus 20 percent or more.
21 A Correct.
22 Q And that means?
23 A That means that there are more people, there's a larger
24 num -- percentage of respondents who are saying those three
25 issues are not -- those three topics are not goals of Black

1 Lives Matter than are goals.
2 Q And then, in contrast, defund police, excessive force,
3 systemic racism, and police killings are all charted at plus 40
4 percent or higher?
5 A Correct.
6 Q And that signifies?
7 A That a large percentage of the population, large
8 percentage of respondents, see those four issues, identify
9 those four issues very strongly as being related to Black Lives
10 Matter. Remember, it's the top three, bottom three. So this
11 is also the people who are attitudinally have very strong --
12 have a very strong position. A very strong understanding --
13 are very confident in their understanding of assigning goals to
14 whether it's a major goal -- or excuse me, assigning these
15 topics as to whether it's a major goal or not a goal.
16 Q Did you provide this same data in a numerical chart?
17 A I did.
18 MR. DELORME: Your Honor, I would move for the admission
19 of Respondent's Exhibit 105.
20 MR. PETERSON: Voir dire, please, Your Honor?
21 JUDGE SOTOLONGO: Go ahead.
22 **VOIR DIRE EXAMINATION**
23 Q BY MR. PETERSON: So the -- this is also difficult since
24 we haven't actually seen the survey. We've heard your
25 testimony about the number -- the 1 through 10 attitudinal

1 chart or attitudinal range. Is that -- is that -- how do
2 you -- what do you call the --
3 A It's an attitudinal scale.
4 Q Attitudinal scale. This chart excludes 4 through -- those
5 that rate -- scaled it in 4 through 7, the responses to the
6 questions which we still don't know what we're --
7 MR. DELORME: Objection, Your Honor. Mr. Peterson is both
8 testifying and cross-examining the witness before --
9 MR. PETERSON: Withdrawn. Withdrawn.
10 Q BY MR. PETERSON: This excludes -- this excludes all of
11 those survey respondents that scaled the -- their responses to
12 whatever the questions were and ranked it in the 4 through 7
13 range?
14 A Correct.
15 Q And why were those excluded from this?
16 A Well, it's a --
17 MR. DELORME: Objection, Your -- that -- objection, Your
18 Honor. This is a matter of cross-examination. This is not a
19 matter of whether the document should be admitted into
20 evidence. He can use a document, once it's admitted into
21 evidence, to cross-examine him on topics that he is interested
22 in cross-examining him on.
23 JUDGE SOTOLONGO: I agree.
24 MR. DELORME: May I approach, Your Honor?
25 JUDGE SOTOLONGO: Yes.

1 MR. DELORME: Oh, is 105 admitted, Your Honor?
2 JUDGE SOTOLONGO: Well, you haven't offered yet.
3 MR. PETERSON: I did. That's what led to the voir dire.
4 JUDGE SOTOLONGO: Okay. All right.
5 MR. PETERSON: Yeah, I object on the grounds that this
6 document hasn't been fully explained. Don't know what it is.
7 JUDGE SOTOLONGO: Okay.
8 MR. PETERSON: We don't know what the -- we don't know
9 what the not goal, major goal is or why just a certain number
10 of responses were excluded from this chart.
11 JUDGE SOTOLONGO: All right.
12 MR. PETERSON: What's the relevance of it.
13 MR. DELORME: All right, Your Honor, may I speak to that?
14 Because Dr. Davison has testified multiple times today that he
15 intentionally, to be conservative, was measuring answers that
16 were 8 through 10 in terms of high correlation between that
17 topic and it being a goal of Black Lives Matter. And 1 through
18 3, which is low association of that topic and a goal of Black
19 Lives Matter, as part of his measuring both directionally and
20 manner of intensity of the responses. It's very clear what he
21 has testified to today.
22 And you know, Mr. Peterson can spend the entire afternoon,
23 if he so chooses, challenging whether or not Dr. Davison has
24 accurately captured the public's interest, but right now, he's
25 just throwing out attacks and oil slicks in the middle of our

1 direct, which is just not productive.

2 JUDGE SOTOLONGO: All right. I agree. 105 is admitted.

3 **(Respondent Exhibit Number 105 Received into Evidence)**

4 MR. DELORME: May I approach?

5 JUDGE SOTOLONGO: Yes.

6 **RESUMED DIRECT EXAMINATION**

7 Q BY MR. DELORME: I've presented and I've handed you what

8 was marked as Respondent's Exhibit 106. Do you recognize this

9 document?

10 A I do.

11 Q Is this the numerical chart of the same data that we just

12 saw on the bar chart in Respondent's Exhibit 105?

13 A Correct.

14 Q Can you explain this chart and what it signifies?

15 A Yes. So first under goal, right, are the nine topics, the

16 nine topical areas. Not a goal is the percent of respondents

17 who answered -- who responded, it's not a goal. Or in other

18 words, it's the -- the number of respondents in categories 1,

19 2, or 3 as a percent of the sample. Major goal is the percent

20 of the respondents who fall into 8, 9, 10 of saying that it is

21 a major goal. And then, the difference is just simple -- is

22 just simple arithmetic. It's just simply major goal minus not

23 a goal for -- you know, the positive numbers mean that there's

24 more -- you know, there are more people, the bigger the

25 positive number, there are a lot more people who are saying the

1 item is not a goal. As it approaches zero, it's sort of mixed,
2 or in other words, they're basic -- basically can -- sort of
3 canceling out. And if they are negative, it means that there
4 are more people who are saying it's not a goal than it is a
5 goal.
6 So it's -- you know, so for instance, the top row police
7 killings, major goal, it's -- the 6 -- the difference, 66.2 is
8 just simply 77.1 minus 10.9.
9 JUDGE SOTOLONGO: All right.
10 THE WITNESS: It's --
11 JUDGE SOTOLONGO: So you would have --
12 THE WITNESS: -- joined that line.
13 JUDGE SOTOLONGO: -- so -- so for example, I think you're
14 taking the first category, police killing. So 77.1 percent of
15 the respondents indicated that this is a major goal. It means
16 they scored at an 8 to 10 scale, correct? 10.9 percent thought
17 it wasn't a major goal, which means that they marked it 1 to 3,
18 you know, correct?
19 THE WITNESS: Correct.
20 JUDGE SOTOLONGO: So -- okay. So that means now there
21 is -- let's see. So roughly that's about 89 percent, correct?
22 THE WITNESS: Correct.
23 JUDGE SOTOLONGO: So I mean, 11 percent --
24 THE WITNESS: Correct.
25 JUDGE SOTOLONGO: And the remaining 11 percent score this

1 only 4 to 7 scale, which means it was somewhere in the
2 middle -- they thought it was somewhere in the middle of how
3 important it was.
4 THE WITNESS: Correct. Correct. This shows both the
5 polarity, but it also shows -- and -- and the concentration.
6 If you -- for instance then, if you -- Judge, it's absolutely
7 correct, okay. So if you add column 1 and column 2, what you
8 do is you get the overall percent --
9 JUDGE SOTOLONGO: Right.
10 THE WITNESS: -- I mean, or the percent of the total of
11 people who are saying 1, 2, 3, 8, 9, 10. Take that number,
12 subtract it from 100, and you have what's left over, but it's
13 pretty a small number. 10 percent, 12 percent. Sprinkled
14 over --
15 JUDGE SOTOLONGO: Okay. Yeah, all right. Okay.
16 THE WITNESS: -- the other six --
17 JUDGE SOTOLONGO: Right. Well, this --
18 THE WITNESS: -- or the other categories.
19 JUDGE SOTOLONGO: So these numbers reveal --
20 THE WITNESS: The dominant track.
21 JUDGE SOTOLONGO: -- what the prior chart did not quite
22 reveal, is what -- what percentage of people had marked these
23 categories in the 4 to 7 scale.
24 THE WITNESS: Exactly. I mean, and it shows -- I mean,
25 again, I think it shows like the conservative approach that I'm

1 trying to use, but also, it shows -- you know, it's showing
2 where the concentration of -- the overwhelming concentration of
3 respondents are.
4 JUDGE SOTOLONGO: Right.
5 THE WITNESS: So the overwhelming percentage of
6 concentration of respondents for one of the two polls, you
7 know. So the attitudinal scale is, you know -- you know,
8 giving us -- is revealing important information.
9 Q BY MR. DELORME: So Dr. Davison, Judge Sotolongo wisely
10 went to my next question, asking you why it didn't add up to
11 100 percent. And Mr. Peterson actually was asking my next
12 question, which is why are you placing less emphasis on the
13 responses that were valued 4 to 7 in this survey?
14 A I'm not placing less emphasis, because I consider those,
15 too. But I am interested in trying to identify what is the
16 major, what is the dominant trend in the data. What does --
17 what does the majority, or what does the large majority of the
18 population identify as the goals of the Black Lives Matter
19 movement. This is -- I'm using this as just -- actually as
20 a -- as I said before, a very conservative, or in other words,
21 the most difficult test of that question, or way to answer
22 that -- way to answer that question.
23 Q What did you gather from the responses between 4 and 7 in
24 terms of the level of commitment of the respondent to that
25 answer?

1 A Well, what that means is, 4 and 5 still -- on the
2 attitudinal scale, 4 and 5 still actually identify an issue --
3 would identify an issue as not a goal. It would be a little
4 weaker than the 8, 9, 10. They're not at the -- in other
5 words, you don't have it -- they're not at the intensity scale.
6 Q You mean weaker than the 1, 2, 3?
7 A Right. And similarly, 6 and 7 also identify -- identify a
8 topic as being a major goal, more than they would identify it
9 as not being a goal.
10 Q But are the answers between 4 and 7, do they demonstrate
11 any strength of commitment to the answer of the individual
12 respondent?
13 A Well, they're are not as strong as the commitments of 1,
14 2, 3 or 8, 9, 10.
15 Q Why is that?
16 A The purpose of a scale -- okay, so 1 through 10 -- so you
17 know, the respondent is given the opportunity now to make
18 relatively granular distinctions, relatively granular -- or
19 record, you know, relatively granular position -- opinions
20 about, you know, whether they think something is or is not --
21 is or is not a goal. So as you move towards into the two --
22 as you move towards the two poles, those are exceptionally --
23 are very, very strongly held attitudes.
24 Q Can you move --
25 A It indicates clarity as you move towards the two ends of

1 the pole.
2 Q Thank you, Dr. Davison. Your Honor, I move for the
3 admission of Respondent's Exhibit 106.
4 MR. PETERSON: Voir dire, please, Your Honor.
5 JUDGE SOTOLONGO: Go ahead.
6 **VOIR DIRE EXAMINATION**
7 Q BY MR. PETERSON: So you've been explaining the -- that
8 actually seems you've given us a general explanation of the
9 attitudinal scale that you created. And the actual -- the
10 wording here on the table, not a goal versus major goal. Only
11 one -- only the one scale was actually -- I believe the term
12 used was, do not associate at all with Black Lives Matter.
13 A Correct.
14 Q And for 10, it was a major goal or purpose of Black Lives
15 Matter.
16 A Yeah. Primary goal.
17 Q And so I guess the -- so the not a goal would actually
18 fall into the, do not associate at all with Black Lives Matter;
19 is that the -- the scale that you're -- is that the
20 actual term --
21 A I don't understand. Could you clarify, please?
22 Q Well, yeah, because the -- so the language you use here
23 differs from the survey. The survey doesn't say do not -- you
24 know, your table here, the survey says, number 1 is, do not
25 associate at all with Black Lives Matter --

1 A Okay.
2 Q -- correct? And then 10 is a major goal or purpose of
3 Black Lives Matter; is that correct?
4 A Yes. Okay.
5 Q And then I -- from -- from what I can tell, the 2 through
6 9 don't have any distinction. They're just -- you're supposed
7 to put something between 1 and 10. Is that -- is that correct?
8 A Well, again, I'm -- I'm not -- I don't think I understand
9 your question. It is -- you know, so maybe you can try again
10 for me. Help me along. I -- I don't -- it's a scale.
11 Q Yeah.
12 A And there's two poles at the end of the -- at the ends of
13 the scale.
14 Q Right. And the -- the poles at each end are defined in
15 your -- in the attitudinal scale in the survey; is --
16 A Yes.
17 Q -- that correct? But the intervening 2 through 8 are not
18 defined. They're just you fall in between those two poles?
19 Like, do -- 1 is do not --
20 A In the survey -- in the survey question, and I don't have
21 the survey in front of me, but in the survey question it is --
22 it is something like, you know, where 1 is not a goal, 10 is --
23 or not at all a goal, and 10 is a primary goal. And then it
24 says something -- it would say something like a 5 would be
25 sort of a mixed -- I think the -- the explanation is a mixed --

1 or you know, a mixture of opinions. But the scale itself is --
2 the scale itself is -- the scale itself is clear, I think. You
3 know, as you -- you're asking -- or you're giving respondents
4 the opportunity to make relatively granular -- or to make
5 granular decisions about where -- how strongly they believe
6 something is a goal or not a goal of Black Lives Matter.
7 Q Yeah. And that's part of the reason why I think it would
8 be very helpful to have the survey and the questions. But --
9 MR. DELORME: Your Honor --
10 Q BY MR. PETERSON: -- based on what you've said --
11 MR. PETERSON: May I --
12 MR. DELORME: Of course. I apologize.
13 MR. PETERSON: -- ask the question?
14 Q BY MR. PETERSON: So the not a goal, the correlation you
15 included 1, 2 and 3 responses, as not a goal; is that correct?
16 MR. DELORME: Objection, Your Honor. We're in cross-
17 examination land again.
18 MR. PETERSON: No. I'm asking about this document where
19 it says not a goal.
20 MR. DELORME: Okay. Right --
21 JUDGE SOTOLONGO: Okay. You know what, I'll tell you
22 what. This -- this is to help me make a decision, okay. I
23 don't have a problem with this. I would have used the middle
24 category as a either somewhat of a goal or a minor goal. A
25 minor goal, somewhat of a goal. I think you can have general

1 distinctions. It doesn't matter. I think it's clear to me
2 what this -- this -- you know, it's pretty clear to me what
3 this goal means. And if it's not clear to you, I'm sorry, but
4 I'm the one who is going to make the decision, and I'm the one
5 who's going to decide whether this is an issue or not, for that
6 reason. I --
7 You know, you can basically call the middle sections
8 somewhat of a goal, a minor goal, say -- you know. You know,
9 it is what it is. And -- and I think I understand that.
10 MR. PETERSON: So Your Honor, I'm not asking about the --
11 the 4 through 7 at this point. I'm asking --
12 Q BY MR. PETERSON: 2 and 3 from the survey don't actually
13 say not a goal. They just put it low on the scale. A response
14 of 1 is the only true response that would be not a goal, no
15 association at all; is that correct? 2 and 3 would be closer
16 to not a goal, but not necessarily not a goal, as this states.
17 A I do not know of anyone in survey research who would have
18 that interpretation. It is a scale -- the scale that I am
19 using, okay, is called a Likert scale, that has been in survey
20 research for 70 years. The scale makes -- allows the
21 respondent to make granular distinctions. And as they move
22 towards the two ends of the pole, gradations, as they move
23 towards the two ends of the pole, all right, then they are
24 holding the attitude, okay, or their point of view,
25 increasingly strongly. It does not mean 2 through 9 is

1 irrelevant, okay.
2 Q Yes.
3 A It is an attitudinal scale, that I must say, everyone
4 understands.
5 Q I understand that. But 2 and 3 are not not a goal. The
6 survey, I mean, it's -- it's close to not a goal, but that
7 doesn't mean not a goal absolutely. And this says not a goal.
8 And that's what I'm trying to -- determination -- only the --
9 MR. DELORME: Your Honor --
10 Q BY MR. PETERSON: -- only the people in 1 said actually
11 not a goal. 2 and 3 were close to not a goal.
12 A Right. And I don't think I can answer this any better.
13 MR. DELORME: Objection, Your Honor. His -- his testimony
14 is what it is. If Mr. Peterson doesn't agree with it, that's
15 fine, that's well within his right. That's why we have cross-
16 examination, if we can ever get to the end of direct.
17 JUDGE SOTOLONGO: I agree. Again, this is crawling on the
18 cross-examination and I'll determine how much value, how much
19 weight I ultimately give this, but not whether it's admissible.
20 So 106 is admitted.
21 **(Respondent Exhibit Number 106 Received into Evidence)**
22 MR. DELORME: Thank you, Your Honor.
23 **RESUMED DIRECT EXAMINATION**
24 Q BY MR. DELORME: Dr. Davison, did you break down the data
25 by region of the United States?

1 A I did.
2 MR. DELORME: My I approach, Your Honor?
3 JUDGE SOTOLONGO: Yes.
4 Q BY MR. DELORME: I'm handing you what's been marked as
5 Exhibit 1 -- or Respondent's Exhibit 107. Do you recognize
6 this document?
7 A I do.
8 Q Can you explain to us what it is?
9 A Yes. So I -- I conducted a regional analysis Northeast,
10 Midwest, Southwest of the responses. This is the breakdown for
11 the four racial justice activities. Again, using the one --
12 the top three, bottom three, okay. So the 1 through 3, 8
13 through 10 method of analysis. The red bars are, it's a major
14 goal. The blue bar is the percentage of the population who are
15 saying it's not a goal.
16 As you can see, there just is no regional variation. All
17 four regions of the United States are overwhelmingly, you know,
18 saying that the racial justice items are major goals of
19 black -- are identifying racial justice activities are four
20 topics that I had, I used as major goals of Black Lives Matter.
21 And then similarly, you know, you see the contrast for
22 identifying what is not a -- what is not a goal.
23 Q And just for clarity, which bar -- which color bar
24 represents major goal?
25 A Red.

1 Q And so blue is not a goal?
2 A Correct.
3 Q Did you do this same regional analysis for the workplace
4 activities actions?
5 A Yes.
6 JUDGE SOTOLONGO: Let's take a five minute break, okay.
7 MR. DELORME: Can I just move for admission --
8 JUDGE SOTOLONGO: Yes, yes.
9 MR. DELORME: -- of 107 before we go?
10 JUDGE SOTOLONGO: Yes.
11 MR. DELORME: I'll forget.
12 MR. PETERSON: Voir dire, Your Honor?
13 JUDGE SOTOLONGO: Yes.
14 **VOIR DIRE EXAMINATION**
15 Q BY MR. PETERSON: Does this survey -- is this -- when you
16 say not a goal, is that people that responded in the 1 to 3
17 range?
18 A Yes.
19 Q And major goal was those that responded in the 8 and 9
20 range?
21 A Yes.
22 Q And again, this is excluding the 4 through 7 in the
23 middle?
24 A Yes.
25 Q All right.

1 MR. PETERSON: No objection.

2 JUDGE SOTOLONGO: All Right. 107 is admitted.

3 **(Respondent Exhibit Number 107 Received into Evidence)**

4 JUDGE SOTOLONGO: Let's take a five minute break.

5 MR. DELORME: Thank you, Your Honor.

6 (Off the record at 11:56 a.m.)

7 JUDGE SOTOLONGO: All right. Let's proceed. By the way,

8 I intend to go until is 1:00 and then break for lunch, and then

9 continue it. Okay? All right? Go ahead.

10 **RESUMED DIRECT EXAMINATION**

11 Q BY MR. DELORME: Dr. Davison, did you create a chart

12 similar to Respondent's Exhibit 107 with respect to the

13 workplace activities questions in your survey?

14 A I did.

15 Q All right.

16 A I'm going to hand you what's been marked as Respondent's

17 Exhibit 108. Do you recognize this document?

18 A Yes.

19 Q Can you tell me what this document represents?

20 A Yes, it is the -- it actually is the same method as with

21 the racial justice activities, applied to the workplace

22 activities. You know, so the red bars are a major goal. The

23 blue bar -- the blue bars are not a goal. This is for the two

24 workplace issues or questions in the survey. And again, by

25 region of the country.

1 And you know, so you know, again, there's two patterns
2 here. You know, one is this -- you know, there's really no
3 regional variation in the root -- in the results. You know,
4 and the other, obviously, is the blue bars are now bigger than
5 the red bars.
6 The workplace issues are not associated as a goal or a
7 major goal of Black Lives Matter. And it is consistent in the
8 four regions of the United States.
9 Q And are these roughly the similar or same distributions
10 when you look -- when you roll up the -- the data to the
11 national level?
12 A It's a little bit different when -- you mean for the
13 national issues?
14 Q No, no. That -- we're going to talk about that in a
15 second. I'm talking about, as you look at these numbers
16 regionally, if you were to take -- if you were to not do this
17 analysis and just look at it nationally, these -- the numbers
18 are similar in the responses.
19 A Oh, oh, oh, oh, I see. Yes. Are the percentages within
20 re -- within each region similar to the percentages nationally?
21 Yes, they're very close. Which again, signifies -- this
22 actually goes back and signifies a -- you know, a
23 methodologic -- no, survey methodology feature that --
24 regarding representativeness, you know, that proportionally
25 we're all also getting very similar results.

1 MR. DELORME: I move for the admission of Respondent's
2 Exhibit 108 into evidence.
3 MR. PETERSON: Quick voir dire, please?
4 JUDGE SOTOLONGO: Go ahead.
5 **VOIR DIRE EXAMINATION**
6 Q BY MR. PETERSON: Is this similar to the other charts in
7 that they omit the -- the --
8 A Right. So it's 1, 2, 3, 8, 8, 10.
9 Q And the -- the writing -- "advocate improving working
10 conditions at private businesses and advocate unionizing at
11 private businesses", those are -- that's your summary of what
12 the questions were responsive to?
13 A Right. That's just my shorthand.
14 Q It's not the actual question?
15 A To clarify the -- to -- to label the graphs.
16 Q It's not the actual question itself?
17 A Well, it's pretty close, but I -- I -- I can't repeat
18 verbatim every question in the survey.
19 Q Yeah. It's your -- it's your summary --
20 A Yeah.
21 Q -- of what the actual survey says.
22 MR. PETERSON: All right. I'm going to try one more
23 objection on foundation grounds that we don't have the actual
24 survey and the questions that are being asked.
25 JUDGE SOTOLONGO: All right. I'll admit it.

1 **(Respondent Exhibit Number 108 Received into Evidence)**

2 MR. DELORME: Thank you, Your Honor.

3 **RESUMED DIRECT EXAMINATION**

4 Q BY MR. DELORME: Dr. Davison, did you also do a similar
5 analysis of the salient national issues that you embedded into
6 the survey as a control?
7 A Yes.
8 Q I'm handing you what has been marked as Respondent Exhibit
9 109. Do you recognize this document?
10 A I do.
11 Q Can you tell us what it represents?
12 A Again, this is the parallel analysis for one, two, three,
13 eight, nine, ten, major goal, not a goal, by region for salient
14 national issues. I -- I think what's -- you know, what's
15 noteworthy here is the -- well, again, there's not very much
16 regional variation within each issue area. But if you -- if --
17 you know, if -- if you -- if you look at it in contrast or in
18 comparison to the other two sets of charts --
19 Q That would be Exhibit 107 and 108?
20 A Correct. You know, which is -- the shapes on the charts
21 are very different. The -- you can see the polarity in 107 and
22 108 for voting rights as well as improving educational
23 opportunities. You know, it -- it's sort of middling. They're
24 very, you know -- they're very close to each other. There's a
25 little more identification of affordable healthcare as not

1 being a goal. You know, but again, it's not the stark
2 differences that are in the first two graphs.
3 Q Is that what you intended when you put the national issues
4 questions into the poll?
5 A Well, the national issues question is in the survey, okay,
6 as a test. I wasn't intending any outcome. Okay. The data
7 are the data. The results are the results. So respondents
8 could have answered the questions differently. It's -- it's a
9 test, or one of the tests that I used to determine if citizens
10 see racial justice, workplace issues, issue clusters
11 differently from national -- from salient -- three salient
12 national issues.
13 And certainly two of the three indicate, yes, absolutely.
14 And even with healthcare, you know, the majority are saying,
15 no, it's not an -- it -- it's not an issue of Black Lives
16 Matter. It's not as stark as the others.
17 So you know the results are consistent with the test or
18 with the question that, you know -- that I was testing whether
19 or not there is, you know -- whether or not the public sees a
20 difference between racial justice and workplace issues on the
21 one hand? Or you know, do they just see it sort of the same as
22 any other major national issue? These are very, three
23 different -- or these are three different kinds of shapes.
24 Q And do the different size of shapes, as you described it,
25 point you in a direction that the data is more accurate?

1 A I don't understand what you mean by "more accurate". The
2 data are the data.
3 Q Okay.
4 A You know, the survey is methodologically --
5 methodologically very good.
6 Q You -- you --
7 A So the --
8 Q You spoke earlier about using the multimodal test to be
9 able to validate sort of the raw responses.
10 A Oh, oh, I see.
11 Q And so what I'm -- what I'm trying to ask inarticulately
12 is, do the results that you see in Exhibits 107, 108, and 109
13 provide you with any information about the validity of the test
14 that you conducted?
15 A Yeah, the major result -- yes, the major result,
16 obviously, you know, the -- the profound result, I think from
17 the open-ended question is when unprompted 1.3 percent of
18 respondents would use some kind of reference to the workplace
19 as a major goal of Black Lives Matter. And the percentage or
20 the number of individuals identifying a, you know, racial
21 justice, criminal justice issue was 30 times larger.
22 This, as well as the graph with the yellow bars, Exhibit
23 105, are consistent with that pattern. Okay. So the -- the
24 tests are -- the -- the separate and independent tests so far
25 are aligning. You know, they're -- they're -- they're telling

1 generally the same story.
2 Q Dr. Davison, I want to take a quick pause and ask a
3 question surrounding the -- the number of questions you had in
4 the three different buckets that you've described: the racial
5 justice questions, the workplace-related questions, and the
6 national issues questions.
7 A Yes.
8 Q You ask four racial justice questions and only two
9 workplace-related issue questions. Do -- is it possible that
10 that predisposed the respondents one way or the other?
11 A I do not believe so because actually there's five
12 nonracial-justice questions. There's the two workplace and
13 then three -- and then the three national issues. So there's
14 actually five in con -- are the -- respondent is -- actually,
15 person in the survey actually has five questions that are
16 compared for four -- or five nonracial-justice questions
17 compared to four.
18 Importantly, and -- and I think I mentioned this.
19 Importantly, I also said that the inventory is randomized.
20 Okay. And so respondents do not see a subsequent question
21 until they answer the question that they're on. So if they
22 answer question number 1, then it will be advanced to question
23 number 2, et cetera.
24 All right. So -- and again, the purpose of randomization
25 is to eliminate, you know, the potential of question-ordering

1 effects. Okay. So the respondent would not -- it's not until
2 the respondent reaches the end of the inventory that they know
3 how many questions were -- of each cluster were actually --
4 were actually asked.
5 JUDGE SOTOLONGO: Are -- are these questions asked all in
6 the same order or were they --
7 THE WITNESS: No.
8 JUDGE SOTOLONGO: -- randomly -- so they -- so one person
9 would see, for example -- our first question could be of
10 voting --
11 THE WITNESS: Voting rights.
12 JUDGE SOTOLONGO: -- for example. And then -- and the
13 first question of somebody else might be employment-related
14 or --
15 THE WITNESS: Absolutely.
16 JUDGE SOTOLONGO: -- or it could be racial justice? So
17 it's completely random?
18 THE WITNESS: Absolutely. I mean, and it's just -- the
19 sequence is generated by random -- there is a random-number
20 generator that is used by, you know -- in the software. And so
21 it's -- it's a completely random process, which I instructed
22 YouGov to do. Yes. I mean, they would have done it anyway.
23 JUDGE SOTOLONGO: Right.
24 THE WITNESS: Because it's a great thing to do.
25 MR. DELORME: Your Honor, I'd move for the admission of

1 Respondent's Exhibit 109.

2 MR. PETERSON: Voir dire, Your Honor?

3 JUDGE SOTOLONGO: Go ahead.

4 **VOIR DIRE EXAMINATION**

5 Q BY MR. PETERSON: So these -- similar to the others, these
6 are omitting the responses that were in the -- the attitudinal
7 scale between thir -- between four and seven?
8 A Correct.
9 Q And these are your -- your paraphrasing of what the
10 questions were that were asked?
11 A Correct.
12 Q And is -- under -- this is not about the open-ended
13 question. This is about the --
14 A This is the inventory.
15 Q -- the inventory? And that's you referring to the
16 closed-ended questions?
17 A Correct.
18 MR. PETERSON: No objection.
19 JUDGE SOTOLONGO: All right. Respondent's 109 is -- 109
20 is admitted.
21 **(Respondent Exhibit Number 109 Received into Evidence)**
22 **RESUMED DIRECT EXAMINATION**
23 Q BY MR. DELORME: Dr. Davison, there was -- well, let me
24 ask you differently. What if a respondent had no idea whether
25 one of the nine provided options in the closed questions was a

1 goal of Black Lives Matter? Did they have an opportunity to
2 indicate that?
3 A Yes. So there is also an option for the respondent to --
4 to record -- instead of like one through ten, where they could
5 just simply indicate, I have no idea. And so I analyzed that
6 data as well.
7 Q What did you do? What did you do with that data?
8 A So I looked at the frequencies, okay, or the -- the rate
9 at which people were listing they had no idea for each of the
10 issues. Looking at the rate at which -- you know, again, this
11 is a -- you know, it -- I'm doing -- I'm performing multiple
12 tests. And you know, so this is one more way in which, you
13 know, I'm trying to be, you know, imposing rigor in the
14 analysis and, you know, in the survey. And so it is -- you
15 know, obviously if lots of people are saying, I have no idea,
16 then it's not a -- you know, they're uncertain, they haven't
17 heard of the issue, they're uncertain about where to place it,
18 they feel uncomfortable about placing it, whatever the reason
19 might be.
20 On the other hand, if it's not very many people who were,
21 you know -- who were actually access -- you know, they're
22 actually recording, I have no idea, then again, it reflects
23 clarity and confidence in their answers.
24 Q And do you know roughly the -- which -- which category:
25 racial issues, workplace activities, or salient national issues

1 had higher "no idea" responses, lower, and fell in the middle?
2 A Yes.
3 Q Okay. Which -- which was the lowest one?
4 A The racial justice issues had the lowest percent of
5 individuals responding, "I have no idea". As I recall, it was
6 two or three percent. One might have had six percent, but they
7 were -- they were exceptionally low for the racial justice
8 issues. So I think it's three of the four had two or three
9 percent responding that they had no idea.
10 In comparison, the two workplace issues were much larger.
11 As I recall, I think it was like 17 or 18 percent were
12 responding that they had -- or 16 or 17 percent were responding
13 that they had no idea. And the, you know, sort of in the
14 middle were the national issues.
15 Q And was -- is that consistent with the other tests that
16 you put into --
17 A Yes.
18 Q -- the survey in terms of the attitudinal strength that
19 respondents had with respect to those three categories?
20 A Right. I mean, again, it's -- you know, it's sort of
21 reinforcing the point, I mean, from another -- yet another
22 direction. Is the -- does somebody hold the opinion, hold an
23 opinion, and is it clearly held or -- or you know, in other
24 words, how stable is it? And you know, again, this is -- this
25 is consistent with the results that are showing individuals do

1 not identify workplace issues with -- as a goal of Black Lives
2 Matter.
3 MR. DELORME: May I approach, Your Honor?
4 JUDGE SOTOLONGO: Go ahead.
5 Q BY MR. DELORME: Dr. Davison, I'm handing you what's been
6 marked as Respondent's Exhibit 110.
7 A Yes.
8 Q Do you recognize this document?
9 A Yes.
10 Q Does this represent the analysis of the "no idea"
11 responses that we just discussed?
12 A Correct.
13 Q Does this refresh your recollection as to the --
14 A Yeah.
15 Q -- some precise percentages?
16 A Yeah, I said two or three percent, I -- as I recalled on
17 three of the four, and one was six. And so that's correct.
18 The workplace issues are 13 percent -- or improved work
19 conditions are 13 percent said that they have no idea.
20 Encouraging union organizing by employees is 18 percent. You
21 know, and the salient national issues are 8 percent and 11
22 percent.
23 MR. DELORME: Your Honor, I'd move for the admission of
24 Respondent's Exhibit Number 110.
25 MR. PETERSON: Quick voir dire, Your Honor?

1 **VOIR DIRE EXAMINATION**

2 Q BY MR. PETERSON: Again, are these -- are these -- are
3 these you paraphrasing with the actuals question in the surveys
4 are?
5 A Yes.
6 MR. PETERSON: No objection to 110.
7 JUDGE SOTOLONGO: All right. Respondent's 110 is
8 admitted.
9 **(Respondent Exhibit Number 110 Received into Evidence)**
10 **RESUMED DIRECT EXAMINATION**
11 Q BY MR. DELORME: Dr. Davison, did you evaluate the
12 importance of other variables as part of your analysis?
13 A I did.
14 Q Did the responses materially changed (sic) when you looked
15 at the other variables?
16 A No.
17 Q What were they --
18 A The patterns were largely -- were largely similar.
19 Q What variables did you look at?
20 A Okay. So what I did was I used -- I looked at classic
21 variables that we use -- you know, that are used in, you
22 know -- and that are identified as important for changes in
23 public opinion. So educational level, gender, race, and so
24 forth.
25 I also looked at -- constructed two questions, and looked

1 at the results as well. One was, how much information, or how
2 much knowledge do you think that you have about the Black Lives
3 Matter movement? Wondering if there would be a difference
4 in -- between individuals who feel that they have a great deal
5 of information about Black Lives Matter and know a lot about
6 Black Lives Matter versus they don't have very much information
7 about Black Lives Matter.
8 I also asked a question about level of understanding or
9 their perceived level of understanding. Do you think you
10 understand well the goals of Black Lives Matter, or do you
11 understand the goals of Black Lives Matter not at all well?
12 Again, looking to see if there's any -- looking to see if
13 there's any differences between, you know, within educational
14 categories, within gender, within perceptions of understanding,
15 information level, and so forth.
16 What I found was, you know, again -- was a largely very
17 consistent, you know, outcome. It really didn't matter
18 whether -- it really didn't change very much the overall
19 pattern or the overall set of results if somebody felt that
20 they had a great -- knew a great deal about ba -- Black Lives
21 Matter or they didn't know very much about Black Lives Matter.
22 They still largely associated racial justice issues with Black
23 Lives Matter and did not strongly associate workplace issues
24 with Black Lives Matter.
25 Similarly, within educational level. Relatively similar

1 percentages of, you know, for instance, of education, you know,
2 somebody who had a high school education or somebody who had
3 college or above. You know, it's -- it increases slightly as
4 educational level increases, the rate at which they're
5 saying -- or is a slightly larger percentage of individuals who
6 identify racial justice issues as being the primary goals of
7 Black Lives -- Black Lives Matter. But even for individuals
8 with a high school education or less than a high school
9 education, there's still majorities who identify racial justice
10 issues or connect racial justice issues as being the primary
11 goals of Black Lives Matter, and they do not identify the --
12 the workplace issues.
13 The -- so the -- there's no difference by gender. It's
14 two or three percent, three or four percent. It's a trivial --
15 it -- it -- it's a trivial difference. Information and
16 understanding -- the -- there is a slight -- there is a slight
17 increase -- or blacks are slightly higher associating all the
18 goals with -- or excuse me -- all the policies as being goals
19 of Black Lives Matter. However, it is not a majority.
20 The other is -- I also look at partisanship. And
21 Republicans are less likely to attribute any of the issues as
22 being goals of Black Lives Matter. For both groups through,
23 majorities, except -- or I think in only one instance, still
24 see racial justice issues as being goals of Black Lives Matter
25 and not the goals of -- or see workplace issues as not topics,

1 as not the goals of Black Lives Matter.
2 Can I still go on for another minute? Okay. So an
3 important question here, I -- or -- or I think clarification,
4 again, is -- you know, I would encourage you to think back to
5 the research design that I created, you know, and so I'm trying
6 to create multiple tests and look at trying to identify, you
7 know, also -- not just what do people think, but also what's
8 the intensity and what is the stability of this viewpoint?
9 So the test that I'm really looking for here is if there's
10 not much difference -- I mean, if majorities of high school
11 educated individuals and college educated individuals, if
12 majorities of men and women still identify racial justice
13 issues, or identify racial justice issues as the primary goals
14 of Black Lives Matter and conversely do not identify the
15 goals -- or workplace topics as goals of Black Lives Matter,
16 then, you know, that indi -- there's -- there's just not
17 variation across these variables. All right.
18 What that means is this is a -- this is a strongly fixed
19 or established opinion. It doesn't change by, you know --
20 well-educated and high school educated. Majorities of both are
21 saying similar things.
22 Q Did you look --
23 MR. DELORME: Strike the question.
24 Q BY MR. DELORME: Did you create any charts that depict the
25 distributions of the three different categories of questions?

1 A I did.
2 MR. DELORME: I want to show those to you relatively
3 quickly here.
4 May I approach, Your Honor?
5 JUDGE SOTOLONGO: Go ahead.
6 Q BY MR. DELORME: Dr. Davison, I'm handing you what's been
7 marked as Respondent's Exhibit 111. Do you recognize this
8 document?
9 A I do.
10 Q Can you explain to us what it is?
11 A Yes. These are hist -- what are known as histograms.
12 Okay. So this is just simply the -- the distribution for every
13 category now. Okay. So 1 through 10, this is inclusive of --
14 so it's -- it's no longer the top three, bottom three. Okay.
15 This is now every category, all ten categories in the -- in the
16 attitudinal scales. This is a graph for the salient national
17 issues.
18 The -- the red line, okay, is the median. The median is a
19 resistant statistic. What that means is a -- the median is the
20 50/50 point of a distribution. Okay. So it's the midpoint of
21 the distribution. It tells you what the shape of the
22 distribution looks like, where observations are clustered or
23 concentrated or not.
24 Okay. So the medians here are for the three salient
25 national issues. And if you notice, the medians are towards

1 the middle of the dist -- you know, of these distributions.
2 Q Meaning that the respondents --
3 A There's a -- there are sort of across the board.
4 Q -- 50/50-ish?
5 A Right. Okay. So the -- the -- the midpoint is for voting
6 rights. Advocating voting rights is number 6. Affordable
7 healthcare is 4. Education is 6.
8 Okay. So the medians are showing -- you know, are towards
9 the middle of the dist -- are towards the middle of the
10 distribution. You know, there's a little bit of concentration
11 at the ends, but not very much, you know, because particularly
12 you want to pay attention to the Y axis, the percent. You
13 know, we're not talking about very large numbers, very large
14 percentages.
15 MR. DELORME: I move for the admission of Respondent's
16 Exhibit 111.
17 MR. PETERSON: Quick voir dire, Your Honor?
18 JUDGE SOTOLONGO: Go ahead.
19 **VOIR DIRE EXAMINATION**
20 Q BY MR. PETERSON: So as I understand it, this represents
21 all ten --
22 A Correct.
23 Q -- no matter how -- is this all of the -- it includes
24 all -- every 2,000 responses --
25 A All --

1 Q -- to -- to the three questions that you asked on the
2 salient national issues?
3 A Right. It's everybody.
4 Q And again, these are your paraphrasing of what the
5 questions were?
6 A Right.
7 MR. PETERSON: No objection.
8 JUDGE SOTOLONGO: All right. Respondent's 111 is
9 admitted.
10 **(Respondent Exhibit Number 111 Received into Evidence)**
11 **RESUMED DIRECT EXAMINATION**
12 Q BY MR. DELORME: I just want to make sure that we clarify
13 for the record, Respondent's Exhibit 111 does not include those
14 who may have written, "I have no idea", correct?
15 A Oh, correct.
16 MR. DELORME: All right. May I approach, Your Honor?
17 JUDGE SOTOLONGO: Please do.
18 Q BY MR. DELORME: Dr. Davison, did you do a similar
19 analysis for the racial justice goals?
20 A I did.
21 Q Handing you what's been marked as Respondent's Exhibit
22 112. Can you identify that document, please?
23 A Yes. This is the same median analysis that I conducted,
24 you know, for the salient national issues. You know, and
25 again, remember, what the median is telling us is, what is the

1 shape of the distribution or, where are the observations
2 concentrated? And what you see -- and there's actually a
3 couple of things, you know, that emerge from this. All four,
4 the medians are highly located on the right-hand side and are
5 in other words, towards a major goal.
6 Protest killing by the police of unarmed African Americans
7 and excessive use of force by the police or vigilantes, the
8 medians are ten. Criminal justice system median is nine.
9 Defund the police is eight. So what it -- you know, so
10 obviously what it's showing is there's a very heavy
11 concentration for the racial justice issues of the observations
12 towards the right-hand side as being a major goal.
13 I also would point -- you know, also remind you,
14 particularly in comparison to the salient national issues, look
15 at the Y axis or the percents (sic). Okay? So you know, we're
16 upwards of, just in the single category, of ten. You know,
17 we're approaching 60 percent of the observations or more
18 than -- you know, so we're actually well past the median.
19 The other is that -- I -- I think the other item that
20 emerges here is of the four racial justice issues, the --
21 the -- the two questions dealing with excessive use of force or
22 by the police or protesting killing by the police of unarmed
23 African Americans are also the strongest issues that are
24 identified among the four racial justice -- among those four
25 racial justice issues.

1 MR. DELORME: I would move for the exhibit of -- which
2 one -- Exhibit 112.
3 MR. PETERSON: Quick voir dire?
4 JUDGE SOTOLONGO: Go ahead.
5 **VOIR DIRE EXAMINATION**
6 Q BY MR. PETERSON: And just confirming this again,
7 similarly to the last one, it contains all ten of the
8 attitudinal scale --
9 A Yes.
10 Q And it also includes all -- all responses other than "no
11 idea"? And these are your -- and -- and is that -- I'm sorry.
12 Is that a yes?
13 A Yes.
14 Q And these are your paraphrasing of what the questions
15 were?
16 A Yes.
17 MR. DELORME: No objection.
18 JUDGE SOTOLONGO: All right. Respondent's 112 is
19 admitted.
20 **(Respondent Exhibit Number 112 Received into Evidence)**
21 **RESUMED DIRECT EXAMINATION**
22 Q BY MR. DELORME: Dr. Davison, did you do the similar
23 analysis for the workplace activities question?
24 A Yes.
25 MR. DELORME: May I approach?

1 JUDGE SOTOLONGO: Yes.
2 THE WITNESS: Thank you.
3 Q BY MR. DELORME: Thank you. I'm going to hand you what's
4 been marked as Respondent's Exhibit 113. Do you recognize this
5 document?
6 A I do.
7 Q Can you explain to us what this -- these charts are
8 indicating?
9 A Again, this is the same analysis of -- median analysis,
10 but for the two workplace issues for all ten categories. But
11 now what we see are the medians are obviously moved to the left
12 towards the direction of "not a goal".
13 Q And am I understanding your testimony correctly, saying
14 that as the median moves closer to the polls, this is yet
15 another test that demonstrates the strength of the opinions of
16 the respondents to the poll?
17 A Correct. This indicates the intensity or the strength of
18 their opinion.
19 MR. DELORME: Okay. Oh, and I move for the admission of
20 Respondent's Exhibit 113.
21 MR. PETERSON: Quick voir dire?
22 JUDGE SOTOLONGO: Go ahead.
23 **VOIR DIRE EXAMINATION**
24 Q BY MR. PETERSON: I think you've already confirmed that
25 this includes all ten of the attitudinal scale results. Does

1 this also include all the -- all the responses to the survey
2 that were not other than "no idea"?
3 A Yes.
4 Q And is that your paraphrasing of the questions that were
5 asked?
6 A Yes.
7 MR. PETERSON: No objection.
8 JUDGE SOTOLONGO: Respondent's 113 is admitted.
9 **(Respondent Exhibit Number 113 Received into Evidence)**
10 MR. DELORME: Your Honor, may we go off the record?
11 JUDGE SOTOLONGO: Yes.
12 (Off the record at 12:44 p.m.)
13 JUDGE SOTOLONGO: All right. I think we've come to a
14 natural break here. There's -- probably needs -- get some
15 records ready for the -- the follow-up questions. So we will
16 convene at a quarter to 2.
17 MR. DELORME: Thank you, Your Honor.
18 JUDGE SOTOLONGO: Off the record.
19 (Off the record at 12:45 p.m.)
20 JUDGE SOTOLONGO: All right. Mr. DeLorme, will you please
21 proceed?
22 MR. DELORME: Thank you, Your Honor.
23 **RESUMED DIRECT EXAMINATION**
24 Q BY MR. DELORME: Dr. Davison, before we took the lunch
25 break, do you recall that I asked a question of clarification

1 when you were answering Mr. Peterson's question with respect to
2 the distribution graphs?
3 A Yes.
4 Q And the question I asked you was, do the answers for "no
5 idea", are they captured somewhere on the distributions, which
6 to remind everyone in the record, are Respondent's Exhibits
7 111, 112, and 113?
8 A Yes. Well, the no answers, I did a separate analysis.
9 Okay. The table --
10 Q That would have been Respondent's Exhibit 110?
11 A Yes. Okay. So that was one way in which I dealt with
12 the -- with no answers to show the distribution of no -- of no
13 answers across the -- each of the issue areas.
14 Q Just to clarify, you mean when they selected "no idea"?
15 A Correct.
16 Q Okay.
17 A Or -- yeah, I shouldn't say no answer. I meant no idea.
18 Pardon me.
19 In the -- okay. So in the graphics, "I have no idea" is
20 counted as not a goal.
21 Q And why is that?
22 A Because if I have no idea, then obviously, I mean,
23 logically, it is not a goal of the -- of the person. And I
24 conducted the analyses actually a variety of different ways.
25 But for the -- the -- the graphical distributions, the charts,

1 the -- "no idea" is included as the -- or also is counted as
2 a -- as not a goal.
3 Q Okay. Thank you for that clarification, Dr. Davison.
4 Okay. You testified about the manner in which the survey was
5 taken by the respondents. Do you recall that?
6 A Yes.
7 Q And you said that it was taken online?
8 A Yes.
9 Q Is that correct? And there were a series of screens that
10 respondents would have to go through?
11 A Correct. Yeah, the way this works is the respondent is
12 going to get sort of a welcome screen. Thank you very much
13 for -- you know, for participating in -- in this survey. Next
14 screen. Or you know, do you agree? Sign the release and so
15 forth. So it's the normal -- you know, it's the normal
16 agreement or -- or consent form to be a research -- be a
17 subject in a research project or in a research question.
18 Then the first question -- and -- and I actually -- I -- I
19 truly don't under -- remember.
20 Q Well, I think it's -- it's -- it's easier for me to just
21 show it to you --
22 A Oh, okay.
23 Q -- because I've got it now.
24 MR. DELORME: May I approach?
25 JUDGE SOTOLONGO: Yes.

1 Q BY MR. DELORME: Dr. Davison, I'm handing you what's been
2 marked as Respondent's Exhibit 114.
3 A Yes. There you go.
4 Q And I do want you to go through it so you familiarize
5 yourself with the sequencing and ordering, but do you recognize
6 this as being the poll as you constructed it with YouGov to be
7 taken by the respondents?
8 A Yes.
9 Q Okay. And so there are no page numbers here. I apologize
10 for that, but I'm moving kind of fast. But if you go to the --
11 well, the first page just asked about your birth, right, for
12 demo --
13 A Correct. Which is how we construct their age.
14 Q Okay. And then it has a question about, have you heard --
15 what if any -- how much, if anything, have you heard about
16 Black Li -- the Black Lives Matter movement?
17 A Correct.
18 Q Right? And then it ma -- it's the decisional page of do
19 you want to take this survey or not?
20 A Correct.
21 Q And then we start getting into some of the questions
22 associated with the Black Lives Matter movement. I do want to
23 point you to -- because I want to make sure I understood your
24 testimony from earlier today. It -- it appears that about
25 halfway through is when we start seeing those demographic

1 questions that you talked about previously?
2 A Um-hum.
3 Q Does that refresh your recollection as to whether the
4 demographic questions came after or before the substance in the
5 survey?
6 A Yes, well, the fir -- the very first question is age,
7 which I think I said, which I think I identified as the
8 initial, you know, as like the initial entre. So yeah, the
9 demographic -- the rest of the demographic questions are at --
10 are at the end. I think what I said, though, is the inventory
11 follows the open-ended question.
12 Q Yes.
13 A Okay. Then as it -- and then also -- let's see. Okay.
14 So page 5 is the -- the general question. Okay. How would you
15 like --
16 Q What you've been referring to as the open-ended question?
17 A Or on page 4 is the open-ended -- is the open-ended
18 question, where I said -- where I per -- paraphrased that in a
19 few words, describe what you believe or understand to be the
20 goals or purpose of the Black Lives Matter movement. And then
21 this is a text box in which they enter their comments, their
22 answer.
23 MR. PETERSON: And just for the record, I -- I believe
24 that's page 5.
25 THE WITNESS: Oh, that's right.

1 MR. PETERSON: You -- I think you said -- I think you said
2 page 4 to --
3 THE WITNESS: Oh, yes, I'm sorry.
4 MR. PETERSON: Okay. Just for the record.
5 THE WITNESS: Yeah, so page 5..
6 MR. PETERSON: Okay.
7 Q BY MR. DELORME: And then -- and then page 6 has text. It
8 doesn't have any spot for a response. But does that explain
9 how a user would interpret the scaling that you have put in the
10 closed-ended question?
11 A Correct. It's -- it's introducing the next -- it's
12 introducing the question or the -- the inventory of nine
13 questions. Okay. And so you know, now we would like to know
14 how closely you associate Black Lives Matter with the following
15 specific topics or causes. It can range from one to ten, where
16 you do not associate, strong associate. Five is medium
17 association.
18 Q And then the --
19 A Okay. And then that --
20 Q -- the -- closed questions follow from there?
21 A But only one by one.
22 Q Right.
23 A Okay. So then on -- I don't know what page we're on now.
24 4, 6, so I guess it's page 7 is the first question. Okay.
25 They answer it. Then they go to the next question. Now, this

1 is just and -- and then all nine questions are listed.
2 Now, this is just a -- this is the list of all nine
3 questions. Online, okay, the respondents are taking this
4 randomly. Okay. The questions as they appear are randomized.
5 JUDGE SOTOLONGO: So in other words, they don't follow --
6 in -- in the actual survey, online survey, they did not
7 necessarily appear in the order they appear here?
8 THE WITNESS: Correct.
9 JUDGE SOTOLONGO: Okay.
10 THE WITNESS: Correct. Then it goes through all -- and
11 then it goes through all nine.
12 Q BY MR. DELORME: But just to clarify, in all instances,
13 the open-ended question precedes the nine closed-ended
14 questions, correct?
15 A Correct.
16 MR. DELORME: Okay. Your Honor, I move for the admission
17 of Respondent's Exhibit 114.
18 JUDGE SOTOLONGO: Just to clarify, these are essentially
19 copies of screenshots that the person --
20 THE WITNESS: Right.
21 JUDGE SOTOLONGO: -- taking the poll would have seen on
22 his or her screen?
23 THE WITNESS: Yes, Judge. With the on -- with -- with the
24 qualification or -- or you know, that the inventory -- the
25 order of the inventory of non-closed-ended questions that's in

1 this document is randomized, the order is randomized on the
2 screen.
3 MR. PETERSON: Quick voir dire, Your Honor?
4 JUDGE SOTOLONGO: Sure.
5 **VOIR DIRE EXAMINATION**
6 Q BY MR. PETERSON: Kind of following up on what your --
7 your counsel asked, I think earlier --
8 A Where --
9 Q -- just the order. And I understand the inventory, and I
10 understand the open-ended question precedes everything. It
11 appears just from how this is laid out, that the demographic
12 questions start at page 16 by my count.
13 A Or I will take the other demographic questions, yeah.
14 I'll take your word for it. I'm not --
15 Q Yeah, it's --
16 A -- you're -- they're not --
17 Q -- yeah, he --
18 A They're not numbered.
19 Q I think earlier you had testified that the demographic
20 questions came before any of the other --
21 A No, I said a few --
22 Q A few?
23 A -- of the demographic questions.
24 Q Oh.
25 A And then the rest of the demographic questions are -- are

1 typically asked at the end.
2 Q I see. And is this the -- is this --
3 A Or actually, I think I said a couple. It -- obviously,
4 it's one. I mis -- but the essence is -- the goal here when
5 you're, you know -- when you're presenting the survey is you
6 want to give the respondent a couple of questions that they can
7 answer just to sort of get them into the, you know, sort of the
8 mode of taking the -- taking the survey. And then after a
9 few -- you know, after the first few questions, then you get to
10 sort of more of the -- I mean, the quest -- all the questions
11 are important, but I guess, maybe the more meatier questions.
12 Q Yeah. So this -- I mean, so generally my -- I guess my
13 question is, do the -- once you're into the inventory, do you
14 stay in the inventory?
15 A Yeah.
16 Q And then -- then the bulk of the --
17 A And you don't know what's happening next.
18 Q And then once you've completed the inventory, then the
19 bulk of the demographic questions are the -- are asked?
20 A Yes.
21 Q And I ge --
22 A Yes.
23 Q Are the --
24 A There's -- right. Gender, race -- there's three, as I
25 recall, religiosity questions that actually are taken from Pew.

1 One is the -- which I've mentioned before was, are you a born-
2 again Christian? Another is -- these are three classic
3 religiosity questions, okay, that are -- you know, as I said,
4 they are actually used in the -- the Pew Research Center
5 questions, which are also the sa -- the same as the ANES and so
6 forth.
7 Frequency of church attendance, you know, or worship
8 service. And the other one is, I believe, how important is
9 religion to you?
10 Q Okay. Yeah, I'm just -- yeah, I'm just -- I'm more trying
11 to understand the -- the structure of the survey.
12 A Um-hum.
13 Q But it -- it -- it sounds like -- it appears that the only
14 kind of demographic question that precedes is actually the year
15 you were born?
16 A Now that I'm looking at it, yes.
17 Q Okay. Yeah. And then do -- do the -- do the -- I
18 understand the inventory is randomized. Are the demographic
19 questions randomized as well, or --
20 A No.
21 Q Yeah. Okay. And is this the actual -- is this the actual
22 survey? I mean, this is a -- obviously a -- the paper
23 representation of the -- of the -- the -- the --
24 A Yeah, this is like -- well, yeah, this is the screenshots
25 of what each respondent is going to see with -- you know, as I

1 said, the only qualification is the inventory appears randomly
2 to each -- to each respondent. It's just, you know, in an
3 order for presentation purposes in the -- in this packet.
4 Q Okay. Yeah, I'm asking because in the subpoena production
5 there were a couple different drafts in different formats. And
6 I just want to confirm that this is the -- this is the final
7 draft, the final version that the survey was presented to the
8 respondents?
9 A Yes. What I presented in the -- what I included in the
10 subpoena, I think, was the top line results. And the --
11 actually, there are three pieces. I -- I -- I included the
12 codebook. Okay. And the codebook has the questions in the raw
13 frequencies, the top line report, which is again, just a rep --
14 again it really is just a nicer printout of the codebook, the
15 questions with -- with the raw frequencies.
16 I also, just for convenience as I recall, included a
17 document that just had the word or just had the questions
18 for -- that I constructed for studying Black Liv -- or looking
19 at Black Lives Matter. Okay. So there -- you know, so I've
20 provided that to try to, you know, actually just, you know, for
21 convenience.
22 Q Yeah, so -- yeah, given those, I -- I -- I hadn't seen
23 this exact version before, but this is the final -- this is the
24 final version that was presented to the respondents?
25 A Yes.

1 MR. PETERSON: No -- no objection to 114.
2 JUDGE SOTOLONGO: All right. Respondent's 114 is
3 admitted.
4 **(Respondent Exhibit Number 114 Received into Evidence)**
5 **RESUMED DIRECT EXAMINATION**
6 Q BY MR. DELORME: Dr. Davison, earlier you testified that
7 there was a document that would capture all of the responses to
8 the open questions; is that right?
9 A Yes.
10 MR. DELORME: May I approach? I'll take that as a yes.
11 Q BY MR. DELORME: I'm handing you what's been marked as
12 Respondent's Exhibit 115. Can you identify that document for
13 me?
14 A Yeah. This is a printout of all, what is it, 1,785
15 literal responses.
16 Q And the commentary?
17 A It's also in the subpoena. It's also, I guess,
18 convenience, I mean, it's both in the data file that I
19 presented, but -- or included. I also presented all of this
20 information in -- or the -- the open-ended comments, okay, the
21 open-ended responses in a couple of Excel files also to make it
22 easier to look at.
23 Q And the 27 responses that refer to workplace that YouGov
24 gathered came from this larger document or dataset; is that
25 correct?

1 A Yes.

2 MR. DELORME: I move for the admission of Respondent's

3 Exhibit 115.

4 MR. PETERSON: No objections.

5 JUDGE SOTOLONGO: Respondent's 115 is admitted.

6 **(Respondent Exhibit Number 115 Received into Evidence)**

7 Q BY MR. DELORME: And you just now spoke about a nicer

8 version of the codebook that gave sort of summaries of all of

9 the responses to the closed questions; is that right?

10 A Correct. It's -- it's usually referred to as a top line

11 report, which is the summary frequencies -- or frequencies for

12 the different answer -- for the different options for the

13 different questions.

14 JUDGE SOTOLONGO: Yeah, just so that I understand it. So

15 the -- the Q1_1 and Q1_2, the two lines -- and then there's a

16 Q1_BLM. And for each of these responses, you know, there's

17 a -- there is a -- a box showing numbers. How -- how --

18 what --

19 THE WITNESS: What does that mean?

20 JUDGE SOTOLONGO: What do the numbers represent?

21 THE WITNESS: Yeah, okay. So the way a word -- the way an

22 open-word -- open-ended question would work is, you know, so

23 they're -- they're writing their answer in the text box. Okay.

24 So they are responding -- you know, they might be writing

25 several different things. So the way in which it's counted or

1 the way -- or I should say the way in which it's organized is
2 first mention, second mention. So somebody might be talking
3 about Black Lives Matter with respect to the police. Okay.
4 That might be the first thing that they say. And they will
5 continue with a second sentence and offer another I -- or
6 mention of Black Lives -- Black Lives Matter. So Q1_1 is
7 what's the first mention.
8 JUDGE SOTOLONGO: The first -- when they first mention.
9 THE WITNESS: The sec -- yes. And then Q1_2 is if a me --
10 how many -- and -- and the numbers are just simply the -- the
11 counts, okay, of that response being mentioned in the -- or
12 included in the second mention.
13 JUDGE SOTOLONGO: And then the third column, the Q1_BLM in
14 the -- in the workplace, that's a third mention? That's
15 different or -- or --
16 THE WITNESS: That is a sep -- that is a separate
17 category, again, just for convenience, that I actually asked
18 YouGov to create. If there was a first mention, second
19 mention, any mention of workplace. So it's only the raw
20 frequency of workplace comments. And that's a separate --
21 that -- that is the Exhibit 103 -- Exhibit 103.
22 MR. DELORME: So if I can perhaps fast forward, if you
23 look at the first reference to workplace in Exhibit 103 and you
24 look at that case ID number --
25 THE WITNESS: Um-hum.

1 MR. DELORME: -- 1713459503 --
2 THE WITNESS: Um-hum.
3 JUDGE SOTOLONGO: Right.
4 MR. DELORME: -- the first one on page 1 of Exhibit 115
5 has the same --
6 JUDGE SOTOLONGO: I see.
7 MR. DELORME: -- case ID and the same Q1 text.
8 JUDGE SOTOLONGO: I see. You're talking about -- right.
9 Eq -- equity to pursue American dream, equal jobs to -- okay.
10 I see. Yeah, there is a correlation there. Yes. All right.
11 MR. PETERSON: Your Honor, I realize that voir dire is --
12 is passed, but I have kind of one more follow-up question, if
13 you --
14 JUDGE SOTOLONGO: Okay. Go -- well, go ahead.
15 **VOIR DIRE EXAMINATION**
16 Q BY MR. PETERSON: So on that same example that we used,
17 the -- the first one that mentions -- that shows up in the
18 Q1_BLM in the Workplace, the -- my eyes aren't good enough to
19 read that, but the one -- the first one with three numbers?
20 A Um-hum.
21 Q Can you -- like, as an example, can you tell us what those
22 numbers represent for that, you know -- for that question, the
23 10, 15, and 11?
24 A The -- okay. Wait a minute. Let me just -- can I have
25 this minute to try to remember all these documents? Is there a

1 copy of the codebook?

2 UNIDENTIFIED SPEAKER: We can pull that up.

3 A No, I don't have a copy of the codebook. I have the copy

4 of the top line report. Okay. So I think I mis -- I think I

5 misspoke. Just give me a second here.

6 JUDGE SOTOLONGO: Take your time.

7 THE WITNESS: Thank you.

8 **RESUMED DIRECT EXAMINATION**

9 Q BY MR. DELORME: Are -- are the -- are the columns to the

10 right of the actual text codes that would go --

11 A Yeah. Okay. So this is -- I created -- I created

12 spreadsheets to summarize the information. And so I'm

13 getting -- so my apologies. I'm getting -- I'm confused with

14 all of the, you know, sort of the dense documentation here

15 without -- when you're organizing open-ended -- when you're

16 organizing open-ended questions, okay, or coding open-ended

17 questions, what is created is a coding -- is -- is a schema,

18 okay, is a conceptual map or coding schema.

19 Okay. So it would be something like people are talking

20 about inflation. What do you think is the most important

21 problem the country is facing? Inflation. What do you think

22 is the most important problem the country is facing? Jobs,

23 wages. Okay. Conceptually, those would all fall under -- or

24 you could create a -- a concept economic. Within that would be

25 a subcategory -- subcategories of, you know, inflation, jobs,

1 em -- wages, and -- and so forth. So the conceptual categories
2 are given codes, and then the -- And then the responses, okay,
3 the literal responses, okay, then are assigned the code or the
4 conceptual scheme that they fit in -- that they fit into, okay.
5 So I -- my apologies, I miss -- I misspoke before.
6 So the Q1_1, Q1_2 of course is first mention, second
7 mention, but the numbers here correspond to the concepts. And
8 I can only -- I included the list of all the concepts and the
9 codes in my subpoena document -- documentation. So I -- I can
10 give you -- you know, so what I can report is just, you know,
11 my recollection of some of them. It's a -- you know, it's a
12 complicated schema.
13 But for instance, a number of -- a number of responses to
14 the open-ended question about Black Lives Matter talked about
15 Black Lives Matter with respect to the police. A number of --
16 you know, and so -- and then some of those are reform oriented,
17 okay. Some are, in other words, to reduce the number of
18 killings and so forth. Some are -- they find it -- Black Lives
19 Matter to be disruptive. Some find Black Lives Matter to be
20 empathetic, okay. And so there's these different categories or
21 you know, concepts or ways in which you can think about -- or
22 excuse me -- ways to organ -- conceptually, ways to organize
23 the comments or summarize the raw data, okay. The raw -- the
24 raw comments.
25 Q So in other words, in the Q_1 column, the number there

1 correlates with the code is in the codebook?
2 A Correct.
3 Q Same is true of Q_2?
4 A Correct.
5 Q And then Q_BLM in the workplace has its own code scheming
6 which is also in the codebook?
7 A Correct.
8 MR. DELORME: Was 115 admitted, Your Honor?
9 JUDGE SOTOLONGO: Yes.
10 MR. DELORME: Okay.
11 Q BY MR. DELORME: And then you talked about what is
12 commonly referred to, you said, as the top line report that you
13 summarize the close-ended questions?
14 A Yes.
15 MR. DELORME: May I approach?
16 Q BY MR. DELORME: Dr. Davison, I'm handing you what's been
17 marked as Respondent's Exhibit 116. Is this what you were
18 referring to as a top line report?
19 A Yes.
20 Q Can you tell us what data is contained therein?
21 A Okay. So this is the -- the percent of respondents who
22 are re -- or the -- yeah, the percent of the answers and the
23 percent of the respondents who are answering each of the
24 options. So how much, if anything, have you heard about the
25 Black Lives Matter movement? A lot, a little, or nothing at

1 all. So 64 percent said that they have heard a lot about Black
2 Lives Matter, 36 percent said that they know a little or have
3 heard a little about Black Lives Latter -- Black Lives Matter,
4 and no one responded nothing at all.
5 Similarly, the opt for -- you know, question number 2, the
6 options are 31 percent for very well -- this is how well you
7 understand the goals or purpose of the Black Lives Matter
8 movement. Would you say very well, fairly well, not too well,
9 or not at -- or not at all well?
10 Q Dr. Davison, don't mean to interrupt you but I think we
11 learned this morning that the document pretty much is going to
12 speak for itself, so I don't need you to run through all of the
13 numbers.
14 A Okay. I'm sorry.
15 Q No, you're fine. What I would like you to look at is and
16 explain to us what is the information contained in the gray
17 boxes for each of these numbered entries?
18 A That's the question.
19 Q Then starting on page 6, we're starting to get summaries
20 of the demographic information?
21 A Correct.
22 Q And is it your understanding that this document presumably
23 created by YouGov from the respondents' data is an accurate top
24 line summary of the responses by percentage to all the
25 questions in the survey?

1 A Right. These are the raw -- this -- these are the
2 percentages of the raw frequencies for each response -- each
3 possible response or the responses to each option.
4 Q Understood.
5 MR. DELORME: Your Honor, I move for the admission of
6 Respondent's Exhibit 116.
7 MR. PETERSON: Quick voir dire, Your Honor.
8 JUDGE SOTOLONGO: All right.
9 **VOIR DIRE EXAMINATION**
10 Q BY MR. PETERSON: Since I -- this includes -- this is
11 representative of all the -- all the respondents' responses. I
12 have one question. Just, the subpoena production I received,
13 two were similar to this -- well, two -- two similar, one was
14 different.
15 MR. PETERSON: Can I -- may I show you what -- what you
16 produced and maybe you can tell me whether it's a draft --
17 like, it was a draft and then something was revised, but --
18 (Counsel confer)
19 MR. PETERSON: May I, Your Honor?
20 JUDGE SOTOLONGO: Yes, sir.
21 Q BY MR. PETERSON: Yeah. So you used what looks like 116,
22 and there's also -- I mean, it's very similar but the questions
23 have -- the questions are different or at least they have the
24 preface. You know, each of them starts -- do you see the
25 difference in the questions?

1 A You mean -- you mean in question number 3?
2 Q Yeah. You --
3 A How closely do you associate?
4 Q Right. And -- and the question -- the rest of the
5 inventory questions on the following pages have that prefatory
6 phrase, how closely do you associate?
7 A Yeah, that's just a reminder. I mean, I -- it's not in
8 116. What that is is just simply a reminder to the
9 respondents. If we -- may I?
10 Q Yes.
11 A If we go to page -- whatever it is -- in the screenshot
12 document, Exhibit 114. Okay. If we go to Exhibit 114, page
13 5 -- or excuse me -- page 7, I guess it is, we have the
14 introductory question about -- for what's going to happen with
15 the inventory. I think it's page 7.
16 Q Yeah, I think that is page 6.
17 A 1, 2 -- oh, I'm sorry -- 3, 4. Yes, page 6. Apologies.
18 For Exhibit 114. So page 6, Exhibit 114. Okay. It is -- now,
19 we'd like to know how closely, et cetera. All right. What's
20 going on is -- and actually, if you -- if you look at the first
21 sentence, "Now, we'd like to know how closely you associate
22 Black Lives Matter with the following specific topics", okay,
23 the first sentence of number 3, "How closely do you associate
24 the Black Lives Matter movement with the following?" And then
25 it's African Americans. Okay. Next, how closely do you

1 associate? What that -- what that is doing is simply it's
2 reminding the respondent so they don't get lost, okay. It's
3 reminding the respondent of what the purpose -- or what they're
4 doing with each question, okay. So in the battery. So it
5 actually -- what you handed me actually, in other words,
6 corresponds with screenshots.
7 Q Right.
8 A Okay.
9 Q Okay. So it's the same -- yeah, that's my question.
10 A All it is is the --
11 Q Does it say --
12 A All it is is the -- is the prime -- is the introductory
13 question.
14 Q The -- this -- this document that I showed you just has
15 the addition of the prefatory language but --
16 A Yes.
17 Q -- all the data is the same as far as -- as far as you --
18 A Yes.
19 Q -- as far as you know? Okay.
20 MR. PETERSON: No objection.
21 JUDGE SOTOLONGO: All right. Respondent's 116 is
22 admitted.
23 **(Respondent Exhibit Number 116 Received into Evidence)**
24 **RESUMED DIRECT EXAMINATION**
25 Q BY MR. DELORME: Dr. Davison, we went through a lot of

1 data and charts and process during direct examination this
2 morning. What did you take away as an opinion about what the
3 American public objectively thinks the goals of the Black Lives
4 movement are?
5 A I believe that the results indicate a few conclusions.
6 The -- the first conclusion is that the public overwhelmingly
7 connects criminal justice, racial justice issues with -- as
8 goals of Black Lives Matter. And in contrast, it is a minority
9 of the respondents who are identifying workplace issues.
10 The second -- and I think that this most clearly comes
11 through from the graphs with the medium analysis, that of the
12 four racial justice issues, the -- the two that relate to the
13 police -- excessive use of force by the police and vigilante
14 groups, and the killing of unarmed African Americans -- are
15 also the strongest. Okay. They have the highest responses.
16 The third is that I think for the -- you know, for the --
17 for the majority of -- of -- of respondents, these are pretty
18 well -- these are well-established views. They don't change by
19 age; they don't change by gender. You know, they're not really
20 influenced, you know, in any substantial way by educational
21 level, amount of information or knowledge they have, their
22 perceived understanding of Black Lives Matter. So it's a very
23 stable or it's a well -- it's a very well, I think, established
24 view.
25 And the third -- or I forgot what number I'm on. Fourth.

1 The -- I think the fourth issue would be, again, kind of
2 related -- I -- you know, I think related to, obviously, all of
3 this, is that -- you know, this is returning to the -- you
4 know, in the use of the -- the national issues, okay. The
5 three salient national issues. The public sees a difference
6 between workplace -- the workplace topics and the -- and the
7 racial justice questions compared to the three -- you know, the
8 control group or you know, the three national issues. All
9 right.
10 So there's also -- you know, there's attitudinal strength,
11 which means that there is stability. And there's also, I
12 think, you know, a -- a substantial amount of clarity. They
13 see a difference between these two issues and three salient
14 national issues that have been in, you know, the public's -- in
15 the public domain for many years.
16 I guess, could I -- may I add one more thing now that I
17 think about it?
18 Q Go ahead. Go ahead.
19 A I also would -- I also, I guess, would ask you to recall,
20 you know, the logic of the research design. You know, the
21 logic of the research design was to develop multiple ways or
22 multiple tests to get at the same -- to sort of get at the same
23 question. And if -- I mentioned -- I think I said this morning
24 something like if all the tests are largely pointing in the
25 same direction, then you -- one can be very confident in those

1 results. You know, if there's ambiguity in the tests, then you
2 know, you have to think more closely.
3 But in my view, you know, all of the tests that I
4 constructed in the survey instrument in the research design
5 are, I think, sort of basically telling the same story.
6 Q Thank you, Dr. Davison.
7 MR. DELORME: I have no further questions at this time,
8 Your Honor.
9 JUDGE SOTOLONGO: All right. Mr. Peterson?
10 MR. PETERSON: Your Honor, may we take a quick five-minute
11 break?
12 JUDGE SOTOLONGO: Sure. Let's go off the record.
13 (Off the record at 2:30 p.m.)
14 JUDGE SOTOLONGO: Mr. Peterson?
15 MR. PETERSON: Thank you, Your Honor.
16 **CROSS-EXAMINATION**
17 Q BY MR. PETERSON: Greetings again, Dr. Davison.
18 A Hello.
19 Q Thank you for your testimony. It's been helpful in
20 understanding the -- the subpoena production, which kind of
21 before your testimony was coded. It was in ways that were
22 difficult to understand for the -- the layperson. So I -- I
23 have a -- I have a better understanding of -- of what you --
24 what you did and what you produced, so thank you for that.
25 I just want to go through -- do you have the exhibits that

1 were -- that we've discussed up in front of you? Just starting
2 with 103, the text responses for any mention of reference to
3 the workplace.
4 A Yes.
5 Q Perfect.
6 A Yeah. Can you give me just a minute?
7 Q Yeah, absolutely. Take your time.
8 A Okay.
9 Q Do you have that in front of you?
10 A Yes.
11 Q So yeah. I was following up on my questions from voir
12 dire about the search terms that you used to -- to --
13 A Yes.
14 Q -- to elicit these responses. And so far, I have work,
15 workers, employer, employment, union, unionization, workplace,
16 and occupation. Are there any others?
17 A I think I used -- I think I used harassment. I tried to
18 be as broadly inclusive as possible, so. But that's a pretty
19 accurate list.
20 Q And this is -- I understand it, these are -- this is a
21 search that you yourself performed?
22 A Actually, the -- the search was done two different ways.
23 YouGov is -- YouGov is a very -- is a highly professional
24 polling organization, so they have a highly -- so they have a
25 very professional infrastructure and staff. So they -- you

1 know, some coding actually was done two different -- I guess,
2 with two different sets of eyes.
3 I read through all of the -- all 2,000 responses to
4 develop a conceptual schema. I discussed that with YouGov
5 because they also are professional in -- in that way. The
6 actual coding -- okay, so assigning code number 10 to
7 respondent number 9 was done by their professional staff.
8 They -- using any reference, as I said before, to a broadly
9 inclusive set of references to work or workplace.
10 I separately conducted a word search for, you know, using
11 these words or phrases to -- as a robustness check to see if
12 what I came up with was also parallel to what YouGov -- the
13 results from the YouGov coders. And I think I -- I think I
14 testified this morning that YouGov came up with 27 matches and
15 I came up with 25.
16 Q Yeah. And I -- so I -- if I understand it then, you --
17 you had given YouGov kind of the broad instructions to kind of
18 come up with their own search for things that you described to
19 them as broadly inclusive of the workplace?
20 A Well, I gave them the -- I told them that we are
21 interested in -- or among the things that I'm interested in is
22 the -- is workplace, and so that's why they created the
23 separate -- you know, also just for convenience -- the separate
24 column for workplace. I'm responsible for the conceptual
25 schema, though.

1 MR. PETERSON: Your Honor, may I approach the witness?
2 JUDGE SOTOLONGO: Yes.
3 Q BY MR. PETERSON: I have what I'm marking as General
4 Counsel's 102.
5 MR. PETERSON: Is that consistent with next in order?
6 JUDGE SOTOLONGO: Yes. The last one was 101.
7 MR. PETERSON: Apologies. Some -- some are double-sided.
8 I mean, Your Honor's is single-sided.
9 Q BY MR. PETERSON: Do you -- I'll give you a chance to look
10 at that exhibit.
11 A Okay.
12 Q Do you recognize what that is?
13 A Yes. This is the coding scheme for the open-ended
14 questions.
15 Q This is the coding schema that you've been testifying
16 about?
17 A Correct.
18 Q And are these the category code? Are those the numbers
19 that correlate with Respondent's 115, the open-ended question
20 results?
21 A Respondent Number 115?
22 Q Yes, the 2,000 open-ended response. It's the very thick
23 document, the 2,000 open-ended.
24 A Sorry. I'm not sure where you're at.
25 Q Yeah.

1 A I'm on the -- I think I'm on the right --
2 Q Do you have 115?
3 A I've got the right document but I'm not sure where you're
4 at.
5 Q Yeah. So you were asked earlier about the -- you know,
6 the first line that has three numbers and under Q-1, Q-2 and
7 the Q1-BLM.
8 A Right. So -- so case ID 1713459503?
9 Q Yes.
10 A Okay.
11 Q So the first Q-1 has a number 10, Q-2 has a number 145 and
12 Q1-BLM in the workplace has a number 11. Do you see that?
13 A Yes.
14 Q And does that correspond to this coding scheme that's on
15 102? GC-102?
16 A Okay. The 11, okay, in column 3 in Exhibit 115. Okay.
17 So the -- the 11 in column 3 in Exhibit 115 is the category
18 code. And that corresponds to the -- yes, the category code
19 that was used as 11 for some mention of the workplace.
20 Q So is it fair to say that PC 102 is a key, at least the
21 category code, for the -- for the numbers under Q-1, Q-2, and
22 Q1-BLM in the workplace on 115?
23 A So 102 is the -- the key, did you say?
24 Q I'm asking if that's, like, the reference key.
25 A Yeah, would -- I'm sorry. Would you just repeat the

1 question for me, please?
2 Q Yeah. Is 102 the visit -- is this a reference key for the
3 numbers on the right-hand -- in the right-hand columns on GC-
4 115?
5 A Yes.
6 Q Okay. And 102, these are -- are these the -- this is the
7 schema that you created?
8 A Yes.
9 Q Yes. And so these are the --
10 A Well, I mean also, I guess I would say that it was done
11 collaboratively. But I mean, I approved it, I changed it, I
12 edited it, so. So yes, I'm responsible for it.
13 Q So this is the category codes and what you wrote in the
14 text response by respondent. That's how you kind of coded or
15 schemed or -- or categorized the answers and responses?
16 A The responses that were related to -- the responses that
17 were related to the workplace, okay, fell. That's what I have
18 highlighted.
19 Q Okay.
20 A So there's -- there's really only two category codes, 11
21 and then 35.
22 Q Right.
23 A Okay. So there's a series of -- okay. So in other words,
24 10 through 19 would be different ways -- would be sort of
25 subcategories of statements that were reform oriented, okay.

1 And category 11 is statements for -- that had some reference or
2 used some -- yeah, some reference to work or the workplace that
3 were reform-oriented. There were 20 respondents, okay, so the
4 count column, who fell into that category. And then there were
5 category code 35 -- okay, 30s, okay, are a series of different
6 types of responses to -- that people wrote that were -- that
7 had a destructive connotation, destroying family, destroying
8 the government, dis -- and so forth. And there were seven
9 responses that fell into that category, or that were organized
10 into that category, for a total of 27 that use some ki -- some
11 kind of a reference to work, workplace, jobs, and so forth.
12 Q Yeah. Understand. So that -- I'm -- I'm asking kind of
13 generally just about the -- you know, the -- for example,
14 starting with category -- I assume they follow the same
15 pattern, these -- these -- all these different category codes,
16 starting with 1?
17 A Well, no, there's -- yeah, there's a logic to them.
18 Q Right. So yeah. So just starting with the top line, it
19 starts with count N 38 --
20 A Okay.
21 Q -- and I -- from your testimony, you're saying that's 38
22 out of -- out of the 2,000 that responded --
23 A 38 out of the, I think it was 1,800- -- or 1,785. Okay.
24 There was 11 pe -- there were 11 percent who did not write
25 anything --

1 Q Right.
2 A -- and 89 percent completed the -- the textbox.
3 Q Right. So of those that completed the textbox, 38 of them
4 respond -- or 1.7 percent answered with some text that you
5 categorized as "increasing awareness, general equality"?
6 A Right.
7 Q And that's what -- so the, you know, "increasing
8 awareness, general equality", that is the category that you
9 created in collaboration with YouGov to summarize the -- the
10 voluminous responses?
11 A Yeah. Right.
12 Q Yeah.
13 A Yeah. I mean, there's nearly 1,800 responses, and so in
14 order to organize them in some sort of meaningful way, what you
15 do is we -- is we use concepts that tries to, you know, sort of
16 collect the different response -- these similar -- the intended
17 or -- or similarly -- statements that seem similar, okay, or
18 comments that -- comments that seem similar.
19 Q And they seem similar, so you assigned -- you -- you used
20 a category for the first one, general equality, and you found
21 38 --
22 A Well, general equality in the for -- in -- in -- in terms
23 of increasing awareness, okay. So Black Lives Matter is trying
24 to increase awareness on inequity, race -- Black Lives Matter
25 is trying to increase awareness on -- I mean, any number of

1 things, okay. So any sort of general comment, they would --
2 would fall into -- you know, that doesn't fall into the more
3 specific co -- classifications, okay, would fall into comments
4 that had this component of increasing awareness, but they're,
5 you know, more general oriented.
6 Q Understand. So about halfway -- halfway down the page,
7 the count is 480 on the left column.
8 A Okay.
9 Q Yeah. Just directing your attention, and then that
10 indicates a 21. -- 21.5 percent of the responses fell into
11 category 13, which you categorize as "reform, equal treatment
12 in society, end of discrimination, end of racism, equal
13 rights"; that's -- is that an accurate way to interpret this?
14 A Um-hum. Yes.
15 JUDGE SOTOLONGO: Yes? Yes?
16 THE WITNESS: Yes, Your Honor.
17 Q BY MR. PETERSON: Okay. And these are categories that
18 generally made sense to you in collaboration with YouGov, as
19 far as categorizing the responses?
20 A Yes.
21 MR. PETERSON: Move for the admission of General Counsel's
22 102.
23 MR. DELORME: No objection.
24 JUDGE SOTOLONGO: General Counsel 102 is admitted.
25 **(General Counsel Exhibit Number 102 Received into Evidence)**

1 Q BY MR. PETERSON: The -- the surveys -- you -- you -- you
2 reviewed a number of surveys that you testified -- that you
3 testified about earlier from American National Election
4 Studies, Roper Center, et cetera. Did you -- did you --
5 A Yes.
6 Q -- review those before conducting the survey, or before
7 creating the survey?
8 A Yes.
9 Q And I assume you concluded from your review of the surveys
10 you did review that there -- the question you were trying to
11 answer hadn't been addressed?
12 A Yes, sir. At least -- I -- I conducted a very extensive
13 search of both literature and what are agreed to be major
14 surveys in the United States, as well as the Roper archive, and
15 I did not find any survey that was explicitly focused on
16 connecting or examining what are the -- connecting specific
17 goals to Black Lives Matter. This was part -- can I just add
18 something?
19 Q Sure.
20 A This was part of the -- I think I testified earlier when I
21 was talking about the research design that I approached this as
22 a -- it -- as -- as an ac -- as any academic research project,
23 or any scholarship project, and the first step is always to
24 establish, you know, what's the current state of knowledge?
25 What's the current state of information? And so I reviewed

1 data sources, a variety of data sources, secondary sources,
2 okay, as the starting point.
3 Q And found the answer unanswered?
4 A Correct. Or at -- at least I didn't find anything --
5 Q Fair enough.
6 A -- okay, and I did a very exhaustive search.
7 Q Respondent's 105 through 1 -- 109, those are some charts
8 and graphs that you -- you created, or -- or -- did you create
9 these, or did -- or did YouGov create them? You --
10 A I -- I created them.
11 Q You created them. You extrapolated from the data that was
12 provided by YouGov?
13 A Well, I didn't extrapolate. I -- I -- I used a -- YouGov
14 promi -- provided me with the raw data file --
15 Q You used the raw data?
16 A -- and I -- I used the statistical platform, or a
17 statistical package, Stata, which is a major statistical
18 package that is used, and conducted the analyses on the -- the
19 raw data file given to me by You -- by YouGov.
20 Q And -- and those --those are the -- 105 through 109 are
21 the ones that you excluded responses that fell into the -- the
22 4 to 7 attitudinal scale?
23 A Correct.
24 Q And I guess -- I -- I'm not a statistician. I've learned
25 a lot about statistics in these last few hours, but I presume

1 that had you -- you -- the data you choose to include affect --
2 can affect the results of the -- the graph or the chart?
3 A It can.
4 Q And so had you included 4 through 7 in all of these,
5 the -- the charts would presumably appear differently?
6 A Actually, they don't appear that differently. If I had
7 in -- if I had included 4 through 7 -- well, first of all, I
8 did. The graph at the very end of my testimony, the -- the
9 median charts --
10 Q Right.
11 A -- okay -- that has everything.
12 Q Right.
13 A Okay. So that's 1 through 10, so that everybody could see
14 everything. Okay? Excluding 4 through 7, including --
15 including 4 through 7, so you know -- so it -- so it --- it's
16 there. Would 4 through 7 have changed -- so the -- these --
17 the graphs, like in 105, is -- is the -- 4 and 5 would be
18 conclu -- would be included as -- well, first of all, from
19 the -- from Ex -- from Exhibit 106, you can see, if you add up
20 "not a goal" and "major goal", three-quarters to four-fifths,
21 sometimes, you know, approaching 90 percent of all the
22 observations are included in 1, 2, 3 or 8, 9, 10.
23 Statistically, it's a trivial amount, okay.
24 The dominant trend in -- in -- that -- that you can see
25 from the -- you know, also from the median distributions, the

1 dominant trends are at -- you know, are at the poles, so a
2 statistician actually could say this is just noise, you know,
3 it's not what the dominant trend is, you know -- you know, just
4 looking at the graphs, it's not the -- it's not the dominant
5 trend.
6 But secondly, is the scale, 1 through 10, okay. So it's
7 an even number, which means somebody has to pick, either a
8 little bit more, or a little bit less, depend -- you know,
9 and -- and of course, it's -- it is an intensity scale, but
10 they have to -- you know, they're -- they're -- they're either
11 saying it's not a goal, if I were to include 1 through 5, or it
12 is a goal, 6 through -- 6 through 10. You're basically adding,
13 not only a small number of observations, but you're basically
14 adding pretty similar numbers of observations in both groups.
15 It doesn't substantively change anything. In -- in -- in this
16 case, it doesn't substantively change anything.
17 Q So your opinion, that wouldn't have skewed the -- the
18 graphs by a significant degree. One -- the -- one of the --
19 one of the troubles I have with the -- the wording of the
20 graphs is, like, for example, Respondent's 106 says, you know,
21 "not a goal" in the second column, right?
22 A Okay.
23 Q But that includes people that scaled it at a 2 and 3,
24 which is saying not much of a goal, but it's not saying "not a
25 goal". Only -- only the response of 1 would be "not a goal",

1 or "no association at all", I believe is what the -- the survey
2 used. Your rankings can range from 1, where "you do not
3 associate the topic cause as a goal or purpose", to 10, where
4 "you strongly associate the topic cause as a major goal or
5 purpose in the Black Lives Matter movement". So I just don't
6 want the -- it -- it -- it -- to me, it's a bit misleading,
7 because only -- 1 is the only response that would technically
8 be "not the goal" at all, no association with Black Lives
9 Matter, whe --
10 UNIDENTIFIED SPEAKER: I'm sorry. I'm sorry. I'm sorry.
11 Q BY MR. PETERSON: Yeah.
12 UNIDENTIFIED SPEAKER: I'm sorry.
13 Q BY MR. PETERSON: Whereas -- whereas 2 and 3 would
14 indicate a low correlation between a goal, but not zero
15 correlation. Am I -- is that a fair statement?
16 MR. DELORME: Objection, Your Honor. Counsel is
17 testifying. We've heard ample testimony as to what 1, 2, 3, 8,
18 9, 10 mean.
19 JUDGE SOTOLONGO: Well, the way the -- the way he phrased
20 the question was awkward in the sense that he's saying, you
21 know, I believe a 3 -- 3 should receive more weight than a 1,
22 right?
23 So -- so I guess what you're asking, Mr. Peterson, is
24 whether, in fact, 106 and the other similar exhibits are skewed
25 because responses like 2s and 3s, which -- which are not

1 absolute -- no absolute zeros, as far as in goal, skews the
2 other results in that direction. Is that what you're asking?
3 MR. PETERSON: Yes. Yes, Your Honor.
4 Q BY MR. PETERSON: Do you agree?
5 A I -- I disagree with that. The -- I think, as I've
6 testified this morning, I used a very conservative approach to
7 categorizing the data. I used 1, 2, 3, 8, 9, 10 because
8 they're both at the -- they're both at the poles. This is --
9 if you think about it as a distribution, these are all
10 respondents who very strongly to absolutely hold this view.
11 These are not people who are equivocating, right? They're --
12 the -- it -- it's a distinctive group. So I -- I -- I -- I
13 disagree that it's distorting the data. And to the contrary,
14 you know, I -- I think -- well, I -- I shouldn't say I "think",
15 I did, every decision I made was to try to establish a -- or
16 was to try to use a very cautious, very, you know, sort of
17 conservative approach to summarize voluminous information.
18 Q And I understand that, and I understand -- I'm not saying
19 that eliminating 4 through 7 -- that's not what I'm talking
20 about. I'm just saying --
21 A Right.
22 Q -- can -- saying that 1 through 3 all are "not a goal" is
23 misleading, because a score of 2 and 3 would indicate that it
24 is not a -- you know, that it is very close to "not a goal",
25 but that still has some aspect of -- they see it as somewhat,

1 at least more than zero, of a goal. Is that -- do you
2 understand my question?
3 MR. DELORME: Objection, Your Honor. Now we're getting
4 argumentative.
5 JUDGE SOTOLONGO: Well, it is. It is. And I mean, he's
6 phrasing the question -- he's phrasing the question in a -- in
7 a -- in a manner that appear to be a statement, not a question.
8 So Mr. Peterson, you're going to have to ask your
9 question.
10 Q BY MR. PETERSON: Yeah. Did -- does a scale -- an
11 attitudinal scale rank of 2 or 3 indicate that it is not a goal
12 at all of the Black Lives Matter movement?
13 A Would you repeat your question?
14 Q Yeah. So the survey says "1, your rankings can range from
15 1, for where you do not associate the topic cause as a goal or
16 purpose of Black Lives Matter, to 10, for where you strongly
17 associate the topic cause as a major goal or purpose of the
18 Black Lives Matter movement. A score of 5 represents --
19 reflects medium association". So from what I can tell, a 1
20 represents zero association; is that correct? Do you agree
21 with that?
22 A Yes.
23 Q A 2 would -- what would a 2 reflect?
24 A A 2 would reflect someone who is very, very strong --
25 very, very, very strongly not identifying this particular goal,

1 or this particular policy, to be a goal of Black Lives Matter.
2 And similarly, a 9 would be someone who is very, very, very
3 strongly associating a -- the -- the topic to be a goal of --
4 of Black Lives Matter. I think that -- if -- if I could just
5 maybe add one more thing --
6 Q Sure.
7 A -- regarding the atti -- regarding an attitudinal scale?
8 I think I mentioned that this allows people to make very
9 granular, fine distinctions, right? It's not a distinction
10 where 1 is not a goal and 2 is.
11 Q The way it's worded --
12 A The 1, 2, 3 are -- are pretty similar people. And 8, 9,
13 10 are also very similar people. And I guess the other thing
14 that I would add is that, in -- in terms of the reasonableness
15 of this coding scheme that I used is, you know, also, you --
16 you know, you can't -- I mean, think of it also in comparison
17 to the median charts. The -- the 1s and the 10s are where the
18 concentrations are, anyway, that you're talking about. So if I
19 only focused on 1 and 10, which are -- which I provide, you
20 still see very significant differences.
21 Q Yes, I understand -- I un -- understand what you're
22 saying. I don't understand how -- I mean, if you have the
23 option 1 is you do not associate the topic as a goal, somebody
24 who chose -- chooses 2 has at least a mild or a very weak, but
25 yet some association, because they didn't choose 1. 1 is the

1 choice of no association.
2 A No, I disagree --
3 MR. DELORME: Objection. Asked and answered, Your Honor.
4 JUDGE SOTOLONGO: I think we're -- we're -- we're -- we're
5 going in circles here.
6 MR. PETERSON: Okay.
7 JUDGE SOTOLONGO: I think the -- I think the professor has
8 answered, unless -- doesn't -- he agrees with your premise, Mr.
9 Peterson, and --
10 MR. PETERSON: Okay.
11 JUDGE SOTOLONGO: -- let’s move on.
12 Q BY MR. PETERSON: The 1 -- I'm sorry. 111, and 1 -- 112,
13 and 113, those are the ones that include all -- all of the --
14 any -- any selection along the attitudinal scale?
15 A Um-hum.
16 Q And so the -- in -- in the "no idea" --
17 A Um-hum.
18 Q -- column, I think you testified you put that under "not a
19 goal"?
20 A Correct.
21 Q So that would inflate the number of -- that would inflate
22 the -- the percentage in the -- the column of "not a goal",
23 even though they didn't say it was not a goal, they said it
24 was -- they have no idea?
25 A Well, it doesn't -- it -- it doesn't really do anything to

1 the racial justice, because it was --
2 Q I'm -- I'm not asking --
3 A -- only 2 --
4 Q I'm not --
5 A -- it was only 2 percent. So the -- the 4 -- it changes
6 the per -- these are not large numbers. It -- it does not
7 change the overall relationship. And the -- and -- and -- and
8 second is -- I guess the second point I would make is that
9 logically, if someone has no idea, then it's not a goal. It
10 can't be a go -- they can't be thinking that it's a goal if
11 they have absolutely no idea.
12 Q I understand you're -- that's -- that's how you assessed
13 the situation, and that's why you included those.
14 A Um-hum.
15 Q My question is, using, for an example, other than racial
16 justice, the workplace activities from -- from 110, Res --
17 Respondent's 110, those numbers are 13 percent had no idea
18 whe -- whether there's a connection with advocating for
19 improved working conditions, and 18 percent had no idea if it
20 was encouraging union organizing by employees of private
21 businesses. Do you agree with that, that that's what the
22 exhibit says, the -- 110?
23 A Yes.
24 Q And so if you count -- add 18 percent -- you used racial
25 justice as an example -- instead of 2 percent is not -- not --

1 not much of a change, but 13 to 18 percent, that would show up
2 in Respondent's 113 as inflating the "not a goal" by a
3 technical definition of what the survey response was?
4 A Right. It -- yes. It would inflate -- it -- it would
5 increase -- it increases the -- the not a -- the "not a goal"
6 category by -- by a little amount.
7 MR. PETERSON: May I approach, Your Honor?
8 JUDGE SOTOLONGO: Yes. Thank you.
9 Q BY MR. PETERSON: Go ahead and flip through that exhibit,
10 and let me know if you recognize it?
11 A Yes.
12 Q And can you tell us what's included in that exhibit?
13 A Basically, this is a pie chart that's actually just
14 repeating the information with the 4, 5, 6, 7 categories.
15 It -- it's -- it's basically just repeating in a different way
16 the information in Exhibit 105.
17 Q And so this is based on --
18 A Sorry. I guess 105 and 106.
19 Q This is -- this is based on the -- this reflects the
20 survey questions, and each -- each -- each response to the
21 inventory questions --
22 A Correct.
23 Q -- correct?
24 A For the top three, bottom three.
25 Q Top three, bottom three. So this is also not including

1 the 4 through 7?
2 A No, it is.
3 Q This is including 4 through 7?
4 A Yeah. Look at the code. The legend is at the bottom.
5 Q Yes.
6 A Okay? So these actually were in color. It's hard to tell
7 with -- in black and white, but what you see is, sort of, the
8 different shades of gray in the legend at the bottom, it's the
9 rectangular box at the bottom of each graph, okay, is 4, 5, 6,
10 and 7, and then, "not a goal" is 1, 2, 3, "major goal" is 8, 9,
11 10. So this is just a pie -- this is a pie chart of basically,
12 the data that I've already presented in different ways.
13 Q So 1 through -- so "not a goal" and "major goal", that 1
14 through 3 -- "not a goal" is 1 through 3, "major goal" would be
15 a response of 8 through 10?
16 A Correct. And then 4, 5, 6, 7 correspond to the very small
17 slices, okay, if you recall, remember I said that there was
18 a -- a -- a fairly small percentage that actually -- of
19 respondents that actually fall into those other categories, but
20 this just simply reports it.
21 Q So the -- turning to the workplace topics, page 5 or 6, I
22 believe, those are the two que -- those reference the two
23 survey questions that you categorized as "workplace topics"; is
24 that correct?
25 A Correct.

1 Q And so "not a goal" includes all of 1, which is not a --
2 "not a goal", and also 2 and 3, which are a degree --
3 A Correct.
4 Q -- of "not a goal".
5 A A very strong degree "not a goal".
6 Q So if I'm in -- tell me if I'm interpreting this
7 correctly, on page 5, that indicates that 47 percent of -- hold
8 on. 47 percent of the respondents viewed the -- advocate for
9 improved working conditions in private businesses as, at least,
10 as -- as a for hire as far as association with Black Lives
11 Matter?
12 A I -- I'm sorry. I don't fol -- I'm not -- I'm not
13 following where you're at.
14 Q Yeah. Not a goal --
15 A Can you just help me, please?
16 Q Yeah, so 53 percent, that's not a goal. That's responses
17 in the 1 through 3 on the attitudinal scale?
18 A Correct.
19 Q And so that leaves -- 47 percent of the responses would
20 have put that as a 4 through 10 on the attitudinal scale,
21 whether there's a connection, or whether they associate
22 advocating for improved working conditions in private
23 businesses is associated with Black Lives Matter?
24 A 53 percent are saying advocating for improved working
25 conditions in private businesses is not a goal, is not a major

1 goal of Black Lives Matter. Or in other words, 53 percent are
2 responding either -- are -- are in the category 8, 9, 10. And
3 47 percent --
4 Q Are you -- I mean, so yeah, you're -- or -- I'm sorry, 1
5 through 3 now, I'm sorry, I'm sorry.
6 A Yeah. That's a lot of data. Oh, okay, I'm sorry, 1
7 through 3. 47 percent, okay, are saying -- fall into all the
8 remaining -- all of the other remaining categories. Okay, 4
9 through 10.
10 Q That was my question.
11 A Okay.
12 Q And similar for page 6, is that the percentages reflect
13 not a goal is the 1 through 3. The remainder is people that
14 ranked it on the attitudinal scale as a 4 through 10; is that
15 correct?
16 A Uh-huh.
17 Q Yeah, okay.
18 A Yes.
19 Q And somewhat similar for all of these -- each of the
20 questions that are -- that are reflected in -- in this exhibit;
21 is that correct?
22 A Yes.
23 MR. PETERSON: Move for the admission of General Counsel's
24 103.
25 MR. DELORME: No objection.

1 JUDGE SOTOLONGO: General Counsel's 103 is admitted.
2 **(General Counsel Exhibit Number 103 Received into Evidence)**
3 Q BY MR. PETERSON: Turning to the -- the open-ended
4 question. You testified that that was -- that is, it was --
5 it's important -- or it's important as far as the quality of
6 the data, you can get to include the open-ended question before
7 any type of prompts; is that correct?
8 A Right, before the inventory.
9 Q Is that because prompting can skew the -- the person's
10 response, or -- or of this person's answer?
11 A It -- it's a slightly different kind of problem, okay,
12 or -- or -- a -- it's a slightly different type of -- of issue.
13 And this again points to -- in the direction of why open-ended
14 questions are considered to be such high-quality information
15 and such a rich source of information. Because it's asking
16 individuals to, unsolicited in their own words, write what they
17 think about their response -- write their response in their own
18 words to the question.
19 When they're closed-ended questions, for instance, with
20 options, and this is partic -- this -- this is a -- there's a
21 vulnerability, for instance, with like, yes/no questions. And
22 hence, why I did not select, or why I'm not using yes/no
23 questions.
24 Is -- there is such a thing, there is such a phenomenon
25 as -- that's referred to as acquiescence bias. A tendency of a

1 small percentage, okay; it's not a big percentage, okay. So 3
2 or 4 percent, it's not something that like totally blows apart
3 the pertinent -- totally changes the results. But acquiescence
4 bias -- acquiescence bias is -- there can be a tendency, a -- a
5 slight tendency, for respondents to answer yes, okay. Because
6 it's one of the two choices.
7 There are also, with closed-ended questions, similar to
8 acquiescence -- acquiescence bias, there's going to be a
9 certain -- again, there's going to be a small number of
10 individuals who we would classify as that -- you know, survey
11 researchers and statisticians would classify as outliers, or
12 they hold, basically what are non-attitudes. They answer --
13 they give an answer, okay. There's -- a -- again, this is not
14 a big number, but it could -- but again, it is a -- it -- it's
15 something to be avoided, if -- if possible.
16 So the -- I think I used the term, you know, like random
17 noise this morning, in the data, meaning, or outliers. And so
18 this small percentage, okay, of individuals -- and it's sort of
19 like, sort of like when we took the S.A.T. Probably many of us
20 took -- when we took the S.A.T., we guessed on a couple of
21 questions to the answer, right? We didn't know the answer.
22 There was an option, I guess. That's what it is. Okay.
23 That's -- that's what's -- what's going on.
24 So in the open-ended question, to make it clean, you don't
25 want to -- you know, you -- you don't want to sort of get in

1 front of the respondents, you know, sort of -- or, you don't
2 want to guide the question. You don't want to do anything that
3 might steer or guide the respondent to some kind of a response.
4 You want it to be as, you know, sort of a sincere first
5 response. What is my -- you know, what do I initially -- what
6 do I initially think, okay. So that's why the inventory should
7 come after, okay. Because those are very specific. You know,
8 those are very specific questions. They're designed to be very
9 specific questions so that there isn't -- so there isn't
10 ambiguity, okay. Questions should be clear, concise,
11 understandable; understandable to everybody.
12 It -- it -- it's also actually another reason or -- or
13 another advantage of why one would use a scale, okay. Because
14 it actual -- it -- it requires a little coming -- while there
15 are, it's half, and so it's a lot different than yes/no. And
16 it's a lot better obviously than yes/no and requires a little
17 more -- requires a little more reflection, okay, to think
18 about, where I'm going to, you know, identify or locate myself
19 along -- along the scale, okay. So is that -- did --
20 Q Yeah, no, that -- that's helpful. And it -- and it
21 gives -- so that gives the respondent an option to think a
22 little bit about whether they -- is it a 1 on the scale or is
23 it a 2 or a 3 on a scale, it -- it requires some reflection.
24 A Right, well, the attitude -- right, the attitudinal scale
25 is -- is a little bit higher standard. It has a higher, it --

1 you know, it places a little more expectation and thought and
2 reflection on the part of the respondent, rather than just
3 simply a yes/no. But also, you know, I've had -- going back, I
4 guess, to the original question, which is about the open-ended
5 question, or about the open-ended questions and the importance
6 of the open-ended questions, that's why it's such high --
7 open -- the responses from open-ended questions are such high
8 quality. They're totally unsolicited. There's not -- you
9 know, there's -- there's nothing there, you know, because they
10 don't know where they're going.
11 Q And I suppose the quality of their response depends on the
12 quality of the question being asked. Is that fair to say?
13 A Yes, there can be question -- wording of facts, you know.
14 But again, that's why, as I -- you know, questions should be
15 clear. They should be, you know, unambiguous. They should be
16 straightforward. They should be easily understood by any
17 respondent. You avoid -- this -- this is really bad, I mean,
18 so if you ever see this in a question, you -- you know, you
19 should be suspicious.
20 There should not be questions that are double barreled --
21 what are known as double barreled. So you're basically asking
22 two different things in the same -- you know, two different
23 things in the same question. You ask a single -- you're --
24 you're asking a single question. I mean, you have a single
25 point or reference in -- in each question.

1 Q And what -- what thought -- can you describe your thought
2 process when you framed the question as -- in a few words,
3 describe what you believe or understand to be the goals or
4 purpose of the Black Lives move -- Matter movement?
5 A Yes. So actually, the -- the phraseology for all the
6 questions is actually the -- the structure of the questions
7 is -- best practice is to use the structure -- is -- is to use
8 question structure that has been used in -- over time, and has
9 been proven to be highly reliable and highly valid. So the
10 question structure in this survey is the same as Pew, ANES, the
11 benchmark studies. The difference is I drop in Black Lives
12 Matter, rather than the Saint Louis Cardinals, or whatever it
13 is that you might be -- whatever it is that the topic might be
14 that you're looking at. That way, you're highly confident that
15 you're getting reliable and valid -- reliable and valid
16 information that comes back. I'm not making up these questions
17 willy-nilly. These are questions that are used over and over
18 and over again in the most prestigious surveys and research
19 organizations around the world. Well, in the United States,
20 and in English.
21 Q And just to confirm, the -- the question is, you've
22 phrased -- the open-ended question as you phrased, it's on page
23 5 of Respondent's 114. And it says, in a few words, describe
24 what you believe or understand to be the goals or purpose of
25 the Black Lives Matter movement, correct? And that's the open-

1 ended question -- that's the only open-ended question that you
2 asked; is that correct?
3 A Correct. There's only one open-ended question.
4 Q Why did you -- why did you choose the -- choose the --
5 the phrase Black Lives Matter movement?
6 A The focus of the study is Black Lives Matter.
7 Q Well, do you think it would have been different if you had
8 said, what do you understand to be the goals or purposes of
9 the -- of the phrase Black Lives Matter and leave out the
10 movement part?
11 A I do not.
12 Q You do not believe -- do you --
13 A It's not a -- this is not a -- when you're looking at --
14 when you're trying to evaluate questions, you want the question
15 to be -- you -- you -- you're not looking for -- or you want to
16 avoid any sort of, I guess, like inflammatory language. Black
17 Lives Matter movement is how it -- it -- it is a phrase that is
18 used in media, in discussion, you know, it -- it's a -- it's a
19 well-known, okay, or it's a well-used phrase, okay. And so
20 there's -- you know, so there wouldn't be -- there -- there
21 wouldn't be ambiguity.
22 Q Do you believe the phrase Black Lives Matter exists on its
23 own apart from the movement?
24 A I don't understand what you're asking me.
25 Q Yeah, I mean, Black Lives Matter, just those three words,

1 do you see any distinction between those words as they stand on
2 their own without being part of a Black Lives Matter movement?
3 A I do not -- I do not see a material difference.
4 Q Do you think the -- would it have skewed the responses had
5 you mentioned, or said anything in the prompt about -- of -- of
6 what -- what do you understand the goals or purposes of the
7 Black Lives Matter movement to mean when in a certain context,
8 like when people are expressing it in front of a hospital or a
9 voting rights center or an educational department? Do you
10 think context gives you -- if you -- if you include context in
11 the phrase, would that skew the responses in any way or would
12 that affect the -- the responses?
13 MR. DELORME: Objection, Your Honor. Calls for
14 speculation.
15 MR. PETERSON: It's a hypothetical opinion as an expert.
16 JUDGE SOTOLONGO: Oh, I'll -- I'll allow it.
17 A That's not the survey question that I asked. So the -- so
18 I don't know what the data -- you know, what the real result
19 would be. If you're asking my personal opinion, then my
20 personal opinion is that --
21 Q BY MR. PETERSON: I guess I'd ask for your professional
22 opinion rather than your personal opinion of it.
23 A Well, but my -- I'm trying to base my professional opinion
24 on the data and -- and -- and the survey that I conducted.
25 Q Yeah. Then I'm -- I'm happy with your response, then I

1 don't need your personal opinion apart from your professional
2 opinion.
3 A Okay, so -- okay, so my -- my personal opinion would be --
4 Q I'm not asking about your personal opinion.
5 A Okay, I guess I'm -- I'm sorry. I guess I'm confused
6 where we're at. Yeah -- yeah --
7 JUDGE SOTOLONGO: No, I think -- I think you said that you
8 cannot give your professional opinion because you didn't ask
9 that question in the survey. So you're bas -- your -- the
10 professional opinion that you have been proffering us today,
11 it's based on the survey --
12 THE WITNESS: Of what I used.
13 JUDGE SOTOLONGO: -- of what you used, and -- and the
14 methodology that you have explained. And -- and counsel's
15 asking what if you had done it then, and there's no answer.
16 And it's -- there's no sense -- counsel is willing to speculate
17 because you don't -- you cannot give a professional opinion,
18 because you don't have the data. That's a question that wasn't
19 asked in that phrase -- in that -- in that way.
20 Q BY MR. PETERSON: Yes, in -- in your -- in your -- in your
21 prompting, you phrase the ques -- your phrasing of the
22 question, there's no reference to -- to the -- to the workplace
23 or to the fact that employees expressing Black Lives Matter in
24 the workplace; is that correct?
25 A In the prompt --

1 Q Page 5, the open-ended question --
2 A On 116?
3 Q 114. By prompt, I mean open-ended question that the --
4 the open-ended question as you word it did not reference any
5 activities taking place at a workplace, is that --
6 A So -- so I just want to make sure I know where I'm at --
7 Q Sure.
8 A -- okay. So we're talk -- you're talking about -- are you
9 talking about the -- the open-ended question, in a few words,
10 describe what you believe or understand to be the goals or
11 purpose of the Black Lives Matter movement?
12 Q Yes.
13 A Okay. Now would you please repeat your question?
14 Q You don't make any reference to the Black Lives Matter
15 message being expressed in a workplace or any other location;
16 is that correct?
17 A Correct. There's no -- there's no prompt whatsoever.
18 It's just simply, what do you identify to be the goals of Black
19 Lives Matter? Whatever the individual wants, you know,
20 whatever the individual response is -- what's recorded in
21 the -- in the text box.
22 Q Do you agree that open-ended questions, lacking the
23 additional cues of fixed alternatives may need to be more
24 clearly focused than closed questions?
25 A Okay, would you repeat that, please?

1 Q Yes, do you believe that open-ended questions lacking the
2 additional cues of fixed alternatives may need to be more
3 clearly focused than closed questions?
4 A Depending upon -- I mean, it -- it -- again, one needs to
5 be specific. If one is trying to, you know, I mean and --
6 and -- and this -- this goes back to, you know, like, what is
7 the research question and the data, you know, in trying to
8 retrieve the data. If you're asking -- if the research
9 question is examining a -- a complex concept, then some context
10 for the open-ended question might be required. However, if the
11 research question is to invite respondent's first or second
12 mention of what they identified to be the goals of Black
13 Lives -- Black -- Black Lives Matter, it would be a mistake to
14 provide additional context, because it could be -- you're sort
15 of steering the -- the respondent, you know, in a particular
16 question. I mean, you know -- and you know, in a particular
17 direction, you know, so it -- but the -- the statement that you
18 read is -- is sweeping and it requires -- you know, it requires
19 specificity, you know, to determine -- for the research to
20 determine well, what would be appropriate for the --
21 appropriate language or might be more appropriate language for
22 the open-ended question.
23 Q You -- thank you.
24 MR. PETERSON: I don't have any more questions.
25 THE WITNESS: Oh, okay.

1 MR. DELORME: Take five minutes, Your Honor?
2 JUDGE SOTOLONGO: Yes, I have some questions though. So
3 perhaps I should ask them now. And so you can then ponder
4 whether you want to ask any questions.
5 MR. DELORME: Fair enough.
6 JUDGE SOTOLONGO: All right. So Professor, I -- I want to
7 start with some of the general, and then work my way with some
8 specifics.
9 THE WITNESS: Okay.
10 JUDGE SOTOLONGO: You know, if you don't recall, early on
11 I asked you how this survey had been conducted -- conducted,
12 and you had replied that it was conducted online.
13 THE WITNESS: Correct.
14 JUDGE SOTOLONGO: Okay. And -- I sup -- I suppose that we
15 can all agree that, you know, computers, tablets, smartphones
16 have become ubiquitous these days, and most people have one
17 device, but not everybody.
18 I think one of -- for example, one of the things that has
19 come out of the pandemic is, for example, a lot of children
20 that, when their schools closed, those who had access to online
21 instruction fared better than those who did, obviously, so --
22 and I guess where I'm going is this -- as I said, I'm sure an
23 expert like you is -- because this is a classic example, the
24 1948 Dewey Defeats Truman --
25 THE WITNESS: Right.

1 JUDGE SOTOLONGO: -- that was conducted via telephone, I
2 think it was Gallup, but I could be wrong -- via telephone, and
3 of course, back then very few people had a telephone, and those
4 who did, skewed to be the upper scales of the socio-economic
5 order, and those tended to be Republicans. So when they got
6 the results, it looked like Dewey was going to bury Truman in a
7 landslide, and as we all know, that was not the case.
8 So I guess my question is this -- is -- is the fact that
9 this was conducted online, could that skewing results somewhat
10 in this case?
11 THE WITNESS: Okay. So Judge, that's a great question.
12 JUDGE SOTOLONGO: So that's -- okay, I'm not going to
13 disagree with that.
14 THE WITNESS: I -- I sort of slipped back into my
15 classroom mode. My -- Your Honor, I apologize.
16 The -- okay -- so and even -- even greater example, I
17 think of, for instance, of the phenomenon that your -- the
18 question is posing, the answer would be the Literary Digest
19 poll predicting Alf Landon defeating Roosevelt in 1936. They
20 sent out 10 million surveys. They received 2.7 million surveys
21 back. And so this and you know, and they predicted that Alf
22 Landon was going to win in a landslide. Now of course, that
23 didn't work out right. I mean, that was really wrong.
24 The key here, the clue -- that -- what's important here is
25 the representativeness of the sample. And so Truman, Dewey,

1 Landon, FDR. If the n is unrelated -- the -- if -- if -- no
2 matter how large the n is, if it's unrelated to a
3 representative sample, then, right, it -- it's worthless. The
4 information that you have is worthless.
5 So this goes back to my earlier con -- I -- I guess the
6 conversation earlier this morning when I was talking about
7 metrics and the sophistication of the YouGov sampling and
8 weighting methodology. I mentioned that YouGov has a -- has a
9 pool, okay, a panel, of over 2 million and -- of over 2 million
10 individuals, okay, who have agreed to participate in a certain
11 number of surveys over the next year. I mean, I don't know how
12 it is, okay, but that is basically what it -- okay -- how it
13 works, or generally how it -- generally how it works.
14 YouGov has a great deal of information about -- and this
15 is what separates YouGov, and a couple of others, from the vast
16 majority of the vendors, okay, of the other polling vendors.
17 Okay. So what YouGov -- YouGov has a great deal of information
18 about the -- about the panelists who conduct -- who complete
19 the surveys. They know their voting history; they know their
20 religiosity and so forth. They also know, you know, for
21 instance, the -- or they estimate -- are they a little bit
22 younger, are they a little bit more technological --
23 technologically sort of savvy or involved. So any survey --
24 every survey has some degree of those distortions.
25 The telephone poll, for instance, you know, 15 years ago,

1 the response rate for telephone service was 36, 37 percent,
2 today it's 6 percent. And those who respond are a certain --
3 you know, have certain characteristics. And so sort of a raw
4 telephone poll is not a very good sense of -- it is not a very
5 good source of information.
6 So the key here then is having sufficient information
7 about the composition of your sample to construct the proper
8 weights so that it is representative and to offset those kinds
9 of -- to offset those kinds of distortions that can appear.
10 You know, that potentially can sort of work, you know, or sort
11 of sneak into -- a -- a survey.
12 YouGov has a very sophisticated -- I mean, as I -- I think
13 I was talking about the propensity scores and the -- you know,
14 they pre-prompt the -- you know, the -- they estimate a
15 logistic regression equation, which is a way of obtaining
16 conditional probabilities of the likelihood of what their
17 sample looks like compared to what their random draw is from
18 the American Community Survey, okay. So it's -- it's
19 compensated for by -- or it -- it's accounted for by the -- the
20 weighting mechanism that the polling organization uses.
21 JUDGE SOTOLONGO: So the short answer is, I don't think
22 this was skewed, because you think it was a -- it was a good
23 representative sample --
24 THE WITNESS: I do think it's --
25 JUDGE SOTOLONGO: -- or a cross-section of -- so that --

1 okay.

2 THE WITNESS: You know, gee whiz, I -- I mean, you know, I

3 just checked with somebody, and you know, I compared it to

4 benchmark surveys. I compare -- I performed external validity

5 tests. I -- I think this is a very elegant research design. I

6 guess that's boastful, but I imagine it is a very elegant

7 research design. It -- and -- and -- and I have a great deal

8 of confidence in the data, in -- in the accuracy of the data

9 within the plus or minus 2.6 percent margin of error.

10 JUDGE SOTOLONGO: All right. My next question will be a

11 little more specific.

12 THE WITNESS: Okay.

13 JUDGE SOTOLONGO: And it has to do with, okay,

14 Respondent's 116. That's the -- the number of the enumerated

15 questions that when you asked, you know, how much do you think

16 the -- the -- the goals of Black Lives Matter movement is

17 reflected in these topics, right?

18 THE WITNESS: Please, I'm sorry, Your Honor, what -- what

19 question are you on?

20 JUDGE SOTOLONGO: So number --

21 THE WITNESS: Number 2 on 116? Okay.

22 JUDGE SOTOLONGO: So okay. So now I'm actually now on --

23 on page 4, question number 9. And that is, it says fighting

24 systemic racism in the courts in a criminal justice -- are you

25 with me?

1 THE WITNESS: Um-hum.
2 JUDGE SOTOLONGO: All right. My -- I guess here's my
3 question. The only time you used systemic racism, the terms in
4 there, is with respect to the criminal justice system.
5 THE WITNESS: Right.
6 JUDGE SOTOLONGO: And I guess my question, would it be
7 fair to say that -- that when peoples talk about systemic
8 racism, they may be talking about a broader, more all-
9 encompassing system where every facet of society is skewed
10 against certain a racial group, not only in the criminal
11 justice system, but you know, in the educational system, the
12 voting rights system, in the employment field, and so forth and
13 so on?
14 So I guess the question is why -- why do you use systemic
15 racism only in that context?
16 THE WITNESS: A couple of -- a couple of points to make.
17 The first is, the question is not asking what somebody believes
18 to be systemic racism. It's not trying to explain what
19 systemic racism is. It's simply a phrase, as you said, however
20 someone might interpret it.
21 JUDGE SOTOLONGO: Um-hum.
22 THE WITNESS: The racial justice questions except the --
23 the police, the systemic racism in -- of course, in the
24 criminal justice system and an excessive use of -- excessive
25 use of force are actually derived from the mission statement of

1 Black Lives Matter online, so I'm using their specific
2 statements.
3 JUDGE SOTOLONGO: Which -- and that -- and by that, you
4 mean that -- I mean, I don't have it in front of me, but that
5 the use of the term systemic racism only in addressing the
6 criminal justice system?
7 THE WITNESS: As I recall, yes. The phrase vigilantes
8 and -- where am I -- excessive use of force by the police or
9 vigilantes against African Americans. That portion of that
10 phrase, that portion, comes directly from, I guess, it's the
11 About Black Lives Matter statement of their history from Black
12 Lives Matter. So they're derived from -- those questions are
13 actually specifically derived from Black Lives Matter itself as
14 an organization.
15 JUDGE SOTOLONGO: Very well. All right. If you want to
16 take a break now before you resume questioning if you have
17 further questions or -- either caused by my own or each other's
18 questions and --
19 MR. DELORME: Let's take five minutes.
20 JUDGE SOTOLONGO: Let's take a five-minute break.
21 (Off the record at 3:51 p.m.)
22 MR. DELORME: Brief redirect, Your Honor?
23 JUDGE SOTOLONGO: Yes.
24 **REDIRECT EXAMINATION**
25 Q BY MR. DELORME: Dr. Davison, you'll recall questions that

1 Mr. Peterson asked you on cross-examination regarding General
2 Counsel Exhibit 103, if you could put that in front of you.
3 JUDGE SOTOLONGO: That's the pie chart?
4 Q BY MR. DELORME: It's under your left hand. There you go.
5 A Yes. Okay.
6 Q And specifically, Mr. Peterson focused on pages 5 and 6,
7 which were the workplace topics.
8 A Yes.
9 Q Do you -- do you recall that questioning and testimony?
10 A Yes.
11 Q You've spoken a number of times today about how using one,
12 two, three and eight, nine, ten as a pole, or poles, was the
13 conservative way to analyze the data. Am I right about that?
14 A Yes.
15 Q Had you decided to use a less conservative method, how
16 would you have used -- or how would you have categorized four
17 and five and six and seven?
18 A Well, one way would be to simply reduce everything to two
19 categories and -- but what you're doing is really just -- you
20 know, you're really diluting or you're really disguising what
21 the -- you know, what the pattern is in the data. Relying on
22 top three, bottom three, you know, I'm -- I'm attempting -- I
23 mean, actually, I'm -- I'm establishing a test. What is the --
24 you know, how many people are falling into the categories that
25 most strongly hold attitudes, yes, it's a goal, no, it's a

1 goal.
2 Q But since we have the data --
3 A Um-hum.
4 Q -- you could look at splitting it into two categories.
5 And what would -- what would the -- be -- what answers would
6 fall -- excuse me -- in those two categories?
7 A Well, if -- if you look at the four, five, six, all right,
8 four, five, six, seven, they basically cancel each other out.
9 It doesn't --
10 Q What do you mean?
11 A -- really change --
12 Q Can you explain specifically what you mean by that?
13 And -- and let's start with workplace 35D_Scale 1, which is on
14 page 5.
15 A Okay. So -- okay. So major goal, 19 percent. Is
16 everybody with me?
17 Q Yes.
18 A Okay. So if I also add in 8 percent and 6.1 percent
19 included in the category, so that's 14.1 percent, okay? So I
20 would add 14.1 percent to the major goal category. I also add
21 an 8.9 percent and 4.2 percent, which would be 13.1 percent.
22 And it's virtually -- in other words, they -- they virtually
23 balance each other out, and so they do not change anything.
24 They don't change the substantive portrait, okay, or the
25 substantive pattern of the -- that's being displayed. It

1 increases major goal and not a goal by basically a constant
2 amount, you know, by basically identical -- identical numbers.
3 You know, it's -- you know, so again, it's -- and they're
4 relatively small, you know -- you know, which again speaks to,
5 you know, why to simplify.
6 Q Okay. And now let's turn to the next page, page 6, which
7 is Q5F_Scale 1 --
8 A Yes.
9 Q -- and do the same analysis.
10 A Okay. Similarly, to a major goal, you then could add 12.4
11 percent, and not a goal, it actually is a little bit more. It
12 would end up being 15 percent. So it actually -- you know, so
13 it moves it a little bit more in the direction of not a goal,
14 you know, but again, you know, what one's trying to identify is
15 what's the -- what's the dominant trend, what's the dominant
16 pattern in the -- you know, in the data.
17 Q I also want to talk about your earlier testimony which
18 we've gone over a number of times about the importance of the
19 data that is mined from the open question --
20 A Yes, sir.
21 Q -- versus talking about the data that is mined from the
22 closed question. In your estimation, which data is more
23 valuable to reach a conclusion on the question you are looking
24 at?
25 A In my view, the highest quality data are open-ended data

1 because they are the least -- they -- they are the data that
2 does not -- that allows each respondent to answer the question
3 in their own words unprompted by anything that could be used to
4 prompt them. It's -- it's the most genuine, okay, form of
5 data. You know, so it's highly -- it's -- it's highly open-
6 ended questions -- or open-ended responses are highly rich --
7 very, you know, important qualitative information.
8 Q And if you could look at Respondent's Exhibit 103.
9 A Respon -- okay. I'm sorry.
10 Q You're fine.
11 JUDGE SOTOLONGO: Okay. The 27 one.
12 THE WITNESS: Oh. Okay. So the list of text responses?
13 Q BY MR. DELORME: Right.
14 A Okay.
15 Q And so in 103, you were as inclusive as you thought you
16 could reasonably be to find out where in the open question do
17 we have respondents referring to any language that would be
18 associated with the workplace; is that correct?
19 A Yes.
20 Q And remind us again how many of those respondents cited
21 issues in the workplace associated with their answers to the
22 open question.
23 A 27.
24 Q And remind us again what percentage of the overall group
25 that responded to the open question did that constitute?

1 A It's about 1.3 percent, 1.4 percent.
2 Q Thank you, Dr. Davison.
3 MR. DELORME: No further questions at this time.
4 JUDGE SOTOLONGO: All right. Mr. Peterson?
5 MR. PETERSON: Yeah. Couple -- couple follow-ups.
6 **RECROSS-EXAMINATION**
7 Q BY MR. PETERSON: One, on a couple of the judge's
8 questions, the -- you know, the fact that the survey has to be
9 conducted online, does that -- do you know if people can do
10 that via their phones, like smartphones?
11 A I -- I actually do not know.
12 Q Not sure?
13 A Okay. I'm not -- I'm not certain about that.
14 Q It would require an internet connection at a minimum, I
15 presume?
16 A I -- I don't know whether they can do it on their -- on
17 their cell phone. It would require an internet connection to
18 do it online with a laptop or a tablet.
19 Q So I guess, does the survey -- I guess, what is it,
20 YouGov, their survey methods, they naturally exclude people
21 without -- without the technological means to -- to perform the
22 survey; is that correct?
23 MR. DELORME: Objection. Mischaracterizes prior
24 testimony.
25 JUDGE SOTOLONGO: Overruled.

1 THE WITNESS: Where am I?
2 JUDGE SOTOLONGO: You can answer.
3 THE WITNESS: Okay. About 90 percent of the popula- -- of
4 the American population has access to a laptop. I think it's,
5 like, 8- -- 88 to 90 percent has acc -- or has access through
6 the internet to -- for some -- for some connection to the --
7 for the survey. So it's a very, very large percentage of the
8 population that has that access.
9 Secondly is, as I was explaining to -- or responding to
10 the judge, the weighting mechanism, okay, the weighting process
11 or method that YouGov uses includes or accounts for those who
12 are excluded. And it would be, you know, and so that -- you
13 know, so it's not like -- it would be an in -- it would be
14 incorrect to say that they simply are ignored, all right? They
15 are -- they are, and that the sample look is, therefore,
16 unrepresentative. That is one of many factors, okay, many
17 variables that YouGov uses to weight their surveys.
18 Q BY MR. PETERSON: So yeah. So how do they -- first of
19 all, how do you know that it's -- I forget what percentage you
20 said of people that have access to laptops. 89 to 90, I think.
21 Is that what you said?
22 A Right.
23 Q What's your source of information?
24 A It actually is reading in technical journals on -- you
25 know, on survey research. A large percentage of the American

1 population has acc -- you know, now has access. Not -- of
2 course, not always the case, but a very large percentage of the
3 American population does, indeed, have some sort of access --
4 internet access.
5 Q And how does the YouGov account for those that don't
6 have -- that don't have access to the technological means to
7 take this survey?
8 A Okay. So --
9 MR. DELORME: Objection. Asked and answered. He just
10 gave a very eloquent answer to that question.
11 JUDGE SOTOLONGO: Overruled. You can answer.
12 THE WITNESS: Okay. So as I mentioned early -- as I
13 explained earlier, YouGov uses a -- remember when I was talking
14 about propensity scores? YouGov uses a number of variables, a
15 number of factors, okay? They have a lot of information about
16 the -- you know, about the respondents. They also gather
17 information from other surveys like the -- like -- or they use
18 information from the -- from Pew. They use information from
19 the CPS -- I'm tired -- CPS is the Current Population Survey,
20 pardon -- you know, which is, again, from the Census Bureau.
21 And so YouGov has a very good -- you know, has a very good
22 sense, okay, has a very good estimate of what percentage of the
23 population is without internet connection and -- because
24 they're taking it from -- they take that information from the
25 current population survey and -- which is an exceptionally high

1 quality survey of the American population and housing
2 characteristics -- and then use that information to weight or
3 adjust accordingly.
4 Q Do -- how do they do -- how -- like, how can you weight
5 something to account for people that aren't able to take the
6 survey, if you know?
7 A YouGov's -- I do not know YouGov's algorithms. YouGov's
8 algorithms are -- and -- and also, lots of survey firms do
9 this. Their algorithms are proprietary. You know, it's their,
10 you know, sort of marketplace comparative advantage. And so,
11 you know, so they're highly -- they're highly technical.
12 So I can answer your -- I -- I can answer your question
13 generally, I mean, what is the logic of how they weight? You
14 know, and really, the logic of how they weight is using the
15 example that I used this morning, is what if there was a sample
16 of 60 percent of the pop -- of the sample is female and 50
17 percent is male, they -- I would weight the sample by five-six
18 -- or female responses by five-six so that I could bring it
19 back into balance.
20 The principle is -- the principle is the same, okay, or
21 the method is the same. They are able to estimate, for
22 instance, from the Current Population Survey, what percentage
23 of the population does not have internet access in their
24 household, in their home, and that information then is
25 incorporated into their weighting mechanism along with a host

1 of other variables. This is -- this is also -- I think what
2 separates the weighting process, or the weighting methodology,
3 by YouGov compared to others, you know, some vendors will just
4 simply use maybe three or four, you know, 50/50, male/female
5 and four percent of the sample is African American and 16
6 percent is Hispanic.
7 The -- you know, the integrity or how rep -- of the
8 representativeness is, you know, really is captured by the
9 number of additional variables that are used to calculate the
10 weight and -- you know, and then I guess the other point that I
11 would -- the other point that I would make is that the -- I
12 also performed external validity tests, and the results of the
13 YouGov survey, or the relationships, you know, among prominent
14 variables in the YouGov survey, are -- you know, align very
15 closely with the results, or the relationships, in the ANES,
16 ANES 2016 and ANES 2020.
17 So it's also sort of a post-hoc, I guess, or you know,
18 also assessment of their accuracy, you know, which is -- well,
19 is YouGov al- -- you know, are the relationships that YouGov --
20 or that my survey reports, are they consistent with the
21 relationships in what are considered to be beyond review
22 benchmark surveys.
23 Q Yeah. No, I understand -- I understand that from your --
24 from your earlier testimony. I don't under -- I still don't
25 understand how you account for people that can't participate in

1 the story -- or in the survey, and it sounds like you believe
2 their algorithm has some way to do it, but you're not sure
3 exactly how. Is that a fair --
4 A No.
5 Q -- statement?
6 A I would not -- I -- I -- I disagree with that. They
7 estimate a logistic regression equation. The logistic
8 regression equation estimates the conditional probability that
9 an individual with a particular set of characteristics is going
10 to be -- will be in the -- in the target pop- -- or in the --
11 the random sample that's drawn from the American Community
12 Survey.
13 And from those, and then I mentioned then that they --
14 what they do is they -- they minimize the Euclidean distance,
15 or in other words the difference, between respondents in their
16 sample and the -- and the randomly drawn sample from the
17 community studies, but they do this same thing, okay? I mean,
18 so it's a very -- it's going to be a very long equation, a very
19 big equation -- to construct their weight.
20 Now how they actually -- or excuse me. So the -- the
21 propensity score that I mentioned before is -- you know, is
22 basically their weighting mechanism and how they account for
23 these potential diff- -- these potential differences.
24 Q Your -- the judge also asked you about question nine of
25 the inventory questions, the systemic racism in the context of

1 the court and criminal justice system. And I think you said
2 you got -- you -- you derived that from Black Lives Matter
3 itself?
4 A Correct.
5 Q What is Black Lives Matter itself? What are you
6 referring?
7 A I went to the BlackLivesMatter.org website, I don't know,
8 several months ago -- or longer ago than that, I guess it's
9 now, what, six months ago -- to inform myself of the -- what
10 issues or what were their policy goals so that I just didn't
11 fabricate them, that they're actually anchored in what the
12 Black Lives Matter was stating.
13 Q Do you know that there are several organizations with
14 Black Lives Matter as part of their name?
15 A I do not.
16 Q You do not? Is the -- is the -- you haven't heard of
17 the -- have you heard of the Movement for Black Lives?
18 A I have.
19 Q The Black Lives Matter Foundation?
20 A I have.
21 Q Did you -- do you consider those Black Lives Matter
22 organizations?
23 A I went to the -- I went to the website that listed the --
24 that told the story of the founders of who established Black
25 Lives Matter.

1 Q Do you remember exactly what that website is? We've had
2 testimony about different types of organizations, so I'm trying
3 to understand what you used in formulating your questions.
4 A I -- I -- I don't -- I do not know the web address.
5 Q Do you -- do you have a smartphone with you, by chance?
6 A I do.
7 Q Could you look up the website that you used so we can
8 refer to it?
9 A Okay. I guess I can try.
10 JUDGE SOTOLONGO: Let's go off the record.
11 (Off the record at 4:20 p.m.)
12 JUDGE SOTOLONGO: We took a few minutes of the -- of the
13 witness looking for the website that he had earlier referred
14 to, and he now informs us that he believes he found them. Go
15 ahead and -- and tell us about that.
16 **RESUMED RECROSS-EXAMINATION**
17 Q BY MR. PETERSON: Yes. What is that -- what is the
18 website?
19 A BlackLivesMatter.com.
20 Q And is that the only website you visited in constructing
21 your survey?
22 A Yes.
23 Q When you're talking about the -- the charts in the -- in
24 the data, General Counsel's 103, the pie -- the various pie
25 charts. The -- the --

1 A Okay.
2 Q Yeah. You mentioned that you were looking at patt- -- I
3 think you said patterns that -- that show a dominant trend.
4 A Correct.
5 Q What do -- what do you mean by -- what's a dominant trend?
6 What does that reveal to you?
7 A In public opinion, a difference of -- I -- of maybe eight
8 to nine percent, ten percent, would be considered very large
9 differences. In public opinion, if a difference is 20 percent
10 or more, you know, or -- and larger, those are considered
11 enormous.
12 And so the dominant trend that -- I mean, you know, so the
13 dominant trend, statistically, is that you simply want to find,
14 you know, where the -- the observations are located or -- or
15 clustered, or if there's a pattern to where the observations
16 are -- are located, which would be from the median -- which
17 would be from the median graphs.
18 But whatever exhibit it was, you know, where I did the
19 differences, you know, with the large positive numbers and
20 large negative numbers, okay, those are enormous differences in
21 public opinion. You know, it was 40 percent, 60 percent were
22 some of those -- were some of the magni- -- were some of the
23 magnitudes.
24 Q Yeah. I guess, is dominant trend, is that, like, a
25 majority or the way you -- is that, like, how you categorize

1 how most people feel or --
2 A In these data.
3 Q Yeah.
4 A Okay. In these results, the dominant trends are at the
5 two poles, and they're not just a simple majority, but it's a
6 large majority of -- you know, of respondents. You mean of the
7 dominant -- or yeah. The dominant trend in -- for these
8 results are -- have two poles depending upon whether it's the
9 racial justice topics or the -- the workplace topics.
10 MR. PETERSON: Nothing further. Thank you.
11 THE WITNESS: Okay.
12 MR. DELORME: Nothing further, Your Honor.
13 JUDGE SOTOLONGO: Very well. I guess that's a wrap.
14 Thank you very much, Professor. Appreciate your testimony.
15 You know, please do not discuss your testimony with any other
16 witness or potential witness in this matter until this whole
17 case is over. So thank you and enjoy your rest of the stay
18 here.
19 THE WITNESS: Thank you very much, Judge.
20 JUDGE SOTOLONGO: All right. So I guess we will then
21 resume Tuesday at 9 a.m. I understand the room is -- I believe
22 it's going to be the 5th floor, Mr. Peterson?
23 MR. PETERSON: Yes. I --
24 JUDGE SOTOLONGO: This same wing, but just up a floor?
25 MR. PETERSON: Yes.

1 JUDGE SOTOLONGO: Very well. I'll see you all on Tuesday.
2 **(Whereupon, the hearing in the above-entitled matter was**
3 **recessed at 4:31 p.m. until Tuesday, August 16, 2022 at 9:00**
4 **a.m.)**
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1 **C E R T I F I C A T I O N**

2 This is to certify that the attached proceedings before the
3 National Labor Relations Board (NLRB), Region 20, Case Number
4 01-CA-263079, et al, National Labor Relations Board and Whole
5 Foods Market, Inc., held at the National Labor Relations Board,
6 Region 20, 1301 Clay Street, Oakand, California 94612, on
7 August 11, 2022, at 9:02 a.m. was held according to the record,
8 and that this is the original, complete, and true and accurate
9 transcript that has been compared to the reporting or
10 recording, accomplished at the hearing, that the exhibit files
11 have been checked for completeness and no exhibits received in
12 evidence or in the rejected exhibit files are missing.
13
14
15 Amanda Self
16 _____
AMANDA SELF
17 Official Reporter
18
19
20
21
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25

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 20

In the Matter of:

Whole Foods Market Services, Inc.,	Case No.	01-CA-263079
		01-CA-263108
		01-CA-264917
Respondent,		01-CA-265183
		01-CA-266440
and		01-CA-273840
		04-CA-262738
Savannah Lynn Kinzer, Suverino Frith, Leea Mary Kelly, Ana Belen Del Rio Ramirez, Camille Tucker-Tolbert, Truman Read, Abdulai Barry, Haley Ashley Evans, Cassidy Visco, Justine O'Neill, Sarita Wilson, Lyla Marcella Styles, Yuri London, Christopher Michno, Kirby Burt, and Kaeleb Rae Candrill, As Individuals,		04-CA-263142
		04-CA-264240
		04-CA-264841
		05-CA-264906
		05-CA-266403
		10-CA-264875
		19-CA-263263
		20-CA-264834
		25-CA-264904
		32-CA-263226
		32-CA-266442

Charging Parties.

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_____

Place: Oakland, California

Dates: August 16, 2022

Pages: 3568 through 3681

Volume: 20

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Phoenix, AZ 85020
(602) 263-0885

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

In the Matter of:		
WHOLE FOODS MARKET SERVICES, INC.,	Case No.	01-CA-263079
		01-CA-263108
		01-CA-264917
RESPONDENT,		01-CA-265183
		01-CA-266440
and		01-CA-273840
		04-CA-262738
SAVANNAH LYNN KINZER, SUVERINO FRITH, LEEA MARY KELLY, ANA BELEN DEL RIO RAMIREZ, CAMILLE TUCKER-TOLBERT, TRUMAN READ, ABDULAI BARRY, HALEY ASHLEY EVANS, CASSIDY VISCO, JUSTINE O'NEILL, SARITA WILSON, LYLA MARCELLA STYLES, YURI LONDON, CHRISTOPHER MICHNO, KIRBY BURT, AND KAELEB RAE CANDRILL, AS INDIVIDUALS,		04-CA-263142
		04-CA-264240
		04-CA-264841
		05-CA-264906
		05-CA-266403
		10-CA-264875
		19-CA-263263
		20-CA-264834
		25-CA-264904
		32-CA-263226
		32-CA-266442
CHARGING PARTIES.		

The above-entitled matter came on for hearing, pursuant to notice, before **ARIEL SOTOLONGO**, Administrative Law Judge, at the National Labor Relations Board, Region 20, Ronald V. Dellums Federal Building, 1301 Clay Street, 2nd Floor, Conference Room H, Oakland, California 94612, on **Tuesday, August 16, 2022, 9:00 a.m.**

1 **A P P E A R A N C E S**

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1 **I N D E X**

2

3 WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
4 Barbara Smith	3573 3632	3651			3631

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1 **E X H I B I T S**

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3 EXHIBIT	IDENTIFIED	IN EVIDENCE
4 **General Counsel:**		
5 GC-1(rrrr) through 1(vvvv)	3661	3661
6 GC-104	3666	3667
7 **Respondent:**		
8 R-117	3593	3599
9 R-118	3626	3632

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1 **P R O C E E D I N G S**

2 All right. Good morning. This is Judge Ariel Sotolongo.
3 It is now Tuesday, August the 16th. We are resuming our case
4 here in Oakland. And from all indications, correct me if I am
5 wrong, it appears that this is going to be the last day of our
6 trial, unless you folks have some surprises for me. In any
7 event, the parties have informed me, there's no preliminary
8 matters to discuss. So without further ado, Mr. Brown, are you
9 ready to call your first -- first witness?
10 MR. BROWN: We are, Your Honor. Whole Foods Market calls
11 Barbra Smith.
12 JUDGE SOTOLONGO: All right. Ms. Smith, please. Thank
13 you. Let me -- and would you please raise your right hand.
14 Whereupon,
15 **BARBARA SMITH**
16 having been duly sworn, was called as a witness herein and was
17 examined and testified as follows:
18 JUDGE SOTOLONGO: Thank you. Please spell your name for
19 us and give us your address. Your business address will
20 suffice.
21 THE WITNESS: Okay. My name is Barbara Jean Smith.
22 B-A-R-B-A-R-A J-E-A-N-N-E S-M-I-T-H.
23 JUDGE SOTOLONGO: What I'm -- one thing I want to ask you
24 to do, Ms. Smith is to speak up a little bit --
25 THE WITNESS: Okay.

1 JUDGE SOTOLONGO: -- because these microphones don't
2 amplify your voice; they simply record.
3 THE WITNESS: Okay.
4 JUDGE SOTOLONGO: So we are in a big room, as you can see,
5 and I can hear you probably okay from the podium, I'm the
6 closest to you, but the attorneys and -- on the table want to
7 be able to hear you. So --
8 THE WITNESS: Okay.
9 JUDGE SOTOLONGO: -- project your voice.
10 THE WITNESS: Okay.
11 JUDGE SOTOLONGO: Thank you very much.
12 Please proceed, Mr. Brown.
13 MR. BROWN: Thank you, Your Honor.
14 **DIRECT EXAMINATION**
15 Q BY MR. BROWN: Good morning, Ms. Smith. Who is your
16 employer?
17 A Whole Foods Market.
18 Q And how long have you been employed by Whole Foods Market?
19 A 22 years.
20 Q Let's briefly review a little of your -- of your history
21 with Whole Foods Market. When you began employment, I guess,
22 in -- in 2000, where were you located and what was the position
23 you held?
24 A I was part of the Northern California region. The
25 regional office was based in San Francisco, and the first role

1 I held was regional recruiter.
2 Q Okay. As regional recruiter, were you part of the TMS or
3 team member services team at Whole Foods?
4 A Yes. I was part of the team member services team.
5 Q And team member services is, in other companies, known as
6 what?
7 A Human Resources.
8 Q Okay. And what were your duties and responsibilities as a
9 regional recruiter?
10 A It was to develop and implement a recruiting program for
11 the region. At the time, it was kind of the heart of the .com
12 bubble and staffing and hiring was really challenged.
13 Q The -- you -- you mentioned Northern California region.
14 Is that also called NorCal or sometimes referred to as NorCal?
15 A It is. Over the years it changed. When I started it was
16 Northern California; then it became Northern Pacific, and then
17 when the two regions broke apart, it became Northern California
18 again.
19 Q Okay. So at the time that you had this responsibility as
20 a recruiter, what general territory did the NorCal region
21 cover?
22 A At the time --
23 Q And don't say Northern California.
24 A Yes.
25 Q Okay.

1 A Well, -- yes. At the time, it covered locations as far
2 south as Monterey. We were getting o -- ready to open a store
3 in Fresno, and then as far north as Seattle, Washington. We
4 had originally opened one location in Seattle.
5 Q The -- currently the Northern California region is
6 headquartered where?
7 A In Emeryville, California.
8 Q After you were in the regional recruiter role, were you
9 promoted to another role?
10 A I was. I continued to do the recruiting function, but
11 then I became an associate coordinator.
12 Q An associate coordinator?
13 A Yes.
14 Q In -- in team member services?
15 A In team member services. Yes.
16 Q Okay. And what were your duties and responsibilities as
17 an associate coordinator for team member services in the
18 Norther -- Northern California region?
19 A It was to take on additional duties, including training
20 and oversight of the TMS generalists in the region.
21 Q Okay. What is a TMS generalist?
22 A It's -- at the time we had admins and generalists, but it
23 was more to take care of any HR duties that pertain to the
24 store locations. So we had a dedicated HR person in every
25 retail location. So they were there to do the payroll

1 benefits, you know, handle any investigations in the stores.
2 Q And how long were you in the associate coordinator for TMS
3 position, approximately?
4 A Two to three years.
5 Q Okay. And what -- what position did you next hold with
6 Whole Foods?
7 A Team member services coordinator.
8 Q Okay. And how long were you a coordinator for team member
9 services?
10 A That was about eight years. I was a coordinator -- in
11 other companies it would be called an assistant director, but
12 Whole Foods just uses a different language.
13 Q Okay. So was this -- and we've seen some emails and
14 references to TMSEC. Was this a TMSEC role?
15 A No. It would be a step below that.
16 Q And what responsibilities and duties did you have as a
17 coordinator in the team member services team?
18 A To help lead the team for the region; to act as a -- in
19 team member relations, you had a lot of investigations, a lot
20 of training, leadership training, help guide the TMS
21 generalists and admins that were in the stores, as well as
22 supervise some of the regional team and recruiting.
23 Q Were some of your responsibilities applying the -- the
24 policies in place in -- in the employee handbook?
25 A Yes. Yeah. A big duty would be to be on call for

1 separations, to approve separations, to make sure that we're
2 consistent with our policies.
3 Q Okay. The -- did you have people reporting to you in your
4 coordinator role?
5 A Yes.
6 Q What -- how many people and what were their
7 responsibilities?
8 A Direct reports was probably four. There was an admin
9 person at the office. There was a generalist recruiting, and
10 we had like a sourcer at the time for recruiting, and then
11 indirectly all of the HR admins or generalists that were in the
12 field.
13 Q From 2012 to 2014, were --
14 MR. BROWN: Let me withdraw that.
15 Q BY MR. BROWN: What -- what was your next position at
16 Whole Foods Market?
17 A From that role, I went into a risk coordinator role.
18 Q What is a risk coordinator?
19 A That oversaw anything to do with safety. So customer
20 safety, team member safety, occupational safety, food safety,
21 as well as, you know, any claims relating to that. So worker's
22 comp claims, general liability claims, and then some peripheral
23 legal work involving Prop 65, weights and measures, things of
24 that nature.
25 Q This operations -- I'm sorry; risk coordinator role, was

1 this in team member services or was it on a different team?
2 A No. That tea -- that role reported differently. It
3 reported to operations. So it reported to a regional vice
4 president for the region.
5 Q Okay. What -- what do you mean by -- or what does Whole
6 Foods mean by operations, as opposed to what I said was team
7 member services, which is the HR team?
8 A Yes. Team member services would be classified as more of
9 a support function, similar to finance or technology. And then
10 operations would be anything having to do with the operations
11 of our stores and our retail locations.
12 Q So after -- how long did you serve in that role in
13 operations as a risk coordinator?
14 A About two and a half, three years.
15 Q Okay. And what was the next position that you held at
16 Whole Foods?
17 A Then I -- I went into an executive coordinator role for
18 team member services for the Pacific Northwest region.
19 Q Okay. So this is now the team member services executive
20 coordinator position.
21 A That's right.
22 Q Is that like a director of Human Resources?
23 A It is. Yes.
24 Q Okay. And for what region?
25 A For the Pacific Northwest region, which encompassed

1 Oregon, Washington, and British Columbia.
2 Q Okay. And just briefly, what were your responsibilities
3 as an executive coordinator of the TMS function?
4 A To be the lead people person for the region, the primary
5 business partner for the regional president, to uphold any
6 HR-related duties for that region.
7 Q Okay. How many direct and indirect reports did you have
8 at the time you were a TMSEC?
9 A At that time, I would say I probably had 26, 28 direct and
10 indirect reports.
11 Q And how many stores, if you can recall, over all that time
12 period, were in the Pacific Northwest region?
13 A I think it was 25 to 30 for the time I was there.
14 Q And approximately how many team members or employees, I
15 guess, fell under your auspices as the head of Human Resources
16 for the Pacific Northwest?
17 A About 4,700.
18 Q I don't -- I'm sorry if I don't -- if I asked this, but
19 how long did you serve in that -- in that role as TMS executive
20 coordinator?
21 A Four years.
22 Q So that would be from, 20 -- my calculation, years 2014 to
23 2018?
24 A Yes.
25 Q Does that sound about right?

1 A Yep.
2 Q Okay. During that time period, I think you testified you
3 had a reporting relationship, or you reported to the regional
4 president.
5 A I don't think I've said that yet. But yes --
6 Q Okay.
7 A -- I reported to the regional president.
8 Q Okay. Did you have any re -- reporting relationship to
9 anyone in team member services?
10 A Yeah. There was a dotted line report into the senior vice
11 president of team member services for the company out of
12 Austin.
13 Q Out of Austin, Texas?
14 A Yes.
15 Q Okay. And who -- who was that -- who was that person that
16 you were reporting to, or those people that you were reporting
17 to from 2014 to 2018 in a dotted line relationship?
18 A Yeah. There -- there were three different individuals in
19 that role. Mark Ehrnstein was in the role when I started.
20 Then Martin Tracey. And then by 2018, it was Brian O'Connell.
21 Q And -- and again, what -- I don't think I asked -- what
22 was their title? What was their role?
23 A Senior vice president of team member services for Whole
24 Foods Market.
25 Q After -- or in 2018, were you promoted, or did you enter

1 into a new -- a new position?
2 A 2018; I was promoted. Yes.
3 Q Okay. What were you promoted to?
4 A Vice president of team member services for field and
5 culture.
6 Q I missed the last part.
7 A For field and culture.
8 Q Okay. And what in -- in broad terms, as the vice
9 president of team member services, what area of responsibility
10 do you have?
11 A I'm the -- all of the region's executive leaders of team
12 member services report up through my group. So I oversee all
13 store-related team member services for the company, as well as
14 integration work with Amazon, team member relations
15 investigations and culture champions.
16 Q Okay. So field refers to what? When you said that you
17 were the TMS -- vice president of TMS for field and culture,
18 what is the field?
19 A Field refers to all of our regions and all of the retail
20 stores. So 500-plus stores, a little over 100,000 team members
21 that represent our retail locations in the company.
22 Q Okay. And then what's the culture part of your ti -- job
23 title?
24 A Culture really refers to the team member experience and
25 making sure that the tenets of Whole Foods culture are upheld

1 far beyond our merger with Amazon.
2 Q Did you have any new responsibilities beginning in 2020 as
3 it related to COVID and the -- the pandemic, I should say, in
4 general?
5 A Yeah. I mean, the pandemic, nobody was prepared for, you
6 know, what we were getting into with the pandemic. My team
7 oversaw all of the incident management, protocol management, as
8 well as case handling and disposition of cases as it was
9 impacting our team members in the field.
10 Q As the vice president of team member services from 2018 to
11 today, in general terms, how many people directly report to
12 you? I -- I understand it might have changed, but just
13 generally.
14 A Yeah. Direct reports today is -- is about 12.
15 Q And what about indirect reports?
16 A Including all the TMS in the field, it's about 340.
17 Q As part of your responsibilities as vice president of team
18 member services, do you oversee or have any responsibilities
19 for the -- the GIG, the General Information Guide or employee
20 handbook?
21 A Yes.
22 Q Okay. What are your responsibilities? What -- what are
23 your duties and responsibilities as it relates to the employee
24 handbook, also known as the GIG?
25 A Yeah. To make sure that all of the TMS teams in the

1 company are following the rules and policies of the General
2 Information Guidebook, and that we're doing it in a consistent
3 manner.
4 Q With regard to Human Resources executives in the regions,
5 you were -- you at one point served as a TMS executive
6 coordinator, which -- which I understand was the head of the
7 Human Resources function in a region, correct?
8 A Correct.
9 Q And is that job title still the same or did it -- has it
10 changed?
11 A No. We went through job architecture in 2019, so now that
12 same role is referred to as an executive leader of TMS.
13 Q So that would be a TMSEL?
14 A Correct.
15 Q Okay. So at -- at present, like from 2020 to today, are
16 there TMS executive leaders or executive coordinators as they
17 used to be in each region?
18 A Yes.
19 Q Okay. And do they report to you?
20 A Some of them.
21 Q Okay. Can you explain how that -- reporting relationships
22 work?
23 A Yeah. When I came into my role, my role was new, so it's
24 developed over time. You know, for a period of time, all of
25 those executive leaders reported directly to me. Since then,

1 I've hired another leader on my team as a senior executive
2 leader who some of those regional executive leaders report to
3 now, and then he reports to me.
4 Q With regard to the regional structure -- and now I'm
5 really talking, I guess, from the time of your employm -- you
6 know, the beginning of your employment to today. What's --
7 what was the regional structure in the United States with
8 regard to Whole Foods? And I understand there's been some --
9 some alignment or realignment, but can you explain how the
10 regions operate? How many regions are there?
11 A Today there is 12 regions. U.K. is its own region, and
12 then ten, here in the U.S. In 2021, we merged two regions
13 together to become the Southeast, and then we're in the process
14 now of realigning some more. I think I mentioned earlier that
15 at one point when I was in the Northern Pacific region, that
16 region broke into two separate regions. So it doesn't happen a
17 lot, but every several years we realign regions in Whole Foods
18 Market.
19 Q So I think you testified that you -- you report to the
20 senior vice president of team member services; is that right?
21 A That's correct.
22 Q And the last person, I think, on your list was Brian
23 O'Connell?
24 A That's correct.
25 Q Okay. And just generally, what are Mr. O'Connell's

1 responsibilities and duties as you understand them?
2 A He's responsible for the entire team member services
3 function for the company. So anything that has to do with --
4 with our people. So compensation, benefits, HR systems,
5 technology, recruiting, talent management, and then all of the
6 functions that I described under my role.
7 Q I want to ask you some questions about the General
8 Information Guide or the gig. And you just testified about the
9 regional structure at -- at Whole Foods. Do the regions have
10 their own handbook or -- or GIG?
11 A Each region has a General Information Guidebook that is
12 unique to their region. The first 80 or so pages is part of a
13 national GIG, and then in our history we've allowed regions to
14 have an additional sub -- supplement that's unique to their
15 region.
16 Q Okay. So the first -- what I understand your testimony to
17 be is that each region would have its own -- its own GIG book,
18 and the first 80 or so pages is the -- is what?
19 A The national section of the GIG that's consistent in every
20 region's GIG.
21 Q So the national section is the exact same language, same
22 policies in every region?
23 A Yes.
24 Q Okay. And then each region could or does have its own
25 addenda; is that right?

1 A Yes.
2 Q Okay. So I'd like to show you what is already an exhibit
3 that's been admitted into evidence. That's General Counsel
4 Exhibit 3.
5 MR. BROWN: And I have extra copies for everybody --
6 JUDGE SOTOLONGO: Sure.
7 MR. BROWN: -- for convenience; if that's all right. If
8 you'll step aside, there.
9 JUDGE SOTOLONGO: Thank you. All right.
10 Q BY MR. BROWN: Ms. Smith, I'm showing you what has already
11 been admitted into evidence as General Counsel's Exhibit 3, and
12 in particular, I'm showing you documents that have in the
13 lower-right corner it's -- there are Bates stamps that say
14 WFM -- Whole Foods Market, and in particular, 37 through 194.
15 Do you see that?
16 A Yes.
17 Q Okay.
18 JUDGE SOTOLONGO: Sorry. Where -- where are you again?
19 MR. BROWN: Just -- just -- I'm showing her the whole
20 document, Your Honor.
21 JUDGE SOTOLONGO: Okay. Sorry.
22 MR. BROWN: Yep. Okay.
23 Q BY MR. BROWN: And this document, as you will see,
24 contains, not -- not only a cover page for all of the regions
25 at the time, but a number of relevant policies -- or at least

1 policies that are relevant to this case. These are not the
2 entire GIG book. So if -- if you take a look -- if I could
3 focus your attention on the first page, the cover page, that
4 says General Information Guide, South Region, revised January
5 of 2020. Do you see that?
6 A Yes.
7 Q Okay. And now I'm going to ask you to turn the page where
8 it says, "Life at Work: Dress Code". Do you see that?
9 A Yes.
10 Q Okay. Is this the -- well, what is this?
11 A This is the dress code policy in the national section of
12 the General Information Guidebook.
13 Q And so this language would be applicable to every single
14 retail store in every region, as this is part of the national
15 section of the -- the GIG?
16 A That's correct.
17 Q Okay. I'm going to ask you if you would, turn the page.
18 The page bearing WFM 39.
19 A Yes.
20 Q And at the bottom of the page, it says, "Regional
21 Addendums to National Policies." Do you see that?
22 A Yes.
23 Q Okay. And -- and then it says, "dress code". Can you --
24 can you explain what we're looking at here?
25 A This appears to be the regional section of the South's

1 General Information Guidebook that details out additional
2 requirements under dress codes in the South.
3 Q And so what -- just as an example that we're looking at
4 here, what is the additional information or guidance here as to
5 the dress code in the south region that's not contained in the
6 national section?
7 A Team members in the south region may only wear shorts if
8 they are working on the customer service team or in the floral
9 garden center. Shorts must be at least mid-length -- mid-thigh
10 and length.
11 JUDGE SOTOLONGO: I'm sorry. Counsel, what page are you
12 on?
13 MR. BROWN: Your Honor, if I could?
14 JUDGE SOTOLONGO: Yeah.
15 MR. BROWN: So im -- copy doesn't have -- have --
16 JUDGE SOTOLONGO: Yeah. See because my -- my -- my -- I
17 go from page 34 to page 90 all of a sudden, so.
18 MR. BROWN: That's the exhibit. It's just bearing those
19 Bates numbers.
20 JUDGE SOTOLONGO: Okay. So in -- in --
21 MR. BROWN: Mine just started right --
22 JUDGE SOTOLONGO: I see. No. Not a problem.
23 MR. BROWN: That started with the national, and then I
24 went to the local.
25 JUDGE SOTOLONGO: Okay. Thank you very much. Now, I can

1 follow you.
2 (Counsel confer)
3 Q BY MR. BROWN: So Ms. Smith, you just reviewed some of the
4 di -- the difference -- or the difference, I should say,
5 between the southern -- su -- the south region's addenda and --
6 and the national. Can you turn back to the second page of this
7 exhibit, bearing WFM 38, and in particular, in the first
8 paragraph, the last sentence beginning with "Each region or
9 store/facility leadership group has the prerogative to set
10 standards stricter than the minimum guidelines established by
11 the company." Do you see that language?
12 A I do.
13 Q Can you tell me -- tell us what that means?
14 A It means that if, for a legitimate business purpose, a
15 store team leader in their particular community finds the need
16 to set a stricter standard for the dress policy, that they have
17 the ability to do that. However, they can't be more lenient
18 and go against the national policy.
19 Q Okay. With regard to the national policy, and in
20 particular -- now I'm referring you to the bullets that -- the
21 sixth bullet that says, "You must wear Whole Foods Market
22 shirts or tops." Do you see that?
23 A Yes.
24 Q Okay. And -- and in particular, it -- it talks about not
25 being able to wear any visible slogan, message, logo, or

1 advertising on a shirt or top. Do you see that?
2 A Yes.
3 Q Okay. With regard to the regional addenda, is any region
4 permitted to go against that national policy?
5 A No.
6 Q Okay. I want to show you another example. And in
7 particular, I'm -- I'm referring to Whole Foods Market in the
8 lower-right corner, 54. 53 is the cover. It says, "Midwest
9 Region".
10 MR. BROWN: Matt, I don't know if you're able to see that.
11 THE WITNESS: Yes.
12 Q BY MR. BROWN: Is this the Midwest region general
13 information guide and their particular dress code?
14 A Yes.
15 Q Okay. So Whole Foods Market 54, the lower right corner,
16 is that the national dress code?
17 A Yes. The same dress code we just looked at.
18 Q Okay. Is it the exact same language?
19 A Yes.
20 Q Okay. And then if I could ask you to turn to Whole Foods
21 Market 56, which is, I guess, page 90 of the Midwest GIG for
22 2 -- 2020, and it says, "Regional addendums to national
23 policies". Do you see that?
24 A Yes.
25 Q And it says "dress code". And then it goes on for an

1 entire -- the bottom of that page and the entirety of the next
2 page. Do you see that?
3 A Yes.
4 Q Okay. Now, with regard to the -- this example here of the
5 Midwest dress code -- without reading through the entirety of
6 it, what kind of issues or more detailed issues did this
7 Midwest region address? And the dress code -- its dress code
8 as compared to the national GIG?
9 A It -- it -- it looks like they called out, you know, that
10 items must be neat and clean, not wrinkled, tucked into the --
11 tucked in when appropriate. They go on to call out shift
12 leaders need to wear safety shoes. There's a variety of
13 things.
14 Q Let me call your attention to the -- the second-to-last
15 bullet. I know that in the national part of the GIG it
16 addresses no visible offensive tattoos in the national section.
17 In looking at the regional addendum for the Midwest, the
18 second-to-last bullet also addresses tattoos; do you see that?
19 A Yes.
20 Q What's the difference between the two?
21 A This goes into more detail. So you know, it -- it does
22 not allow any facial tattoos or tattoos of -- of -- of an
23 offensive nature that can be visible. It also calls out
24 visible branding or scarification. And then they go on to
25 define offensive, which includes anything falling under a

1 protected category or defined as offensive in the Whole Foods
2 Market policy against harassment.
3 Q I'm not -- I have no intention of going through every
4 single GIG and addendum, but what other types of things is --
5 off the top of your head, if you remember -- like camouflage,
6 other type of clothing or attire that -- that the region
7 addressed that -- that's not addressed in the national or that
8 may be unique to each region?
9 A Yeah. Camouflage was one in the Rocky Mountain region.
10 They didn't allow team members to wear camouflage,
11 specifically. Other regions, they could be more detailed in
12 their policy about colors or other things that are -- that
13 represent gangs where that may be an issue. Those are some of
14 the things that call out to me. There's other regions that
15 note that if you're wearing a skirt you must wear pantyhose.
16 Things -- things of that nature.
17 Q And the last question is -- that I have -- as it relates
18 to this -- this exhibit, which has every single regional GIG
19 from 2020 and every national addenda of the dress code, with --
20 with regard to the national dress codes, are they all exactly
21 the same?
22 A The national portion is exactly the same in every general
23 information guidebook, yes.
24 Q Okay. You can -- you can set that aside. Thank you. In
25 2013 and into 2014, Ms. Smith, were you aware of a posting

1 obligation that Whole Foods had as it related to a National
2 Labor Relations Board matter?
3 A Yes.
4 Q Well, do you have any -- do -- do you know about it
5 specifically, or do you have a general understanding?
6 A General understanding.
7 Q Okay. What was your general understanding?
8 A I was just aware that we needed to post something to
9 address a change in a variety of policies.
10 Q And if you remember -- do you remember what kinds of
11 policies, or -- or -- were being addressed by that posting?
12 A I recall there was something around dress code. There
13 were quite a few changes to our section in the GIG, detailing
14 major infractions. So just some language change that we needed
15 to inform our team members of.
16 MR. BROWN: Your Honor, if I could? I'd like to show
17 what's been marked as Respondent's 117 to this witness.
18 JUDGE SOTOLONGO: Thank you.
19 Q BY MR. BROWN: Ms. Smith, I'm showing you what's been
20 marked for identification as Respondent's 117, which is a
21 variety of GIV -- GIG cover pages and national dress code
22 policies from 2014 through 2016. And I'd look to just quickly
23 go through this with you and have you identify this and
24 authenticate it as indeed, telling the -- the judge whether
25 this is, indeed, true and accurate copies of these portions of

1 the GIG.
2 So with regard to the September 2014 revised southern
3 region GIG, which was page 1 of this document, was this the
4 first regional revision to the GIG in -- in 2014?
5 A Yes.
6 Q Okay. And turning the page, I see the second page, it
7 says "dress code"; you see that?
8 A Yes.
9 Q Okay. Is this the national dress code?
10 A Yes.
11 Q Okay. And in particular, I want you to look on the second
12 page at the last bullet that begins with, "You must wear Whole
13 Foods Market shirts and tops"; you see that?
14 A Yes.
15 Q Can you just take a moment and read that paragraph to
16 yourself? Is that the same exact language that we just
17 reviewed in those 2020 national portions of the GIG?
18 A Yes, it is.
19 Q Okay. I'd like you to turn to the fourth page. It's a
20 purple co -- co -- cover. We're doing this color-coded here
21 for my -- my benefit. The purple general information guide for
22 the mid-Atlantic region revised March of 2014. Is this the
23 first addendum to the mid-Atlantic region in 2014?
24 A Yes.
25 Q Okay. And turning to the second page, I see "dress code".

1 Do you see that?
2 A Yes.
3 Q Page 46, I guess, of the mid-Atlantic general information
4 guide, revised in March of 2014. Is this the same exact
5 dress -- national dress code as we reviewed in 2020?
6 A Yes.
7 Q And in particular, the paragraph, "You must wear Whole
8 Foods Market shirts or tops". Is that the same language that
9 we saw in 2020?
10 A Yes.
11 MR. BROWN: I'm going to try to bypass or short-circuit
12 this, Your Honor, and not have Ms. Smith identify the same
13 exact thing in every single GIG, but I will ask her, if I
14 would, to look at -- at these GIGs and I will -- I will ask
15 her, I guess, the big question.
16 JUDGE SOTOLONGO: Go ahead.
17 Q BY MR. BROWN: Okay. So Ms. Smith, would you look at all
18 of the general information guide national dress code policy
19 for -- for the 2014 amendments only?
20 JUDGE SOTOLONGO: Okay. We can go off the record while
21 she does that. Let us know when you're finished.
22 THE WITNESS: Okay.
23 (Off the record at 9:38 a.m.)
24 JUDGE SOTOLONGO: All right. Please proceed.
25 MR. BROWN: Thank you.

1 **RESUMED DIRECT EXAMINATION**

2 Q BY MR. BROWN: Ms. Smith, I've given you an opportunity to
3 review the documents and what has been marked for
4 identification as Respondent's 117. Have you had an
5 opportunity to look at all of the reginal adden -- the regional
6 general information guides and the national dress code policies
7 from 2014 through 2016?
8 A Yes.
9 Q Okay. Are the national dress code policies the same?
10 A Yes.
11 MR. BROWN: I would move Respondent's 117 into evidence?
12 JUDGE SOTOLONGO: Any objection or voir dire?
13 MR. PETERSON: So Your Honor, this was part of a subpoena
14 that the General Counsel had subpoenaed -- all iterations of
15 Respondent's dress code going back to 20 -- 2012 in light of
16 their alternative defense. Your Honor granted their motion to
17 quash that -- to quash that subpoena. And now, Respondent is
18 seeking to introduce those very documents. So I would object
19 on -- on those grounds.
20 MR. BROWN: Your Honor, if I could be heard on this?
21 JUDGE SOTOLONGO: Go ahead.
22 MR. BROWN: We -- we objected to this because we didn't
23 think it was at all necessary to our motion to dismiss the
24 mai -- the -- the maintenance of the policy consistent with the
25 settlement agreement that was reached with the National Labor

1 Relations Board. The opposition that we received to that
2 motion was that, while we had produced the 2020 general
3 information guide -- General Counsel's Exhibit 3, which we went
4 through again today -- which had the exact language that was in
5 the settlement agreement from 2013 -- counsel for the General
6 Counsel argued that we don't know whether the company modified
7 the national language somehow between 2013 and then reverted
8 back to it in 2020. It -- it made no logical sense to us. It
9 still doesn't. You -- you denied the request for all that
10 information. Nevertheless, on -- you did, I think -- I think
11 you directed us or asked us or both -- to produce the 2014 GIG,
12 which was produced to Mr. Paterson -- Peterson on --
13 JUDGE SOTOLONGO: Because as I -- as I recalled, that was
14 the first GIG that followed the 2013 settlement agreement.
15 MR. BROWN: Correct. And that was produced to counsel on
16 April 29th. We produced that. And then in response to
17 argument last week on this motion, once again, counsel argued
18 that he didn't have the iterations of the national GIG between
19 2013 or 2014 and the -- the one at issue. That is what
20 Respondent's 117 does. It shows that between 2014, the first
21 iterations of the GIG after the settlement agreement all the
22 way up to 2020 -- the language has been exactly the same. And
23 that's the purpose of this is -- is to support our motion to
24 dismiss.
25 MR. PETERSON: Your Honor, I also raise a -- a relevance

1 objection because the language is different from the language
2 in the settlement agreements. There has been --
3 JUDGE SOTOLONGO: Because it -- it lacks the word
4 "printed"?
5 MR. PETERSON: Correct.
6 JUDGE SOTOLONGO: Well, okay. Well, let's -- I'm going to
7 admit it for that purpose. And here -- here is my -- my -- my
8 take on this. I -- I revoked -- I revoked the General
9 Counsel's subpoena because I, quite frankly, was left with the
10 impression the General Counsel was sort of fishing for evidence
11 of additional violation between 2014 and 2020. And inasmuch as
12 that was not alleged on the 2020 complaint, I wasn't going to
13 allow that. What we're here to -- to -- to discuss and to
14 litigate is the -- the -- the 2020 GIG and -- and how, if at
15 all, it -- it changed from the 2013 settlement agreement and
16 how, if at all, the language of the 2020 GIG, you know,
17 violated the Act. I guess, this -- this is a way of -- of --
18 of addressing the fact that the summation that there was back-
19 and-forth changes.
20 I don't know exactly when the word "printed" was dropped
21 out of the language. Perhaps this document will show it
22 whether it was in '14 or '15 or '16. Perhaps it was the
23 original. This will show that -- that since '14 if that change
24 was, in fact, made in '14 -- in other words, by change, I mean
25 that the -- the -- the dropping of the word "printed" that was

1 contained in the settlement agreement occurred in the 2014
2 iteration. And that -- that it continued for the next several
3 years. This is what this document will change. Or perhaps
4 it -- it was put back on in '16, but -- and dropped again. I
5 don't know. And we'll have to show that. But I -- I think it
6 doesn't hurt to have this in there and -- and -- and so I'm
7 going to admit it for that -- for that reason.
8 **(Respondent Exhibit Number 117 Received into Evidence)**
9 MR. BROWN: Thank you. Your Honor, if I -- just briefly.
10 The testimony is that these are the GIGs. The dre -- this is
11 the national dress code that was immediately put into effect.
12 Or -- or those GIGs that were put into effect immediately after
13 the settlement agreement. The -- the word "printed" you will
14 not find anywhere in any GIGs.
15 JUDGE SOTOLONGO: Okay.
16 MR. BROWN: And we will -- we've argued why that's
17 irrelevant, and -- and that's just a legal argument that we'll
18 make.
19 JUDGE SOTOLONGO: Very well.
20 MR. BROWN: Thank you.
21 Q BY MR. BROWN: Ms. Smith, if you could go back to the
22 first document we looked at, General Counsel's Exhibit 3 --
23 that big stack of -- of general information guides from 2020.
24 And I'm going to call your attention to the very first page of
25 the national dress code that's the subject matter of this

1 litigation. In the opening paragraph of the national dress
2 code policy, it begins with, "Unlike most businesses, team
3 members at Whole Foods have freedom in selecting their work
4 attire, keeping in mind the positive customer and community
5 image we want to maintain". Do you see that?
6 A Yes.
7 Q What -- what is that addressing? What is that -- what do
8 you understand that to -- to be addressing?
9 A I understand that that's addressing that we want to give
10 team members some freedom and some latitude within a structured
11 framework to make sure that their attire and their dress in the
12 workplace is representative of our brand and makes our team
13 members easily identifiable to our customers.
14 Q And then focusing your attention once again on the
15 paragraph which is "You must wear Whole Foods Market shirts or
16 tops", and then it says, "or shirts or tops without any visible
17 slogan, message, logo, or advertising on them". Do you see
18 that?
19 A Yes.
20 Q Okay. Did the Whole Foods Market dress code policy permit
21 team members in the 2020 and all of the years before -- all the
22 way back to 2013, I guess -- did it permit team members to wear
23 Union pins, buttons, and other insignia?
24 A Yes.
25 Q Okay. And did, in fact, team members in that time period

1 understand that?
2 A Yes.
3 Q How do you know that?
4 A Because they wore them.
5 Q Okay. When you say, "they wore them", what do you mean?
6 A I mean, there's dozens of you know, times when a team
7 member would wear a pro-Union or anti-Union button, and we
8 would allow that.
9 Q Okay. Was at any point any team member ever disciplined
10 or told that they were not permitted to wear, for example, a
11 pro or anti-Union button or pin or other apparel?
12 A Not that I'm aware of.
13 Q Okay. And that would've come to your attention as the
14 head of team member services for the -- the stores beginning in
15 2018?
16 A It would've, yes.
17 Q Okay. With regard to store --
18 JUDGE SOTOLONGO: If I -- if I may interrupt just for a
19 second?
20 MR. BROWN: Sure.
21 JUDGE SOTOLONGO: I remember seeing somewhere -- somewhere
22 in the GIG that -- I remember seeing specific language
23 addressing the wearing of Union buttons that said that whatever
24 other policies you might have, that shall -- words to the
25 effect -- that shall not apply to Union buttons and so forth.

1 Is that -- where -- where is that language?
2 THE WITNESS: That's in the revised dress code policy that
3 rolled out in November of 2020.
4 JUDGE SOTOLONGO: Okay. So that first appeared in
5 November of 2020, okay? Yes. All right.
6 MR. BROWN: Thank you.
7 JUDGE SOTOLONGO: I thought I had seen that. Very well.
8 That's clarified. Very well.
9 Q BY MR. BROWN: With regard to store leadership, were they
10 aware that team members could wear Union -- for example, other,
11 you know, protected messaging, like Union pins and -- and
12 buttons?
13 A Yes.
14 Q How do you know that?
15 A We incorporated it into various trainings that we did to
16 let them know that there were other legal protections that if
17 anything like that came up that they had a question about then
18 they could escalate it to their EL of TMS.
19 Q What types of pro or anti-Union pins, buttons, or other
20 apparel have you seen over the years that team members have
21 worn?
22 A Buttons, T-shirts, lanyards, jackets, hats on occasion.
23 Q And those have all been permitted?
24 A Yes.
25 Q I'd like to show you, now, what has already been

1 introduced into evidence as General Counsel's Exhibit 4, which
2 is entitled "Mandatory Face Mask SOP". Ms. Smith, I'm showing
3 you what has already been introduced into evidence as General
4 Counsel Exhibit 4. It's a seven-page document with the title
5 "Mandatory Face Mask SOP". what is this document?
6 A It's a document for operational leaders to understand the
7 procedure around face masks pursuant to the pandemic.
8 Q Had any time prior to the pandemic in your stores for the
9 team members on the -- on the sales floor, for example, was --
10 were face masks part of the uniform? Prior to the --
11 A Can you --
12 Q Prior to the pandemic.
13 A No.
14 Q Were face masks part of the uniform?
15 A No.
16 Q Okay. Was this new to Whole Foods --
17 A Yes.
18 Q -- in 2020?
19 A Yes.
20 Q Okay. And why was there a need to put out a standard
21 operating procedure, SOP, regarding face masks as it related to
22 the pandemic?
23 A Yeah. We had many pan -- many SOPs related to the
24 pandemic. Things were changing so fast, and we really needed a
25 mechanism to make sure that our operators knew how to preserve

1 the health and safety of our team members. So this was
2 necessary to make sure that they understood what was required
3 in general for the face mask SOP. Keep in mind, we had a lot
4 of city, county, local mandates that we were also juggling in
5 terms of what was required, not only for our team members but
6 for our customers as well.
7 Q With regard to this -- this SOP, which was first issued, I
8 guess, it looks like April 13th of 2020. Do you recall that
9 time period and whether Whole Foods had the ability or was even
10 allowed to issue medical-grade face masks to its team members?
11 A There was a period of time where the supply of face masks
12 was very short, and so face masks in general, were being
13 preserved for first responders, medical professionals that were
14 dealing with the pandemic. So in very early days we couldn't
15 even get supply to provide face masks, disposable or reusable,
16 to our team members.
17 Q And does this face mask SOP address team members who made
18 their own mask or brought in nonmedical-grade -- that's my
19 language -- nonmedical-grade face masks?
20 A Yes. We were trying to educate team members on how to
21 safely make their own face mask, just as a practical matter
22 just to help protect them while at work.
23 Q With regard to page 3 of 7 of General Counsel's Exhibit 4,
24 there is a FAQ -- frequently asked question -- number 7, "Can I
25 bring in and wear my own face mask or N95 filtering face piece

1 respirator"; can you see that?
2 A Yes.
3 Q And I'm looking at the second-to-last bullet. Can you
4 read that?
5 A "Homemade or res -- reusable cloth masks must adhere to
6 Whole Foods Market's dress code as outlined in the GIG. Any
7 mask or produ -- protective equipment must be without any
8 visible slogan, message, logo, or advertising."
9 Q Okay. So -- as I understand it, Ms. Smith, the dress code
10 applied to this new piece of the dress that was required of --
11 of Whole Foods Market team members?
12 A Yes.
13 Q Okay. And so this incorporates the -- the dress code
14 into -- the face mask is incorporated into the dress code?
15 A Yes. It is considered protective -- personal protective
16 equipment.
17 Q Okay. You can set that aside. As I understand it, Ms.
18 Smith, unlike, I guess, other types of businesses, did Whole
19 Foods Market stay open during the pandemic?
20 A We did. We never closed.
21 Q And why is that?
22 A Because we were considered an essential business. We had
23 an obligation to provide food for the communities that we
24 served.
25 Q What types of mea -- what -- what kind of measures did

1 Whole Foods Market take with regard to team members and their
2 safety while working as an essential -- I guess, essential
3 workers -- during the pandemic?
4 A Yeah. There was a variety of measures. You know, we put
5 decals on -- on the floors to encourage social distancing. We
6 monitored the capacity in our stores regardless of the fact of
7 which -- if we -- if there was an ordinance in place that
8 required us to do so, which many counties and cities enacted at
9 different times in the pandemic. We supplied hand sanitizer.
10 We did some video monitoring of the capacity to make sure that
11 we didn't have too many people in the building at one time to
12 preserve social distancing. We put health checks up in the
13 back of the house to encourage team members to watch their own
14 health and systems. We put in temperature checks at the
15 entrance so that all of our team members would get a
16 temperature check before they would enter work. There -- there
17 was a variety of measures. Once they became -- once we got the
18 proper supply, we supplied disposable masks as well as reusable
19 masks every two months to our team members. In some
20 jurisdictions we had to issue customized letters to each
21 individual team member to allow them to actually report to work
22 because they could be stopped by authorities just for coming in
23 to work, especially where curfews were enacted.
24 Q With regard to -- we didn't know it then -- but the early
25 days of the pandemic -- so March of 2020 through the summer of

1 2020 -- did Whole Foods Market have trouble or difficulty
2 staffing its stores during the pandemic?
3 A Yes. It was completely uncharted territory. In the early
4 days of the pandemic our sales spiked well beyond even our peak
5 season without the ability to either staff up with our team
6 members or even secure the right supply chain. So you know,
7 our stores were incredibly busy. People were, you know, buying
8 a lot of product. Team members were -- were scared. You know,
9 we -- we put some provisions in place to allow them to you
10 know, preserve their own health and safety first and foremost.
11 And in -- in addition to that, the community was scared and so
12 a lot of customers went to online ordering, which made the
13 demand for team members in our shopper division really --
14 really through the roof. So it was -- we did a lot of hiring
15 during the pandemic, especially as other companies were closing
16 down. And you know, we continued to hire to be able to staff
17 our stores and maintain our business.
18 Q Notwithstanding all of the safety measures that -- that
19 Whole Foods took, team members, I assume, got sick or were
20 exposed to others. Is that -- is that a fair statement?
21 A Yes, it is fair.
22 Q And so did that impact attendance? Did that impact
23 staffing levels at Whole Foods? And if so, can you explain
24 that?
25 A It did. You know, we had a certain amount of our

1 population that was considered to be at -- at high risk, and so
2 they didn't -- they didn't want to be exposed during the
3 pandemic. So you know, there were some team members that
4 didn't come to work at all, and so we made some provisions for
5 them. And then others we just really wanted to encourage to do
6 the right thing, that if they weren't feeling well, please stay
7 home, you know, and, you know, take care of yourself. Get
8 well. Come back to work, you know. Many of our team members
9 got very sick.
10 Q I'd like to show you, now, a document that's already in
11 evidence as General Counsel Exhibit 6.
12 A Thank you.
13 Q This is a one-page document entitled -- entitled "Time and
14 Attendance Policy Update, May 22, 2020". Do you see that, Ms.
15 Smith?
16 A I do.
17 Q Can you tell us what this document is?
18 A Yes. This is an an -- an announcement of a extension to
19 our time and attendance policy. We -- we issued a period of
20 forgiveness. We extended it a couple of times so that team
21 members wouldn't be concerned with getting time and attendance
22 occurrences or points if they needed to call off because
23 they -- they were experiencing symptoms consistent with COVID.
24 Q And so with regard to this May 22nd update, what did it
25 say regarding the relaxation of time and attendance and -- and

1 what would happen in the next 30 days?
2 A It was basically announcing that we were going to extend
3 or relax time and attendance policy through June 21st and that
4 beginning June 22nd, we will return to our standard time and
5 attendance and application.
6 Q And -- and did, in fact, Whole Foods return to its
7 standard time and attendance policy beginning, again, on June
8 22nd of 2020?
9 A Yes.
10 Q Okay. I see a reference to PCLOA on the third full
11 paragraph. What is that?
12 A That was a specific leave of absence that we stood up. We
13 titled it "Personal COVID Leave of Absence" for those that were
14 in those categories determined to be high risk so that they had
15 a way to preserve their employment with Whole Foods Market
16 while choosing not to work for an extended period of time.
17 Q I know this is obvious, but I will ask it anyway. Did
18 this May 22nd, 2020 time and attendance policy update have
19 anything whatsoever to do with the Whole Foods dress code?
20 A No.
21 Q Did it have anything to do with team members wearing any
22 clothing that was not compliant with the dress code?
23 A No.
24 Q Had any teams members, as far you were aware, worn Black
25 Lives Matter apparel or messaging as of May 22nd, 2020?

1 A No.
2 Q You can set that aside.
3 MR. BROWN: Your Honor, we've been going for just over an
4 hour. I'd appreciate a two-minute -- five-minute break.
5 JUDGE SOTOLONGO: Yes. Yeah. Let's -- let's go on break.
6 Five minutes. Or ten minutes?
7 MR. BROWN: Five minutes would be fine --
8 JUDGE SOTOLONGO: All right, five minutes. Off the
9 record.
10 MR. BROWN: Thank you.
11 (Off the record at 10:08 a.m.)
12 MR. BROWN: Thank you.
13 **RESUMED DIRECT EXAMINATION**
14 Q BY MR. BROWN: Ms. Smith, did you become aware of the
15 murder of George Floyd on May 25th, 2020? And if so how did
16 you learn about it?
17 A Yes. I learned about it on the news. On the news.
18 Q Okay. And what is it that you recall learning about Mr.
19 Floyd's murder?
20 A Just that he -- he died at the hands of police. He was
21 unarmed, and people were very upset about it.
22 Q And how, if at all, did the murder of George Floyd effect
23 you?
24 A Personally, or?
25 Q Personally?

1 A It -- it -- it was just tragic. It was very sad and very
2 upsetting.
3 Q Did you become aware of the Black Lives Matter protests
4 and rallies springing up all over the U.S. in the immediate
5 aftermath of the -- the murder of George Floyd?
6 A Yes.
7 Q Okay. And how did you become aware of that?
8 A A lot of it because the rallies and -- and some of the
9 civil unrest impacted some of our locations. You know, some of
10 our stores had to board up their windows. Some stores had to
11 close because activity immediately surrounding the store was
12 very volatile. Some cities enacted curfews and that limited
13 out team members' ability to get to work. We actually, at one
14 point, set up Lyft vouchers to give team members that reliant
15 on public transportation means to get to work in some of the
16 cities that were impacted.
17 Q Did you learn about the Black Lives Matter protests and
18 messaging in the news as well?
19 A Yes.
20 Q Okay. What did you understand the Black Lives Matter
21 movement and messaging to be about?
22 A I understood Black Lives Matter to be a mechanism for
23 people to show their -- their objection to police brutality and
24 police killing of unarmed black people.
25 Q When you saw the coverage in the news, which you've

1 testified about, and you learned about the protests as it
2 related to I guess, the impact on -- on Whole Foods Market
3 stores, did you have any understanding that the Black Lives
4 Matter movement or messaging had anything whatsoever to do with
5 Whole Foods Market as a company or anything to do with Whole
6 Foods Market policies or work conditions?
7 A No.
8 Q Okay. Before 2020 -- and really before May 25th and
9 there -- thereafter in 2020 -- had you in your professional
10 capacity at Whole Foods Market, had any encounters with team
11 members wearing Black Lives Matter messaging?
12 A Yes.
13 Q Can you tell the judge what your experience with team
14 members wearing Black Lives Matter messaging was before May of
15 2020?
16 A Yes. When I was in the Pacific northwest region -- I
17 believe it was 2015 -- we had some team members specifically in
18 our Portland, Oregon market -- wear Black Lives Matter -- BLM
19 buttons -- following incidents in Ferguson, Missouri, and we
20 had conversations with those team members and explained to them
21 that, you know, it wasn't allowed in the workplace. And they
22 understood and they took it off.
23 Q When you say, Ferguson, Missouri or incident in Ferguson,
24 Missouri, what do you recall the incident was?
25 A I just recall that a black man -- an unarmed black man was

1 shot and killed by police.
2 Q Okay. And with regard to what the team members who were
3 wearing Black Lives Matter pins or buttons, I think you
4 testified, were told, why were they told that they could not
5 wear that messaging in the workplace --
6 A Bec --
7 Q -- at work?
8 A Because it was a violation of our dre -- our dress code.
9 Q Did you understand at the time -- and I think you said
10 2014 or 2015 -- what the Black Lives Matter language -- the
11 wording and the message -- related to?
12 A Yes.
13 Q What was that?
14 A It was, you know, really bringing to light the continued
15 killing of black people by police. At the time I lived in
16 Seattle and several people had lawn signs and -- and whatnot to
17 really highlight that black lives matter.
18 Q With regard to the team members who were wearing Black
19 Lives messaging in 2014 or 2015, did that have anything
20 whatsoever to do with Whole Foods Market as a company or its
21 policies or conditions of employment?
22 A No.
23 Q You're aware, I assume, that over the course of June,
24 July, and into August of 2020, there were a number of team
25 members at Whole Foods who wore Black Lives Matter messaging;

1 is that fair?
2 A Yes.
3 Q Okay. Did you receive any information from, I guess, the
4 folks reporting to you or -- or others -- about what messaging
5 team members were wearing and why?
6 A Yes.
7 Q Okay. What -- what types of messaging did you -- Black
8 Lives Matter messaging -- did you learn about?
9 A I learned about pins, face masks, jewelry. Some team
10 members writing on their skin with marker.
11 Q Do you recall team members wearing the words Black Lives
12 Matter or BLM on face masks or other articles of clothing?
13 A Yes.
14 Q And what about "No justice, no peace"?
15 A I -- I -- I did learn about a couple incidents of that as
16 well.
17 Q And what about "I can't breathe"?
18 A Yes.
19 Q Okay. What do you remember about learning about the team
20 members wearing the -- the phrase "I can't breathe"?
21 A It was very early in the protests and because it was
22 written on a face mask there was concern that maybe there was
23 some kind of need for interactive discussion or some kind of
24 medical accommodation. We weren't -- we weren't sure. We
25 wanted to make sure that there wasn't an actual problem with

1 the face mask, because we had gotten a lot of reports of that
2 as well.
3 Q What, in fact, did you learn about the phrase "I can't
4 breathe"? And did it relate to a medical condition?
5 A It did not relate to a medical condition. It related to
6 the murder of George Floyd.
7 Q Okay. And what, if any, information did you receive from
8 the folks in -- in the regions about why their team members
9 were wearing Black Lives Matter messaging?
10 A They were upset.
11 MR. PETERSON: Objection. Lack of foundation. Seem to be
12 describing reports.
13 JUDGE SOTOLONGO: Okay. You need to give us a little more
14 foundation, a little more details about what, where, whom, and
15 so forth.
16 MR. BROWN: Okay.
17 Q BY MR. BROWN: Do you recall leadership in regions
18 contacting you?
19 A Yes.
20 Q Okay. Do you recall having conversations with them?
21 A Yes.
22 Q What do you recall leadership in various regions -- and if
23 you remember their names -- what do you remember them telling
24 you? And what do you remember saying in response?
25 MR. PETERSON: Objection. Still, no foundation as to

1 dates, time period, location. And the other objection is to
2 the extent this is being offered for the truth of the matter
3 asserted, it's hearsay.
4 MR. BROWN: Your -- Your Honor, I don't need to -- I don't
5 need a witness to tell him exactly who or when. She's
6 recalling a conversation. And if she knows the details --
7 JUDGE SOTOLONGO: Okay.
8 MR. BROWN: -- she should testify about it.
9 JUDGE SOTOLONGO: Okay. Try to give us as much detail --
10 background details also as to -- if you don't remember the
11 exact dates, that's fine. Can you tell us approximately when
12 the conversation occurred with whom? Who else was involved in
13 the conversation, if anybody, and what do you recall being
14 told? And what do you recall saying to the individual? Just
15 go one -- one blow at a time. So let's go. Take it one at --
16 from -- say in a region-by-region -- in a region-by-region
17 basis.
18 THE WITNESS: I recall one conversation with the senior
19 team leader in the Midwest region about a team member that was
20 very emotional and very upset over the killing of George Floyd
21 and feeling like she wanted to wear the BLM mask to show her
22 support for the cause. So there was a lot of emotion, tears,
23 you know, very, very impassioned team members wanting to show
24 their support.
25 JUDGE SOTOLONGO: Is this what you were being -- being

1 told by the person reporting to you?
2 THE WITNESS: Yes.
3 JUDGE SOTOLONGO: Who -- who was this person, and what
4 exactly did he or she say?
5 THE WITNESS: This was Heather Silick in the Midwest
6 region. She's a senior team leader of team member services.
7 And she was describing a particular team member in one of the
8 stores in the Midwest region who had actually posted a Twitter
9 rant, who was very impassioned about the topic. And I actually
10 viewed the video on Twitter as well. And the team member was
11 upset and -- and crying because she wanted to show her support
12 for the cause.
13 JUDGE SOTOLONGO: Okay. Any other details you can provide
14 us about that? Do you recall the store in question or the --
15 the person in question?
16 THE WITNESS: I believe her first name was Yurie (phonetic
17 throughout).
18 JUDGE SOTOLONGO: Her name was what?
19 THE WITNESS: Yurie.
20 JUDGE SOTOLONGO: This is the person reporting to you or
21 the person who was in the video?
22 THE WITNESS: The team member in the video.
23 JUDGE SOTOLONGO: The team member. Okay.
24 THE WITNESS: Yeah. The person reporting to me was
25 Heather Silick.

1 JUDGE SOTOLONGO: I see. Okay. And you recall what store
2 in the Midwest?
3 THE WITNESS: I do not.
4 JUDGE SOTOLONGO: Okay.
5 THE WITNESS: I think it was a store in Indiana.
6 JUDGE SOTOLONGO: All right. Go ahead. Tell us about
7 other reports you got and from whom and what was said and so
8 forth.
9 THE WITNESS: I remember speaking with Jamie Zito in the
10 North Atlantic region. He was the executive leader of TMS, and
11 team members in the North Atlantic region, Boston, Cambridge,
12 were very upset. Wanted to wear the BLM messaging to show
13 support for the cause.
14 JUDGE SOTOLONGO: Do -- do you -- remember their -- you
15 were told they were wearing -- were wearing BLM messaging. Do
16 you recall whether you were told they were wearing masks or
17 other types of items?
18 THE WITNESS: Both of those instance were face masks.
19 JUDGE SOTOLONGO: Okay. Any other -- any other reports of
20 such a nature?
21 THE WITNESS: Yeah. I remember having a few conversations
22 with David Gearhart out of the mid-Atlantic region,
23 specifically, the South St. Philadelphia store -- team members
24 being very, very upset about the situation and wanting to wear
25 BLM. And that, as I recall, was masks and jewelry, if I recall

1 correctly.

2 JUDGE SOTOLONGO: Okay. An -- any others?

3 THE WITNESS: There -- there were lots of others. Those

4 are the primary ones that stick out where I can let you know

5 what region and who --

6 JUDGE SOTOLONGO: All right. Approximately what time

7 frame were these conversations you have been describing?

8 THE WITNESS: I would say from early June through the end

9 of July.

10 JUDGE SOTOLONGO: Okay. Please proceed.

11 MR. BROWN: Your -- Your Honor, I'd like to ask the -- the

12 witness what other memories she has of these conversations.

13 And if she has details, she'll have detail. If she doesn't --

14 at -- at her high level with 100,000 team members and the

15 pandemic going on --

16 JUDGE SOTOLONGO: I -- I --

17 MR. BROWN: -- she's not going to have that -- that

18 detail.

19 JUDGE SOTOLONGO: I -- I understand. Just, you know, tell

20 us -- give us -- give us as much detail as you can remember.

21 And you're saying that, you know, you were getting multiple

22 reports. And you may not be able to -- to remember the

23 specifics of each one, but to the extent that you can recall

24 details, provide those to us.

25 MR. BROWN: Thank you.

1 Q BY MR. BROWN: Do you recall any other conversations, any
2 other detail over the summer of June of 2020 through July of
3 2020 rel -- relating to team members wanting to wear or wearing
4 Black Lives Matter messaging?
5 A There were also incidents in Seattle that I recall. And
6 it was both team members and customers in Seattle. There were
7 several incidents with civil unrest and customers becoming
8 unruly towards our leaders in Seattle. But many team members
9 that, you know, wore Black Lives Matter masks and refused to
10 take them off. So they were really passionate about the topic
11 and really wanted to represent their support for the Black
12 Lives Matter movement.
13 Q With regard to regional team member services, executive
14 leaders or regional presidents, did you have any communications
15 with them -- and I'll ask you for detail in just a moment --
16 about how the dress code should be applied to Black Lives
17 Matter messaging on uniforms during working time?
18 A Yes. We -- I definitely had conversations with several
19 TMS executive leaders, as well as a few regional presidents.
20 Not so much on, you know, if this was allowed in our dress
21 code. They knew it wasn't allowed. But more around the
22 emotion and how impassioned team members were about the topic
23 and what a sensitive topic it was for what was going on in
24 society and how to navigate that conversation in a way that
25 continued to treat the team member with respect even though we

1 were illustrating that they actually couldn't wear that
2 messaging at work.
3 Q Do you recall specific team member services, executive
4 leaders or regional presidents with whom you spoke in June
5 and/or July about the -- the topic that you just testified
6 about?
7 A Yeah. I definitely --
8 JUDGE SOTOLONGO: And that would be June or July of 2020,
9 correct?
10 MR. BROWN: Yes. Thank you.
11 JUDGE SOTOLONGO: All right.
12 Q BY MR. BROWN: June or July of 2020.
13 A Yes. I definitely recall conversations with Scott
14 Allshouse in terms of you know, how team members were feeling
15 specifically in Philadelphia. There was a lot of civil unrest
16 in that store in terms of protests that, you know, kind of grew
17 out of hand and the closing of that store multiple times. I
18 spoke with Angela Lorenzen in the Pacific northwest
19 specifically regarding Seattle. There was a lot of interface
20 with those team members and really trying to you know,
21 emotionally escort them through the situation to be prepared in
22 having real conversations with team members that allowed them
23 an opportunity to vent but also to you know, navigate back to
24 our dress code and what we needed from team members while they
25 were working.

1 Q In the summer of 2020 -- June and July in particular --
2 did you have weekly calls with regional presidents and team
3 member service executive leaders?
4 A Yeah. During -- pretty much during the pandemic and for
5 an extended period of time we had calls two times a week with
6 our TMS executive leaders. Things were changing so rapidly and
7 you know, there was so much to talk about and navigate to keep
8 our team members safe in the workplace that, you know -- that
9 was really necessary to keep everybody updated. I periodically
10 joined a weekly call with regional presidents to do the same or
11 to provide an update as to where we were at and what we were
12 experiencing in our team member population in terms of the
13 pandemic.
14 Q And with regard to those calls, was the issue of team
15 members wearing Black Lives Matter apparel -- whether a face
16 mask, a pin, a name tag -- whatever it might be -- was that
17 raised during -- during those weekly calls?
18 A It was. Especially, to the point where we were, you know,
19 holding team members accountable to our time and attendance
20 policy again. We had had time to spin up a couple of different
21 mechanisms to allow for COVID -- the PCLOA that we already
22 spoke of as well as a specific PTO-type for COVID time off.
23 And so as we were, you know, turning the accountability back on
24 for time and attendance we spoke to the regional presidents as
25 well as the TMS executive leaders about a process to go through

1 the -- that conversation and navigate that in a way that was
2 respectful in considering the team member's point of view.
3 Q Now, I understand your testimony from before that the
4 conversations that you had with regional presidents and team
5 member service executive leaders as it related to wearing the
6 Black Lives Matter messaging while working, but there wasn't a
7 discussion about whether it complied with the dress code but
8 rather how to address team members who were wearing it. Do I
9 have that right?
10 A That's correct. You know, our leaders knew that it
11 violated the dress code policy. I think that there was a
12 heightened sensitivity to the emotion and the passion from our
13 team member base and that this was a really volatile topic, and
14 we wanted to navigate that conversation with respect while
15 still upholding our policies and you know, focusing on work.
16 Q Did you at any point in the summer of 2020 -- June of
17 2020, July of 2020, August of 2020 -- ever have an
18 understanding that the team members wearing Black Lives Matter
19 messaging on working time in working areas were doing so to
20 address Whole Foods Market as an employer or in terms and
21 conditions of employment?
22 A No.
23 Q What did you understand based on I guess, the news, your
24 experience with Black Lives Matter and the information that you
25 were receiving from the regions -- understand the reason that

1 team members were wearing Black Lives Matter messaging?
2 A They were passionate about the cause, about the social
3 justice around the cause, and they wanted to see change in
4 society.
5 Q Ms. Smith, when the issues of team members wearing Black
6 Lives Matter messaging on working time and working areas came
7 to your attention, what specifically was the advice or council
8 that you gave to regional presidents and team member services
9 executive leaders about how Whole Foods -- you being Whole
10 Foods -- would handle team members in that situation?
11 MR. PETERSON: Objection. Foundation. Seeking --
12 MR. BROWN: I mean, I don't know if I could lay a better
13 foundation than she's in charge of all of human resources for
14 Whole Foods Market stores.
15 JUDGE SOTOLONGO: Overruled. Go ahead.
16 A We asked our leaders to have conversations with each
17 individual team member to, you know, start out the conversation
18 by understanding their point of view. And let them -- let them
19 vent. Let them share their thoughts and opinions about why
20 they were passionate about wearing the mask. And then, you
21 know, continue the conversation to circle back to our dress
22 code policy and give them options on what they needed to do to
23 be compliant with the dress code policy and continue working.
24 But ultimately to give them choices so that they can make the
25 best choice for what they felt was necessary through the course

1 of that conversation.
2 Q BY MR. BROWN: In the course of the discussions that you
3 had with regional presidents, team member services executive
4 leaders, did you learn or what, if anything, did you learn
5 about consistent enforcement of the dress code policy in
6 various stores and/or regions?
7 A Yeah. Throughout the course, you know, we found that our
8 leaders weren't as consistent as we had hoped in the
9 application of the dress code policy.
10 Q And by that, do you have any specific examples or
11 recollection of the kinds of things you are talking about that
12 you heard about or understood to be happening or not happening?
13 A Yeah. I mean, I think after the fact, you know, we heard
14 about instances that maybe didn't get addressed, you know, our
15 leaders are human and, you know, they may not see every single
16 instance. You know, there were some comments, I think,
17 especially in the early days when masks were really hard to
18 find of, you know, people wearing masks with messages on them.
19 But once supply chain eased up and we had more of a
20 supply, that should no longer be the case. And then one -- one
21 team member, you know, pointed out a rainbow lanyard that a
22 leader was wearing and, you know, commented on, you know, that
23 the inconsistency in that and we took note of that.
24 Q In or about the end of June of 2020 and into July of 2020,
25 did you, as the head of the team member services relating to

1 the stores, remind or refresh, the regions about enforcement of
2 the dress code?
3 A Yes.
4 Q Okay. Ms. Smith, I'm showing you a three-page document
5 marked for identification as Respondent's 118 and ask you to
6 look at the three pages and tell us what this document is?
7 A This is a couple of slides that I sent to review on a
8 regional president call to discuss our approach on how we were
9 handling dress code violations that we were seeing with
10 consideration to time and attendance accountability being back
11 in place.
12 Q So I see that there is an email on the first page dated
13 July 6th with a attachment that says June 2020. Do you see
14 that?
15 A Yes.
16 Q Okay. Who's Brenda Allen?
17 A Brenda Allen is an executive assistant that takes charge
18 in running the regional president calls that happen weekly.
19 Q Okay. And I'd like for you to turn to the second page.
20 Is this a slide that you put together?
21 A It is.
22 Q Okay. It says, "Dress Code Policy Violations June 2020."
23 And in the first bullet, you talk about a reminder. What --
24 why did you believe there was a -- that a reminder was
25 necessary?

1 A It seemed that in the chaos of the pandemic that, you
2 know, with a lot of changing requirements and policies that
3 maybe our leaders had gotten away from understanding the dress
4 code parameters, so that along with the time and attendance
5 accountability going back into effect, we really wanted to
6 remind our leaders so that everybody was on the same page and
7 following the policy consistently.
8 Q Did this issue, this reminder and the issues with the
9 dress code, was that limited to Black Lives Matter messaging on
10 apparel or were there other dress code issues that you wanted
11 to make sure were addressed by your regions?
12 A There were other issues and, you know, this was a reminder
13 to, you know, get back to consistency with all issues, not just
14 specifically Black Lives Matter.
15 Q What kind of other issues do you recall?
16 A I -- I recall some MAGA masks. I recall team members
17 objecting to wearing masks at all, even though there was a
18 local mandate. There -- there were various, various issues
19 that were coming up.
20 Q With regard to the MAGA, did you say mask or hat? I
21 didn't -- I didn't hear you?
22 A I think there was an incident of both.
23 Q Okay. How was that addressed, if you know. And where was
24 this?
25 A I believe it was in Florida. And it was addressed by

1 leadership having a conversation with a team member and
2 explaining the dress code, basically going through the same
3 process. And -- and the team member removed it and went back
4 to work.
5 Q With regard to the second bullet in your PowerPoint and it
6 says, "Any team members or TMS outside of dress code -- " and
7 there are three bullets below that. Can you just explain what
8 the process was that you were counseling leadership on?
9 Q We wanted leadership to have a conversation and allow a
10 forum for a team member to speak their mind or share their
11 thoughts. And then give them an opportunity to get into
12 compliance with the dress code and return to work. You know,
13 we really wanted to encourage dialog and conversation so that
14 team members could get it right. And then only if, once they
15 were afforded an opportunity to correct the situation and chose
16 not to, that then we proceeded with disciplinary action
17 depending on their -- their choice and what route they decided
18 to go.
19 Q I'd like to call your attention to the, I guess the
20 last -- second to last bullet on this page that says, "Contact
21 TMS V.P." Do you see that?
22 A Yes.
23 Q Okay. Is the TMS V.P. you?
24 A Yes.
25 Q Okay. And then it says, "And Legal," with a capital L.

1 Do you see that?
2 A Yes.
3 Q What is -- who is Legal with a capital L?
4 A That would be Jason Nickerson or someone on his team. But
5 we tried to work with the same legal partner to have
6 consistency.
7 Q Okay. This -- this Jason Nickerson right here?
8 A Yes.
9 Q Okay. And it says, That should any team member or TM be
10 considered for final warning or termination, they should
11 contact you and Legal. Do I have that right?
12 A Yes.
13 Q Okay. Why is that?
14 A Anything related to the pandemic, it was -- it was new
15 territory. So we really wanted to make sure that we had
16 consistency across the regions. And so if we were going to
17 take the ultimate employment action with a team member, we
18 really wanted to make sure that we reviewed it and that we were
19 being fair and consistent with the application of our policies.
20 Q And did wearing Black Lives Matter messaging, was that
21 also incorporated into this -- that, this bullet here, that a
22 final warning or termination should be called to your attention
23 and to Legal's attention?
24 A Yes.
25 Q And why is that?

1 A Again, to make sure that we're being fair and consistent
2 and that, you know, treating the situation, you know, that
3 we're holding them accountable but only where it truly violated
4 our policies and that we went through the process described.
5 Q The sentence also says that you and Legal should be
6 contacted. Quote, "If the team. members or TMS' reasons for
7 noncompliance with dress code is related to wages, hours, or
8 working conditions." Do you see that?
9 A Yes.
10 Q Can you explain why that was addressed or what your
11 rationale was for putting that in place?
12 A Yeah. We wanted to call out so that we were, we had the
13 information, if any of the actions of the team member were
14 protected, to make sure that we weren't disciplining a team
15 member for protected activity.
16 Q Okay. Was wearing Black Lives Matter messaging at work on
17 working time, protected messaging?
18 A No.
19 MR. PETERSON: Objection. Calls for --
20 JUDGE SOTOLONGO: It call for other conclusion -- it calls
21 for a conclusion, yes. Well, did you -- did you consider --
22 MR. BROWN: Does it -- does it call for a legal
23 conclusion?
24 JUDGE SOTOLONGO: Well, let me ask you this. Are you
25 going to say their Black Lives Matter message could be included

1 or something related to wages, hours, or work conditions?
2 THE WITNESS: No.
3 Q BY MR. BROWN: With regard to the third page of this
4 document.
5 MR. BROWN: And I apologize, Your Honor, if it's -- to
6 everybody, it's difficult to read that this is the best I could
7 do.
8 Q BY MR. BROWN: It says, "Violation of policy process." Do
9 you see that?
10 A Yes.
11 Q Can you tell us what this document is?
12 A This document is meant to be a flowchart for how to have a
13 conversation with the team member before we hold them
14 accountable to a policy violation.
15 MR. BROWN: I would move for the introduction of
16 Respondent's Exhibit 118.
17 JUDGE SOTOLONGO: All right. Any objection or voir dire?
18 MR. PETERSON: Quick voir dire, Your Honor.
19 JUDGE SOTOLONGO: All right. Go ahead.
20 **VOIR DIRE EXAMINATION**
21 Q BY MR. PETERSON: Good morning, Ms. Smith. I'm Matt
22 Peterson. I'm the lawyer for the National Labor Relations
23 Board. So this email is dated July 6th of 2020?
24 A Yes.
25 Q Is that when this was distributed?

1 A This is when it went to the regional presidents. It had
2 gone to the TMS executive leaders before that.
3 MR. PETERSON: No objections.
4 MR. BROWN: Thank you.
5 JUDGE SOTOLONGO: Okay. And just -- just a few. When
6 this flowchart that is in the third -- third page, do you
7 recall when -- when was this created?
8 THE WITNESS: This was created prior to the time and
9 attendance accountability going back into effect, so it was
10 probably created in May/June.
11 JUDGE SOTOLONGO: Okay. And how about the dress code
12 policy violation, the reminder in other words, page 2. Was
13 that created right around the same time?
14 THE WITNESS: Yes.
15 JUDGE SOTOLONGO: Okay. I thank you.
16 Respondent's 118 is admitted.
17 **(Respondent Exhibit Number 118 Received into Evidence)**
18 MR. BROWN: Thank you.
19 **RESUMED DIRECT EXAMINATION**
20 Q MR. BROWN: Ms. Smith, so far we've really been talking
21 about team members wearing Black Lives Matter messaging on
22 working time in working areas. And -- and I want to ask you a
23 couple of quick, quick questions. Did team members wearing
24 Black Lives Matter messaging on their clothing, on their
25 uniform, whatever it might be, walking into work before they've

1 clocked in or walking out of work after they've clocked out,
2 violate the Whole Foods Market dress code?
3 A No.
4 Q Are you aware of any team member being disciplined or even
5 spoken to about engaging in that type of activity?
6 A No.
7 Q What about team members on paid or unpaid break time
8 walking around the store, in the break room, wherever it is on
9 Whole Foods Market store property and wearing Black Lives
10 Matter messaging. Would that violate the dress code?
11 A No.
12 Q And are you aware of any team member who was disciplined
13 or even spoken to about engaging in that type of activity?
14 A No.
15 Q Ms. Smith, are you aware or were you aware that there were
16 team members outside a number of stores protesting the Whole
17 Foods policy that wouldn't permit them to wear Black Lives
18 Matter messaging and the Black Lives Matter movement?
19 A Yes.
20 Q Okay. Were you aware that there were team members who
21 engaged in that protest activity?
22 A Yes.
23 Q Okay. Was that a violation of either the dress code or
24 any Whole Foods market policy?
25 A No. We would just remind them to punch out so that they

1 weren't being paid for the time that they were participating in
2 the protest.
3 Q Other than that, was it was that a violation of any Whole
4 Foods Market policy to participate in a protest?
5 A No.
6 Q Okay. Was any team member, as far as you're aware, that
7 had a team member service or human resources for the stores
8 disciplined in any way for engaging in protest activity?
9 A No.
10 Q Were you aware of team members participating in protests
11 not outside a Whole Foods Market stores but the bigger Black
12 Lives Matter rallies and protests going on in various cities.
13 A Yes.
14 Q Okay. Was that a violation of any Whole Foods Market
15 policy?
16 A No.
17 Q Was any team member disciplined or even spoken to about
18 participating in that type of protest?
19 A No.
20 JUDGE SOTOLONGO: Let me ask you briefly, how does it
21 work, for example, when an employee goes on break, whether it's
22 a regular break or a lunch break and happens to be wandering
23 through the aisles of the store, I mean, are member, are team
24 members expected, for example to remove their aprons or other
25 clothing items identifying them as members, as team members, as

1 employees?
2 THE WITNESS: They are, yeah. They're expected to remove
3 any branded uniform items before they go on break.
4 JUDGE SOTOLONGO: All right. So if, for example,
5 employees as -- someone -- I know that some of your stores
6 have, like, little cafes attached to them, maybe not all of
7 them but some of them do.
8 THE WITNESS: Yeah.
9 JUDGE SOTOLONGO: So even if an employee chooses to have
10 lunch in that area, if he or she expected to -- are they
11 expected to remove any clothing items that identify them as
12 Whole -- Whole Foods employee?
13 THE WITNESS: They are, yes.
14 JUDGE SOTOLONGO: Go ahead. Please proceed.
15 MR. BROWN: Thank you.
16 Q BY MR. BROWN: At some point in the summer of 2020, did
17 you learn of team members putting on temporary tattoos on their
18 arms or hands or other body parts?
19 A Yes.
20 Q Okay. What is it that you remember specifically learning?
21 And if you can remember from whom, please tell us.
22 A I remember an incident where a team member wrote, like, on
23 their knuckles, BLM with a black Sharpie permanent marker. I
24 don't recall what region or what location that was in.
25 I do recall a team member in our Berkeley location in

1 Northern California writing with Sharpie on his neck, BLM.
2 There were some other, like, kind of tattoos and some other
3 creative temporary tattoos in support of BLM.
4 Q And at the time, and now I'm talking about the summer of
5 2020, what was TMS' position on whether that type of messaging
6 on the body, temporary tattoo, violated the dress code or not?
7 A It wasn't addressed in the dress code, so it wasn't a
8 violation of the dress code. I think that there is an
9 appropriateness conversation, especially when it's on the neck
10 or, you know, some visible part on whether that's the brand
11 image that we want to project. But that's more of a
12 conversation, not a specific dress code violation.
13 Q And what about the writing on the knuckles? I know you
14 don't remember the region of the store. Was that addressed
15 differently than, say, a temporary hand tattoo or writing on
16 the arm or wrist?
17 A The hand, depending on the department, it could be a food
18 safety violation, you know, and concern there. But depending
19 on the of the department, you know, there -- there may not be
20 as direct of a line to address that.
21 Q At any point in the summer of 2020, June, July of 2020,
22 did you become aware of team members wearing Black Lives Matter
23 or BLM messaging on jewelry, necklaces, earrings, bracelets,
24 that kind of thing?
25 A Yes.

1 Q Okay. What was TMS' view, your view on whether that was
2 addressed in the dress code? And if so how was it to be
3 enforced?
4 A Yeah, we didn't have a specific call out for jewelry. So
5 we really, you know, didn't really have a direct line to
6 address that. So I don't believe the jewelry was addressed.
7 Q With regard to the wearing of Black Lives Matter
8 messaging, as the head of team member services for the stores
9 in the summer of 2020, did you have any, or give any thought
10 to, sort of a slippery slope, that the concerns that by
11 permitting Black Lives Matter messaging, it would open the door
12 to other types of messaging? And if so, what was your thought
13 process?
14 A Yeah. That's -- that's always a concern that, you know.
15 if we made an allowance for that, then, you know, then other
16 items, you know, we -- we would have less of an argument to
17 restrict them. So whether it's, you know, MAGA political
18 message, some other kind of volatile issue that people are
19 passionate about, we would have to allow all of those which
20 didn't seem appropriate for our staff.
21 Q In the summer of 2020, do you recall team members, I don't
22 know if they complained to you directly or indirectly talking
23 about Whole Foods Market permitting LGBTQ and or Pride
24 messaging, branded Whole Foods Market branded pride messaging.
25 Do you recall that?

1 A Yes.
2 Q Okay. And what, if anything, do you recall about what
3 that call out was, what the complaint was? And what, if
4 anything, was your response?
5 A Yeah, we were dealing with a situation in one of our
6 stores in the Midwest and someone in store leadership, I don't
7 remember if it was the store team leader. An associate store
8 team leader was having a conversation with a team member who
9 was really passionate about BLM. And the leader himself was
10 wearing a Whole Foods Market branded rainbow lanyard.
11 And the team member quite poignantly pointed out, you
12 know, the inconsistency in allowing that leader as a team
13 member to wear something that they were passionate about when
14 the team member themselves could not do the same. And it
15 really, you know, we took note because that showed an
16 inconsistency.
17 Q And so what, as what did you say, take note. What, if
18 any, actions did you with -- did TMS take in the summer of 2020
19 relating to Pride messaging.
20 A Yeah. We -- we pulled back on Pride messaging, you know,
21 that it was, you know, not related to the workplace. It didn't
22 need to be in the workplace. And regardless of our history
23 with community events, you know, we didn't need to continue to
24 promote it. I do recall that specific leader in that
25 conversation in the moment actually taking the lanyard off out

1 of respect from team member.

2 JUDGE SOTOLONGO: Did a directive flow from headquarters,

3 Austin or elsewhere to different -- different regional offices

4 about that? In other words, where they said -- their directive

5 said, in light of what's happening now with Black Lives Matter

6 and the inconsistency that it might show, please remove any

7 Pride messaging that anybody in the store. Did the store

8 themselves make a displaying or -- or team members or team

9 leaders maybe wearing them?

10 THE WITNESS: Yeah. I don't recall that it was linked

11 specifically to Black Lives Matter. I do think that there was

12 kind of a reminder to say, hey, anything that's not, you know,

13 related to work. But it was a volatile time, too, because a

14 lot of our legacy community involvement and participation in

15 Pride events. A lot of those events were getting canceled just

16 because of everything that was happening with the pandemic. So

17 we were pulling back in general regardless.

18 Q BY MR. BROWN: But I need to -- I'm sorry, Judge.

19 JUDGE SOTOLONGO: My question, but I -- my question was

20 what -- was there a directive or communication from

21 headquarters to the region saying, all right, to the extent

22 that you have been allowing people to wear, whether as team

23 leader or team members, to wear Pride associated messaging,

24 discontinue that?

25 THE WITNESS: Yeah. It was more of a reminder of, make

1 sure that we're in compliance with our dress code for all of
2 these related topics, including Pride. So you know, kind of
3 take more scrutiny to make sure that you're in line with our
4 stated policy.
5 Q MR. BROWN: And just to be really clear about the judge's
6 question, you say we and headquarters, it's you?
7 A Yes.
8 Q Okay. You made that decision or at least you made that
9 reminder.
10 A Yes.
11 Q Correct?
12 A Yes, correct.
13 Q I'd like to ask you a little bit more about face masks.
14 Were there customers who -- were there incidents with customers
15 who took exception to wearing face masks? I'll leave it at
16 that.
17 A Yes, many.
18 Q What do you recall about any confrontations or incidents
19 relating to customers and face masks?
20 A There -- there were many of them. There were protests by
21 customers. There were customers directly challenging our team
22 members and our leadership. There were customers spitting in
23 team members faces because they didn't want to wear a face
24 mask. It was -- at one point it was mayhem. It was -- it was
25 just really, really difficult for our team members and our

1 customer and our team members and our leadership to deal with.
2 I -- I recall some customers presenting petitions to our
3 team, to our leadership and team members because they objected
4 to being forced to wear masks in our retail locations
5 regardless of any kind of local or government mandate that may
6 have been in effect.
7 Q And do you recall in around that same summer 2020, whether
8 other retailers had experienced any violence or conflict with
9 customers where team members were wearing Black Lives Matter
10 messaging?
11 MR. PETERSON: Objection. Relevance. Going beyond the
12 Whole Foods store. I mean the --
13 MR. BROWN: I'm inquiring as to what she knew as the --
14 the person in charge of the policies.
15 JUDGE SOTOLONGO: Yeah. Along as it is somewhat limited,
16 I'll allow it. Go ahead.
17 A Can you repeat the question?
18 Q BY MR. BROWN: Sure. Were you aware of other retailers
19 who had incidents or conflicts with their associates or
20 employees wearing Black Lives Matter messaging on face masks?
21 A Yes, I believe I heard of some other retailers.
22 Q Do you know who those retailers were?
23 A I believe Home Depot, Target, Trader Joe's. Those are the
24 ones I can recall just off the top of my head.
25 Q With regard to Whole Foods Market stores in the summer of

1 2020 as it related to Black Lives Matter protests and rallies,
2 what in particular, with as much detail as you can recall, do
3 you -- do recall about --
4 MR. BROWN: Let me let me withdraw that question. with as
5 much.
6 Q BY MR. BROWN: With as much particularity as you can
7 recall today, how, if at all, where Whole Foods Market stores
8 impacted by Black Lives Matter rallies and protests?
9 A Yeah. I mean, we had some locations that curfews were
10 enacted. Enacted and so we either had to limit our business
11 hours or team members were challenged getting to work. Some
12 cities where public transportation was suspended. There were
13 incidents of civil unrest where we actually had to close stores
14 or we got windows broken. Several stores that we boarded up
15 the glass windows for months on end to protect the physical
16 building. And some stores that were broken into and looted,
17 merchandise taken or destroyed.
18 Q I'd like to show you a document that's already in evidence
19 as General Counsel Exhibit 5.
20 Ms. Smith, I'm showing you what is in evidence of General
21 Counsel's Exhibit 5. It's a multi-page document, 23 pages.
22 And it begins with an October 7th, 2020 email attaching a team
23 member update announcing a new look to standard apparel for
24 store based team members. Do you see that?
25 A Yes.

1 Q Okay. With regard to this packet, and I believe some of
2 it's repetitious, but there is a Whole Foods Market Look Book
3 as well as a Revised Dress Code policy beginning on page 17 and
4 Frequently Asked Questions. Can you just take a look at this
5 packet? And when you're finished, I have some question about
6 it.
7 (Pause)
8 Q BY MR. BROWN: Thank you. Ms. Smith, what -- what are all
9 these documents?
10 A They're all related to the socialization of our new dress
11 code policy.
12 Q Did you participate in helping to craft this new policy?
13 A Yes, I did.
14 Q Okay. Was there some sort of committee formed?
15 A Yeah. Any time we look at revising a policy, we get a
16 collection of stakeholders together to make sure that we're
17 looking at the policy comprehensively.
18 Q And who participated in this -- this team or this
19 committee to revise the -- the dress code policy?
20 A We members of TMS, Legal, Procurement, Product Manager,
21 Marketing, Public Relations, Internal Comms. That's what I can
22 recall this afternoon.
23 Q Okay. And I want to be sort very careful here because of
24 the attorney client privilege issues. At the time that this
25 committee was -- was formed to address or look at the -- at the

1 dress code policy, was as Whole Foods Market actively in
2 litigation over its dress code policy in that Title VII matter
3 in Massachusetts?
4 A Yes.
5 Q And were there pending unfair labor practice charges
6 relating to Whole Foods Market dress code?
7 A Yes.
8 Q Okay. When you say that Legal was involved in -- in this,
9 did you and others in each of the meetings seek counsel and
10 advice from your lawyers about the dress code policy.
11 A We did.
12 Q Okay. So without disclosing any communications, what
13 generally, and now I'm asking about you, what was the purpose
14 or the goal of, in your view, of revising the dress code
15 policy?
16 A We really wanted to make it simple and make it really
17 clear to both team members and leaders so that everybody could
18 get it right and that we would clean up and simplify the issues
19 that we had been experiencing.
20 Q Okay. With regard to the new dress code policy, I want to
21 ask you if you could to turn to page 17 out of 23 and ask you,
22 is this the revised dress code policy?
23 A It is.
24 Q And was this rolled out on a national basis?
25 A It was. So we would have one policy.

1 Q And then you say, we would have one policy, are there any
2 longer any regional agenda with their own -- revised or
3 additions to the dress code?
4 A No.
5 Q Okay. With regard to the first paragraph of the dress
6 code and in particular the second sentence, what did you mean,
7 or what does it mean that -- that our -- "Our team members are
8 the face of Whole Foods Market and must represent a positive
9 customer and community image"?
10 A It means that our team members are a part of our community
11 and we want to make sure that they represent the Whole Foods
12 Market brand and are easily identifiable to the customers in
13 our store.
14 Q In the first sentence, in the next paragraph, can you
15 expand on what you meant by, This is a neutral policy to
16 ensure -- "This neutral policy ensures an inclusive and safe
17 customer and team member experience allowing the focus within
18 our stores to be on our mission to promote vitality and well-
19 being." Can you -- can you expand on that?
20 A Yeah. Well -- well, we wanted to make sure that everyone
21 understood it said, you know, we wanted to present freedom
22 within a framework so that our team members could still be an
23 individual, but that ultimately, you know, safety, the team
24 member experience and the customer experience were paramount
25 and that the focus when entering our store should be on our

1 food and our products.
2 Q In the next sentence it reads, "This policy also helps to
3 ensure that our customers will have a satisfying shopping
4 experience and be able to promptly identify our team members
5 who work on the sales floor or when encountering customers
6 during their working time." Can you address why that was
7 included in the dress code policy?
8 A Yes. Because we wanted to make sure that our customers
9 could easily identify our team members and going to one
10 universal uniform allowed us the ability to do that.
11 Q Okay. I want to call your attention to page 19 of 23,
12 where it says, "Shirts, tops, dresses, and garments." And with
13 regard to the fourth bullet which reads, "Except for company
14 logos shirts and small nondistracting manufacturer logos, no
15 visible symbols, flags, slogans, messages, logos, or
16 advertising are allowed." Do you see that?
17 A Yes.
18 Q Okay. In your view, does -- is this a material change
19 from what was in the previous policy as it related to wearing
20 visible slogans, messages, logos, or advertising?
21 A No.
22 Q What I do see here that is new is it says, "Manufacturers
23 logos are generally allowed, but they must be of minimal size,
24 one inch or less in size and nondistracting." Do you see that?
25 A Yes.

1 Q Why was that included in the dress code?
2 A That is included for clarity so that, you know, we further
3 defined manufacturer logos such as like a Nike swoosh or, you
4 know, other logos that have been problematic in the past. So
5 we added that for clarity.
6 Q I'd like you to turn if you could to page 20 of 23 and I
7 see -- I'm calling your attention, not to "Hygiene" or "Hair,"
8 but -- but rather to "Tattoos." Is this different than the
9 previous national GIG policy on tattoos?
10 A Yes. I think the only -- in the previous policy, we only
11 addressed offensive tattoos.
12 Q Okay.
13 A And in this policy, temporary tattoos and body markings
14 are not allowed. Is that right?
15 A That's right.
16 Q Okay. And is there anything else that is substantially
17 different from -- from this policy, from the previous policy?
18 A No.
19 Q With regard to the "Exceptions and Variations." And I'm
20 on page 21. See that in the first paragraph it addresses PPE
21 or personal protective equipment and includes safety. And then
22 there's "Reasonable accommodations." Do you see that?
23 A Yes.
24 Q Okay. With regard to Reasonable Accommodations," what is
25 that addressing?

1 A That's just calling out that a team member, you know, if
2 they have any kind of accommodation that's related to dress
3 code, that there's a mechanism to bring that forward and to
4 talk through it so that we can work together to find a
5 reasonable accommodation.
6 Q And then the last thing I want to point out with regard to
7 the new dress code is the second paragraph under
8 "Accountability," I believe that Judge Sotolongo referenced
9 earlier. Can you explain the inclusion of -- of this provision
10 in the new dress code?
11 A Yes. We just took the opportunity to overtly call out
12 that nothing in the dress code should imply that team members
13 don't have the right to wear pro or anti-union insignia pins,
14 buttons -- so that overtly call it out.
15 Q And with regard to that, since the implementation of this
16 new dress code in 2020, in November 1st of 2020, have team
17 members worn union insignia in compliance with the dress code?
18 A Yes.
19 Q What -- what are the specifics do you recall about that?
20 A Specifics of buttons, you know, team members in some
21 locations have chosen to wear a small button in support of the
22 union. There may have been one or two not supporting unions,
23 but in compliance with the policy.
24 Q I'd like you to turn to page 14 of 23. And this is in the
25 section of the new, I guess the dress code roll out here

1 about -- under the -- under the heading, "Questions about
2 nonuniform apparel." And in particular, I'm calling your
3 attention to the fifth question, "What if a team member wears a
4 union affiliated pin button or insignia?" Do you see that?
5 A Yes.
6 Q Okay. What is the reason for including this? And what
7 was the message that you were pushing out to leadership and
8 team members?
9 A Yeah. It was mainly to call out, you now, team members
10 that are working on the sales floor with customers versus those
11 that are in the back of the house or overnight have a little
12 bit more latitude as long as the messaging is readily removable
13 when they're entering customer-facing areas.
14 Q And in customer-facing areas, they are permitted to wear
15 protected union buttons or pins, correct?
16 A Right. Provided that it's no bigger than the name badge.
17 Q Okay.
18 MR. BROWN: Your Honor, if I could have maybe ten minutes.
19 I think I'm done but I would like --
20 JUDGE SOTOLONGO: Very well. Let's take a ten minute
21 break.
22 MR. BROWN: Thank you.
23 (Off the record at 11:19 a.m.)
24 JUDGE SOTOLONGO: Well, let's go back on the record.
25 MR. BROWN: No further questions, Your Honor.

1 JUDGE SOTOLONGO: All right. Mr. Peterson.
2 MR. PETERSON: Your Honor, it's 11:30 at the moment. I
3 would -- I would propose taking lunch break. Right now I don't
4 anticipate a lengthy cross-examination but up until today I
5 wasn't aware of which witness Respondent would be calling and
6 there are some -- some documents from their subpoena production
7 that I want to review.
8 And in addition, I was also -- as the subpoena, the order
9 regarding the subpoena has come up in connection with
10 Respondent's 117, those -- the subpoenas, the motions to quash
11 and the responses in your order haven't -- has not been
12 included as part of the formal documents up to this point,
13 because it's been more of a background issue than a front
14 issue, so I'm just --
15 JUDGE SOTOLONGO: Well, I'll tell you what, can you let's
16 say go for an half an hour and then we'll break around 12:00?
17 Would that work?
18 MR. PETERSON: So I can do, I mean, I can basically do
19 some initial cross-examination right now.
20 JUDGE SOTOLONGO: Why don't we do that. Why don't we take
21 our break around 12 and we'll go say -- we'll have an extended
22 lunch break until 1:30 or so.
23 MR. PETERSON: Okay.
24 JUDGE SOTOLONGO: So let's, why don't we proceed then that
25 way?

1 MR. PETERSON: Okay.

2 JUDGE SOTOLONGO: All right. And I always say you can, in

3 light of your examination, whatever documents you need to

4 reexamine, if you need to revisit some questions that you ask

5 now, that's fine, I'll permit that. So go ahead.

6 MR. PETERSON: Thank you, Your Honor.

7 JUDGE SOTOLONGO: All right.

8 **CROSS-EXAMINATION**

9 Q BY MR. PETERSON: Good afternoon or good morning -- good

10 morning, still. Yeah, I am still Matt Peterson. Now, I have a

11 chance to ask you some follow-up questions based on what your

12 attorney has asked you.

13 And yeah, so from where do you -- you've been working in

14 the same position, your current position, VP of TMS for Field

15 and Culture since 2018; is that correct?

16 A That's correct.

17 Q Have you been based in Austin throughout that time period?

18 A When I first started the role, I was still based in

19 Seattle from August when I started until mid-end of September

20 when I moved to Austin in 2018.

21 Q Okay. So summer 2020, you were based in -- in Austin. Is

22 that where company headquarters is?

23 A That's correct.

24 Q And you have obviously a large number of responsibilities.

25 Do you -- do you visit the individual stores with any degree of

1 frequency?
2 A Yes. Until the pandemic and then travel kind of shut down
3 for a period of time. And -- and now I'm back to visiting the
4 regions, yes.
5 Q So and so by regions, do you visit all 500? Yeah, there's
6 about 500 stores in the United States. Is that is -- us
7 that -- is your estimate?
8 A Yes. It might be a little more than that.
9 Q Apart from the pandemic, were you visiting or is it your
10 practice to visit each -- each store every year?
11 A No, not each store. More the region and then select
12 stores when I'm in the region.
13 Q So you visit a sampling? You visit a region. Did the
14 regions have headquarters where they're kind of house the --
15 the regional leadership?
16 A Yes. There's a regional office in each region.
17 Q So you -- when you when you visit these regions, then you
18 will make an effort to visit a couple of stores in the -- in
19 the actual region.
20 A It depends on the purpose of the visit. Sometimes the
21 purpose of the visit might be regional training, regional
22 leadership training. But in general, when I visit the regions,
23 try to at least get into a few of the stores to talk with team
24 members and store managers.
25 Q And so in the summer of 2020, that was the pandemic, was

1 still going on. I -- was at a time period where you were not
2 visiting regional -- regional headquarters and regional
3 locations?
4 A Correct.
5 Q So that the -- events you testified about occurring in
6 summer 2020, they were involving the TMs at the various store
7 locations, those are all based on reports that you received
8 from -- from various store leadership?
9 A From store leadership, regional leadership, yes.
10 Q You didn't actually visit, you didn't go and see the
11 employees wearing the various Black Lives Matter attire that
12 has been -- been described?
13 A No.
14 Q And similarly, I -- I imagine you're relying on your --
15 the store -- store and regional leadership's reports to you
16 about how the policies -- dress code policies were being
17 enforced and during that time period?
18 A Yeah. We were on travel restrictions, so it wasn't even
19 possible to visit stores or agents.
20 Q There is some testimony about the -- in 2013, 2014, an
21 NLRB posting. Do you recall that testimony? You were -- I
22 think you said you were generally aware about what was
23 happening in that situation.
24 A Yes.
25 Q Is that right? You didn't play a role in communicating

1 with the NLRB directly about whatever was happening in relation
2 to the NLRB posting?
3 A No.
4 Q The Black Lives Matter, it -- it sounds like you are aware
5 of at least, I think you gave one example of an -- of an
6 employee in -- in the Portland -- or employees in the Portland
7 store that were wearing Black Lives Matter messaging at that
8 point. Do you recall that?
9 A At which point
10 Q I think you said 2015.
11 A Yes. Did you?
12 Q Did you -- your understanding of the Black Lives Matter
13 message is that -- is, as I understand it, it's related to
14 police -- police brutality.
15 A Correct
16 Q Did you see any other -- is there any other message
17 associated with Black Lives Matter that you're aware of?
18 A Yeah. There's a lot of layers of messaging and agendas
19 related to Black Lives Matter. It's my understanding that the
20 community uprise during the time period that we're talking
21 about in 2020 was related to police brutality.
22 Q What are the -- what are some of the other areas of
23 understanding that you that -- you have, apart from police
24 brutality, related to the Black Lives Matter message?
25 A You know, there's -- there's different, I -- I don't know

1 that I can, as I sit here today, I can recall them all. I just
2 remember, you know, hearing news reports and reading articles
3 about some very specific things that the Black Lives Matter
4 movement can go down in relation to. It's just gender identity
5 and some other things that just seem very peripheral to the
6 core message of what society understands it to represent, what
7 I understand it to represent.
8 Q Apart from gender identity, you're aware -- you're aware
9 of, you've heard -- you heard of the term, "systemic racism"?
10 A Yes.
11 Q What's your understanding of what systemic racism is?
12 A What I understand systemic racism to be is systems, laws,
13 mechanisms that were in place that put black people at a
14 disadvantage so things, like, obtaining a mortgage, education,
15 housing, things in society that were put in place that were
16 blockers for Black Americans.
17 Q Have you heard of it in connection with voting rights?
18 A Yes.
19 Q What about, like, equality in general?
20 A Yes.
21 Q And I guess that message of equality is, is it your
22 understanding that some people include the workplace as far as
23 that message of equality?
24 A I'm not aware of that.
25 Q You're not aware of workplace equality being a component

1 of the Black Lives Matter message?
2 A Not a Black Lives Matter.
3 Q But you are of education, voting, mortgages, I think you
4 mentioned.
5 A Oh, I thought I thought that question was related to
6 systemic racism and what I understand that to be.
7 Q What about as -- as it relates to Black Lives Matter?
8 MR. BROWN: Objection. I mean, if you understand the
9 question, you can answer. But I -- I don't think there's --
10 JUDGE SOTOLONGO: Do you understand the question?
11 THE WITNESS: I'm not -- I'm not sure.
12 MR. PETERSON: Yeah --
13 THE WITNESS: Can you ask --
14 MR. PETERSON: -- you -- you -- you also through me off
15 with the idea.
16 Q BY MR. PETERSON: So you were talking about systemic
17 racism and its various components?
18 A Um-hum.
19 Q You don't -- you don't view employment opportunity,
20 promotion in -- in general as being part of systemic -- as --
21 as an issue of systemic racism?
22 A Not from how I understand it. I understand systemic
23 racism outside and apart of Black Lives Matter.
24 Q And then -- so same question then with -- in connection
25 with Black Lives Matter, do you understand the message of

1 general equality to be part of the Black Lives Matter message?
2 A Yes.
3 Q And would that include voting rights, education rights,
4 employment opportunity, et cetera?
5 A In terms of equality, yes. In terms of Black Lives
6 Matter, I don't understand Black Lives Matter to be a workplace
7 issue.
8 Q But you do understand the Black Lives Matter as having a
9 message of -- of equality?
10 A In general, yes.
11 Q In general. And but you, as far as that equality goes,
12 you don't see a connection between equality in -- in the
13 workplace specifically?
14 A No.
15 Q Were you aware of what types of discipline, disciplinary
16 actions employees received for -- if they were wearing Black
17 Lives Matter, some type of attire and -- and refused to remove
18 it?
19 A Not necessarily.
20 Q You're not aware of the different types of disciplinary
21 infractions that employees received for -- for wearing Black
22 Lives Matter and refusing to remove it when given the
23 opportunity.
24 A In general, I'm aware of it. In the -- each region has a
25 different corrective action policy. So there's several of them

1 in terms of the steps. And it would depend on the specific set
2 of circumstances as to what policy was being violated.
3 Q So the regions had some -- the flowchart that you had
4 testified about --
5 A Um-hum.
6 Q -- at issue, Respondents 118, that "'Violation of Policy
7 Process". Are you saying that regions weren't expected to
8 follow that?
9 A They were expected to follow that. That was a process of
10 having a conversation before they got to corrective action for
11 the individual situation.
12 Q What -- what types of corrective actions are you aware of
13 employees receiving for wearing Black Lives Matter at work at
14 whole Foods?
15 A I -- I don't think they received corrective action for
16 wearing Black Lives Matter. They would have received
17 corrective action for the specific policy violation that they
18 were noncompliant to.
19 Q In which policy violations are you aware of being a
20 component of any corrective action?
21 Q That -- that would be dependent on how the team member
22 chose and what decision they made in relation to the behavior
23 and the situation that was happening at the time. So it could
24 have resulted in their choice to leave work and then being
25 accountable to the time and attendance policy.

1 It could have resulted in them continuing to work and be
2 noncompliant with dress code, so they could have been held to
3 the dress code policy. But it really depended on their choice
4 in the individual situation.
5 Q So that they had the choice to, if they -- if they refused
6 to remove, in this case, Black Lives Matter messaging or the
7 phrase, they were given the choice of either going home or
8 continuing to work?
9 A Becoming compliant with a dress code and continuing to
10 work, yes.
11 Q What about if they, could they continue to work while
12 wearing the -- the Black Lives Matter messaging and -- and get
13 a dress code violation?
14 A They could have. In that flowchart, it also talks about
15 following the conversation, if the team member was noncompliant
16 and returned to work outside of the dress code, to allow them a
17 cooling off period. If they became compliant during that
18 cooling off period, then there shouldn't have been corrective
19 action or any accountability. But if they were insubordinate
20 or willing -- willfully going against our policy, then there
21 would be corrective action for either insubordination or the
22 policy violation.
23 Q And by policy violation, you mean the dress code --
24 A Sure --
25 Q -- violation?

1 A -- yes.
2 Q You were asked about your awareness of other retailers
3 having incidents regarding Black Lives Matter. Do you recall
4 that testimony?
5 A Yes.
6 Q Do you -- are you aware that any -- any of those retailers
7 ultimately permitted employees to wear Black Lives Matter --
8 MR. BROWN: Objection. Relevance.
9 JUDGE SOTOLONGO: Overruled.
10 A I'm not sure.
11 Q BY MR. PETERSON: You don't know?
12 A I don't know.
13 Q Were you aware of any -- of Starbucks changing its policy
14 from prohibiting Black Lives Matter to later permitting it?
15 A Yes. I believe Starbucks came out with a very specific
16 T-shirt or some kind of attire for their associates to wear.
17 MR. PETERSON: That's all the questions I have for you
18 for -- for now. I do -- I do want to just review some -- some
19 documents and perhaps have some follow-up questions for you.
20 JUDGE SOTOLONGO: All right.
21 MR. PETERSON: If we're off the record or --
22 JUDGE SOTOLONGO: Let's -- let's go off the record.
23 (Off the record at 11:47 a.m.)
24 JUDGE SOTOLONGO: All right. Let's go back on the record.
25 THE COURT REPORTER: You're on the record.

1 JUDGE SOTOLONGO: All right. Mr. Peterson?
2 MR. PETERSON: Thank you, Your Honor.
3 As noted earlier, I wish to offer a fifth supplement to
4 the formal papers that have previously been received into
5 evidence as General Counsel's Exhibit 1. The fifth supplement
6 includes Exhibits 1(rrrr) through 1(vvvv), inclusive Exhibit
7 1(vvvv) being an index and description of the supplemental
8 exhibits. I have shared -- shared this with Respondent's
9 counsel and will upload them into the SharePoint later this
10 evening.
11 MR. BROWN: Respondents have no objection.
12 JUDGE SOTOLONGO: All right. So the fifth supplemental
13 index and description of formal documents is received.
14 **(General Counsel Exhibit Numbers 1(rrrr) through 1(vvvv)**
15 **Received into Evidence).**
16 JUDGE SOTOLONGO: However, there is something else
17 attached to that, correct?
18 MR. PETERSON: So that's just all the exhibits themselves.
19 So that --
20 JUDGE SOTOLONGO: Okay. I see.
21 MR. PETERSON: -- so the first page is the exhibit.
22 JUDGE SOTOLONGO: Okay. Right. Very well.
23 MR. PETERSON: This is just a hard copy.
24 JUDGE SOTOLONGO: All right. So -- yes, so the fifth
25 supplement is now received so it will be 1 through -- 1(rrrr)

1 through 1(vvvv). Is that correct?

2 MR. PETERSON: That is correct, Your Honor.

3 JUDGE SOTOLONGO: Right. So that is received.

4 MR. PETERSON: Thank you.

5 JUDGE SOTOLONGO: Okay.

6 MR. PETERSON: May I resume the cross-examination --

7 JUDGE SOTOLONGO: Yes.

8 MR. PETERSON: -- of Ms. Smith, please?

9 JUDGE SOTOLONGO: Please do.

10 MR. PETERSON: Thanks, Your Honor.

11 **RESUMED CROSS-EXAMINATION**

12 Q BY MR. PETERSON: So Ms. Smith, as I -- as I understand

13 it, the -- the -- the employees said -- you were aware that

14 employees were raising concerns about fairness of the

15 application of the dress code policy with Black Lives Matter

16 masks. Is that -- is that correct?

17 A Yes.

18 Q Part of that was related to the explicit support of Pride,

19 for example. Is that correct?

20 A Yes. That was an instance, I imagine.

21 Q And some employees, they had -- Whole Foods is a company

22 that has held itself out on -- on Pride and even other social

23 issues. Is that -- is that fair to say?

24 A It is fair to say that we get involved in issues important

25 to communities that we serve. Yes.

1 Q "Racism has no place here" is one of the -- one of the
2 mottos of Whole Foods. Is that correct?
3 A I wouldn't say it's a motto. I would say that it was in
4 response to the social unrest that we were experiencing in
5 December of 2020.
6 Q Is that a public statement that Whole Foods had made?
7 A Yes.
8 Q You were also aware that employees had brought up a number
9 of concerns or demands in connection with wearing the Black
10 Lives Matter mask. Is that correct?
11 A Yes.
12 Q Which -- what -- what are the demands that you recall?
13 A I just remember a couple of lists of demands of things for
14 us to change policy, but I didn't see the relevance of Black
15 Lives Matter or how it impacted team members in the workplace.
16 Q They wanted you to change the dress code policy, or at
17 least the application of it against Black Lives Matter. Is
18 that correct?
19 A Yes. They wanted us to alter our policy.
20 Q Do you remember any other demands in connection with
21 their -- the Black Lives Matter masks and other adornments?
22 A I recall something around maybe corrective action or
23 people that missed work.
24 Q Having those rescinded?
25 A The corrective action rescinded, yeah.

1 Q Do you recall anything about backpay?
2 A Yeah. For the people that missed work.
3 Q Do you recall any demands about -- about the diversity of
4 Whole Foods leadership?
5 A Yeah. I think there was some kind of request for
6 demographic information.
7 Q I'm going to show you what's been -- it's already in
8 evidence as General Counsel's 73. Go ahead and flip through
9 that and let me know if you recognize it.
10 JUDGE SOTOLONGO: We can go off the record while --
11 THE COURT REPORTER: All right.
12 (Off the record at 1:09 p.m.)
13 JUDGE SOTOLONGO: Go back on the record.
14 THE COURT REPORTER: On the record.
15 JUDGE SOTOLONGO: All right. The witness has finished
16 reading the -- go ahead.
17 Q BY MR. PETERSON: Ms. Smith, do you -- do you recognize
18 the -- the -- the contents of that exhibit, pages 1 through 4
19 that appear to come from Jolina Christie?
20 A I mean, I recall some of the themes, but I don't recall
21 this document.
22 JUDGE SOTOLONGO: Are you -- are you -- I don't see your
23 name and email listed there. Did you receive -- do you
24 remember receiving a copy of this email?
25 THE WITNESS: I don't.

1 JUDGE SOTOLONGO: Okay.
2 MR. PETERSON: Your Honor, may I approach?
3 JUDGE SOTOLONGO: Yes.
4 Q BY MR. PETERSON: I'm not necessarily going to make this
5 an exhibit, but if you look at that, does that refresh your
6 recollection as to whether you received a copy of the contents
7 of General Counsel's 73?
8 A Yes.
9 Q And do you now recall receiving the contents of General
10 Counsel's 73 by email?
11 A Yes. It looked like -- yeah. It looked like my team
12 fielded this email.
13 MR. BROWN: Objection. The response is not responsive.
14 JUDGE SOTOLONGO: Mr. Brown, I couldn't hear you, Mr.
15 Brown.
16 MR. BROWN: The -- I object to her response as
17 nonresponsive. The question was whether she remembered
18 receiving this and her answer was that she believes her team
19 received it.
20 JUDGE SOTOLONGO: Okay. Well, that kind of -- do you --
21 do you remember receiving it yourself?
22 THE WITNESS: Not expressly, no.
23 Q BY MR. PETERSON: Does your --
24 A I do see that I'm copied here, though.
25 Q You're copied? Your name is copied on the email? Do you

1 have any reason to doubt that you didn't receive this?
2 A No, I just don't recall the content.
3 Q But the contents are what's reflected in General Counsel's
4 73?
5 MR. BROWN: Objection. He asked her if -- if the content
6 is what she recalls. And she's testified that she doesn't
7 recall seeing the email.
8 JUDGE SOTOLONGO: Okay. Now, she -- she doesn't recall
9 receiving the email.
10 Is that -- is that your testimony?
11 THE WITNESS: Yeah. I -- I don't recall the contents of
12 this email.
13 Q BY MR. PETERSON: That is your -- your email is included
14 on the first pages of that exhibit, or that document?
15 A The second document that you handed me?
16 Q Yes.
17 A Yes.
18 MR. PETERSON: All right. I will mark that as General
19 Counsel's 104.
20 **(General Counsel Exhibit Number 104 Marked for Identification).**
21 Q BY MR. PETERSON: So as I understand it, you recall -- you
22 recall the themes that are contained in Jolina Christie's
23 comments in both 104 and General Counsel's 73?
24 A As I read through them, there are -- some of the things
25 are familiar. Yes.

1 Q You don't actually remember receiving the email, though?
2 A No, I don't remember reading it.
3 MR. PETERSON: I move for the admission of General
4 Counsel's 104.
5 MR. BROWN: Objection to 104. This witness -- for two
6 reasons: the witness has testified that she doesn't remember
7 receiving it and the second part of that objection is that the
8 top email is -- does not include her at all. That's not -- it
9 shouldn't be part of -- of an exhibit that she's
10 authenticating.
11 JUDGE SOTOLONGO: Well, I -- I agree with that. The top
12 part of it doesn't seem to be connected to the bottom half and
13 I'm not sure what the top half's about anyway. So I'll admit
14 that the -- the first half starting with the second part of the
15 first page of General Counsel's 104 where the witness' email
16 does appear. She doesn't recall. She testified she doesn't
17 recall seeing that it -- doesn't recall receiving it.
18 **(General Counsel Exhibit Number 104 Received into Evidence)**
19 MR. BROWN: So to be clear, Your Honor, the -- the
20 email -- just for the record, the email from Suzanne Bell on
21 August 19th at 11:48 a.m. is not part of this exhibit?
22 JUDGE SOTOLONGO: That's correct.
23 MR. BROWN: Thank you.
24 MR. PETERSON: Thank you, Your Honor.
25 Q BY MR. PETERSON: So how do you recall learning of the

1 themes, as you -- as you testified -- in -- in Jolina's
2 Christie's letters?
3 A I don't recall Jolina Christie as an individual, but you
4 know, my team fielded a lot of inquiries that were sent in and
5 we reviewed any emails to determine whether they would be
6 responded to.
7 Q Do you recall reviewing Ms. Christie's email in accordance
8 with how you just described the policy?
9 A Yeah. I remember the summary of it.
10 Q What does that mean?
11 A Just some of -- of what she brought up and reviewing the
12 contents. I don't -- I don't that there's an actual question
13 in here that we would have responded to rather than just
14 collecting the feedback in general.
15 MR. PETERSON: May I approach, Your Honor?
16 JUDGE SOTOLONGO: Yes.
17 Q BY MR. PETERSON: I'll give you a chance to look through
18 that document and let me know if you recognize it.
19 A Okay.
20 Q Do you recognize General Counsel's 69?
21 A Yes.
22 Q What is that?
23 A It's an email exchange between Doug Midevak (phonetic),
24 Regional President, and a team member.
25 Q You were copied on all those emails? Is that -- or I

1 guess not all of them -- all the ones that -- that indicate
2 your name in the -- in the "To" or "cc" line?
3 A Yeah. It looks like some of them I was copied on and some
4 I was not. One is to --
5 Q Yeah, turning your attention to page 3.
6 A Yes.
7 Q You were -- you -- you -- you're copied -- you're
8 actually -- that one's addressed to you and Scott Allshouse.
9 Is that correct?
10 A Correct.
11 Q Do you recall receiving this one?
12 A Yes.
13 Q Did you take any action?
14 A No. I discussed it with Scott and he was going to reply.
15 Q What did you discuss with Scott about how to reply?
16 A Just if he had received the email.
17 Q He didn't get in any detail that you recall about what his
18 response may be?
19 A Not -- not that I recall.
20 Q Thank you, Ms. Smith, that's all -- all the questions I
21 have for you.
22 JUDGE SOTOLONGO: All right. Mr. Brown?
23 MR. BROWN: Just one moment.
24 JUDGE SOTOLONGO: Sure.
25 MR. BROWN: Or two minutes.

1 JUDGE SOTOLONGO: Let's go off the record.
2 THE COURT REPORTER: Off the record.
3 (Off the record at 1:24 p.m.)
4 JUDGE SOTOLONGO: Go back on the record.
5 THE COURT REPORTER: On the record.
6 MR. BROWN: I do not have any further questions for this
7 witness.
8 JUDGE SOTOLONGO: All right. Thank you very much, Ms.
9 Smith. The -- you're excused. I'm going to tell you not to
10 discuss your testimony with any other witness or potential
11 witness in this matter, but I think that's -- we've run out of
12 witnesses so thank you very much for your testimony.
13 All right. Mr. Brown, is that -- are you resting in the
14 Employer's case.
15 MR. BROWN: I would like, if I could, Your Honor, to
16 invite Mr. Ferrell to give our -- our closing remark, which
17 will be about 30 seconds.
18 JUDGE SOTOLONGO: Sure. Let's go off the record.
19 MR. BROWN: Oh, no. We would like the record.
20 JUDGE SOTOLONGO: Oh, on the record.
21 MR. FERRELL: At this time, we have no additional
22 witnesses and we do rest our case at this time.
23 JUDGE SOTOLONGO: Okay.
24 MR. FERRELL: Secondly, Your Honor, we would, at this
25 time, now that the evidentiary record in this case has been

1 closed, to renew our motion to dismiss with respect to the
2 allegations in paragraph 6 through 20, with respect to Whole
3 Foods' dress code policy. And also to renew Whole Foods' oral
4 motions to dismiss allegations at the stores which the General
5 Counsel did not present any witness testimony, specifically
6 Brookline, Massachusetts and Atlanta, Georgia. And also to
7 move to dismiss or renew our motions to dismiss, our oral
8 motions, on those charges for which the General Counsel has
9 failed to make out a prima facie case, specifically the
10 allegations of discharge or constructive discharge with respect
11 to Charging Parties Jolina Christie and Charging Party Ana
12 Belen Del Rio Ramirez.
13 JUDGE SOTOLONGO: All right. I am going to reserve my
14 decision on those matters -- excuse me -- from my written
15 decision. I'm not going to -- I'm not going to make a rule
16 from the bench because these are issues that I need to analyze
17 closely.
18 Obviously, to the extent that no evidence was presented as
19 to some of the allegations, you can be assured that those --
20 those portions of the complaints will be dismissed. Obviously,
21 needless to say. But I have to go -- I'm going to have to go
22 line by line in the complaint and make sure, you know, that all
23 the "T"s are crossed and the "I"s are dotted with regard to
24 whether or not the -- the -- the -- you know, Counselor A
25 introduced any evidence, in which case, it's obvious then

1 that -- that the allegation would be dismissed, unless it's
2 withdrawn via brief, are two and then those obviously that
3 where he made a prima facie case. Those would also be
4 dismissed, although, obviously that would -- that would only
5 take, again, greater analysis. Obviously, the ones where no
6 evidence was introduced at all, that's pretty easy. The ones
7 who were no prima facie case was made or where the evidence
8 contradicts the allegations, then in that regard, I'm referring
9 to some of the constructive discharge cases, while those I will
10 address in my decision itself.
11 So I'm going to hold off on your motions and I will
12 address those in my decision. And obviously, all those issues
13 should be briefed and should be briefed thoroughly. I'm going
14 to give you some thoughts in that regard in a -- in a second.
15 But you wanted to make a closing -- a closing?
16 MR. FERRELL: That was -- that was all we were --
17 JUDGE SOTOLONGO: Okay.
18 MR. FERRELL: -- going to raise.
19 JUDGE SOTOLONGO: All right.
20 MR. FERRELL: Beyond that we were just going to reserve
21 further argument for post-hearing briefing and --
22 JUDGE SOTOLONGO: Yes. Well, basically, yes. Then --
23 then -- like I said, I will address those issues in -- in my
24 decision. So the only thing that remains to be done is now is
25 set a date for briefing. I'm only -- I only have authority to

1 give you 35 calendar days so that means the brief -- the briefs
2 will be due on Tuesday, September the 20th of -- of 2022.
3 Having said that, obviously, given the -- the -- given the
4 complexity and the length of this case, I would understand it
5 perfectly if you want to submit motions for extension.
6 All I can tell you is that it is up to the Associate Chief
7 Judge, Judge Gerald Etchingham, in San Francisco on the San
8 Francisco Commission of Judges to either grant or deny a motion
9 to -- a motion to -- for an extension of time to file the
10 briefs. To the extent that you file such motions, it would
11 be -- it would be to your benefit if all sides concur. And
12 while I can't speak for Judge Etchingham, I am certain that,
13 under these circumstances, given the complexity and -- and the
14 length of the case, that, as far as all the parties agree, I
15 don't anticipate any -- any problems in him granting the
16 extension. He will ask me my opinion. I can tell you right
17 now that I will tell him, yes.
18 A -- a question -- I mean, or a case such as this,
19 obviously it's going to need to be -- we're talking about
20 maybe, I'm taking a rough guess, but about a 5,000-page
21 transcript at least. So if you calculate roughly about 200
22 pages per day for a full day when we're there until -- we're
23 talking about that vicinity. So something that's going to take
24 a while to digest and the reality is I don't want to -- to
25 create any false expectations here.

1 The reality is that I -- I have two other decisions that I
2 need to crank out. Maybe I shouldn't use that word. That I
3 need to issue before this one. One that's been actually long
4 overdue and so the -- the reality is, I will likely not be able
5 to turn my full attention to this case as far as writing the
6 decision until year's end or beginning of the new year, quite
7 frankly. That's just being realistic. So I have no problems
8 if he -- if Judge Etchingham asks my opinion and he will, I'll
9 tell him, go ahead and grant it, given the -- given the
10 circumstances of this case.
11 Now, there's a few -- you know, this case presents -- this
12 case presents some very, very interesting and noble issues.
13 That's -- as I'm sure you agree with me. And one thing, for
14 example, just regarding the motion to dismiss the allegations
15 having to do with the wording of the -- the employee
16 handbook -- of the GIG and your argument that -- that the
17 language of the GIG followed the 2000 -- was approved by
18 General Counsel inasmuch as -- as it was part of the 2013
19 settlement agreement. And as we have discussed here
20 previously, there appears to be one word that was left out of
21 that and -- and the word "printed" was used in the settlement
22 agreement and the word "printed" does not appear in the GIG.
23 That's -- so one of these things -- is whether the absence of
24 such a word makes -- makes a difference, legally. Does it
25 change completely the -- the meaning of the language, change

1 the interpretation of the language. That's something that
2 needs to be addressed.
3 Obviously, subsumed within that are is -- in a certain
4 sense, Respondent's arguing, I think, an estoppel issue. Is it
5 not? The General Counsel approved this wording before and is
6 now essentially reneging on its own -- I'm not sure the -- the
7 estoppel applies to the government, or at least to the NLRB,
8 but if it does, I want you to brief that. And even if it's not
9 estoppel, it's an issue of basic fairness that should be
10 addressed in -- in the decision.
11 With respect to the -- with respect to -- to the -- the
12 larger issue in this case, as we have -- as I, you know,
13 previously alluded to, I think we were in D.C. when I addressed
14 the -- the motion to sever and the reasons why I was going to
15 deny it and as I pointed out, that I think it's something that
16 need to address or that you should address in -- in -- because
17 I think, obviously, that they're very interesting, but it's a
18 complex issue. I think we'd all agree that -- that pursuant to
19 the Supreme Court's Eastex decision and the NLRB's Fresh & Easy
20 Neighborhood Market decisions, that it is clear that it is the
21 objective understood purpose of employees' activity and other
22 subjective intentions that determines whether the activity's
23 protected. So in other words, the more -- so the motive of the
24 employees involved should be distinguished from the purpose of
25 their activity. So in this instance how do we determine what

1 the objective -- the objective of the purpose of the employees'
2 activity. I think that's something that going to be very
3 interesting to the -- the -- for example, in -- in the one
4 decision that has addressed this issue in a sort of an indirect
5 way, that's Judge Bogas' decision in the Home -- I think it was
6 Home Depot --
7 MR. BROWN: Home Depot.
8 JUDGE SOTOLONGO: -- case. He said that the -- the
9 evidence in the case would support that this was this the --
10 the objective understood purpose of the activity, but he didn't
11 explain how the evidence showed or didn't show that. I think,
12 in this case, we've had a lot more evidence and a lot of it,
13 like I said, I think we can all agree some of that can be
14 classified as subjective evidence, subjective intent and that
15 needs to be -- I need to be able to separate -- as I said in
16 my -- in my order denying the motion to sever, to separate the
17 wheat from the chaff.
18 How do -- how do we -- how do we -- how we define the
19 objective purpose of this activity? What -- what -- what
20 factors do we look at? And as I said, for example, in -- in --
21 in -- in much simpler issue, for example, in cases where, you
22 know, coercive or threatening conduct has been alleged on the
23 part of an employer or union, as I said. You know, the -- the
24 Board looks at all the circumstances to determine whether a
25 certain conduct -- if that was coercive or threatening. And

1 they use the objective standard, meaning, knowing whether the
2 employee that was subjected to this misconduct was subjectively
3 coerced or threatened or felt -- providing whether under normal
4 circumstances a reasonable person or a reasonable employee
5 would have been coerced under the circumstances. Sort of a
6 reasonable person standard that we're all familiar with from
7 our law school days. That's a fairly easily understandable
8 concept to -- to figure out -- easy concept to understand.
9 How do we -- how do we translate that into this case? A
10 reasonable person standard. Is that the standard? Is there a
11 reasonable person standard? Would a reasonable person have
12 understood the -- the -- the purpose of this activity was not
13 only to address, you know, unjustified violence against people
14 of color or black people, but also the overall systemic
15 discrimination issue. I don't know. And that's something
16 that-- that -- that we need to explore. And so it's not
17 something that -- that -- that is readily apparent to me. How
18 do we -- how do we measure -- how do we gauge what the quote
19 "objective understood purpose" is? What factors -- what
20 criteria do we need to look at? Is it -- is it a poll, as the
21 one that was testified to by -- by the Employer's -- by the
22 professor last week? I already forgot his name.
23 MR. BROWN: Davidson.
24 JUDGE SOTOLONGO: What is it?
25 MR. BROWN: Davidson.

1 JUDGE SOTOLONGO: Davidson, right. Excuse me. Or is it
2 more of the -- the -- the -- or is it more closely aligned to
3 what the General Counsel's witness testimony and the General
4 Counsel's special -- expert witness. Some of the history of
5 the Black Lives -- Black Lives Matter movement is how it has
6 evolved over time. I did not know. I can't profess to know
7 and that's something that I need to carefully study and I need
8 you to help me by addressing these issues. I think it's a
9 fascinating subject. I am -- you know, maybe by the time -- I
10 don't know if I should be saying, but perhaps, by the time I
11 actually sit down and start writing this decision, the Board
12 may have issued a decision in the other cases and they may
13 provide some -- some -- some guiding light to me. And so but
14 I'm not going to hold my breath and expect that. So I may need
15 to -- to figure this out by myself and let the Board take its
16 shot at it later on. In any event -- and I'm sure there's
17 other issues -- I think that's the main one, obviously, in this
18 case. And there's some other issues, certainly, the one that I
19 issued earlier about the -- the wording of the settlement
20 agreement and so forth.
21 Anyway, this has been an adventure. This has been a very
22 interesting case. I want to thank you for your cooperation in
23 this matter. This case would have been a lot more difficult
24 absent your cooperation. So I wanted to thank you, all the
25 parties, for that. You've been very civil and that is greatly

1 appreciated. There's -- the Board right now, I've been
2 speaking to my colleagues and they've been handling other big
3 cases -- I'm not going to mention any names or any -- but --
4 but there are some cases that are -- have looming issues --
5 very large, important issues, such as this one, where the -- by
6 all appearances, the litigation's not going to be easy, it's
7 going to be sort of a scorched-earth approach to things and
8 that doesn't make things better or easier.
9 So I appreciate -- again, I appreciate your cooperation in
10 this case. What's made this case tolerable has been the fact
11 that you have been very cooperative and -- and civil. And I
12 really appreciate that. It makes a difference and I should say
13 that, in my experience and I've been doing this for 45 years,
14 it always works better. Whoever thinks that taking a scorched-
15 earth approach to litigation is going to win, either is
16 inexperienced or hasn't been paying attention. I don't think
17 as far as the judge is concerned, it makes much of a
18 difference. If anything, it might create animus and while
19 that's -- it may affect the judgement -- unbiased judgement of
20 those or ones who make decisions, it certainly adds a -- an
21 element that -- that is unpredictable. So again, I -- it's
22 been a pleasurable experience, not so much for the airlines,
23 but in any event, I want to thank you. And the record is
24 hereby closed.
25 MR. BROWN: Thank you.

1 MR. FERRELL: Thank you.
2 MR. PETERSON: Thank you, Your Honor.
3 JUDGE SOTOLONGO: All right.
4 **(Whereupon, the hearing in the above-entitled matter was closed**
5 **at 1:43 p.m.)**
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1 **C E R T I F I C A T I O N**

2 This is to certify that the attached proceedings before the
3 National Labor Relations Board (NLRB), Region 20, Case Numbers
4 01-CA-263079, et al., Whole Foods Market Services, Inc. and
5 Savannah Lynn Kinzer, Suverino Frith, Leea Mary Kelly, Ana
6 Belen Del Rio Ramirez, Camille Tucker-Tolbert, Truman Read,
7 Abdulai Barry, Haley Ashley Evans, Cassidy Visco, Justine
8 O'Neill, Sarita Wilson, Lyla Marcella Styles, Yuri London,
9 Christopher Michno, Kirby Burt, and Kaeleb Rae Candrill, held
10 at the National Labor Relations Board, Ronald V. Dellums
11 Federal Building, 1301 Clay Street, 2nd Floor, Conference Room
12 H, Oakland, California 94612, on August 16, 2022, at 9:00 a.m.
13 was held according to the record, and that this is the
14 original, complete, and true and accurate transcript that has
15 been compared to the reporting or recording, accomplished at
16 the hearing, that the exhibit files have been checked for
17 completeness and no exhibits received in evidence or in the
18 rejected exhibit files are missing.
19
20
21
22 Amanda Self
AMANDA SELF
23
Official Reporter
24
25