IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 21–1256

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

Appellees,

v.

PORT AUTHORITY OF ALLEGHENY COUNTY,

Appellant.

BRIEF FOR APPELLANT AND APPENDIX VOLUME I

Appeal from the United States District Court
for the Western District of Pennsylvania
Civil Action No. 2:20–cv–01471–NR

Gregory J. Krock
Pa. I.D. No. 78308

McGUIREWOODS LLP
Tower Two–Sixty
260 Forbes Avenue, 18th Floor
Pittsburgh, PA 15222–3142
(412) 667–6042

Brian P. Gabriel
Pa. I.D. No. 73132

CAMPBELL DURRANT, P.C.
535 Smithfield Street
Suite 700
Pittsburgh, PA 15222
(412) 395–1267

Counsel for Appellant Port Authority of Allegheny County

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STATEMENT OF JURISDICTION

Appellees (collectively, "Local 85") filed suit in the United States District Court for the Western District of Pennsylvania (the "Trial Court") under 42 U.S.C. § 1983. Local 85 alleged that the employee uniform policies implemented by Appellant Port Authority of Allegheny County ("Port Authority") violate the First Amendment of the U.S. Constitution.

On January 19, 2021, the Trial Court granted Local 85's motion for preliminary injunction and enjoined Port Authority from enforcing the policies in certain respects. Port Authority filed a timely notice of appeal on February 10, 2021 in accordance with 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Can Port Authority lawfully engage in viewpoint discrimination in the employment context, and thereby permit its uniformed employees to wear face masks or coverings ("facemasks") containing certain political and social protest messages while simultaneously prohibiting facemasks containing other political or social protest messages (including messages involving similar subject matter from a divergent viewpoint)?

> Raised: Raised in the Pre–Hearing Brief in Opposition to Motion for Preliminary Injunction, the closing argument during the injunction hearing, and Post–Hearing Brief in Opposition to Motion for Preliminary Injunction. *See* Appendix ("App.") at 174–76, 628–33, 709–12.

Ruled Upon: Erroneously ruled upon in the affirmative in the Opinion. App. at 37–39, 46–47.

2. Does Port Authority's interest in providing safe and welcoming transit services — by preventing (1) its captive customers from being exposed to political and social protest messages, (2) disruption with customers, and (3) disruption among employees — outweigh its uniformed employees' interest in engaging in social protest speech while on duty?

Raised: Raised in the Pre–Hearing Brief in Opposition to Motion for Preliminary Injunction, closing argument during the injunction hearing, and Post–Hearing Brief in Opposition to Motion for Preliminary Injunction. App. at 169–80, 634–40, 709–12.

Ruled Upon: Erroneously ruled upon in the negative in the Opinion. App. at 28–48.

3. Are Port Authority's uniform policies simultaneously underinclusive (by failing to address other forms of expression, such as verbal statements or social media posts) and overbroad (by failing to permit political and social protest speech in situations in which the risk of disruption is lessened)?

Raised: Raised in the Pre–Hearing Brief in Opposition to Motion for Preliminary Injunction. *See* App. at 173–74.

Ruled Upon: Erroneously ruled upon in the affirmative in the Opinion. App. at 39–41.

STATEMENT OF RELATED CASES AND PROCEEDINGS

In accordance with Third Circuit Rule 28.1(a)(2), Port Authority states that (1) this proceeding has not previously been before the Third Circuit and (2) Port Authority is unaware of any other case or proceeding that is in any way related, completed, pending, or about to be presented to this Court.

STATEMENT OF THE CASE

Local 85 is an unincorporated voluntary labor organization that is the certified exclusive labor representative of certain types of Port Authority employees. App. at 244–45. In particular, Local 85 represents two separate bargaining units of Port Authority employees: (1) individuals who operate and maintain Port Authority vehicles and facilities; and (2) first line transportation supervisors, dispatchers, route foremen, and instructors. *Id.* at 244–45, 520–21. Appellees James Hanna ("Hanna"), Sasha Craig ("Craig"), and Monika Wheeler are members of Local 85.

A. The Former Uniform Policies

In the 1970's, Port Authority suspended several employees for wearing pins on their uniforms to protest the jailing of a prominent activist accused of bank robbery. *Id.* at 534–35. Local 85 successfully challenged the suspensions on the basis that the then–existing uniform policies did not prohibit the pins. *Id.* Because the arbitration panel instructed that Port Authority could lawfully prohibit such pins, Port Authority amended its uniform policies as part of the arbitration award (with the panel's approval). *Id.*

Effective February 1, 1972, Port Authority implemented new uniform policies to address the clothing that operators and first line supervisors could wear on duty. *Id.* at 535.[1] The Former Uniform Policies both stated: "Buttons and stickers of a political or social protest nature are not to be worn." *Id.* at 535, 683.

B. A Global Pandemic Required Port Authority Employees to Wear Facemasks While on Duty

In March 2020, a global pandemic arose involving the novel coronavirus now commonly known as COVID–19. *Id.* at 536. While public health experts advised that individuals could wear facemasks to help prevent the spread of COVID–19, a shortage of masks existed at the pandemic's outset. *Id.* at 536–39. On April 15, 2020, the Pennsylvania Secretary of Health issued an order requiring certain individuals to wear facemasks. *Id.* at 537. Port Authority began requiring its employees to wear facemasks to comply with the order. *Id.*

While Port Authority intended to provide facemasks to all employees, the shortage in supply prevented Port Authority from procuring sufficient quantities to do so. *Id.* at 539. Employees initially wore a mix of surgical–style masks that Port Authority obtained in limited quantities, cloth masks that Port Authority manufactured by temporarily repurposing its Upholstery Shop (which ordinarily repaired cloth vehicle seats), and masks that employees obtained or made on their

[1] For ease of reference, these two policies are collectively identified as the "Former Uniform Policies."

own. *Id.* at 537–39. At that time, Port Authority did not contemplate that employees might wear facemasks with logos or messages. *Id.* at 541–42.

Because of the pandemic, ridership on Port Authority vehicles plummeted by upwards of 70% during the summer of 2020. *Id.* at 522. Port Authority temporarily utilized physical barriers (from April through June 2020) to prevent customers from entering the vehicles through the front door and otherwise congregating in the front of the vehicles near the operator. *Id.* at 522–23. In addition, Port Authority imposed passenger limits ranging from 10 to 20 customers during those summer months. *Id.*

C. Social Protests Involving Racial Injustice

In May 2020, an African American by the name of George Floyd died in Minnesota after being handcuffed and pinned to the ground by a Caucasian police officer. *Id.* at 54, 103. The incident lead to widespread social protests throughout the United States. *Id.* One such social protest occurred in Allegheny County in downtown Pittsburgh on May 30, 2020. *Id.* at 166, 710. The protest turned violent, resulting in injuries to media personnel, pedestrians, and police officers. *Id.* at 166. The protest also resulted in extensive property damage, vandalism, and looting of downtown businesses. *Id.* The media reported that police arrested more than 40 individuals, and the city issued an overnight curfew. *Id.*

The social protests continued throughout the fall. In fact, a protest over the Labor Day weekend in downtown Pittsburgh made news across the nation. *Id.* at

166, 710. Videos depicting anti–racism protestors confronting patrons at Pittsburgh restaurants went viral on the internet. *Id.* at 166. The Pittsburgh Post–Gazette described the protest, and then–President Donald Trump's reaction to the resulting civil unrest, in an article entitled "Trump Calls Protestors Who Confronted Pittsburgh Diners 'Thugs!'" *Id.*

D. The Amendment to the Former Uniform Policies

On July 15, 2020, Port Authority learned that an employee had complained that a colleague was wearing a Black Lives Matter facemask in violation of the Former Uniform Policies. *Id.* at 542–44. The offended employee questioned how Port Authority would react if he were to wear a White Lives Matter facemask. *Id.* In response, Port Authority updated the Former Uniform Policies to clarify that the prohibition on political or social protect messages applied to facemasks as well as pins and buttons. *Id.* at 546–48, 675–84. These revisions took effect within approximately one week of receiving the complaint, on July 23, 2020. *Id.* at 548.

Port Authority quickly addressed the situation because several racial incidents had occurred among Port Authority employees in the past. In particular:

- In 2019, Port Authority suspended two Caucasian employees for their comments to a Black employee. At that time, a high–profile trial was underway involving a Pittsburgh police officer who fatally shot a Black teenager. The Caucasian employees allegedly referenced the need to "go out for target practice" and made gestures in which they fired "finger guns."
- Within the last few years, Port Authority terminated a Black

employee for brandishing a knife during a dispute with a Caucasian employee. In his grievance, the Black employee asserted racial discrimination because Port Authority terminated him but not the Caucasian employee.

- In 2007, Port Authority found a noose hanging in a facility after a dispute had arisen between Black and Caucasian employees running for the same union representative position within Local 85. New media reported the incident, the ensuing discipline, and related lawsuits.

Id. at 547–51.

After Port Authority revised the Former Uniform Policies, several Port Authority employees violated those policies by wearing facemasks containing political or social protests messages. *Id.* at 553–54. A small group of operators wore Black Lives Matter facemasks, an operator wore a Thin Blue Line/Blue Lives Matter facemask, and a transit security officer wore a Trump 2020 facemask. *Id.*

E. Communications Among Port Authority Employees Regarding Political and Social Protest Facemasks

During July 2020, Port Authority employees communicated via text message and social media regarding the social protest activities, including Black Lives Matter facemasks. *Id.* at 686–97. The national Amalgamated Transit Union sent a text message on July 16, 2020 announcing its support of "Strike for Black Lives," a protest movement endorsed by racial and social justice organizations calling for nationwide rallies and walkouts on July 20, 2020. *Id.* at 693. A debate ensued about the Black Lives Matter movement, with one individual stating "I was taught that all

lives matter." *Id.* at 694. Another individual responded "then you should have no problem supporting this so that u show black lives matter like all lives matter." *Id.* After some back–and–forth, one individual stated: "This is a joke. No way should this union or any other union should be getting political or aligning themselves with a side. Shame on you." *Id.* at 696.

A separate text message authored by Appellee Craig reveals that social protest facemasks created tension among Port Authority employees. *Id.* at 686–90. Craig stated:

> **Norine Smith** I thought for a minute how to answer your post and the ONLY way is to do it HONESTLY! Our members have been wearing BLM masks ever since the COVID–19 set foot upon Port Authority property! Although BLM ISN'T a POLITICAL statement, some of OUR MEMBERS questioned, mocked and/or feared what it represented! BLM is in fact HOW some of OUR MEMBERS LIVE EVERY DAY! Devin Veyda, a West Mifflin Serviceperson, is the ATU Member who took exception to the wearing of the BLM masks! He has consistently posted controversial racially insensitive subject matter on here. He actually sought out membership on Local 85 Roundtable to get attention. Well you have EVERYONE'S attention NOW!! Unfortunately, Devin has informed me that there are OTHER ATU members at West Mifflin garage who share his views! That is so sad. Brother Veyda called the President of Local 85 and threatened to wear a White Lives Matter (WLM) mask if BLM masks are permitted. Once again, ALL LIVES MATTER! If a member chooses to respectfully wear a mask that highlights a cause, then what's the problem? Blue Lives Matter! White Lives Matter! Black Lives Matter! My Life Matters! Your Life Matters! To have to STILL cry this in 2020 is sad. BUT IT'S NECESSARY! The West Mifflin DSD sadly isn't equipped to handle the situation and deferred to 'Legal'! **Stephen Palonis** is also lacking as a LEADER and caved to a 'bratty' child! I DON'T have the authority to tell you to wear the BLM mask, but I can say with certainty; if enough members who BELIEVE that

BLM wear that mask, the company WON'T send you ALL home!!!

Id. The tension was sufficiently severe that Craig banned one Port Authority employee from participating in the forum. *Id.* at 407–08.

In an e–mail to union leadership in July 2020, Appellee Hanna recognized this tension when he stated: "As a black man and an Executive Board Member I'm totally aware of the situation with employees complaining about statements on the mask." *Id.* at 685. Hanna copied Kenneth Day, the President of the International Black Caucus of the International ATU on his e–mail. *Id.* In response, Mr. Day encouraged Hanna to wear his Black Lives Matter the minute he left work. *Id.* However, Mr. Day ***did not*** support Hanna's desire to wear the masks while on duty, questioning what would happen if "another worker wanted to wear a mask saying Black Lives AIN'T Nothing." *Id.*

F. Port Authority's Explanation for Its Facemask Policies

In September 2020, certain Port Authority employees congregated outside of its corporate office to protest prohibition on wearing Black Lives Matter facemasks. *Id.* at 662. Port Authority Chief Executive Officer, Katharine Kelleman ("Kelleman"), sent a message to Port Authority employees the following day explaining its reasons for the prohibition. *Id.* at 662–64.

Kelleman emphasized that Port Authority did not amend the policies to target the Black Lives Matter movement. *Id.* at 662–63. Kelleman explained that, in order

to remain "viewpoint neutral," Port Authority could not allow employees to wear facemasks containing some (but not other) political and social protest messages:

> While private businesses have the ability to permit employees to display certain messages while preventing other employees from displaying other messages, federal law prohibits public agencies like Port Authority from doing the same. If Port Authority allows uniforms to be used as a message board for some political or social protest topics, we must then allow all messages on that topic, including those that could disrupt Port Authority's ability to deliver public transit services in a safe and efficient manner and not cause harm to our employees, customers and communities. In legal terms, our policy is viewpoint neutral and simply aims to keep our transit system from being disrupted unnecessarily.
>
> The face coverings of our drivers should not be a barrier to using public transit, and customers should not be made to feel uncomfortable or unsafe because the personal message on the face covering of our drivers is in conflict with their own beliefs our ideologies, particularly in a time of significant political and social polarization in our country.
>
> * * *
>
> If we allow one employee to wear a BLM facemask, then we have to allow all other messages on political and social justice topics. We've also counseled and directed our employees to not wear masks with other political or social justice–type messages on them. This is not the experience we want in the workplace between co–workers and for our customers.

Id. at 663–64.

G. The Current Uniform Policies

When it secured a sufficient supply of facemasks from its uniform vendor, Port Authority further revised its uniform policies. *Id.* at 528–29. Port Authority's new policies for its operators and first line supervisors (the "Current Uniform

Policies") took effect on September 27, 2020. *Id.* at 675–84.

Under the Current Uniform Policies, employees must wear one of the following facemasks: (1) a solid black or navy mask (or gaiter style face covering), either provided by Port Authority or acquired on their own; (2) a black or navy mask provided by Port Authority containing the Port Authority logo; (3) a Port Authority–approved mask provided by Local 85 containing the Local 85 logo; or (4) an N–95 mask, KN–95 mask, or clear face shield as long as the mask (or face shield band) is solid white, black, or blue. *Id.* at 668–69, 672–73. Employees may not wear a facemask or containing any other logo, text, or image. *Id.*

H. <u>The Preliminary Injunction Motion</u>

Local 85 commenced this lawsuit in September 2020 on the basis that the Former Uniform Policies violated the First Amendment by prohibiting political and social protest messages. *Id.* at 51–90. In addition, Local 85 moved for a preliminary injunction to prevent Port Authority from (1) enforcing the Former Uniform Policies and (2) prohibiting on–duty employees from wearing Black Lives Matter facemasks. *Id.* at 91–99. After Port Authority filed a motion to dismiss, Local 85 filed a First Amended Complaint to allege that the Current Uniform Policies violate the First Amendment. *Id.* at 100–47.

The Trial Court conducted a two–day preliminary injunction hearing. Local 85 called 14 union members to testify, 10 of whom have worked at Port Authority

for at least twenty years. In general, these employees testified that they have observed repeated violations of the Former and Current Uniform Policies over the years that went unpunished.[2]

Port Authority relied upon the testimony of its Chief Legal Officer, Michael J. Cetra ("Cetra"). Cetra explained the reasons that Port Authority anticipated that political and social protest messages on employee facemasks would cause tension and disruption among employees and customers. *Id.* at 547–52, 578–79. Cetra stated: "We are not a private entity. We can't say okay, Black Lives Matter is an appropriate message and then discriminate against other viewpoints. So we have to be viewpoint neutral, and that's the purpose of what we're doing here." *Id.* at 569.

I. The Injunction Order and Opinion

On January 19, 2021, the Trial Court granted the preliminary injunction in part.[3] *Id.* at 3. The Trial Court did not enjoin Port Authority from enforcing the Current Uniform Policies in their entirety. Instead, the Trial Court enjoined Port Authority from prohibiting employees from wearing the Black Lives Matter facemasks identified during the injunction hearing (as well as any masks with

[2] The supervisors who testified admitted that, as member of the same union, they would never report other employees' uniform violations to Port Authority's senior management. *Id.* at 316–17, 384–85.

[3] The Trial Court entered an Amended Order Granting Motion for Preliminary Injunction (the "Order") the following day to address the bond that Local 85 was required to post. *Id.* at 4–5.

"substantially the same words or messages"). *Id.* at 4.

In its Opinion, the Trial Court concluded that — because riders did not complain, and employee conflicts did not erupt at work, during the few months when employees occasionally wore Black Lives Matter facemasks — Port Authority's concerns of disruption were unreasonable. *Id.* at 34–35. Importantly, the Trial Court only considered the potential for disruption caused by Black Lives Matter facemasks. *Id.* at 37–38. The Trial Court rejected Port Authority's contention that, if it allowed employees to wear facemasks with certain political and social protest messages, the First Amendment would require it to allow employees to wear facemasks with other such messages. *Id.* at 46–47. The Trial Court also suggested that Port Authority eliminate its uniform policies altogether, wait until a particular facemask caused disruption, and then punish the employee who wore the disruptive facemask. *Id.* at 47.

SUMMARY OF THE ARGUMENT

Port Authority has long prohibited its uniformed employees from wearing political or social protest pins or buttons on their uniform while on duty. The global pandemic that erupted in March 2020 required Port Authority employees to wear facemasks to combat the COVID–19 virus. In July 2020, an employee expressed discomfort that a colleague had worn a Back Lives Matter facemask while on duty (and questioned Port Authority's reaction if he had worn a White Lives Matter

facemask). Port Authority promptly implemented a series of amendments to its uniform policies to clarify that employees cannot wear facemasks with messages of their choosing, including political and social protest messages.

The Trial Court enjoined Port Authority from prohibiting employees from wearing Black Lives Matter facemasks. In particular, the Trial Court found that the employees' desire to support the Black Lives Matter social protest — while on duty and in uniform — outweighs Port Authority's interests in preventing on–duty employees from engaging in political and social protest speech. The Trial Court rejected the contention that, if Port Authority allows on–duty employees to wear Black Lives Matter facemasks, then it must allow employees to wear facemasks with other political or social protest messages. In effect, the Trial Court suggested that Port Authority can permit non–controversial facemasks that are less likely to cause disruption, but prohibit controversial facemasks on the same topics that are more likely to cause disruption. The Trial Court's ruling turns First Amendment law involving viewpoint discrimination on its head.

Contrary to the Trial Court's suggestion, Port Authority cannot lawfully engage in viewpoint discrimination. Port Authority cannot permit employees to wear some political or social protest facemasks (like Black Lives Matter) but simultaneously prevent employees from wearing other political and social protest facemasks (like White Lives Matter, Proud Boys, or the Confederate flag).

Accordingly, the Trial Court erred by refusing to consider the likely tension and disruption that would result from ***all*** political and social protest facemasks, and limiting its analysis to Black Lives Matter facemasks.

Furthermore, Port Authority's interest in preventing on–duty employees from wearing Black Lives Matter facemasks far outweighs the employees' interest in wearing them. The U.S. Supreme Court has recognized that transit agencies possess a significant interest in preventing their captive customers, who ride the vehicles as a matter of necessity, from exposure to political and social messages. In addition, it is important that Port Authority's operator maintain a neutral appearance so that customers feel comfortable approaching the operator to raise questions or problems that may arise in transit. Unfortunately, Black Lives Matter protests in the summer of 2020 resulted in hostility, violence, and vandalism in Pittsburgh. Social media messages and posts revealed that the Black Lives Matter facemasks caused tension among Port Authority employees.

While the Trial Court correctly noted that the tension had not yet resulted in violence on Port Authority property, Port Authority has a legitimate reason to believe that allowing employees to wear social protest facemasks will result in hostilities and disruption as ridership levels return to normal. Proactively preventing such disruption warrants a limited restriction on Port Authority employees' right to

engage in social protest activities while on duty. Employees are free to engage in any social protest speech or activity of their choice once they leave work.

STANDARD OF REVIEW

Appellate courts conduct a *de novo* review of a government employer's right to restrict employee speech under the First Amendment. *Johnson v. Indep. Sch. Dist. No. 3 of Tulsa Cty., Okl.*, 891 F.2d 1485, 1489 (10th Cir. 1989) ("A court always reviews *de novo* the *Pickering* determination of whether the employee's interests in making statements are outweighed by the state's interests as employer."); *see Gillis v. Miller*, 845 F.3d 677, 684 (6th Cir. 2017) (same). The appellate court must examine the entire record, and not just the portions cited in the trial court's opinion. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (noting that appellate courts have an "obligation to make an independent examination of the whole record" in First Amendment cases) (internal quotation and citation omitted); *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 184 (5th Cir. 2005).

The issues that Port Authority raises on appeal involve its First Amendment right to prevent its on–duty employees from using their uniforms to engage in social protest activities. Accordingly, all issues are subject to *de novo* review.

ARGUMENT

A. Government Agencies Can Restrict Employee Speech That Is Likely to Interfere With Their Public Services

The U.S. Supreme Court has long held that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). While government employees do not surrender all of their First Amendment rights, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 US. 410, 418 (2006). "[E]ven the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." *Waters v. Churchill*, 511 U.S. 661, 672 (1994).

When assessing a policy prohibiting government employees from speaking as citizens, the court must balance the employee's interest in commenting on matters of public concern with the government's interest in providing effective public service. *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 556 (W.D. Pa. 2003). If the employee's speech is likely to interfere with the employer's ability to provide effective public service, the employer may prohibit that speech. *See Waters*, 511 U.S. at 680 (county hospital lawfully discharged nurse because "the potential disruptiveness of the speech as reported was enough to outweigh whatever First

Amendment value it might have had"); *Connick v. Myers*, 461 U.S. 138, 154 (1983) ("The limited First Amendment interest involved here does not require that [the district attorney] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.").

1. Government Agencies Need Not Wait Until Their Services are Affected to Prohibit Employee Speech

The possibility that employee speech will interfere with a government entity's services is sufficient to prohibit that speech. As the U.S. Supreme Court has explained:

> Likewise, we have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. . . . But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as a sovereign our review of legislative predictions of harm is considerably less deferential.

Waters, 511 U.S. at 673; *Munroe v. Central Bucks Sch. Dist.*, 806 F.3d 454, 472 (3d Cir. 2015) ("The government need not show the existence of actual disruption if it establishes that disruption is likely to occur because of the speech.").

In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*"), the Supreme Court imposed a higher burden on government employers, under certain circumstances, to demonstrate that employee speech would likely harm

their interests. *Id.* at 468. Federal employees challenged a statute prohibiting them from receiving compensation for off–duty speeches or articles, regardless of the subject matter or audience involved. *Id.* at 457–58. The Court explained:

> With few exceptions, the content of respondents' messages has nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the offices in which they work. They do not address audiences composed of co–workers or supervisors; instead, they write or speak for segments of the general public. Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.

Id. at 465. Under these circumstances, the Court concluded that — when courts assess the validity of a rule prohibiting prospective speech, rather than a disciplinary response to speech that has already occurred — the government employer bears a heightened burden demonstrate that the speech will interfere with its operations. *Id.* at 468–70. The Court explained: "Because the vast majority of the speech at issue in this case does not involve the subject matter of Government employment and takes place outside of the workplace, the Government is unable to justify [the statute] on the grounds of immediate workplace disruption asserted in *Pickering* and the cases that followed it." *Id.* at 470.

In *City of San Diego v. Roe*, 543 U.S. 77 (2004), the U.S. Supreme Court clarified the heightened *NTEU* standard applies if the policy restricts speech outside of the workplace on topics unrelated to the employment. *Id.* at 80–81. The city terminated a police officer for selling adult videos depicting him engaging in

sexually explicit actions while wearing his police uniform. *Id.* at 78–79. In rejecting the officer's contention that the *NTEU* standard applied, the Court did not rely upon the fact that dispute involved a disciplinary decision as opposed to a general policy prohibiting speech. *See id.* at 80–81. The Court instead emphasized that *NTEU* established that, "when government employees speak or write ***on their own time*** on ***topics unrelated to their employment***, the speech can have First Amendment protection, absent some governmental justification 'far stronger than mere speculation' in regulating it." *Id.* at 80 (emphasis added). Although the police officer's speech occurred outside of the workplace, the Court held that — by wearing his uniform and taking other steps to link his videos to his police work — the speech related to his employment. *Id.* at 81. For this reason, the Supreme Court concluded that the "present case falls outside of the protection afforded in *NTEU*." *Id.*

Thereafter, the Ninth Circuit addressed a similar situation in which a city terminated a police officer for participating in a sexually explicit website. *Dible v. City of Chandler*, 515 F.3d 919, 922–24 (9th Cir. 2008). The court explained the *NTEU* and *Pickering* standards as follows: "[W]hen a government employee's speech is under consideration, there are two paths of analysis, depending upon whether the speech is related or unrelated to the person's employment." *Id.* at 925. In light of *Roe*, the Ninth Circuit recognized that the speech must occur outside of the workplace and be unrelated to the employment relationship in order to invoke

the *NTEU* standard. *Id.; see also Medici v. City of Chicago*, 144 F. Supp. 3d 984, 989 (N.D. Ill. 2015) (refusing to apply the *NTEU* standard, even though the police officers brought a facial challenge to preclude future enforcement, because policy requiring them to cover their tattoos while on duty only regulated on–duty speech and did not prohibit speech outside of workplace), *vacated on other grounds*, 856 F.3d 530, 533 (7th Cir. 2017).

Admittedly, certain courts have suggested that (1) the *Pickering* standard applies to as–applied challenges to discipline imposed after employees speak and (2) the *NTEU* standard applies to facial challenges to policies that prohibit prospective speech. However, those courts — as well as this Court — have correctly applied *NTEU* to impose the heightened standard only if the prohibition restricts speech outside of the workplace about topics unrelated to the employment relationship. *Lodge No 5 of Fraternal Order of Police ex rel. McNesby v. City of Philadelphia*, 763 F.3d 358, 368–69 (3d Cir. 2014) (applying the *NTEU* standard in assessing the constitutionality of a policy prohibiting police officers from contributing to a political action committee); *Swartzwelder v. McNeilly*, 297 F.3d 228, 235–36 (3d Cir. 2002) (applying the *NTEU* standard to a policy requiring police officers to obtain prior authorization before providing expert testimony outside of the workplace). Research has not uncovered a single case in which any court has applied the *NTEU* standard to a policy that regulates employees' on–duty speech. Instead,

courts have applied *Pickering's* increased deference to the employer's reasonable concerns about potential disruption caused by on–duty speech.

This deference makes sense. By virtue of its occurrence at the workplace, on–duty speech is virtually certain to have some impact on the government's services. It makes sense to defer to the government agency to determine whether that impact is likely to cause disruption among the agency's customers, vendors, employees, or the public. However, off–duty speech has a far more limited ability to affect the government's operations. Common sense dictates that the government employer should have a greater burden to establish that off–duty speech will adversely affect its operations.

2. Courts Have Repeatedly Upheld Policies Prohibiting On–Duty Employees From Conveying Messages on Their Uniforms

Courts have consistently upheld uniform policies that prohibit government employees from utilizing their uniforms to convey messages of their choosing. For example, in *Risk v. Burgettstown Borough, Pa.*, Civil Action No. 05–1068, 2007 WL 2782315 (W.D. Pa. Sept. 21, 2007), the Trial Court held that a borough did not violate a police officer's First Amendment rights by prohibiting him wearing religious jewelry or pins on his uniform. *Id.* at *2. The court noted that the police officer's uniform was not a forum for expressing his own personal beliefs. *Id.* (granting summary judgment because the "restriction on his speech is precisely the type of restraint that may be constitutionally imposed by a government on its

employees."); *see also U.S. Dep't of Justice v. FLRA*, 955 F.2d 998, 1005–06 (5th Cir. 1992) (prohibiting border agents from wearing union pins on their uniforms did not violate their constitutional rights).

The Fifth Circuit's ruling in *Communications Workers of America v. Ector County Hospital District*, 467 F.3d 427 (5th Cir. 2006), is directly on point. In that case, the court ruled as a matter of law that a county hospital lawfully prohibited a nurse from wearing a pro–union pin on her uniform. *Id.* at 437–41. The court noted that the policy imposed a minimal restriction because it only prohibited employee speech while on duty. *Id.* at 437–38. In contrast, the policy advanced the employer's significant interest in avoiding tension among employees and patrons:

> There is no reason to believe that a uniform requirement will not have somewhat similar efficiency enhancing effects in the non–law enforcement context, as is clearly attested by the presence of uniforms in so many non–law enforcement occupations, e.g., postal employees, bus drivers, flight attendants, United Parcel Service personnel and a host of others. . .
>
> Moreover, we agree . . . that "[t]o allow employees to adorn their uniforms with objects of their own choosing undermines the very purpose that uniforms serve." If each employee "uniform" were to be festooned with whatever button or buttons the wearing employee desired, it would obviously no longer be a "uniform" in any meaningful sense.
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> * * *
>
> A strong argument can be made that governmental employer genuine and essentially neutral uniform anti–adornment policies, administered without discrimination, applicable only to employees while on duty, will of themselves almost always pass *Pickering* balancing, as they concern what is essentially a part of the employees' normal job

> performance for the employer and at the same time result in only the most minimal intrusion into employee free speech rights, leaving full scope for employee expression on any subject.

Id. at 440–42 (internal citations omitted).

In *American Federation of Government Employees, AFL–CIO v Pierce*, 586 F. Supp. 1559 (D.D.C. 1984), the court held that government employers can similarly prohibit non–uniformed employees from wearing political buttons while on duty. *Id.* at 1562–63. Because the policy applied to all employees, including those who admittedly had no outside contact with customers or vendors, the court concluded that it was overbroad under the applicable regulation issued by the Civil Service Commission. *Id.* at 1561. However, the court stayed the injunction so that the employer could narrow its policy to apply only to those employees who would likely have contact with customers and/or the public. *Id.* at 1562–63.[4]

B. The Trial Court Improperly Suggested That Port Authority Engage in Viewpoint Discrimination By Permitting Some, But Not All, Facemasks Containing Political and Social Protest Messages

Port Authority repeatedly advised the Trial Court that — if Port Authority allows employees to wear Black Lives Matter facemasks — it must allow them to

[4] In *Scott v. Goodman*, 961 F. Supp. 424 (E.D.N.Y. 1997), a court denied a transit agency's motion for summary judgment on the basis that its uniform policy was overbroad. *Id.* at 427–48. However, the court emphasized that the "only interest posited by the TA to justify such a ban is its asserted need for strict uniformity in the appearance of TA employees." *Id.* at 427. Because the transit agency did not adduce any evidence of potential disruption, the trial court concluded that its desire for a "pristine uniform" was insufficient to support its policy. *Id.*

wear facemasks containing other political or social protest messages. For example, employees might wear facemasks stating White Lives Matter, depicting the Confederate flag, or conveying an anti–abortion message. Port Authority relied upon the potential for disruption caused by all such facemasks, and not merely Black Lives Matter facemasks, as the basis for its decision.

The Trial Court disagreed. It concluded that Port Authority could (1) permit non–controversial facemasks that are unlikely to cause disruption and (2) prohibit controversial facemasks on the same topics that are more likely to cause disruption. In other words, the Trial Court concluded that Port Authority could engage in viewpoint discrimination. The Trial Court justified its conclusion by stating "there is nothing in *NTEU*, *Pickering*, or any other precedential case from the Supreme Court or Third Circuit that forbids content or viewpoint–based discipline in the context of public employment." App. at 46–47. In denying Port Authority's motion to stay the injunction pending appeal, the Trial Court confirmed that it considered only the potential for disruption caused by Black Lives Matter facemasks and not facemasks conveying other political or social protest messages:

> Port Authority's arguments for a stay largely skirt the central issue in this case — whether it has established actual or likely disruption ***associated with employees wearing "Black Lives Matter" masks***. Instead, Port Authority cobbles together ***concepts from outside the public employment context (e.g., viewpoint discrimination***, "Heckler's Veto," forum analysis, advertising speech).

Id. at 740 (emphasis added).

Respectfully, the Trial Court is wrong. First, the U.S. Supreme Court has prohibited viewpoint discrimination in the context of public employment. *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin*, 429 U.S. 167, 175–76 (1976). In *Madison*, a teacher spoke at a school board meeting to convey her belief that the union contract the board was negotiating should not include a "fair share" provision. *Id.* at 171–72.[5] The union accused the school board of unfair labor negotiations by allowing the teacher to speak, and the court ordered the school to prohibit teachers from speaking at board meetings on issues that were the subject of the collective bargaining negotiations. *Id.* at 172–73. In reversing, the U.S. Supreme Court concluded that the school could not prevent its employees from speaking at future meetings because doing so would constitute unlawful viewpoint discrimination. *Id.* at 175–76.

Second, courts have repeatedly held that a government's restriction on employee speech must be viewpoint neutral. For example, in *Buttaro v. City of New York*, No. 15 CV 7703, 2016 WL 4926179 (E.D.N.Y. Sept. 15, 2016), the court dismissed an employee's claim that the city's uniform policy violated the First Amendment by requiring firefighters to wear their uniforms (rather than shirts bearing messages of their choosing) while on duty in the firehouse. *Id.* at *7.

[5] The "fair share" provision would require all teachers to pay union dues to defray the cost of collective bargaining, including teachers who did not join the union. *Id.* at 168.

However, the court concluded that the employee had pleaded a cognizable viewpoint discrimination claim. *Id.* at *10. The court explained that, although "the *Pickering* balancing test discussed above may justify the FDNY's decision to bar firefighters from wearing expressive t–shirts in lieu of department–authorized clothing," the city engaged in unlawful viewpoint discrimination if it allowed firefighters to wear some expressive t–shirts while disallowing other similar t–shirts. *Id.*; *see also Sprague v. Spokane Valley Fire Dep't*, 409 P.3d 160, 176–80 (Wash. 2018) (employer engaged in viewpoint discriminating by prohibiting an employee from using its e–mail system to comment on the same non–business topics, from a religious viewpoint, on which it permitted other employees to comment).

In *Communications Workers*, the Fifth Circuit emphasized the need to remain viewpoint neutral in upholding the hospital's uniform policy. *Communications Workers*, 467 F.3d at 440–42. The Fifth Circuit recognized that, if the hospital allowed the plaintiff to wear a "Union Yes" button on her uniform, the First Amendment would require it to allow employees to wear buttons addressing a wide variety of other political messages:

> But the concerns are not limited to "Union Yes" or "Union No" buttons. Speech on labor related issues may *not* be privileged over speech on other issues of public concern, for to do so would "undercut the 'profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide–open.'" If "Union Yes" — and/or "Union No" — buttons are allowed, so must employees be allowed to wear on their uniforms at work buttons addressing other topics of equal or greater public concern, such as, for example,

> "Abortion is Murder," "No Gay Marriage," "Deport Illegals Now" and the like. Common sense tells us, and the testimony confirms, that this would plainly be deleterious to the Hospital's mission.

Id. at 440–41 (internal citations omitted). While the Third Circuit has not had occasion to issue a similar ruling, other Circuit Courts have confirmed that the viewpoint neutrality (or lack thereof) of the government's restriction on employee speech is an important factor in the *Pickering/NTEU* analysis.[6]

For these reasons, Port Authority correctly recognized that its uniform policies cannot discriminate against employee speech based on its viewpoint. In considering the disruption that might arise from permitting employees to wear Black Lives Matter facemasks, Port Authority was entitled to consider that the potential disruption caused by facemasks containing other political and/or social protest messages that Port Authority would be required to permit — like White Lives Matter or Proud Boys, images of a Swastika or a Confederate flag, or anti–abortion

[6] *See Adams v. Trs. of the Univ. of N. Carolina–Wilmington*, 640 F.3d 550, 560–61 (4th Cir. 2011) (holding that an employee had asserted a cognizable claim for viewpoint discrimination under the *Pickering* test); *Barone v. City of Springfield, Or.*, 902 F.3d 1091, 1106 (9th Cir. 2018) (concluding that *Pickering* balancing favored the employee because the prohibition's "targeted focus on only 'disparaging or negative' speech renders the [prohibition] a posterchild of overt viewpoint discrimination"); *Wolfe v. Barnhart*, 446 F.3d 1096, 1108–09 (10th Cir. 2006) (concluding that *NTEU* balancing favored the employer because "[u]nlike the requirements struck down in those cases, . . . the compensation restriction in 5 C.F.R. § 2635 depends upon a viewpoint–neutral standard"); *Sanjour v. E.P.A.*, 56 F.3d 85, 96–97 (D.C. Cir. 1995) (concluding that *Pickering* balancing favored the employee because the regulation permitted the employer to engage in viewpoint discrimination to restrict only a subset of speech on a particular topic).

messages such as "Unborn Lives Matter."[7] By asserting that Port Authority could engage in viewpoint discrimination to prevent these other messages, the Trial Court committed reversible error.

C. Port Authority's Interests in Ensuring Comfort and Avoiding Disruption Outweigh the Employees' Interest in Engaging in Political and Social Protest Speech While on Duty

Port Authority identified three reasons for prohibiting on–duty employees from wearing facemasks containing political or social protest messages: (1) conveying a position of neutrality so that third parties feel comfortable on Port Authority property; (2) avoiding disruption with customers; and (3) avoiding disruptions among employees. Port Authority provided case law and evidence to support its concern that Black Lives Matter facemasks would likely result in such discomfort and disruption.

In rejecting each of Port Authority's reasons, the Trial Court replied upon the fact that arguments did not erupt on Port Authority property during the few months in which employees wore Black Lives Matter facemasks. The Trial Court erred in relying so heavily on this limited time period involving limited locations, at a time

[7] It is particularly telling that Mr. Day, the President of the International Black Caucus of the International ATU, recognized that — if Port Authority allowed employees to wear Black Lives Matter facemasks while on duty — it would have to allow employees to wear other facemasks with contrary messages on race–related issues. App. at 685. Mr. Day appreciated that Port Authority's uniform policies are lawful.

when Port Authority ridership was significantly reduced and social distancing protocols between customers and employees (as well as among employees) were in place, despite the considerable evidence regarding the extensive disruption arising from ongoing social protest activities in the community.

1. Port Authority Has a Significant Interest in Protecting Its Customers From Political and Social Protest Messages

Among the reasons for prohibiting employees from engaging in political or social protest activities while on duty, Cetra testified that "[w]e want everyone to feel welcome on our system." *Id.* at 579. The Trial Court ignored this significant interest.

The U.S. Supreme Court has long recognized that passengers on transit vehicles are unique in that they constitute a captive audience. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) ("The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.") (internal quotation omitted). For this reason, the Supreme Court permits transit agencies to prohibit political advertisements inside their vehicles. *Id.* at 304 (upholding prohibition of political advertisements to avoid imposing the "blare of political propaganda" upon captive customers); *see also Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 368 (D.C. Cir. 2018) (transit agencies can ban political advertising in its vehicles); *Lebron v. Nat'l R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650, 658 (2d Cir. 1995) (same).

Importantly, these courts did not require transit companies to demonstrate that customers had complained about political or social advertisements in order to justify their prohibition. *Id.* For similar reasons, the *Communications Workers* court held that the captive nature of hospital patients and their family members made it reasonable for the hospital to prevent on–duty staff members from wearing political buttons on their uniforms:

> Moreover, the Hospital's patients — and their families — are in the nature of a captive, and essentially involuntary, audience with respect to whatever message is conveyed by buttons on the uniforms of on–duty Hospital Employees. It is reasonable for the Hospital to conclude that its service to patients and their families is enhanced by not being involuntarily subjected to having messages on matters of public concern indiscriminately conveyed to them on the uniforms worn by on duty Hospital employees.

Communications Workers, 467 F.3d at 441.

Here, Port Authority's riders constitute captive customers. Cetra testified that considerable portions of Port Authority's ridership include disabled, elderly, lower income, and student populations who have no choice but utilize public transportation. In fact, one of Local 85's leaders outright admitted operators want to wear Black Lives Matter facemasks while on duty because it enables them to expose many people to their social protest message. App. at 270–71. Courts have repeatedly recognized that it is reasonable to believe that a portion of a transit agency's captive customers will be uncomfortable being exposed to a variety of such political and social justice messages.

a. The Trial Court Incorrectly Implied That Port Authority Customers are "Hecklers"

Rather than recognize the unique nature of Port Authority customers, the Trial Court cited cases involving the "heckler's veto" for the proposition that threatened disruption by others as a result of speech may not serve as a justification for Port Authority's uniform policies. *Id.* at 38. The implication that Port Authority customers are akin to "hecklers," such that their reaction to employee facemasks is irrelevant, is misguided.

In *Munroe*, this Court rejected a public teacher's contention that the trial court had impermissibly considered the expected reaction of the school's students and parents to the teacher's comments as part of the *Pickering* balancing. *Munroe*, 805 F.3d at 475–76. The Third Circuit acknowledged that the First Amendment prohibits the "heckler's veto" in which the government disallows unpopular speech to avoid the community's hostile reaction to that speech. *Id.* at 475. However, the Third Circuit emphasized that — in disputes involving a public employee's speech — the public employer's customers are not "hecklers." *Id.* ("Simply put, neither parents nor students could be considered as outsiders seeking to 'heckle' an educator into silence").

The Third Circuit is not alone in this regard. Other Circuit Courts have consistently noted that the concept of a heckler's veto does not apply in the context of a government employee's speech. *Bennett v. Metro. Gov't of Nashville &*

Davidson Cty., Tenn., 977 F.3d 530, 544 (6th Cir. 2020) ("The public — as the consumers of [the county's] services — and Bennett's colleagues with whom she must work collaboratively can hardly be said to be a 'hostile mob.'"); *Dible*, 515 F.3d at 928–29 ("Worries about a heckler's veto have generally dealt with the restriction of a citizen's speech based upon the anticipated disorderly reaction by members of an audience. Those worries do not directly relate to the wholly separate area of employee activities that affect the public's view of a governmental agency in a negative fashion, and, thereby, affect the agency's mission.") (internal citation omitted).

b. The Trial Court Incorrectly Ruled That Port Authority Can Only Prohibit Employee Speech to Prevent Physical Harm and Not Emotional Discomfort

Despite U.S. Supreme Court precedent that transit agencies can prevent their captive customers from exposure to political or social messages, the Trial Court held the exact opposite. The Trial Court concluded that transit agency employees have a First Amendment right to convey their individual political and social protest messages to their employer's captive customers. In fact, the Trial Court stated: "To hold otherwise would run contrary to the entire premise of the First Amendment, which is that disagreement and debate are not evils to be feared or purged, but societal goods to be welcomed and nurtured." App. at 38.

Unfortunately, the law upon which the Trial Court relied involved debate and

disagreement in a ***public forum***. While the First Amendment encourages robust debate and disagreement in the public arena, it does not require Port Authority to allow its vehicles — or the uniformed employees that Port Authority pays to drive and maintain those vehicles — to become public fora for political and social protest debate. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 809–11 (1985) ("Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate and free exchange of ideas."). The law is clear that Port Authority does not have to allow employees to take advantage of its captive customers by exposing them to political or social protest messages.

The Trial Court quoted an article entitled "The Coddling of the American Mind" to criticize a "culture that allows the concept of 'safety' to creep so far that it equates emotional discomfort with physical danger." App. at 39. This quotation crystalizes the Trial Court's erroneous assessment of the government employer's interests in general, and a transit agency's interests in particular. The quotation suggests that only evidence of "danger" to Port Authority customer and employees could establish potential disruption. In its role as an employer, however, Port Authority can lawfully prohibit employee speech that is likely to cause its customers and employees to feel "emotional discomfort." The First Amendment does not require Port Authority to allow its customers or employees to feel "emotional

discomfort" on its property or to allow employees to wear political and social justice messages that drive away new customers.

In denying Port Authority's motion to stay the injunction pending appeal, the Trial Court addressed *Lehman* for the very first time. *Id.* at 744. The Trial Court suggested that a rider's exposure to an operator's facemask would likely be more limited than exposure to an advertisement inside the vehicle. *Id.* at 745. However, as the Trial Court has conceded, the operator is "typically the only [Port Authority] employee on board." *Id.* at 23 (at ¶ 33). The operator is therefore an authority figure on the vehicle, the proverbial "captain of the ship," with sole control and responsibility for the customers' safety and comfort. If questions, problems, or issues arise, it is critical that the customers (1) feel comfortable approaching the operator for assistance and (2) believe that the operator will treat them fairly. Accordingly, the need for Port Authority operators to appear neutral — and refrain from advancing positions on political or social protest issues while on duty — is much ***greater*** than the need to preclude advertising inside the vehicle. *See Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 504 (5th Cir. 2001) (employer's interest in maintaining an authority figure's uniform "free from expressions of personal bent or bias" far outweighed the "interest in wearing any non–department related symbol on it"); *Risk* 2007 WL 2782315, at *2 (same).

In short, the U.S. Supreme Court concluded that it is reasonable to shield

captive transit customers from exposure to political or social protest messages. The First Amendment does not require Port Authority to allow its employees — while on duty, and acting as Port Authority's representatives — to thrust their personal messages upon its captive customers.

2. Port Authority Demonstrated That Black Lives Matter Facemasks Were Likely to Cause Disruption with Customers and Among Employees

While a government agency cannot rely upon mere speculation of harm in order to prohibit speech, the U.S. Supreme Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995); *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 143 (3d Cir. 2020) (same). In particular, the U.S. Supreme Court has allowed government agencies to rely upon:

- newspaper articles criticizing lawyer solicitations as a basis for prohibiting attorneys from using direct mail to solicit personal injury or wrongful death clients within 30 days after an accident. *Florida Bar*, 515 U.S. at 627.
- logic and common sense as a basis for prohibiting the solicitation of votes and display of campaign materials within 100 feet of the entry of a polling place. *Burson v. Freeman*, 504 U.S. 191, 207–11 (1992).
- a study performed by a different city in prohibiting adult theaters from locating within 1,000 feet of any residence, church, park,

> or school. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51 (1986).

Accordingly, Port Authority was not required to demonstrate that arguments had erupted on its property. Port Authority was permitted to rely upon evidence related to the manner in which individuals were reacting to Black Lives Matter protests in other settings and circumstances, particularly in light of Port Authority's own history of race–fueled disputes among its union–represented employees.

a. Black Lives Matter Protests Had Resulted in Violence and Vandalism in Pittsburgh

Cetra testified that Port Authority vehicles are a "microcosm of society." App. at 550. Even disagreements over relatively benign issues have unfortunately led to tension, threats, and occasionally violence on Port Authority vehicles. *Id.* at 551 (noting that disputes over a $2.50 have led to assaults of operators). Because certain of the Black Lives Matter protests became violent and disruptive, including several in Pittsburgh, Port Authority reasonably believed that its employees' wearing of Black Lives Matter facemasks would eventually cause tension and disruption with Port Authority customers.

In rejecting this argument, the Trial Court responded that on–duty speech is not exempt from the First Amendment. This response is a non sequitur. The U.S. Supreme Court has long held that "place" where the employee speaks is a critical factor in assessing the potential for disruption. *Connick*, 461 U.S. at 152. Relying

upon common sense, the Supreme Court has recognized that on–duty speech is far more likely to cause disruption than off–duty speech. *Id.*at 153 ("the fact that Myers, unlike Pickering, exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered"); *NTEU*, 513 U.S. at 466 (emphasizing that the speeches "were addressed to a public audience, were made outside of the workplace, and involved content largely unrelated to their government employment"); *Pickering*, 391 U.S. at 569–70 (emphasizing that the teacher's off–duty speech was "in no way directed towards any person with whom [he] would normally be in contact in the course of his daily work as a teacher").

The Supreme Court noted in *Connick* that the timing and circumstances surrounding an employee's on–duty speech are also critical factors in assessing the potential for disruption. *Connick*, 513 U.S. at 153. The plaintiff, an assistant district attorney, was transferred to prosecute cases in a different section of the criminal court than she had been appearing for the past five years. *Id.* at 140. Shortly thereafter, the plaintiff circulated a questionnaire soliciting input from other assistant district attorneys regarding the transfer policy. *Id.* at 141. In affirming that the speech was likely to cause disruption, the Court emphasized: "This is not a case where an employee, out of purely academic interest, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of the transfer notice." *Id.* at 153.

Here, the Trial Court ignored the undisputed fact that social protests involving racial injustice had occasionally been disruptive. One social protest in Pittsburgh resulted in injuries, extensive property damage, and vandalism. In another protest, videos depicting anti–racism protestors confronting patrons at Pittsburgh restaurants went viral on the internet. The fact that social protests had resulted in tension, hostility, and disruption in the community supported Port Authority's concern that allowing employees to engage in social protest while on duty would cause similar disruption among employees, customers, and third parties interacting with Port Authority employees. Nowhere in its 46–page Opinion did the Trial Court consider this undisputed evidence.[8]

The Trial Court bases its conclusion that Black Lives Matter facemasks would not cause disruption is the fact that, when Port Authority operators occasionally wore

[8] Instead, the Trial Court relied upon evidence that disruption did not occur over the past 30 years when Port Authority employees occasionally wore political pins (supporting political or union candidates) in violation of the uniform policies. App. at 13–18, 35. The Trial Court compared apples to oranges. The size and location of an operator's facemask makes it exponentially more likely that a customer or colleague will notice, read, and react to a facemask as compared to a small pin located somewhere on the operator's shirt. Moreover, the timing of the employees' use of social protest facemasks — when social protests were making news across the nation, and occasionally leading to violence — makes their potential disruption far more likely. In any event, the fact that some employees previously "got away with" uniform policy violations that did not cause disruption does not establish that Port Authority's concerns are not reasonable. *Hardwick ex rel. Hardwick*, 711 F.3d 426, 444 (4th Cir. 2013) (affirming school's right to prohibit shirts bearing the Confederate flag even though students had "gotten away" with doing so in the past, and those shirts did not cause disruption that lead to their detection).

such facemasks during the summer of 2020, arguments did not immediately erupt on Port Authority property. The very law to which the Court cited makes clear that not all circumstances require the government employer to prove that disruption resulted immediately. *Cochran v. City of Atlanta, Georgia*, 289 F. Supp.3d 1276, 1291 n.9 (N.D. Ga. 2017) (rejecting the argument that fact that the book existed in the workplace for approximately 11 months without incident established that it was not likely to cause disruption).

Importantly, the COVID–19 pandemic significantly reduced the number of Port Authority customers who were exposed to the Black Lives Matter facemasks during the summer of 2020. During those months ridership declined "upwards of 70%" on Port Authority vehicles, Port Authority utilized physical barriers to prevent customers from congregating in the front of the vehicles near the operator, and Port Authority imposed passenger limits ranging from 10 to 20 customers. The disruption and violence caused by social protests in Pittsburgh were sufficient for Port Authority to reasonably believe that, if on–duty employees continue to wear Black Lives Matter masks, tension and disruption will periodically result.

b. Black Lives Matter Facemasks Caused Tension and Hostility Among Port Authority Employees

The Trial Court's commentary on the tension that the Black Lives Matter facemasks created among Port Authority employees is perplexing. The Trial Court acknowledged that the Black Lives Matter facemasks did in fact cause tension

among Port Authority employees. In fact, the Court granted a spoliation inference that Port Authority would have been able to introduce even more evidence of such tension had Local 85 not destroyed relevant text messages. App. at 26–27. Without any support for its conclusion, the Trial Court stated the fact that the employees conveyed their frustration and tension in "internal discussions among union members" somehow suggests that Port Authority had no reason for concern that similar communications would occur elsewhere at work. *Id.* at 36–37.

This suggestion defies logic. It is unreasonable to believe that tension and hostility surrounding Black Lives Matter, which was so extensive that one employee threatened to wear a White Lives Matter mask to work and another was banned from a text message group because of his disruptiveness, would be compartmentalized in union–related correspondence. Under the Trial Court's reasoning, if Port Authority were to provide a "hotline" or other forum for employees to express their concerns, Port Authority would not be able to consider those concerns in its decision making because employees expressed those concerns in a forum intended to seek their input.

The prior racial incidents involving Port Authority employees belies the Trial Court's assumption that any racial tension would remain compartmentalized outside of the workplace. The Trial Court attempted to minimize their import by asserting that — because Port Authority only identified two racial disputes, one of which occurred 14 years ago — its concern for racial harmony should not be considered in

the *Pickering/NTEU* analysis.[9] This assertion is inexplicable.

Port Authority identified two recent racial disputes among employees, one involving a reference to shooting Blacks and a second involving an altercation in which a knife was drawn at work. While a third incident that Port Authority identified did occur 14 years ago, that high–profile incident involved the hanging of a noose at a garage. The newspapers reported on the incident (and its investigation) for some time, and it left a longstanding stain on Port Authority's reputation. The conclusion that these events are irrelevant to Port Authority's interests and decision–making process in determining whether it can lawfully prohibit employees form wearing political and social protest messages while on duty is alarming.

Equally as alarming is the Court's suggestion that Port Authority should (1) eliminate its uniform policies and (2) discipline employees on a case–by–case basis ***after*** their speech has disrupted Port Authority's operations. App. at 47. First, employees and their union would unquestionably challenge the discipline on the basis that the absence of a policy did not provide fair notice that their speech was prohibited. More importantly, Port Authority cannot allow disruption to occur and then punish employees after the fact. Port Authority would run the risk of losing both valued customers and talented employees if it enacted such a "reactive"

[9] Cetra testified about three specific incidents involving racial issues among employees, and noted that other disputes have arisen as well. It is unclear which two the Trial Court intended to reference in its Opinion.

approach that the Trial Court proposed. *See Waters*, 511 U.S. at 673 (noting that "tangible, present interference with the agency's operation" is not required to prohibit the speech). As one court adroitly explained: "Respondent should not be required to wait until it receives complaints or suffers a decline in business to prove special circumstances. Businessmen are required to anticipate such occurrences and avoid them if they desire to remain in business." *N.L.R.B. v. Harrah's Club*, 337 F.2d 177, 180 (9th Cir. 1964) (internal footnote omitted). The Trial Court erred by effectively requiring Port Authority to wait until its operations are disrupted to prohibit employee speech.

3. Port Authority Employees Have a Limited Interest in Engaging in Political or Social Protest Speech While on Duty

In its analysis, the Trial Court did not merely misinterpret Port Authority's significant interest in proactively preventing discomfort and disruption. The Trial Court also misinterpreted the employees' limited interest in engaging in social protest ***while on duty***.

The U.S. Supreme Court has emphasized that employees possess a significant interest in speaking when, by virtue of their position, they have specialized knowledge about the government's operations to share with the public. "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much form their informed opinions." *Waters*, 511 U.S. at 674. For this reason, the Supreme Court in *Pickering* held that

a public school unlawfully dismissed a teacher for sending a letter to a local newspaper to express his opinion regarding a tax increase intended to raise revenue for the school district. *Pickering*, 391 U.S. at 565. The Court based its ruling in significant part on the teacher's unique knowledge about the school's operations. *Id.* at 572.[10] In contrast, employees' speech is less deserving of protection if it does not involve unique knowledge based on their employment. *See, e.g., Carr v. Dep't of Transp.*, 230 A.2d 1075, 1090 (Pa. 2020) (unlike cases involving "employees who by virtue of their positions and experience had specialized knowledge regarding matters of public concern," the employee's speech did not involve "an explanation of safety concerns that she became aware of as a Department employee").

Employees' interest in speaking is also entitled to less weight when the speech occurs while on–duty. *U.S. DOJ*, 955 F.2d at 1005–06 (prohibiting employees from wearing pins on their uniforms while on duty "results in only minimal intrusion of the free speech rights of union employees"); *Risk*, 2007 WL 2782315, at *2 (same). For example, in *Coover v. Saucon Valley School District*, 955 F. Supp. 392 (E.D. Pa. 1997), the court concluded as a matter of law that a policy prohibiting employees

[10] *See also Harman v. City of New York*, 140 F.3d 111, 119 (2d Cir. 1998) ("Here, there is an ongoing public debate about the effectiveness of the City's child welfare agency. Experienced case–management supervisors such as Harman and Stadler can contribute valuable insights to the discussion. Harman's comments concerning the City's priorities in evaluating child welfare case managers, for example, illuminate potential problems in the management of that agency.").

from using school property for political purposes, while on duty at work, was lawful. *Id.* at 402. The court explained:

> Policy No. 321 has as its purpose, "The Board recognizes and encourages the right of its employees, as citizens, to engage in political activity. However, school property and school time, paid for by all the people, may not be used for political purposes." As such, the restriction on political activities is merely a "manner or means" facially neutral restriction which does not impinge on Plaintiff's First Amendment rights. It is plain that the policy would prohibit using school property and time for a meeting with partisan content.

Id.; *see also I.N.S. v. FLRA*, 855 F.2d 1454, 1466 (9th Cir. 1988) (upholding uniform policy that was "viewpoint–neutral and limited to working hours . . . while leaving the immigration inspectors free to express their views in other ways and during non–working hours").

Here, the employees were not speaking on issues related to Port Authority or its operations on which they possessed specialized knowledge or a unique perspective. While the employees' desire to support Black Lives Matter, their interest in doing so while on duty is limited. Moreover, Port Authority's uniform policies only restrict facemasks that employees can wear while on duty. Port Authority employees are free to engage in political or social protest activities while they are not on duty. The Trial Court's failure to recognize the employees' limited interest is a fatal flaw in its *Pickering/NTEU* balancing analysis.

D. The Current Uniform Policies are Neither Unconstitutionally Underinclusive Nor Overbroad

In fewer than three pages in its 45–page Opinion, the Trial Court asserted that the Current Uniform Policies are simultaneously underinclusive and overbroad. App. at 41–43. These assertions are misguided.

1. Port Authority Need Not Prohibit All Political or Social Protest Speech in Order to Avoid Being Underinclusive

Because Port Authority does not prevent on–duty employees from discussing Black Lives Matter, or posting support for the movement on social media, the Trial Court concluded that the Current Uniform Policies are underinclusive.[11] The Trial Court's criticism of Port Authority for prohibiting ***too little*** speech is misplaced.

First, the First Amendment does not necessarily prohibit underinclusive policies. *Williams–Yulee v. Florida Bar*, 575 U.S. 433, 448–49 (2015). As this Court has instructed, "underinclusiveness is only important to our inquiry if it 'raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Greater Philadelphia*, 949 F.3d at 156 (internal citation omitted). Second, the government

[11] The Trial Court also suggested that a Port Authority operator could greet a rider by stating "Good morning, Black Lives Matter." App. at 40. This statement flat out contradicts Cetra's testimony. Cetra testified that operators ***are not*** permitted to welcome passengers by stating "Black Lives Matter." *Id.* at 599–600 (explaining: "Would you walk into Target and expect a cashier to say Black Lives Matter? Of course not. We may be a government agency but we are running a business here. We are not running a political justice forum on our buses.").

"need not address all aspects of a problem in one fell swoop; policy makers may focus on their most pressing concerns." *Williams–Yulee*, 575 U.S. at 449 ("We have accordingly upheld laws — even under strict scrutiny — that conceivably could have restricted even greater amounts of speech in service of their stated interests.").

The U.S. Supreme Court's ruling in *Williams–Yule* is highly instructive. In that case, an attorney argued that Florida's rule of judicial conduct prohibiting judicial candidates from directly soliciting campaign funds was underinclusive because the candidates could ask for loans, utilize their campaign committees to solicit funds, and write thank you notes to donors. *Id.* at 448. The Court rejected this argument because personal solicitations pose "a categorically different and more severe risk of undermining public confidence" in the integrity of the judiciary. *Id.* at 449–50. Accordingly, the Court explained:

> Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*. . . . Even under strict scrutiny, "[t]he First Amendment does not require States to regulate for problems that do not exist."
>
> Taken to its logical conclusion, the position advanced by Yulee and the principal dissent is that Florida may ban the solicitation of funds by judicial candidates only if the State bans *all* solicitation of funds in judicial elections. The First Amendment does not put a State to that all–or–nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.

Id. at 451–52 (internal citations omitted).

Similarly, there is a categorically different risk associated with Port Authority employees (1) wearing a facemask with a political or social protest message during their entire 8 or 12–hour shift, during which time they interact with riders, vendors, and co–workers and (2) commenting a political or social protest topic during a private discussion with a willing colleague or in a social media post. The First Amendment does not place Port Authority in an "all–or–nothing" conundrum, and require Port Authority to ban employees from uttering a single word about a political or social protest issue while on duty, in order to lawfully prohibit on–duty employees from wearing facemasks containing political or social protests messages.

2. Port Authority Need Not Limit Its Restrictions to Situations Most Likely to Cause Disruption to Avoid Being Overbroad

The Trial Court stated that the Current Uniform Policies are overbroad because Port Authority did not "tailor its policies to the specific workplace contexts where there might be a heightened risk of disruption." App. at 41. While the Trial Court acknowledged that trainers should not wear facemasks that might reflect bias against a trainee, it did not believe that a similar need to remain neutral — or any other concerns about potential disruption — exists with respect to bus drivers, mechanics, or supervisors wearing facemasks conveying political or social protest messages. *Id.* Legally and factually, the Trial Court is wrong.

From a legal standpoint, Port Authority is not required to parse its policy as thin as the Trial Court mandated. In *Greater Philadelphia*, this Court affirmed the

constitutionality of a city ordinance prohibiting employers from inquiring about a prospective employee's wage history. *Greater Philadelphia*, 949 F.3d at 121–22. The city enacted the ordinance in an attempt to address the disparity in pay of women and minorities. *Id.* In rejecting the contention that the ordinance was overbroad because it applied to all prospective employees (and not just women and minorities), this Court held that the city was permitted to implement a "blanket" rule governing all employees rather than attempting to draw difficult distinctions among the employees. *Id.* at 155–56.

Once again, the U.S. Supreme Court's ruling in *Williams–Yulee* is on point. The plaintiff argued that Florida's rule prohibiting judicial candidates from soliciting donations was overbroad because it did not distinguish direct and in–person communications from mass mailings, the latter of which would not create the same appearance of impropriety. *Williams–Yulee*, 575 U.S. at 452–53. The Supreme Court disagreed, noting that the First Amendment does not force government entities to draw such fine distinctions:

> Moreover, the lines Yulee asks us to draw are unworkable. Even under her theory of the case, a mass mailing would create an appearance of impropriety if addressed to a list of all lawyers and litigants with pending cases. So would a speech soliciting contributions from the 100 most frequently appearing attorneys in the jurisdiction. Yulee says she might accept a ban on one–to–one solicitation, but is the public impression really any different if a judicial candidate tries to buttonhole not one prospective donor but two at a time? Ten? Yulee also agrees that in person solicitation creates a problem. But would the public's concern recede if the request for money came in a phone call or a text

> message?
>
> We decline to wade into this swamp. The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be "perfectly tailored." The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary. Yulee is of course correct that some personal solicitations raise greater concerns than others. A judge who passes the hat in the courthouse creates a more serious appearance of impropriety than does a judicial candidate who makes a tasteful plea for support on the radio. But most problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form.

Id. at 453–54 (internal citations omitted).

From a factual standpoint, the Trial Court disregarded the evidence that every Port Authority employee subject to the uniform policies at issue interacts with the public, customers, and vendors. The undisputed evidence demonstrated:

- The Port Authority operator is the only employee on the vehicle with responsibility to address questions, complaints, and issues that may arise. The need to portray a neutral and unbiased appearance to customers, so that they feel comfortable seeking assistance, is important.

- Mechanics who repair equipment often do so at stations, platforms, and locations that are available to the public (where they can interact with customers).

- Mechanics who repair equipment inside a Port Authority facility also interact with third–party vendors, contractors, government officials, or members of the public who are invited to the facility.

- Supervisors participate in disciplinary proceedings on behalf of a Local 85 member. There may be many circumstances in which a supervisor's facemask containing a particular social justice message might not appear to be neutral.

App. at 246, 372–73, 377–78, 523–25. In addition, it was undisputed that first level supervisors have the authority to discipline other employees. *Id.* at 390.

In short, while the likelihood of disruption and appearance of bias might be greater of lesser depending upon the specific duties performed by each Port Authority employee, the First Amendment does not require Port Authority to draw challenging (and potentially unworkable) lines. The Current Uniform Policies are sufficiently tailored to advance Port Authority's legitimate interests to restrict its uniformed employees' speech while on duty.

CONCLUSION

For the foregoing reasons, the Order granting Appellees' motion for preliminary injunction should be REVERSED. Because Port Authority's significant interest in preventing its on–duty employees from wearing facemasks containing political or social protest messages substantially outweighs the employees' limited interest in engaging in social protest while on duty, the case should be REMANDED to the Trial Court with instructions to DENY the injunction motion.

Respectfully submitted,

McGUIREWOODS LLP

By: /s/ Gregory J. Krock
Gregory J. Krock
Pa. I.D. No. 78308

Tower Two–Sixty
260 Forbes Avenue, Suite 1800
Pittsburgh, PA 15222–3142
(412) 667–6042

— and —

Brian P. Gabriel
Pa. I.D. No. 73132
CAMPBELL DURRANT, P.C.
535 Smithfield Street, Suite 700
Pittsburgh, PA 15222
(412) 395–1267

Counsel for Appellant Port Authority of Allegheny County

CERTIFICATE OF BAR MEMBERSHIP

I, Gregory J. Krock, hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

/s/ Gregory J. Krock
Gregory J. Krock
Pa. I.D. No. 78308

CERTIFICATE OF COMPLIANCE REGARDING FORM OF BRIEF

The undersigned hereby certifies that this brief complies with the type–volume limitations contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Exclusive of exempted provisions as set forth in Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, this brief contains 12,941 words according to the word count function in the Microsoft Word software with which this brief was produced. The full text of the print and electronic versions of this brief filed with the Clerk of Courts and served upon counsel are identical.

/s/ Gregory J. Krock
Gregory J. Krock

CERTIFICATE OF COMPLIANCE WITH VIRUS CHECK

The undersigned hereby certifies that the electronic copy of this brief filed with the Court has been scanned with Symantec Antivirus scanning software product version 10.1.7.7000 and was found to be free of any viruses known as of this date.

/s/ Gregory J. Krock
Gregory J. Krock

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMALGAMATED TRANSIT UNION LOCAL 85, et al.,	)	
	)	Case No. 21–1256
Appellees,	)	
v.	)	
PORT AUTHORITY OF ALLEGHENY COUNTY,	)	
Appellant.	)	

APPENDIX VOLUME I
TABLE OF CONTENTS

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMALGAMATED TRANSIT UNION LOCAL 85, et al.,	)	
	)	Case No. 2:20–cv–01471–NR
Plaintiffs,	)	
	)	Judge J. Nicholas Ranjan
v.	)	
PORT AUTHORITY OF ALLEGHENY COUNTY,	)	*Electronically filed*
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Defendant Port Authority of Allegheny County hereby appeals to the United States Court of Appeals for the Third Circuit from (1) the Amended Order Granting Motion for Preliminary Injunction [ECF No. 47] dated January 20, 2021 and (2) the Opinion [ECF No. 44] explaining the basis for the preliminary injunction.

Respectfully submitted,

CAMPBELL DURRANT, P.C.

By: /s/ Brian P. Gabriel
Brian P. Gabriel
Pa. I.D. No. 73132
535 Smithfield Street, Suite 700
Pittsburgh, PA 15222
(412) 395–1267

Gregory J. Krock
Pa. I.D. No. 78308
McGUIREWOODS LLP
Tower Two–Sixty
260 Forbes Avenue, Suite 1800
Pittsburgh, PA 15222–3142
(412) 667–6042

Counsel for Defendant Port Authority of Allegheny County

CERTIFICATE OF SERVICE

The undersigned hereby certifies the foregoing **Notice of Appeal** was filed via the Court's CM/ECF system on the 10th day of February 2021, which system will effectuate service upon the following counsel of record:

Joseph J. Pass
Patrick K. Lemon
JUBELIRER, PASS & INTRIERI, P.C.
219 Fort Pitt Boulevard
Pittsburgh, PA 15222
Counsel for Plaintiffs

/s/ Brian P. Gabriel
Brian P. Gabriel

EXHIBIT
2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMALGAMATED TRANSIT UNION LOCAL 85, *et al.*, Plaintiffs, v. PORT AUTHORITY OF ALLEGHENY COUNTY, Defendant.	2:20-cv-1471-NR

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

AND NOW, this **19th day of January, 2021**, upon consideration of Plaintiffs' motion for preliminary injunction, ECF 2, it is **HEREBY ORDERED** that the motion is **GRANTED** as follows:

(1) The Port Authority is **ENJOINED** from enforcing its uniform policy to prohibit any employee from wearing facemasks that display the messages identified during the evidentiary hearing that relate to "Black Lives Matter"; specifically, masks that depict "Black Lives Matter," "BLM," "My Life Matters," "I Can't Breathe," "Unapologetically Black and Proud," "Black Matter," "Black Voters Matter," or substantially the same words or messages.

(2) It is further **ORDERED** that the Port Authority shall rescind any discipline issued to any employee, including any written or oral warnings, for wearing one of the masks specified above.

(3) The injunction shall become effective upon Plaintiffs depositing security with the Court (bond or cash) in the amount of one hundred dollars ($100.00).

BY THE COURT:

/s/ *J. Nicholas Ranjan*
United States District Judge

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMALGAMATED TRANSIT UNION LOCAL 85, *et al.*, Plaintiffs, v. PORT AUTHORITY OF ALLEGHENY COUNTY, Defendant.	2:20-cv-1471-NR

AMENDED ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

AND NOW, this **20th day of January, 2021**, upon consideration of Plaintiffs' motion for preliminary injunction, ECF 2, it is **HEREBY ORDERED** that the motion is **GRANTED** as follows:

(1) The Port Authority is **ENJOINED** from enforcing its uniform policy to prohibit any employee from wearing facemasks that display the messages identified during the evidentiary hearing that relate to "Black Lives Matter"; specifically, masks that depict "Black Lives Matter," "BLM," "My Life Matters," "I Can't Breathe," "Unapologetically Black and Proud," "Black Matter," "Black Voters Matter," or substantially the same words or messages.

(2) It is further **ORDERED** that the Port Authority shall rescind any discipline issued to any employee, including any written or oral warnings, for wearing one of the masks specified above.

(3) The injunction shall become effective upon Plaintiffs depositing security with the Court (bond or cash) in the amount of one hundred dollars ($100.00). If security is cash, certified check, or attorney's check, the funds will be deposited into the Court's local Registry, where it will remain until further order by the Court.

BY THE COURT:

/s/ *J. Nicholas Ranjan*
United States District Judge

EXHIBIT
4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMALGAMATED TRANSIT UNION LOCAL 85, *et al.*,	)	
Plaintiffs,	)	2:20-cv-1471-NR
v.	)	
PORT AUTHORITY OF ALLEGHENY COUNTY,	)	
Defendant.	)	

OPINION

J. Nicholas Ranjan, United States District Judge

The Allegheny County Port Authority has long prohibited its employees from wearing uniform adornments, such as buttons and stickers, that reflect "political or social-protest" messages. It has done so based on its belief that such messages are likely to lead to disruption in the workplace. This case presents a First Amendment challenge to a recent extension and modification of that policy to apply to facemasks.

In the early days of the COVID-19 pandemic, the Port Authority, like many employers, directed its employees to wear facemasks while performing their duties. Several employees, including Plaintiffs here, sought to comply with that policy, wearing masks that displayed the slogan "Black Lives Matter." They did so to express their support for the "Black Lives Matter" movement, especially after the highly publicized killing of George Floyd by a Minneapolis police officer. For a period of time, many Port Authority employees wore "Black Lives Matter" and other similar masks without incident.

Eventually, however, the "Black Lives Matter" masks came to the attention of the Port Authority's management, through a complaint from a single employee, who

asked how management would feel if he wore a "White Lives Matter" mask in response. Although the Port Authority had itself publicly endorsed the "Black Lives Matter" movement, it feared that allowing employees to wear "Black Lives Matter" masks would cause disruption (likely from other "competing" masks), much like the "political and social-protest" messages it had banned from other uniform adornments. So the Port Authority took action to prohibit its employees from wearing such masks—first by extending its preexisting policy against uniform adornments containing political or social-protest messages to apply to facemasks; and then, when that policy proved difficult to enforce, by requiring employees to wear one of a few specified facemasks and banning all others. Both of these policies were motivated by a desire to prevent workplace disruption caused by what the Port Authority viewed as controversial speech or counter-speech.

Following the policy change, several employees, including Plaintiffs here, were disciplined or threatened with discipline for wearing "Black Lives Matter" masks. So they, along with the labor union that represents them, filed this lawsuit.

Presently, Plaintiffs seek a preliminary injunction against enforcement of the Port Authority's mask policy. They argue that the policy violates the First Amendment because the Port Authority does not have a substantial interest in prohibiting its employees from engaging in innocuous expressions of personal political or social views, even at work. The Port Authority counters that, in the context of managing its workplace, it has a strong interest in heading off potential employee conflicts and customer-relations issues, and it suggests that the political and social-protest speech it seeks to ban is likely to create just those sorts of problems. The question for the Court is whether the First Amendment tolerates such restrictions.

At the heart of the First Amendment is the time-tested belief that, in almost every context, society benefits from allowing more speech, even (and perhaps

especially) when that speech is unpopular or controversial. This belief recognizes that expressive freedom not only benefits the speaker, but also the listener, who might otherwise not be exposed to important new ideas or opportunities to challenge their own orthodoxies. That is especially true where, as here, the speech in question relates to matters of significant public concern. Of course, in the public-employment context, the government necessarily has much wider discretion to regulate the speech of its employees. If the business of government is to get done, some "play in the joints"[1] is necessary to allow for restraint of speech that is likely to disrupt the workplace, interfere with customer relations, or undermine employee productivity.

But while the government is afforded unique flexibility in the employment context, that doesn't mean public employees forfeit their right to speak freely upon entering the office (or bus). The government can restrict or punish workplace speech only if it is, in fact, likely to be disruptive of the workplace. And when such restrictions are challenged in a lawsuit like this one, the government must support its predictions of disruption with specific evidence; perhaps not evidence of actual disruption, but at least evidence that disruption can reasonably be expected to occur. Importantly, a speculative fear that otherwise innocuous speech could induce others to engage in counter-speech, which may, in turn, become disruptive, is not enough to justify censorship by the government, even in the employment context.

In contrast to instances of after-the-fact discipline of disruptive employees, policies that impose broad, prior restraints on employee speech are particularly suspect. Yet that type of broad policy is what the Port Authority initially adopted here when it imposed a sweeping ban on facemasks displaying any "political or social-protest" message. In doing so, the Port Authority specifically targeted for restriction

[1] *See Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931) (Holmes, J.) ("The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.").

speech that is afforded the greatest protection by the First Amendment. Further, it did so based only on a generalized and speculative fear that a "political or social-protest" message, passively displayed on a facemask, might cause other employees, or members of the public, to engage in more disruptive counter-speech. As will be discussed, this policy was arbitrary and overbroad, while the Port Authority's predictions of likely disruption are unsupported by the evidence that has been presented to the Court.

The Port Authority's subsequently adopted, facially "neutral" policy, requiring employees to wear one of a few specified facemasks, suffers from the same problems. The only proffered justification for the new policy remains the same—to prevent a perceived risk of disruption caused by employees wearing "political or social-protest" masks—and that justification remains impermissible. The Port Authority may not cure a First Amendment violation by restricting even more speech. Nor can the Port Authority's generalized interest in its uniform policy justify the new policy's broad restrictions. "Mere incantations that a pristine uniform is necessary to provide safe public transportation" are "clearly insufficient" to justify broad restraints on non-disruptive employee speech like political buttons or masks. *Scott v. Goodman*, 961 F. Supp. 424, 428 (E.D.N.Y. 1997), *aff'd sub nom. Scott v. Meyers*, 191 F.3d 82 (2d Cir. 1999). That is particularly so here, where the evidence overwhelmingly suggests that the Port Authority's uniform policy is laxly enforced, such that political and social-protest uniform adornments have been tolerated for years without incident.

In sum, the Court sympathizes with the Port Authority's good-faith desire to maintain a safe and productive workplace. But the vast majority of the employee speech it has banned here—including its effective ban on "Black Lives Matter" masks—would not materially undermine that goal. Moreover, any of the truly disruptive behavior that the Port Authority fears can be readily deterred and dealt

with on a case-by-case basis, and likely using non-speech-based means. For all these reasons, and based on the specific facts of this case and evidentiary record, the Court finds that Plaintiffs are likely to prevail on their First Amendment claims. The Court will thus grant their motion for preliminary-injunctive relief and enjoin the Port Authority from enforcing its ban on "Black Lives Matter" masks.

PROCEDURAL BACKGROUND

Plaintiff Amalgamated Transit Union Local 85, along with several individual Port Authority employees, filed this lawsuit on September 30, 2020. ECF 1. In its complaint, the Union asserts claims under 42 U.S.C. § 1983 for violations of its members' free speech and equal protection rights under the First and Fourteenth Amendments of the United States Constitution, as well as their analogous rights under Article I, Sections 7 and 20 of the Pennsylvania Constitution. Along with its complaint, the Union moved for a preliminary injunction, asking the Court to enjoin the Port Authority from enforcing its operative facemask policy and to allow its employees to wear facemasks with the message "Black Lives Matter." ECF 3.

The Port Authority initially responded to the Union's complaint by moving to dismiss for lack of subject-matter jurisdiction, arguing that the Union's claims were based on its older facemask policy, which had recently been superseded by a new, modified policy. ECF 10. On November 2, 2020, the Court granted the motion to dismiss, but allowed the Union to amend its complaint to state a claim directed at the now-operative mask policy. ECF 16. The Union did so on November 3, 2020, ECF 17, and the Port Authority again responded by filing a motion to dismiss, this time for failure to state a claim under Fed. R. Civ. P. 12(b)(6), ECF 18.[2]

The Court held a two-day evidentiary hearing on the Union's preliminary-injunction motion on November 10 and 17, 2020. ECF 27; ECF 30. During the

[2] The Court has denied the Port Authority's motion to dismiss by separate order, for the reasons stated in this decision.

hearing, the Court heard evidence and testimony from 16 witnesses, followed by oral argument from counsel on the pending motions. ECF 30-1; ECF 34; ECF 36. Following the hearing, the Court issued an order directing the parties to address, in their post-hearing briefing, whether the Court should apply the modified *Pickering* standard articulated by *United States v. National Treasury Emp. Union*, 513 U.S. 454 (1995). ECF 33. The parties filed post-hearing briefs on December 8, 2020, and the matter is now ready for disposition.

FINDINGS OF FACT

1. Defendant Port Authority is the public transportation authority for Allegheny County and a municipal organization organized under the second-class Port Authority Act, 55 P.S. § 551, *et seq*. ECF 17, ¶ 13.

2. The Port Authority employs over 2,700 employees, including approximately 1,700 bus operators and 600 to 700 maintenance employees. ECF 36, 97:9-13. Those employees are spread across four bus-operating locations (East Liberty, West Mifflin, Collier, and the Ross Garage), a rail center in the South Hills, maintenance buildings in the South Hills and North Side, and administrative offices in downtown Pittsburgh. ECF 36, 97:14-98:4.

3. Plaintiffs in this case are four Port Authority employees, as well as the labor union that represents them. Specifically:

   a. Plaintiff Amalgamated Transit Union Local 85 is the labor union and certified exclusive labor representative for a bargaining unit of Port Authority employees. ECF 17, ¶ 9. The Union is comprised of several different types of employees, with different roles. For example, some employees drive buses; some are mechanics; some are instructors; and some are disciplinary-hearing representatives. *See, e.g.,* ECF 34, 41:4-43:20, 53:19-54:7, 169:8-170:4.

b. Plaintiff James Hanna is a bus operator employed by the Port Authority. He is also a member and Executive Board member of the Union. ECF 17, ¶ 10.

c. Plaintiff Sasha Craig is a first-level supervisor and instructor employed by the Port Authority. He is also a member of the Union. ECF 17, ¶ 11.

d. Plaintiff Monika Wheeler is a first-level supervisor and instructor employed by the Port Authority. She is also a member of the Union. ECF 17, ¶ 12.

4. To promote "consistency" and ensure that its employees "are representing Port Authority in a cohesive manner," the Port Authority requires its employees to wear a uniform while on the job. ECF 36, 103:17-19.

5. As part of this policy, the Port Authority has, since 1972, prohibited uniform adornments (*e.g.,* buttons, stickers, etc.) that display "political or social-protest" messages. ECF 36, 113:8-114:17.

6. The Port Authority adopted its ban on political and social-protest adornments after a small group of employees wore "Free Angela Davis" buttons to advocate for the release of the then-imprisoned activist. ECF 36, 113:17-114:17. The same employees also engaged in a work stoppage or "wildcat strike" as part of their protest. ECF 36, 158:12-159:1.

7. The Port Authority contends that banning political and social-protest adornments is necessary to avoid workplace disruption, such as "disputes breaking out between employees within a garage" or "disputes breaking out with the public." ECF 36, 130:10-131:5.

8. There is no evidence in the record suggesting that the Port Authority prohibits its employees from engaging in the exact same type of speech (*i.e.*, political or social-protest speech) in other ways, such as by communicating it verbally to co-workers or members of the public. *See generally* ECF 40-1, PDF pp. 1-22.

9. The Port Authority's enforcement of its ban on political and social-protest uniform adornments has been lax and largely non-existent. Employees often wore political buttons and other items that seemingly violated the policy, and they were rarely, if ever, disciplined for doing so prior to the incidents involving facemasks. *See, e.g.,* ECF 34, 21:9-22:4; 35:6-38:19; 47:8-48:12; 51:16-54:24; 56:14-57:8; 69:15-23; 70:6-9; 105:17-106:19; 108:7-17; 116:1-12; 117:5-13; 139:1-9; 140:2-9; 154:17-155:3 166:3-167:10; 194:3-19; ECF 36, 10:9-13; 25:21-26:9; 47:20-48:7; 54:16-19; 55:22-25; 62:23-63:16; 64:6-13; 66:5-7.

10. By way of example, Port Authority employees over the years have worn such social or political-related adornments, without being disciplined:

a. ECF 34, 35:13-21 ("…A: Absolutely because, listen, Port Authority has never, never in my 26 years, 27 years here, never disciplined anybody for that, for wearing a button or a pin. Q: You talked about political presidential pins, political pins, and you mentioned ATU for Hillary. I take it those are pins that were distributed by either the local or the national? A: The international sent them to us and we handed them out to our membership, that's correct.");

b. ECF 34, 36:20-21 ("A: Yes, the answer is yes, they would wear pins while on their route.");

c. ECF 34, 53:19 ("Q: When you were an operator, were people wearing political buttons in support of candidates? A: Correct, including myself. Q: Can you tell us what those buttons were? A: Well, most recently in the last election, I wore a Bernie Sanders button on my uniform sweater. And I also wore, after Bernie lost, I wore an ATU for Hillary on my sweater. Q: Previous to that, did you wear any other buttons for candidates, Obama, or anyone prior to Hillary? A: Yes. Q: Do you recall

which they might have been? A: It would have been one for Obama and it might have been Clinton … I think I wore one for Clinton, also.");

d. ECF 34, 54:8-11 ("Q: When you attended 105 hearings, do you remember specifically wearing those buttons supporting Hillary and/or Obama? A: Yes.");

e. ECF 34, 69:15-20 ("THE COURT: Just so I understand your testimony, however in the past, you were aware of operators wearing political buttons such as Obama or Hillary buttons while operating buses, is that right? THE WITNESS: That is correct. I personally myself wore one.");

f. ECF 34, 105:17-106:19 ("Q: Have you observed the … Port Authority's enforcement of the uniform policy since it has been in effect? A: It is very lax. Q: What do you mean by that? A: A lot of people wear shirts that aren't authorized or hats or shoes, pants. It's not real strict. Q: How about political, did you ever see anybody wear political buttons? A: Yes, I have. During election campaigns they wore particular buttons supporting particular people. … Q: Anything else? A: Sporting teams, gay pride buttons. Q: Gay pride? A: Yes. Q: Have you seen them wear masks saying anything in support of gay pride? A: There was a few. Rainbow, like rainbow colors. Q: Rainbow pins, have you ever seen that? A: Yes.");

g. ECF 34, 108:7-17 ("Q: Political buttons, have you seen those? A: Yes. Q: Which ones have you seen people wore? A: Through all the elections, there was union elections where officials were running for office, they wore pins. Then national level, Obama, Hillary, a bunch of different political pins. Q: Have you ever worn them? … A: Pins, yes, I wore them.");

h. ECF 34, 116:1-2 ("I have worn masks with ankhs[3] on them.");

i. ECF 34, 116:11-12 ("Q: Is that a fist, black power fist, is that it? A: Yes. Q: You have been wearing them for years? A: Yes. Q: While driving? A: Yes.");

j. ECF 34, 117:5-6, 12-13 ("Q: Have you ever worn these things that you have on where Ms. Kelleman, the CEO was present? A: Yes. … Q: [She] [s]aid what was nice? A: Said my chains were nice. Q: What chains were they? A: These same two I have on, my ankh chain and my black power fist.");

k. ECF 34, 139:1-9 ("Q: During your career have you seen any individuals wearing buttons, political or other statements, that they have had on their uniforms while working? A: Yes. Q: Can you tell us what you have seen[?] A: I have seen, let's see, ATU for Hillary, crosses. Q: You say crosses, what do you mean? A: Cross necklaces. Just last week I seen Biden pins, as well as Mason pins.")

l. ECF 34, 140:2-9 ("Q: Have you worn jewelry which had any type of issues about Black Lives Matter or things of that nature? A: Yes. On Friday I had on a pair that stated Black By Popular Demand. Q: Anything else? A: I have Black Lives Matter earrings. I have a lot of jewelry. I also have seen other people wearing them as well. But I myself wear it.");

m. ECF 34, 154:17-155:3 ("Q: You have worn political buttons[?] A: Yes, absolutely. Q: --- in support of political candidates? A: Yes. Q: I am talking about both union candidates as well as civilians. A: Yes, yes. Yes.

[3] An "ankh" is an Egyptian symbol of life, increasing in prominence in African-American culture within the last 25 years. *See* The Famuan, "Ankh becomes popular symbol of Black culture," *available at* http://www.thefamuanonline.com/2002/12/04/ankh-becomes-popular-symbol-of-black-culture/.

Q: For how long and how frequently were they worn? A: … I wear a lot of buttons.");

n. ECF 34, 166:3-167:10 ("Q: Have you seen employees wearing political support buttons for different candidates? A: Yes, I have seen Bernie, you know, Bernie. Q: Bernie Sanders? A: Yes. Different buttons for different people. … Q: Did you ever wear [an ATU Hillary '16] button? A: Yeah, I had a button. Q: For Hillary? A: Yes. Q: Did you ever have a button for any other political candidate you wore? A: I had an Obama hat. … Have you seen other employees wear buttons supporting political candidates? A: Yes, I seen -- Q: While they were working? A: I seen a MAGA hat. … Q: Anyone ever give you a problem when you were wearing those buttons? A: No.");

o. ECF 34, 194:3-15 ("Q: Have you seen employees wearing stickers or buttons supporting other issues and causes? A: Absolutely. They wear — let me see, where can I start? I have been here for 30 years. Okay. I have seen stickers for Stronger Than Hate. I have seen Trump 2020 stickers. I have sign [sic] MAGA hats. I have seen political buttons that take me personally all the way back to Clinton. Q: Did you ever wear such buttons? A: Absolutely. I have worn every -- I am a registered Democrat. I have worn every button that supports the Democrat party's candidate. Q: Did anyone ever tell you you couldn't wear them? A: Absolutely not.");

p. ECF 36, 10:9-13 ("Q: How about buttons supporting political candidates? A: Sure. Q: Can you tell me which ones, if you remember? A: They had buttons supporting local candidates, national candidates, Clinton, Biden.");

q. ECF 36, 25:21-26:9 ("Q: Have you ever worn any other kind of buttons, pins, or messages that were not on the uniform policy? A: Yes. Q: Could you tell the Court what they were? A: I wore Obama buttons in support of the election, Hillary buttons, Bernie Sanders buttons, local union buttons. If we were having an election, stickers, we had stickers as well. Q: What do you mean by stickers? A: In support of the candidate. Sometimes they were not buttons, they were just stickers that you just put on the uniform. Q: Those were local union elections? A: Yes.");

r. ECF 36, 47:20-48:7 ("A: I had on two necklaces. One is a black solidarity fist and the other one is an emblem of Africa. Q: What is that on your t-shirt? A: That is also a black solidarity fist. Q: Have you worn those chains that you have often or before or is that the first time you wore them? A: Every day for the past 22 to 25 years. I have a collection of them. I'm proud of them. Q: Have you worn them while you are working? A: Every day. I feel naked if I don't have it on.");

s. ECF 36, 54:16-19 ("A: … I have a tree of life necklace and that ribbon was probably representing someone who had passed away. I also have a black handkerchief in the same pocket that the ribbon is in. … Q: Did you go to work that day dressed exactly like that? A: Yes, I did. Q: Did you operate your bus in the revenue service? A: Yes, I did.")

t. ECF 36, 55:22-25 ("Q: You have something on your necklace there; right? A: Yes. That's a peace symbol. Q: Did you wear it while you were working that day? A: Yes, I did. Q: Did anyone ever complain or tell you to take it off? A: No. …").

u. ECF 36, 62:23-63:16 ("Q: What [buttons] did you see? A: I have seen Bernie Sanders, Hillary, Trump, Obama, Biden, I have seen things for like local candidates, whether it's a little sticker or whether it was a

small button or whatever. Q: Have you worn any? A: Yes. Q: What have you worn? A: I've worn Obama, I have worn Bernie, I've worn a sticker promoting myself … Q: Did you wear the buttons you spoke about, the political buttons in particular while operating in the revenue service? A: Yes. Q: Did anyone ever say that you shouldn't be doing that? A: No.");

v. ECF 36, 64:6-13 ("Q: How about any other kind of buttons? A: I have seen Masonic pins, I have seen union buttons that we get from the International. We have a few guys, the wear the buttons on their sweaters as though they are military type of medals. I see them on their bags and everyone carries a bag onto the bus that they carry their belongings in. …");

w. ECF 36, 66:5-7 (Q: "What if someone were to wear a Trump -- did you ever see someone wear a Trump pin? A: Yes.").

11. The Port Authority's Chief Legal Officer, Michael Cetra, identified seven instances of discipline imposed for uniform violations over the past six years. ECF 36, 135:7-19. None of those instances involved discipline for violations of the policy regarding political or social-protest adornments. ECF 36, 135:20-136:5.

12. Mr. Cetra also testified that no issues related to the ban on political or social-protest adornments had, to his knowledge, been brought to upper management's attention prior to 2020. ECF 36, 114:18-115:9.

13. The Port Authority considers violations of its uniform policy to be "minor" infractions that do not warrant significant discipline. ECF 36, 133:1-13; 136:6-10.

14. When the COVID-19 pandemic arrived in early 2020, the Port Authority imposed an additional requirement that its employees wear a facemask as part of their uniform. ECF 36, 115:10-117:15.

15. Initially, the Port Authority did not have sufficient masks to provide to all its employees and so directed them to wear their own. ECF 36, 116:7-11, 117:16-118:23.

16. Many employees chose to wear masks that reflected political or social-protest messages related to "Black Lives Matter." *See, e.g.,* ECF 34, 73:14-19, 82:25-83:2, 84:4-8, 105:6-10, 115:12-21, 128:20-129:4, 137:1-8; ECF 36, 19:22-20:20. The specific facemasks presented to the Court during the hearing included, among others, masks containing the following messages: "Black Lives Matter," "BLM," "My Life Matters," "I Can't Breathe," "Unapologetically Black and Proud," "Black Matter," and "Black Voters Matter."

17. The employees who wore "Black Lives Matter" masks, including Plaintiffs, did so to express support for the "Black Lives Matter" movement, especially after the highly publicized killing of George Floyd by a Minneapolis police officer. *See, e.g.,* ECF 34, 115:12-21, 148:12-20, 156:24-157:1, 165:9-15, 167:25-168:3, 200:8-13; ECF 36, 65:23-66:4.

18. More generally, the Port Authority and its CEO, Katharine Kelleman, publicly supported the "Black Lives Matter" movement. ECF 36, 182 ("Q: She states, first and foremost, the organization believes black lives matter and this organization holds this position and that will not change. So I assume that is still the position of the organization? A: Yes, sir."); ECF 39-1, PDF p. 46 ("First and foremost, this organization believes that Black lives matter. Period. Despite the public debate over what we allow or don't allow on a mask or uniform, fundamentally, this organization holds this position and that will not change."); ECF 39-2, PDF p. 2 ("If you, as a white person, wouldn't want to be treated the way you see black or brown people treated, then do the work to make it stop. I'm committing and I hope you join me."); *id.* at PDF p. 3 ("Black lives matter.").

19. The Port Authority's management became aware of employees wearing "Black Lives Matter" masks after a complaint from another employee, who asked how management would feel if he wore a "White Lives Matter" mask in response.[4] ECF 36, 124:12-20; 160:16-23.

20. Although the Port Authority had itself publicly endorsed the "Black Lives Matter" movement, it was concerned that allowing employees to wear "Black Lives Matter" masks would cause disruption—likely from other "competing" masks with more controversial messages. ECF 36, 130:10-131:5; *see* ECF 39-1, PDF p. 47 ("If Port Authority allows uniforms to be used as a message board for some political or social protest topics, we must then allow all messages on that topic, including those that could disrupt Port Authority's ability to deliver public transit service in a safe and efficient manner and cause harm to our employees, customers, and communities.").

21. Because of its concerns, the Port Authority adjusted its policy to prohibit "Black Lives Matter" masks, initially by extending its prohibition on "political or social-protest" uniform adornments to include facemasks. ECF 36, 107:22-108:1; 131:11-132:12.

22. After the policy was extended to cover facemasks with "political or social-protest" messages, several Union employees were disciplined or threatened with discipline for wearing "Black Lives Matter" or other similar masks. ECF 36, 132:16-135:6. These employees included Plaintiffs Sasha Craig, Monika Wheeler,

[4] During the evidentiary hearing, the Court admitted Mr. Cetra's testimony about this complaint, over Plaintiffs' hearsay objection. The Court did so only for the limited purpose of explaining what prompted the Port Authority to extend its uniform policy. ECF 36, 125:5-18. As noted on the record, the Court credits Mr. Cetra's testimony that this complaint was made, which brought the "Black Lives Matter" mask "issue" to the Port Authority's attention.

and James Hanna, as well as others. ECF 34, 123:19-124:12, 133:17-134:4, 175:19-24, 179:2-180:15; ECF 36, 45:22-46:23, 134:10-135:6.

23. In attempting to enforce its facemask policy, the Port Authority found it difficult to navigate the "gray area" of deciding what was or was not prohibited. ECF 36, 108:2-7. As Mr. Cetra put it, application of the original policy required the Port Authority to wrestle with difficult questions of "is that a political message, is that a social protest message?" ECF 36, 108:6-7.

24. As a result, the Port Authority sought to make its mask policy "easier" and "clearer to comply with." ECF 36, 108:2-4.[5]

25. It did so by promulgating a new and more restrictive policy, effective September 27, 2020, under which employees may only wear one of several approved masks. ECF 36, 104:15-19; ECF 40-1, PDF p. 4. Those masks are (a) a Port Authority logo mask provided by the Port Authority; (b) an ATU 85 union mask provided by the Union; and (c) a solid blue or black mask, or a surgical N-95 or KN-95 rated mask, that is either provided by the Port Authority or brought from home by the employee. ECF 40-1, PDF p. 4. The policy further provides that "no other masks or face coverings are permitted to be worn while on duty" and that "[p]ermitted masks or face coverings shall not be altered or affixed with any pins, stickers, logos, images, text, color[,] and/or color combination or scheme not permitted as described above." *Id.*

[5] Notably, the Supreme Court and Third Circuit have both held that policies that ban speech defined only as "political" are unconstitutionally vague. *See Minnesota Voters All. v. Mansky,* 138 S. Ct. 1876, 1888 (2018) ("[T]he unmoored use of the term 'political' in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test."); *Ctr. for Investigative Reporting v. Se. Pennsylvania Transportation Auth.*, 975 F.3d 300, 316 (3d Cir. 2020) ("[SEPTA] fails to offer any reason why the lingering references to advertisements that 'contain political messages' and those that address 'political issues' are any more capable of reasoned application than those that were struck down.").

26. This September 27, 2020, policy is presently the operative policy—meaning that employees who wish to wear "Black Lives Matter" masks remain unable to do so. ECF 36, 104:15-19.

27. There is no evidence that any member of the public has complained to the Port Authority about a bus driver, or any other employee, wearing a "Black Lives Matter" or other similar mask during the time-period where such masks were permitted. *See, e.g.,* ECF 36, 121:24-122:2, 163:5-17; ECF 34, 34:22-25.

28. Several bus drivers testified that they received positive and supportive comments from customers about their "Black Lives Matter" masks. *See, e.g.,* ECF 36, 49:12-14 ("A: Nothing but comments that were positive, that they liked them, that they liked them as much as I liked them."); ECF 34, 119:12-16 ("Q: Anyone ever -- how about your passengers, did they ever comment on what you were wearing, Black Lives Matter? A: No. Q: Or your chains? A: I usually get compliments."); ECF 34, 190:5-9 ("Q: Did any of the public say anything about it? A: No, actually complimented me on it. Q: In what way? A: Hey, I appreciate you standing up for us. Hey, I like that mask."); *see also* ECF 34, 151:7 ("I get a lot of compliments on my buttons.").

29. The testifying Port Authority employees stated that they either viewed "competing" masks (such as those supporting the police or supporting "all lives") favorably, or at least expressed that they had no objection to others' rights to wear facemasks that express differing views from their own. ECF 34, 65:23-66:9, 96:1-12, 133:2-16, 206:3-209:16; ECF 36, 66:5-9, 84:7-14.

30. There is no evidence that any work stoppage or strike was caused by an employee wearing a "Black Lives Matter" or other similar mask.

31. There is no evidence of any disruption of bus operations or reduction in employee productivity attributable to an employee wearing a "Black Lives Matter" or other similar mask. *See* ECF 36, 168:11-13 ("Q: … There weren't any operational disruptions; were there? A: That's correct. …").

32. There is no evidence of any instances of workplace violence, either between coworkers or with the public, attributable to an employee wearing a "Black Lives Matter" or other similar mask.

33. On the Port Authority's buses, a bus driver is typically the only employee aboard. Further, in light of the COVID-19 pandemic, the bus driver now sits behind a shield, and buses operate at reduced capacity, with passengers required to wear masks and socially distance. *See* ECF 36, 101:23-102:15, 146:16-24 ("…The reality is you are getting on a bus. The bus driver is sitting behind a fare box. Now all of them have it but even then, most of them. There is a spit shield, the driver shield, now it has become a COVID shield, but a shield they can deploy in front of them. They are typically facing this way. … I'm not dressing them down to see if they are in uniform.").

34. The Port Authority has itself engaged in public speech regarding political and social-protest issues, including by displaying such speech prominently on its buses (*e.g.,* a LGBT "pride" themed bus; an African-American heritage themed bus). ECF 36, 59:24-60:23, 148:1-13. There is no evidence that these displays or pronouncements have resulted in complaints from the bus-riding public, hostility towards drivers of those buses, or other negative consequences (aside from some employees requesting that they not be made to drive the "pride" bus).

35. The Port Authority contends that it has a unique "history of racial tension in the workplace[.]" ECF 41, p. 13. The Court finds that this assertion is not supported by the record. The Port Authority has almost 3,000 employees and has operated in Allegheny County for decades. *See* Finding of Fact ¶ 2. Yet it cited only two instances of arguable racial incidents, one of which occurred 14 years ago, to support this assertion. ECF 36, 127:6-128:23. In the Court's view, neither incident is sufficiently specific and probative evidence of any unique "history of racial tensions" at the Port Authority.

36. The Port Authority contends that, before it prohibited the "Black Lives Matter" masks, "employees complained on social media when a bus operator by the name of Vincent Brandon wore a Black Lives Matter facemask while on duty." ECF 41, pp. 12-13. The Court finds that this assertion is only partly supported by the record. In the cited portion of his testimony, Mr. Brandon was not asked about, and did not mention, any posts on social media complaining about him wearing a "Black Lives Matter" mask. Rather, he was asked if *he* recalled stating on social media that other members of the Union had complained about his mask. ECF 34, 95:3-20. He responded that he "vaguely recall[ed] that" but "can't recall any specific incident that I may have posted about." *Id.* Counsel then followed up by asking Mr. Brandon if he was aware of other employees with complaints "aside from what [he] posted about," and he responded that he "never had anybody directly confront me." ECF 34, 95:21-25. This testimony is, at best, ambiguous and does not support a finding that employees "complained on social media" about Mr. Brandon's mask.

37. The Port Authority contends that Mr. Brandon also "conceded that he is sometimes offended when people wear 'Thin Blue Lines' facemasks to support police officers." ECF 41, p. 13. The Court finds that this assertion is largely true, but incomplete. Mr. Brandon did testify that he "ha[s] been offended" by others wearing "Blue Lives Matter" or "All Lives Matter" masks, depending "on how it's being done." ECF 34, 96:18-20. But he also testified that he believed all Port Authority employees should be free to wear "Blues Lives Matter" or "All Lives Matter" masks, because "the First Amendment reigns supreme in this country" and "[y]ou should have the right to voice your opinion respectfully and peacefully." ECF 34, 96:1-12. He further explained that he felt employees wearing such masks were simply "showing their support for what they believe," and that he "support[s] that freedom that they have." ECF 34, 98:17-21.

38. The Port Authority contends that "employees complained on social media" about an employee named Timothy Eads, who "wore a Thin Blue Lines [sic] facemask while on duty," and that those employees "called him a racist." ECF 41, p. 13. The Court finds that this assertion is only partly supported by the record. Mr. Eads, who is Black, did testify that he wore a "Thin Blue Line" mask at work (although he also supports "Black Lives Matter"). ECF 34, 126:7-11, 131:17-18. Mr. Eads testified that he is an avid Facebook user who is "kind of popular" and has "like 2,000 friends on Facebook." ECF 34, 132:18-20. He acknowledged that people on social media (not necessarily Port Authority employees) had asked him "as a black man why would [he] support the police" and "accused [him] of being a racist" because of his public support for the police. ECF 34, 132:1-8. But he did not testify that multiple Port Authority employees complained on his Facebook page or, for that matter, accused him of being racist. Instead, he was only asked about one post on his Facebook page by someone who "appeared to be a fellow employee." ECF 34, 132:18-23. That post, made in response to a picture of Mr. Eads wearing a "Thin Blue Line" mask, stated: "The problem is that Port Authority said we are not allowed to wear Black Lives Matter mask, so how is a Blue Lives Matter mask acceptable." ECF 34, 132:9-17. The post ended by thanking Mr. Eads for "good argument and debate." *Id.*

39. The Port Authority contends that an employee named Devin Veyda complained about other employees wearing "Black Lives Matter" facemasks in a "Roundtable" message chain of Union employees. ECF 41, p. 13. The "Roundtable" is a messaging group of some kind, privately administered by Plaintiff Sasha Craig. ECF 34, 202:15-22. The Port Authority suggests that Mr. Veyda "became so disruptive to the Roundtable that Mr. Craig banned him from that forum." ECF 41, p. 13. The Court finds that these assertions are mostly consistent with Mr. Craig's testimony, which the Court credits. Specifically, Mr. Craig testified that Mr. Veyda contacted him via "Messenger, DM, direct messaging" to express concerns about

employees wearing "Black Lives Matter" masks. ECF 34, 204:12-17. Mr. Craig also testified that Mr. Veyda is "no longer a member of the Local 85 roundtable because he was very disruptive, very disrespectful, and … counterproductive to what we were trying to get accomplished[.]" ECF 34, 204:20-24.

40. The Port Authority asserts that "tension within Local 85 over the Black Lives Matter facemasks resulted in name-calling and the pressure to 'take sides.'" ECF 41, p. 13. The Court finds that this assertion is not supported by the record. As evidence, the Port Authority cites only one message that Plaintiff Sasha Craig sent or posted on social media. *See* ECF 34, 210:5-211. In it, Mr. Craig referred to Devin Veyda as a "bratty child," argued that the Union should support employees wearing "Black Lives Matter" masks, and suggested that if Mr. Veyda wanted to "wear a White Lives Matter mask, then [he should] go ahead and wear it." ECF 34, 210:15-20. This evidence may reflect an outside-the-workplace dispute between Mr. Craig and Mr. Veyda about Union policy, but it does not establish broader pressure to "take sides," or "tensions rising" within the entire Union.

41. The Port Authority also complains about, and seeks an adverse inference for, the spoliation of certain text messages by the Union's President, Stephen Palonis, and its Assistant Business Agent for Operations, Theodore Kielur. ECF 41, pp. 15-20. That request is based on Mr. Palonis's and Mr. Kielur's testimony that they deleted some of the text messages they received from union members about the "Black Lives Matter" mask issue. ECF 34, 30:4-16. The Court finds no bad faith by Mr. Palonis or Mr. Kielur that would warrant a sanction, such as an adverse inference. Nonetheless, out of an abundance of caution, the Court will grant the Port Authority's request for an adverse inference, and will infer that Mr. Palonis and Mr. Kielur received additional text messages from Union employees, and that those text messages, if preserved, would have reflected disagreement or displeasure with both

the Union's support for this lawsuit and, more broadly, its position supporting the wearing of "Black Lives Matter" masks.

LEGAL STANDARD

"The decision to grant or deny a preliminary injunction is within the sound discretion of the district court." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 114 (3d Cir. 2018) (citation omitted). However, preliminary-injunctive relief is an "extraordinary remedy" that "should be granted only in limited circumstances." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (cleaned up). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted); *see also Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 131 (3d Cir. 2017).

In First Amendment cases, however, "the initial burden is flipped." *Greater Phila. Chamber of Commerce v. City of Phila.*, 949 F.3d 116, 133 (3d Cir. 2020). In other words, "[t]he government bears the burden of proving that [its conduct] is constitutional" and "the plaintiff must be deemed likely to prevail if the government fails to show the constitutionality of [its conduct]." *Id.* (cleaned up). To trigger the government's burden, the plaintiff need only "make a colorable claim that the [government's conduct] restricts some form of speech." *Id.* (cleaned up). If the plaintiff makes that preliminary showing, "[t]he government must then justify its restriction on speech under whatever level of scrutiny is appropriate … given the restriction in question." *Id.* (cleaned up). If the government fails to establish that the restriction is constitutional, "the challenger must still demonstrate irreparable harm[.]" *Id.* (citation omitted). But such harm "is generally presumed where the moving party's freedom of speech right is being infringed." *Id.* (citation omitted).

DISCUSSION & ANALYSIS

I. The Union is likely to succeed on the merits of its First Amendment claim.

The Court turns first to whether the Union has demonstrated a likelihood of success on the merits of its First Amendment claim. "To satisfy this requirement for preliminary relief, the movant need only prove a prima facie case, not a certainty [it will] win." *Issa*, 847 F.3d at 131 (cleaned up). Thus, the Union must show only that it has a "reasonable probability" of success at trial. *Id.* (citation omitted). Further, because this is a First Amendment case, the Port Authority bears the burden of proving that any restrictions on its employees' speech rights are constitutional. *See Greater Phila. Chamber of Commerce*, 949 F.3d at 133.[6] Based on the evidence presented, the Court finds that the Port Authority has not carried its burden and, as a result, that the Union is likely to prevail.

When it acts as an employer, the government has a somewhat greater-than-usual interest in restricting its employees' free-speech rights. But this discretion is not without limit. It is well-established that "[p]ublic employees have a First Amendment right to speak freely on matters of public concern." *Curinga v. City of Clairton*, 357 F.3d 305, 309 (3d Cir. 2004) (citations omitted); *see also Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) ("The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."). Accordingly, the government may restrict or penalize such speech only if it is "likely

[6] The burden shifts to the Port Authority because the Union has met its initial burden of making "a colorable claim" that the Port Authority "restricts some form of speech." *Greater Phila. Chamber of Commerce*, 949 F.3d at 133. The Port Authority does not dispute that the policies in question restrict employee speech. To the contrary, the express purpose of both the original and amended mask policy was to restrict employee speech that the Port Authority perceives to be disruptive.

to disrupt the efficient operation of the workplace." *Grigsby v. Kane*, 157 F. App'x 539, 542 (3d Cir. 2005) (cleaned up).

To effectuate this standard, the Supreme Court has described two related but differing tests for evaluating restrictions on public-employee speech. The test to apply depends on the nature of the restriction at issue.

First, where "a public employer penalizes a particular employee because of past expression," the Court applies the familiar balancing test of *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). *Swartzwelder v. McNeilly*, 297 F.3d 228, 235 (3d Cir. 2002). Under that test, the Court begins by asking whether the employee's speech involved a "matter of public concern," meaning that the speech is "fairly considered as relating to any matter of political, social[,] or other concern to the community." *Baldassare v. State of N.J.*, 250 F.3d 188, 195 (3d Cir. 2001) (cleaned up). If the answer is yes, the Court considers whether the employee's First Amendment "interest in the speech … outweighs any potential disruption of the work environment and decreased efficiency of the office." *Curinga*, 357 F.3d at 312. The government bears the "burden to establish that its interest in [disciplining the plaintiff] outweighed [the plaintiff's] expressive interests[.]" *Festa v. Westchester Med. Ctr. Health Network*, 380 F. Supp. 3d 308, 322 (S.D.N.Y. 2019). And while the government "need not show the existence of actual disruption" caused by the employee's speech, it must at least show "that disruption is likely to occur because of the speech." *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d 454, 472 (3d Cir. 2015) (citation omitted).

Second, where a government employer "restricts employee speech before it occurs, rather than penalizing employee speech after the fact," the Court applies the modified *Pickering* analysis described in *United States v. National Treasury Employees Union ("NTEU")*, 513 U.S. 454 (1995). *Swartzwelder*, 297 F.3d at 235. This differs from the ordinary *Pickering* test in that the government must make an even more difficult showing "that the interests of both potential audiences and a vast

group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the operation of the government." *Swartzwelder*, 297 F.3d at 236 (cleaned up). This is an "exacting standard." *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1211 (9th Cir. 1996).

Here, the Court finds that the heightened *NTEU* standard applies. The Port Authority initially adopted a policy extending its ban on uniform adornments displaying "political or social-protest" messages to the facemasks it directed employees to wear due to the COVID-19 pandemic. *See* Findings of Fact ("FOF"), ¶ 21. When that policy proved difficult to administer and enforce, the Port Authority decided to prohibit the political and social-protest messages it viewed as potentially disruptive by adopting a broader restriction that allowed employees to wear only a few, specifically identified masks while on duty. FOF, ¶¶ 23-25. Both policies represent exactly the type of broad, prior restraint on speech that falls squarely within *NTEU*'s ambit.[7] But even assuming the more flexible *Pickering* standard

[7] The Port Authority argues that the *NTEU* standard should not apply because the Supreme Court later "clarified," in *City of San Diego v. Roe*, 543 U.S. 77 (2004), that "the heightened NTEU standard only applies if the policy restricts speech ***outside the workplace*** on topics unrelated to the employment." ECF 41, pp. 4-5 (emphasis added). But the Port Authority reads too much into the quote it cites from *Roe*, in which the Supreme Court merely observed that public-employee speech ***"[o]utside of [the] category [of matters of public concern]"*** can still be protected by the First Amendment "when government employees speak or write on their own time on topics unrelated to their employment[.]" *Roe*, 543 U.S. at 80 (emphasis added). The Court did not discuss or impose any "off the clock" requirement on speech related to matters of public concern.

On that point, the Third Circuit has broadly described *NTEU* as applying in any case involving a "generally applicable statute or regulation, as opposed to a particular disciplinary action[.]" *Lodge No. 5 of Fraternal Order of Police ex rel. McNesby v. City of Phila.*, 763 F.3d 358, 369 (3d Cir. 2014) (cleaned up). Consistent with this precedent, the Court find that while both "*Pickering* and *NTEU* arose in the context of speech activities that occurred during non-duty hours," they "also recognized that the same balancing test applies during duty hours, although the potential for 'immediate workplace disruption' would be greater in such situations." *Am. Fed'n of Gov't Employees v. D.C.*, No. 05-0472, 2005 WL 1017877, at *10 (D.D.C.

applies, the Port Authority's approach still violates the First Amendment rights of its employees. The Court will therefore analyze this case under both the *NTEU* and *Pickering* standards.

In assessing the policy, the Court must consider two relevant questions: First, under the original policy, was it constitutionally permissible for the Port Authority to prohibit its employees from wearing masks that display "political or social-protest" messages? Second, under the amended policy, is it constitutional for the Port Authority to require its employees to wear one of a few, specified masks in order to prevent them from engaging in the "political or social-protest" speech it views as disruptive? For the following reasons, the answer to both questions is "no."

A. The Port Authority's prohibition of masks with political or social-protest messages violates the First Amendment.

To begin, the Court will consider the constitutionality of the Port Authority's original policy, which prohibited employees from wearing masks that displayed political or social-protest messages. That policy has been superseded by the Port Authority's new policy, but the individual employees were disciplined under that policy, and the Port Authority admits that it adopted its new, "neutral" policy to ban the same messages in a more administrable way. FOF, ¶¶ 23-25. Thus, the Court

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May 2, 2005) (citation omitted). Thus, consistent with the First Amendment's broader disfavor of prior restraints, the key distinction drawn by *NTEU* was not between speech at work and speech outside of work, but between, on one hand, broad, prior restraints on employee speech related to matters of public concern, and, on the other hand, after-the-fact disciplinary proceedings against individual employees. *See Urofsky v. Gilmore,* 216 F.3d 401, 407 (4th Cir. 2000) ("[T]he place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace."); *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 749–50 (7th Cir. 1999) ("The Court [in *NTEU*] recognized that a prior restraint, as opposed to a *post hoc* disciplinary decision, poses problems not present in *Pickering*. With a prior restraint, the impact is more widespread than any single supervisory decision would be[.]") (citation omitted); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect.").

finds it necessary and appropriate to analyze both policies here. Starting with the original policy, on this factual record, and in the context of this government employer, the Court concludes that a ban targeting masks with political or social-protest messages violates the First Amendment.

As an initial matter, there is no dispute that a ban on any type of political or social-protest speech strikes at the heart of the most valuable speech protected by the First Amendment. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (cleaned up). Here, the Union's employees wish to wear facemasks that comment on the "Black Lives Matter" movement. FOF, ¶¶ 16-17. Neither party disputes that this is an issue of significant public concern, and so the Port Authority must make a sufficiently weighty showing of likely disruption to overcome its employees' significant interest in that speech. *See Munroe*, 805 F.3d at 472 ("In short, the inquiry involves a sliding scale, in which the amount of disruption a public employer has to tolerate is directly proportional to the importance of the disputed speech to the public.") (cleaned up).

The Port Authority makes two main arguments. It first argues that its restriction is reasonable because it applies only while employees are on duty. Then, it argues that it has an interest in prohibiting political and social-protest speech on masks because speech of that kind is potentially disruptive in the workplace. Based on the evidentiary record here, the Court finds both of these arguments unpersuasive.

i. Speech "on the clock" is not exempt from First Amendment protection.

Initially, the fact that the speech restriction here applies only in the workplace, while employees are on duty, is not dispositive. Certainly, it is relevant that the Port Authority has not attempted to ban its employees from wearing masks and buttons outside of work. That would clearly be unconstitutional. But speech "on the clock" is

not categorically exempt from First Amendment protection either. "An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace." *Urofsky,* 216 F.3d at 407; *see, e.g., Rankin v. McPherson*, 483 U.S. 378, 379–80 (1987) (holding that clerical employee could not be constitutionally discharged for stating "[i]f they go for him again, I hope they get him," in reference to attempted assassination of President Reagan, during a conversation with another employee at work); *Am. Fed'n of Gov't Employees*, 2005 WL 1017877, at *10 ("[T]he same balancing test applies during duty hours, although the potential for 'immediate workplace disruption' would be greater in such situations.") (citation omitted).

Thus, the Court must still assess whether the Port Authority has shown that disruption is "likely" to result if employees are permitted to wear masks that display "Black Lives Matter" or similar messages in the workplace.

ii. The Port Authority has failed to make a substantial showing, based on specific evidence, of actual or likely disruption.

The Port Authority has failed to present sufficient evidence that allowing its employees to wear "Black Lives Matter" or equivalent masks is "likely to disrupt the efficient operation of the workplace." *Grigsby*, 157 F. App'x at 542.

To be sure, the Port Authority clearly believes that political or social-protest speech could be disruptive. But "[m]ere allegations of disruption are insufficient to put the *Pickering* balance at issue." *Sexton v. Martin*, 210 F.3d 905, 912 (8th Cir. 2000) (citation omitted); *Harman v. City of New York*, 140 F.3d 111, 123 (2d Cir. 1998) (explaining that a government-employer "cannot justify broad restrictions on First Amendment rights by supposition alone."). Instead, the Port Authority must "make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." *Waters v. Churchill,* 511 U.S. 661, 674 (1994) (citations omitted); *Cragg*

v. City of Osawatomie, Kan., 143 F.3d 1343, 1347 (10th Cir. 1998) ("We will defer to a public employer's reasonable predictions of disruption, but those predictions must be supported by the presentation of specific evidence.").

It has not done so here. Instead, the Port Authority's position reflects an outsized fear of relatively harmless, but important, employee speech—a view that is incompatible with the First Amendment, even in the unique context of a government workplace. Initially, there is no compelling evidence of ***actual*** disruption caused by employees wearing masks that display political or social-protest messages. At most, the Port Authority has identified (1) a few social-media messages or posts by Port Authority employees that can be viewed as reflecting debate about whether employees should be allowed to wear "Black Lives Matter" or "Thin Blue Line" masks;[8] and (2) text messages reflecting (and a requested spoliation inference inferring) internal disagreement among Union members, either about the Union's support for "Black Lives Matter" and employees wearing "Black Lives Matters" masks generally, or about the Union's decision to litigate this particular case. *See* FOF, ¶¶ 36, 38-41.[9]

What is missing, however, is any evidence of complaints from bus riders or the public about drivers wearing certain masks; conflict or violence between employees

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[8] As detailed in the Court's Findings of Fact, there are only a few, borderline examples of this. FOF, ¶¶ 36, 38-41. Additionally, nearly all those examples involved Plaintiff Sasha Craig, whom the Court found to be uniquely outspoken and vocal on these issues. *See, e.g.,* ECF 34, 206:20-207:9 ("A: Sir, I am going to have to apologize to you because this is going to take a minute. Please forgive me. My name is Sascha Craig. I was born in 1964 in West Germany of an African-American father and a German mother …"). The one exception was a post ending in "good argument and debate." FOF, ¶ 38. Thus, the Port Authority has not presented evidence of significant or widespread expressions of employee displeasure on social media. *Id.*

[9] The Port Authority also suggests that it has a "history of racial tension" that warrants a heightened degree of precaution. As detailed in the Court's Findings of Fact, this assertion is not supported by the record. FOF ¶ 34. Instead, it is based only on (largely hearsay) testimony from its Chief Legal Officer, Michael Cetra, about

or members of the public; impediments to employees performing their work; decreased employee efficiency; or any other negative impact *in the workplace* attributable to employees wearing masks that feature political or social-protest messages. *Cf. Nichol v. ARIN Intermediate Unit 28,* 268 F. Supp. 2d 536, 560 (W.D. Pa. 2003) (Schwab, J.) ("Plaintiff's wearing her cross has not been disruptive, controversial (until banned by ARIN), distracting or confusing to students, nor has it caused any dissension or problems in the working or school environment. There is no evidence—nor even an allegation—that it causes any interference with ARIN's operations.").

Of course, the Port Authority is right to say that evidence of actual disruption is not necessarily required. *See Munroe*, 805 F.3d at 472. Under *Pickering*, a government-employer's reasonable prediction of "likely" disruption can be enough, so long as the feared disruption is significant enough to overcome the employee's expressive interests. *Id.* But the lack of any evidence of actual disruption is nonetheless telling here, given the ample opportunity for such disruption to occur in connection with (1) several months of drivers wearing masks with political and social-protest messages, FOF, ¶¶ 15-18; (2) Port Authority drivers routinely wearing political buttons and other adornments with such messages for many years (despite the policy against it), FOF, ¶¶ 9, 10; and (3) the Port Authority's own political and social-issue messaging; for example, its public pronouncements that support "Black Lives Matter" or the political and social-issue messages that are placed on its buses—which are often far more prominent than a message on a mask or button, *e.g.,* LGBT "pride" and African-American heritage themed buses.[10] FOF, ¶ 34; *see also Watters*

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two arguable instances of racial tension, one of which occurred 14 years ago. *Id.* In the Court's view, two relatively minor, racial incidents in 14 years does not evince any significant history of racial tension. *Id.*

[10] With respect to its own political messaging, the Port Authority points out that it is free to engage in speech on its own without necessarily permitting its employees to

v. City of Phila., 55 F.3d 886, 896 (3d Cir. 1995) (noting that evidence of "actual disruption" would "obviously be highly relevant" to the *Pickering* analysis); *Scruggs v. Keen*, 900 F. Supp. 821, 833 (W.D. Va. 1995) ("Strong evidence of a lack of likely disruption is the lack of actual disruption.") (citation omitted).

As for the social-media chatter identified by the Port Authority, the Court does not find this to be persuasive evidence of potential disruptiveness for purposes of a *Pickering* analysis. The posts in question are few in number and reflective of only generalized displeasure or disagreement between employees. FOF, ¶¶ 36, 38-41. Moreover, the Court is loath to allow the restriction of public-employee speech based on a few social-media posts by individual employees, and the largely imaginary concern that ill-considered or hyperbolic online communications will extend into the workplace. Put simply, the fact that the Port Authority was able to find a few employees expressing displeasure with bus drivers' masks on social media simply cannot justify a sweeping, prior restraint on political expression by any Port Authority employee.

For similar reasons, the Court also finds the evidence of disagreement or conflict during the Union's internal discussions to be a fundamentally different sort of "disruption" than that with which *Pickering* is concerned. Unions exist, at least in large part, for the very purpose of providing workers with a forum to air workplace grievances and seek representation of their interests. Given that, it is unsurprising to find members debating what issues the Union should advocate for or how it should

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engage in the same speech. *See* ECF 36, 149:16-18 ("I think it's very different from us. No. 1, I think it's different because it's our speech and we can choose what we say as an agency."). That is true, but it also doesn't negate the relevance of that evidence. The Port Authority's own political messaging remains relevant because, if political or social-protest speech is indeed inherently "disruptive," one might expect to see some evidence of disruption caused by the Port Authority's prominent display of those messages over the years. But there is no evidence that any such disruption has occurred, which calls into question why the Port Authority expects that it will now occur when employees engage in equivalent or even less intrusive speech.

go about doing it. It is also unsurprising that employees would send their Union president messages, expressing displeasure about pursuing certain litigation or expressing certain views on behalf of the Union. Such debates may become heated from time to time. But without more, this sort of internal debate (much of it on virtual platforms) doesn't suggest that employees are likely to bring those virtual disputes into the real workplace. Indeed, it is again telling that no employee is alleged to have done so here, despite having ample opportunity.

More fundamentally, the Port Authority's policy confuses its legitimate interest in preventing workplace or operational disruption with a more generalized and entirely speculative fear that political or social-protest speech might be controversial and upset co-workers or members of the public, or lead to counter-messages that could, in turn, lead to disruption. Indeed, it is clear that the Port Authority's *real* concern has little to do with a fear that disruption will be caused by the message "Black Lives Matter" itself. The Port Authority publicly supports the "Black Lives Matter" movement. Rather, the Port Authority is worried that employees will start wearing more controversial masks in response, such as "White Lives Matter" and the like. But, as a factual matter, the record doesn't reflect anyone wearing a mask depicting a responsive message of any kind that has created actual or likely disruption.[11] And a restriction on First Amendment rights in a government workplace cannot be based on speculation over a risk of disruption caused by speech

[11] There is evidence of one of the Union employees, Timothy Eads—an African-American male who is a former police officer—wearing a "Thin Blue Line" mask on occasion, in support of the police. But there is no evidence that this mask created or risked creating any disruption. FOF, ¶¶ 26-32. In fact, the testimony of many of the employees—which the Court views as credible—was that they either viewed "competing" masks, such as those supporting the police or supporting "all lives," favorably, or at least acknowledged having no objection to others expressing differing views. FOF, ¶ 28.

or messages that others may potentially convey in the future. That is simply too attenuated of a risk of disruption.

Put differently, while it may certainly discipline employees for rude or disruptive behavior, the Port Authority does not have a legitimate, let alone weighty, interest in ensuring that its employees do not express, in any fashion, a political or social position at work that might inspire a co-worker or member of the public to disagree. Indeed, under *Pickering*, "threatened disruption by others as a result of speech may not serve as a justification for public employer discipline" at all. *Scruggs,* 900 F. Supp. at 833–34; *see also Watters*, 55 F.3d at 897 ("[D]isruption caused by actions independent of the speech at issue cannot be equated with disruption caused by the speech itself."); *see, e.g. Flanagan v. Munger*, 890 F.2d 1557, 1566 (10th Cir. 1989) ("The department cannot justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs' speech offensive and for that reason may not cooperate with law enforcement officers in the future."); *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985) ("[T]he perceived threat of disruption … was caused not by the speech itself but by threatened reaction to it by offended segments of the public. … [W]e think this sort of threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action[.]").

To hold otherwise would run contrary to the entire premise of the First Amendment, which is that disagreement and debate are not evils to be feared or purged, but societal goods to be welcomed and nurtured. Simply put, Americans have both the "right and civic duty to engage in open, dynamic, rational discourse," and those "ends are not well served when the government seeks to orchestrate public discussion through content-based mandates." *United States v. Alvarez*, 567 U.S. 709, 728 (2012). As such, the Court declines to legitimize the erroneous, if increasingly endemic, view that mere exposure to differences of opinion is a harm to be feared or

avoided.[12] The reality is that conversations about matters of public concern "routinely tak[e] place at all levels in the workplace," and the risk that such speech "will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful." *Rankin*, 483 U.S. at 393 (Powell, J. concurring).

In any event, to the extent that the *NTEU* standard applies, even assuming the Port Authority's stated goal of avoiding potential discord arising from political or social-protest speech is legitimate, the policy it has adopted is ill-fitting and not at all tailored to achieving that end. *See Lodge No. 5 of Fraternal Order of Police ex rel. McNesby v. City of Phila.,* 763 F.3d 358, 375 (3d Cir. 2014) ("While *NTEU* did not explicitly establish a tailoring requirement, we have noted that such a requirement seems to be implicit in the Court's discussion.") (cleaned up); *Gasparinetti v. Kerr*, 568 F.2d 311, 316 (3d Cir. 1977) (under *Pickering*, "regulations may be promulgated, but their restrictive effect may extend only as far as is necessary to accomplish a legitimate governmental interest."); *Wolfe v. Barnhart*, 446 F.3d 1096, 1107 (10th Cir. 2006) ("Other courts have recognized that the tailoring requirement is an important aspect of the *Pickering* / *NTEU* analysis.") (citations omitted); *see, e.g.*, *Guthrie v. Bradley*, No. 06-0619, 2008 WL 4279805, at *7 (W.D. Pa. Sept. 15, 2008) (Conti, J.) ("While these are legitimate government concerns, regulations enacted for the purpose of realizing these goals can have no greater restrictive effect than necessary for their accomplishment.").

On one hand, the policy is underinclusive in an arbitrary fashion. That is, both the current and former versions of the policy relate only to messages conveyed on facemasks and other uniform adornments. Yet the Port Authority does not prohibit

[12] *See* G. Lukianoff and J. Haidt, *The Coddling of the American Mind*, at p. 29 ("A culture that allows the concept of 'safety' to creep so far that it equates emotional discomfort with physical danger is a culture that encourages people to systematically protect one another from the very experiences embedded in daily life that they need in order to become strong and healthy.").

its employees from engaging in the exact same speech at work in other, seemingly more intrusive ways. For example, a bus driver could, without violating any policy, greet each passenger who boards the bus by saying "Good morning, Black Lives Matter," discuss "Black Lives Matter" with a co-worker in the workplace, or text or tweet about "Blacks Lives Matter" during the work day.[13] The Port Authority does not explain why it is disruptive for an employee to passively communicate that "Black Lives Matter" by wearing a mask with a logo, if communicating the exact same message verbally and directly is not.

At the same time, the policy is also overbroad. This is so for two reasons. First, much of what the Port Authority speculates might be induced by the type of speech it has prohibited—such as employees fighting among themselves or with customers—either is or easily could be prohibited and deterred directly, through other, non-speech related policies. *See, e.g., Waters*, 511 U.S. at 673 ("[A] public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large."). An "across-the-board prohibition of the wearing of political buttons [or masks] is invalid" where "there are far less sweeping means available to safeguard legitimate governmental interests." *Am. Fed'n of Gov't Employees, AFL-CIO v. Pierce*, 586 F. Supp. 1559, 1561 (D.D.C. 1984); *see also Sypniewski v. Warren Hills Reg'l Bd. of Educ.,* 307 F.3d 243, 260 (3d Cir. 2002) ("Speech codes are disfavored under the First Amendment because of their tendency to silence or interfere with protected speech."); *Harman v. City of New York*, 140 F.3d 111, 123 (2d Cir. 1998) ("[T]he City has not shown that the executive orders are designed to address the asserted harm in a direct and material way. … This sweeping prior restraint mechanism is overbroad.").

[13] Indeed, the CEO of the Port Authority has tweeted and otherwise issued statements in support of "Black Lives Matter." *See* FOF, ¶ 18.

Second, the Port Authority has also made no attempt to tailor its policies to specific workplace contexts where there might be a heightened risk of disruption. The Union is comprised of several different types of employees, with different roles. Some employees drive buses; some are mechanics; some are instructors; some are disciplinary-hearing representatives. FOF, ¶ 3(a). But the policy here applies without regard for whether disruptive potential exists in each of the many contexts where Port Authority employees work (*e.g.,* on a bus, at the garage, at service centers, in disciplinary or other union hearings, in meetings, during training sessions, and in the field). Yet the evidence established that the risk of disruption varies widely across these different contexts.

For example, there is evidence that a bus driver wearing a mask aboard his or her own bus does not pose much risk of disruption—drivers are the only employee aboard, they sit behind a shield, buses currently operate at reduced capacity (and presumably will do so for as long as facemasks are necessary), no customer has complained to the Port Authority about a mask worn by a bus driver, and several drivers testified that the only customer comments they have received regarding their masks have been uniformly positive. FOF, ¶¶ 28, 32. Similarly, the Court perceives no evidence of disruption associated with employees wearing masks while working in the garage, or in a conference room during a disciplinary hearing.

In contrast, there is arguably some reason for concern in the specific context of training instructors wearing masks during training sessions. In that context, where the instructor determines if new recruits "pass" or "fail," the Port Authority might have a legitimate interest in guarding against the appearance of bias by banning masks reflecting a position on a political or social-protest issue. Yet the Port Authority's policy does not reflect any of this sort of context-specific nuance or tailoring. Absent more careful tailoring, directed to the specific context in which disruption is likely to arise, the policy runs afoul of the First Amendment.

iii. The Port Authority does not have a strong interest in enforcing a "pristine" uniform.

In defending its policy, the Port Authority also cites a few cases that have upheld prohibitions on uniform adornments against First Amendment challenges. *See, e.g., Commc'ns Workers of Am. v. Ector County Hosp.*, 467 F.3d 427 (5th Cir. 2006); *U.S. Dep't of Justice v. FLRA,* 955 F.2d 998 (5th Cir. 1992); *Risk v. Burgettstown Borough, Pa.*, No. 05-1068, 2007 WL 2782315 (W.D. Pa. Sept. 21, 2007) (Lenihan, J.). But these and other similar cases have invariably involved law enforcement agencies, paramilitary organizations, or, in some circumstances, hospitals. *See Risk*, 2007 WL 2782315 (borough police officers); *FLRA*, 955 F.2d 998 (INS patrol agents); *Commcn's Workers of Am.,* 467 F. 3d 427 (various hospital workers); *but see Herrera v. Med. Ctr. Hosp.*, 241 F. Supp. 2d 601, 611–13 (E.D. La. 2002) (holding that fact issues existed as to whether public hospital had strong enough interest to prohibit carpenter from wearing a union pin).

What all these entities share is a uniquely strong interest in projecting uniformity, discipline, and neutrality, either internally or to the general public. *See, e.g., Risk*, 2007 WL 2782315, at *2 (holding that officer's First Amendment rights at work were "far outweighed by the necessity of maintaining police uniforms as a symbol of neutral government authority, free from expressions of personal bent or bias.") (cleaned up); *Smith v. United States*, 502 F.2d 512, 517 (5th Cir. 1974) (VA hospital could prohibit staff psychologist from wearing peace pin while administering psychotherapy to "emotionally disturbed" veterans, due to likelihood that pin would cause psychological "harm to the very patients he is employed to assist on treating").

But outside of those contexts, public employers are not entitled to the same level of deference, and "[m]ere incantations that a pristine uniform is necessary to provide safe public transportation" are "clearly insufficient to legitimatize an anti-adornment rule which renders nugatory all expressions of constitutionally protected

speech contained on a button, badge[,] insignia," or, as here, a mask. *Scott v. Goodman*, 961 F. Supp. 424, 428 (E.D.N.Y. 1997), *aff'd sub nom. Scott v. Meyers*, 191 F.3d 82 (2d Cir. 1999)*; see also Herrera*, 241 F. Supp. 2d at 611–13 ("[I]n these cases the Fifth Circuit allowed the INS and the police department to satisfy their burden by asserting that uniform regulations are critical to obedience and commitment. … Outside of the military context, of course, public employers are not entitled to the same high level of deference.") (citations omitted); *Liverman v. City of Petersburg*, 844 F.3d 400, 407-08 (4th Cir. 2016) ("[S]uch deference applies with special force to police departments because they are paramilitary—discipline is demanded, and freedom must be correspondingly denied.") (cleaned up).

While the Port Authority surely has some degree of interest in adopting a uniform to promote obedience and cohesion among its employees, it is not a law enforcement agency or paramilitary organization and it does not have any obvious interest in enforcing a "pristine" uniform, free from unintrusive uniform adornments like small buttons or facemask logos. *Cf. Pierce*, 586 F. Supp. at 1561 ("[I]t is claimed that the wearing of buttons might cause political problems between subordinates and supervisors as well as between fellow employees. This argument would be more persuasive were it not for the fact that most federal agencies either lack 'button' regulations altogether or fail to enforce such regulations as may be on their books.").

Indeed, the testimony in this case established that uniform violations—including violations of the ban on political and social-protest adornments—are commonplace and laxly enforced within the Port Authority. FOF ¶¶ 9-10. The Port Authority's Chief Legal Officer also described such violations as "minor." FOF, ¶ 13. In other words, even if there were, as a matter of law, support to treat transit employees the same as police officers with respect to furthering an interest in having pristine uniforms, as a matter of fact, the evidence here shows that the Port Authority's long-time tolerance for Black Power necklaces, ankhs, Clinton buttons,

Obama buttons, Biden buttons, Trump 2020 stickers, and the like undermines (and calls into doubt the existence of) any such interest.

Given this, and the lack of evidence that political or social-protest speech of the kind prohibited by the Port Authority's original policy poses a risk of workplace or operational disruption, the Court finds that the Port Authority lacks any legitimate interest in prohibiting employees from wearing masks adorned with such messages.

B. The Port Authority's new facemask policy suffers from the same constitutional problems.

Of course, the Port Authority's view is that everything discussed thus far is now moot because it has adopted a new, "neutral" policy. That policy provides that the "only masks and other face coverings permitted to be worn while on duty" are (1) "Port Authority-issued logo masks with Port Authority's logo printed on the mask"; (2) "ATU Local 85-issued logo mask with ATU Local 85's logo printed on the mask"; (3) "solid black or solid blue" color "masks or gaiter style face coverings," either issued by the Port Authority or "brought from home;" and (4) "clear face shields" or "surgical-style, N-95 rated or KN-95 rated masks," either issued by the Port Authority or "brought from home so long as [they] … do not have any visible logos, images, texts or other markings on them." ECF 40-1, PDF p. 4; *see also* FOF, ¶ 25. The new policy further provides that "no other masks or face coverings are permitted to be worn while on duty" and that "[p]ermitted masks or face coverings shall not be altered or affixed with any pins, stickers, logos, images, text, color[,] and/or color combination or scheme not permitted as described above." ECF 40-1, PDF p. 4. The Port Authority argues that this broader policy is content and viewpoint neutral, and therefore consistent with the First Amendment.

In taking this approach, the Port Authority has "burn[ed] the house to roast the pig," *Butler v. State of Mich.*, 352 U.S. 380, 383 (1957), which the First Amendment does not allow. The Port Authority offers the same justification for the

new policy that it offered for the old—it was adopted to ban the political and social-protest speech it views as disruptive, just in a more readily administrable way. FOF, ¶¶ 23-25. In various First Amendment contexts, courts have recognized that even a facially neutral policy can violate the Constitution if the government's "asserted *interest* is related to the suppression of free expression … and concerned with the content of such expression." *United States v. Eichman*, 496 U.S. 310, 315 (1990) (cleaned up; emphasis in original); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality … is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. … The government's purpose is the controlling consideration. … Government regulation of expressive activity is content neutral so long as it is ***justified without reference to*** the content of the regulated speech.") (cleaned up; emphasis added); *Karn v. U.S. Dep't of State*, 925 F. Supp. 1, 10 (D.D.C. 1996) ("Pursuant to extensive First Amendment jurisprudence, the government's rationale for the regulation controls, regardless of the form of the speech or expression regulated.") (emphasis added).

Again, aside from any general interest the Port Authority might have in enforcing a "pristine" uniform (which, as discussed, is not strong) and its desire to ban all political and social-protest messages (which, as discussed, is not constitutional), the Port Authority has not articulated any interest to justify restricting its employees from wearing masks that display messages related to matters of public concern. In particular, the Port Authority has not proffered any safety-based rationale for requiring the particular masks it has specified. Nor is it clear how the content of the mask could relate to any such concern. Thus, the policy remains a prior restraint on employee speech, with no work-related justification aside from the perceived disruptiveness of political or social-protest messages.

As a result, the new policy makes the problem here worse, not better. The Port Authority cannot cure an unconstitutional prohibition on displays of political or social-protest messages by banning even *more* employee speech along with those messages, with no independent justification. *See Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 361 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy."); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[T]he remedy to be applied is more speech, not enforced silence"); *Rappa v. New Castle Cty.,* 18 F.3d 1043, 1072–73 (3d Cir. 1994) ("Eliminating the offending exception would mean that we would be requiring the State to restrict more speech than it currently does. … We refuse to strike down the exception in part because of the special status of speech in our constitutional scheme, a scheme which generally favors more speech."); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 194 (D. Mass. 2015) ("An alternative interpretation in which 'intimidating' was not merely duplicative would restrict more speech and require a stronger justification still.").

What appears to be motivating the new broader policy is the desire to enact a content and viewpoint-neutral policy. *See* ECF 39-1, PDF p. 47 ("If Port Authority allows uniforms to be used as a message board for some political or social protest topics, we must then allow all messages on that topic, including those that could disrupt Port Authority's ability to deliver public transit service in a safe and efficient manner and cause harm to our employees, customers, and communities."). As noted above, the Port Authority supports "Black Lives Matter"; it simply does not want to open the door to competing viewpoints, and believes it cannot enact a content or viewpoint discriminatory policy targeted to limit those competing views. FOF, ¶ 20.

But there is nothing in *NTEU*, *Pickering*, or any other precedential case from the Supreme Court or Third Circuit that forbids content or viewpoint-based discipline

in the context of public employment. Content and viewpoint discrimination are concerns that ordinarily arise where the government restricts speech in public forums, not in the workplace. *See Cochran v. City of Atlanta, Georgia*, 289 F. Supp. 3d 1276, 1292–94 (N.D. Ga. 2017) (discussing and rejecting a concern over viewpoint discrimination in the context of *Pickering* balancing test); *see also id.* at 1294 ("[I]f a public employer could constitutionally fire an employee for using racial slurs in the workplace under *Pickering*, under Plaintiff's reasoning, that employee could later prevail in a viewpoint discrimination claim by showing that the public employer did not fire employees who promoted racial equality."); *see, e.g., Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 652 (9th Cir. 2006) (applying *Pickering* balance test where government employer prohibited employee from expressing his religious views by displaying religious items in his cubicle). In other words, nothing prevents the Port Authority from analyzing specific instances of employee speech for potential disruptiveness, rather than imposing a prior restraint on an entire category of important and highly protected speech.[14]

In sum, the Port Authority's new policy violates the First Amendment in the same manner as its old policy, and fails under both the *Pickering* and *NTEU* standards, for the reasons discussed above.

All that being said, the Court's analysis here is guided by the specific facts of this case, and the evidence presented to it at the preliminary-injunction hearing. This evidence included speech of indisputably great public concern. It included a facially

[14] The Port Authority is right to be worried about enacting a viewpoint or content-based policy that attempts to define "disruptive" speech in a vacuum. So, what's the Port Authority to do? In the end, having no policy may be better than a broad prior restraint. As noted above, targeted enforcement of any problems caused by uniform adornments that result in disruption can likely be addressed by disciplining individual employees based on disruptive conduct tied to conduct-based policies. And regarding speech, the Port Authority remains free to discipline speech that is unprotected by the First Amendment or that does not touch on matters of public concern.

neutral policy, but one that quite obviously was directed to target "Black Lives Matter," as well as any potentially competing facemask messages, using the bluntest possible instrument—a categorical, prior restraint aimed at core political speech and reflecting no attempt at tailoring based on context or non-speech considerations. It included a long history of Port Authority employees using uniform adornments and accessories to express political and social-protest speech, notwithstanding the Port Authority's on-the-books policy, without any evidence of resultant disruption. It included an evidentiary record that allowed the Court to assess any actual disruption caused by the specific speech at issue over a several-month period, during a time when racial tensions across the country were at their peak. And it included the narrow issue of specific facemasks to be worn by transit employees for hopefully only a short time longer due to a global health pandemic.[15] This confluence of factors compels the outcome here.

For all these reasons, the Court finds that the Union has a reasonable probability of success on the merits of its First Amendment claim. The Port Authority has not shown that the prohibition on "Black Lives Matter" masks is necessary to avoid workplace or operational disruption. And absent such a showing, the Port Authority's policy does not comport with its employees' "right to speak freely on matters of public concern." *Curinga*, 357 F.3d at 309 (citations omitted).

II. The remaining injunction factors also favor granting the Union's motion for preliminary relief.

What is left, then, is to consider the remaining injunction factors. First, the Union will suffer irreparable harm if an injunction is not issued. "The loss of First

[15] As reflected in the Court's separate order, the injunction here enjoins enforcement of the Port Authority's policy as to the specific facemask messages described or shown to the Court during the hearing and masks that contain substantially the same messages, as those facemasks all undisputedly concern messages of public concern. No other facemask has been placed at issue by Plaintiffs' motion.

Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) ("The ban prevents B.H. and K.M. from exercising their right to freedom of speech, which unquestionably constitutes irreparable injury.") (cleaned up).

Second, the issuance of an injunction would not "result in even greater harm" to the Port Authority. *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999). Even if invalidating the policy might create some administrative headaches (and there is no evidence of that), the Port Authority "cannot properly claim a legitimate interest in enforcing an unconstitutional [policy]." *Am. Freedom Def. Initiative v. Se. Pennsylvania Transp. Auth.*, 92 F. Supp. 3d 314, 330 (E.D. Pa. 2015); *see also ACLU v. Ashcroft*, 322 F.3d 240, 251 n. 11 (3d Cir. 2003) ("Neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.").

Third, granting a preliminary injunction is in the public interest. "As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n. 8 (3d Cir. 1994). Moreover, "there is a significant public interest in upholding First Amendment principles." *Am. Freedom Def. Initiative v. Se. Pennsylvania Transp. Auth.*, 92 F. Supp. 3d 314, 330 (E.D. Pa. 2015); *see also Ramsey v. City of Pittsburgh, Pa.*, 764 F. Supp. 2d 728, 735 (W.D. Pa. 2011) (Cercone, J.) ("[C]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.").

For these reasons, all injunction factors favor relief and the Union is entitled to a preliminary injunction.

III. The Court will require the Union to post a nominal bond of $100 before the preliminary injunction will issue.

Federal Rule of Procedure 65(c) "mandates that a court when issuing an injunction must require the successful applicant to post adequate security." *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988); *see* Fed. R. Civ. P. 65(c) ("No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."). However, "the amount of the bond is left to the discretion of the court[.]" *Frank's GMC Truck Ctr., Inc.*, at 847 F.2d at 103. Here, because the Union "seek[s] injunctive relief to protect [employees'] First Amendment rights," and because the Port Authority "did not offer any evidence that [it] will suffer a financial loss as a result of the injunction," the Court will "require [the Union] to post a nominal bond of $100 before the preliminary injunction will issue." *Am. Freedom Def. Initiative v. Se. Pennsylvania Transp. Auth.*, 92 F. Supp. 3d 314, 331 (E.D. Pa. 2015).

CONCLUSION

For all the reasons discussed above, the Court grants Plaintiffs' motion for a preliminary injunction. ECF 2. An appropriate order follows.

DATED: January 19, 2021

BY THE COURT:

/s/ *J. Nicholas Ranjan*
United States District Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies the foregoing **Brief for Appellant and Appendix Volume I** was filed electronically via the Courts CM/ECF system on the 4th day of June 2021, which system will effectuate service upon the following Filing User via a Notice of Docket Activity:

Joseph J. Pass
Patrick K. Lemon
JUBELIRER, PASS & INTRIERI, P.C.
219 Fort Pitt Boulevard
Pittsburgh, PA 15222
Counsel for Appellees

/s/ Gregory J. Krock
Gregory J. Krock

MCGUIREWOODS LLP
Tower Two–Sixty
260 Forbes Avenue, Suite 1800
Pittsburgh, PA 15222–3142
(412) 667–6042

Counsel for Appellant Port Authority of Allegheny County