No. 18-340

IN THE

Supreme Court of the United States

IN-N-OUT BURGER, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Board's order compelling a private employer to speak violates the First Amendment, particularly given this Court's recent holdings in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), and *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

2. Whether the Board's and the Court of Appeals' application of the Board's "special circumstances" test conflicts with other decisions of the Board and the decisions of other Circuits, and whether the test is so muddled and internally inconsistent as to be unenforceable in light of its chilling effect on employers' First Amendment rights.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

REASONS FOR GRANTING THE PETITION 7

I. THE NLRB'S "SPECIAL CIRCUMSTANCES" JURISPRUDENCE IS DIAMETRICALLY OPPOSED TO THIS COURT'S FIRST AMENDMENT JURISPRUDENCE 7

A. A Private Employee's Workplace Speech Right Is Statutory 7

B. A Private Employer's Commercial Speech Right Is Constitutional 9

C. The NLRB Erroneously Treats An Employee's Statutory Speech Right As Superior To An Employer's Constitutional Speech Right 11

II. THE NLRB'S CONFUSED APPLICATION OF THE "SPECIAL CIRCUMSTANCES" RULE DESPERATELY NEEDS THIS COURT'S ATTENTION 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases:

Boch Imports, Inc. v. NLRB,
826 F.3d 558 (1st Cir. 2016) 13, 15

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000) 9, 11

C. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) 12

Citizens United v. FEC,
558 U.S. 310 (2010) 9

George v. Lab. Corp. of Am. Holdings,
522 F.Supp.2d 761 (N.D. W. Va. 2007)..... 9

Guardian Indus. Corp. v. NLRB,
49 F.3d 317 (7th Cir. 1995) 7

Hudgens v. NLRB,
424 U.S. 507 (1976) 8

Janus v. AFSCME,
138 S. Ct. 2448 (2018) 10

Kay v. New Hampshire Dem. Party,
821 F.2d 31 (1st Cir. 1987) 9

Lansing v. City of Memphis,
202 F.3d 821 (6th Cir. 2000) 8, 9

Page(s)

Marbury v. Madison,
5 U.S. 137 (1803) 11

NIFLA v. Becerra,
138 S. Ct. 2361 (2018) 10, 11

NLRB v. City Disposal Systems, Inc.,
465 U.S. 822 (1984) 7

Riley v. Nat'l Fed. of the Blind of N. Carolina, Inc., 487 U.S. 781 (1988) 10

Rumsfeld v. FAIR,
547 U.S. 47 (2006) 10, 12

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011) 1

Administrative Decisions:

Bell-Atl.-Penn.,
339 NLRB 1084 (2003) 14

Casino Pauma,
202 L.R.R.M. 2108 (2015) 13

Healthbridge Mngmnt, LLC,
360 NLRB 937 (2014) 14

Medco Health Solutions of Las Vegas, Inc.,
357 NLRB 170 (2011) 14

Pathmark Stores, Inc.,
342 NLRB 378 (2004) 14, 16

Page(s)

Sacred Heart Med. Ctr.,
347 NLRB 531 (2006) 14

S. New Eng. Tel. Co.,
356 NLRB 883 (2011) 14

Starwood Hotels & Resorts Worldwide, Inc.,
348 NLRB 372 (2006) 13

Constitutions, Statutes, and Regulations:

U.S. Const.:
Amend. I ..... *passim*

National Labor Relations Act:
29 U.S.C. §157 ..... *passim*
29 U.S.C. §158(c) 8

Miscellaneous:

Howard Davis, *Five Hidden Los Angeles Treasures (Part II)*, Scoop Culture, https://perma.cc/N88S-3F7Z (Sep. 28, 2018) 2, 3

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Page(s)

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation ("WLF") is a nonprofit, public-interest law firm and policy center with supporters in all fifty states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF has appeared as *amicus curiae* before this Court in important commercial speech cases. See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

Employees enjoy a constrained statutory right to free speech in the workplace on labor issues. Employers enjoy a robust constitutional right to free commercial speech. Elevating the employees' statutory right above the employers' constitutional right, the National Labor Relations Board ("NLRB" or "the Board") presumes that each employer-imposed restraint on employees' labor-related workplace speech is invalid. The NLRB will uphold such a restraint only when the employer establishes "special circumstances" for doing so. The NLRB's application of this "special circumstances" test is uneven and unpredictable.

The NLRB, WLF believes, is thwarting constitutionally protected commercial speech. This Court should require the NLRB to apply a consistent

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, WLF notified each party's counsel of record of WLF's intent to file the brief. Each party's counsel of record has consented in writing to the brief's being filed.

and predictable rule that gives the constitutional speech right priority over the statutory one.

STATEMENT OF THE CASE

"In-N-Out, founded on the West Coast in 1948, is that rarest of chain restaurants: one with a cult following." Tom McNichol, *The Secret Behind a Burger Cult*, N.Y. Times, https://perma.cc/2PV3-GRUR (Aug. 14, 2002). It is "exalted both by hamburger fans and [by] those who normally shun fast food." *Id.*; see, e.g., YouTube, *Anthony Bourdain on In-N-Out: 'My Favorite Restaurant in LA'*, https://perma.cc/2JZA-3FBD (Jan. 14, 2015) ("It's the only fast food chain that I actually like.").

Anyone who doubts that a corporation can be expressive should step inside an In-N-Out. "Part of the chain's charm lies in its distinctive signature colours—white for the buildings' exterior walls and the employees' basic uniform, red for the buildings' roofs and the employees' aprons and hats, and yellow for the decorative band on the roof and the iconic zig-zag in the logo." Howard Davis, *Five Hidden Los Angeles Treasures (Part II)*, Scoop Culture, https://perma.cc/N88S-3F7Z (Sep. 28, 2018). "The interior of any In-N-Out Burger location pays homage to its [Southern-California] origins through retro, LA-style neon signage. The exterior, wherever possible, includes a pair of live palm trees (echoed on the drink cups)." Eidson & Partners, *Branding Genius: The Secrets Behind In-N-Out Burger's Outsized Reputation*, https://perma.cc/ZYB5-UHVG (Jan. 2, 2018).

"The authentic California vibe is as much a part of the In-N-Out experience as the food." *Id.* In-N-Out channels the ineffable feel of a place "where laid-back surfers lounge on beaches and palm trees abound." *Id.* It pairs this relaxed feel with a clean space, happy employees, and fresh and well-prepared food. See, e.g., *id.*; Eidson & Partners, *Inside In-N-Out Burger's Powerful Employee Experience* https://perma.cc/C23Z-XWPC (Feb. 5, 2018); Davis, supra ("In-N-Out was one of the very few restaurant chains given a positive mention in the book *Fast Food Nation*, which commended [it for using] natural and fresh ingredients and for looking after the interests of employees.").

In-N-Out recently ranked first in a survey of 126 restaurant chains' brand loyalty. Nation's Restaurant News, *Top Brands Ranked By Customer Loyalty: Consumer Picks 2017*, https://perma.cc/5Z84-G52T (Nov. 14, 2017). It obviously knows what it takes to maintain the pleasant atmosphere that registers so strongly with its customers.

In-N-Out does not allow an employee to wear "any type of pin or sticker" on her uniform. Pet. App. 34. In April 2015 a pair of employees at an Austin, Texas, In-N-Out wore a button with the number 15—a reference to a campaign to raise the minimum wage to $15 an hour—in front of a clenched fist. *Id.* at 3-4. Enforcing the "no pin or sticker" rule, the manager forbade employees from wearing the button in the restaurant. *Id.*

A labor group filed an unfair labor practice charge. Pet. App. 32. An administrative law judge concluded that In-N-Out's "no pin or sticker" rule—

and its use of the rule to bar the clenched-fist button—violates the National Labor Relations Act ("NLRA"). *Id.* at 6. The NLRB affirmed in pertinent part. *Id.* at 24-26.

The Fifth Circuit, too, affirmed. Applying NLRB case law, the court declared In-N-Out's "no pin or sticker" rule "presumptively invalid." Pet. App. 8-11. In-N-Out could establish the validity of its rule only by showing that "special circumstances" justify it. *Id.* This "special circumstances" exception is "narrow" and applies "in only a limited number of situations." *Id.* The employer bears the burden of raising "substantial" evidence establishing "special circumstances." *Id.*

In-N-Out argued, among other things, that its distinct image is a "special circumstance" justifying the "no pin or sticker" rule. Pet. App. 12. But In-N-Out failed, the court concluded, to establish a "public image" special circumstance. *Id.* at 13-19. The "public image" prong of the "special circumstances" rule is so "exceedingly narrow" that not even customer offense at an employee's speech triggers it. *Id.* at 14-15 & n.5. And In-N-Out's use of buttons that say "Merry Christmas," or that promote a charity supporting victims of child abuse, "undermine[d]" In-N-Out's opposition to its two employees' protest button. *Id.* at 5, 16. (The starkly different messages conveyed by the holiday and charity buttons, on the one hand, and the protest button, on the other, was treated as irrelevant.) "The Board was entitled," in short, under the "special circumstances" structure it has constructed, "to reject the evidence adduced by In-N-Out as speculative." *Id.* at 16.

SUMMARY OF ARGUMENT

America's businesses are as diverse as America itself. Some of them believe, along with Milton Friedman, that their main responsibility is to generate profits. Others, such as Newman's Own, believe their calling is to generate money for charity. Some close in observance of holy days; others promote the fact that they never close. Some sponsor fun runs and Little League teams; some donate goods to victims of natural disasters; and some just deliver snacks at 3 a.m. Some seek to align themselves with controversial social causes. Some seek to help people forget for a while that social problems exist.

The NLRA ensures that a company respects its employees' right to cooperate in promotion of their interests. That's a good thing. Unfortunately, however, the NLRB has heavily glossed the statute, expanding employees' organizing right to the point that it engulfs employers' constitutional right of free speech. Under the NLRB's reading of the NLRA, employees enjoy a presumptive right to speak about labor issues in their employer's establishment, during its business hours, to its customers. In this case, for instance, the NLRB concluded that In-N-Out employees may wear protest buttons depicting a clenched fist as they serve burgers and milkshakes. These employees—who are free, off the clock, to convey *their* serious message—may now alter *In-N-Out*'s lighthearted message. A distinct corporate voice is diminished.

The Court should review this case in order to address two key problems:

1. The NLRB has turned the First Amendment and the NLRA upside down. Under the First Amendment, for example, *the government* bears the burden of showing that an alteration of an employer's commercial speech is justified. According to the NLRB, however, *the employer* bears the burden of showing that certain attempts to *protect* its speech from government-sanctioned alteration are justified. In this and other ways the NLRB privileges employees' NLRA speech right over employers' First Amendment speech right.

2. The NLRB will allow an employer to restrict employees' labor-related workplace speech if the employer establishes that "special circumstances" support the limitation. In addition to violating the First Amendment, the "special circumstances" test is a mess. Employers have no way to predict which t-shirts, hats, pins, buttons, or stickers they may ban. Employers—and, it seems, the NLRB—need this Court's guidance on the contours of an employer's right to regulate protest in the workplace.

At all events, employees' statutory speech right must stop where their employer's constitutional speech right begins. In-N-Out's employees may raise awareness about labor issues; but In-N-Out should get to decide whether its burgers are served with a side of grievance.

The petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I. THE NLRB'S "SPECIAL CIRCUMSTANCES" JURISPRUDENCE IS DIAMETRICALLY OPPOSED TO THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

The NLRA ensures that an employer cannot punish its employees for promoting labor interests. The NLRB has carried the NLRA a step further, however, interpreting it as granting employees a broad right of free speech, as to labor issues, in the workplace. The statutory speech right the NLRB enforces invades employers' First Amendment speech right at every turn. The Court should step in and restore the proper balance between the NLRA and the First Amendment.

A. A Private Employee's Workplace Speech Right Is Statutory.

Section 7 of the NLRA gives employees the right to self-organize, to unionize, and "to engage in other concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. § 157. Section 7 ensures that employees may "join[] together" to "achieve common goals." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984).

What is beyond doubt is that, thanks to section 7, an employer may not "discriminate against [employees'] speech and organizational efforts, making them more costly than they would be if the employer left the employees to their own devices." *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) (Easterbrook, J.). It is far less clear

what in section 7 might require an employer—which enjoys its own right of free speech under the NLRA, see 29 U.S.C. § 158(c)—actively to promote employee speech or collective action. If, for example, an employer allows employees to post for-sale notices on a bulletin board, it is hard to see how the employer's allowing *only* for-sale notices—and not notices of union meetings *or of anything else*—could violate section 7. See *id.* at 318-23 (holding that it doesn't).

The NLRB has nonetheless construed section 7 as giving employees extraordinary speech rights in the workplace. The NLRB requires that employees be allowed to wear—even in front of customers—buttons, pins, or stickers promoting labor interests. Pet. App. 8-9. There are only "narrow" exceptions to this rule, and they arise only in "special circumstances." *Id.* The employer bears the burden of justifying a restriction. *Id.* at 10. To carry its burden, the employer must present "substantial" evidence of the "special circumstance" it seeks to establish. *Id.* In this case, for instance, In-N-Out bore the burden of establishing that an employee's wearing a protest pin with a clenched fist "unreasonably interfered" with a desired "public image" that In-N-Out has documented in a "business plan." *Id.*

Whatever the proper scope of private employees' section 7 speech right is, the right *comes from section 7*—not the First Amendment. The Free Speech Clause "is a guarantee only against abridgement by government, federal or state," *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); it does not regulate a private employer's approach to its employees' speech, see, e.g., *Lansing v. City of*

Memphis, 202 F.3d 821, 828 (6th Cir. 2000) ("A private entity acting on its own cannot deprive a citizen of First Amendment rights."); *Kay v. New Hampshire Dem. Party*, 821 F.2d 31, 33 (1st Cir. 1987) ("The Constitution provides no redress when private parties abridge the free expression of others."); *George v. Lab. Corp. of Am. Holdings*, 522 F.Supp.2d 761, 763 (N.D. W. Va. 2007) ("The protections guaranteed by the First Amendment * * * do not extend to private-sector employees."); Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 Ind. L.J. 101, 116 (1995) ("Employees in the private sector have, of course, no constitutional free speech rights to raise against their employer's decision to fire them.").

An employee's workplace speech right is exclusively a creature of statute.

B. A Private Employer's Commercial Speech Right Is Constitutional.

The First Amendment protects "the freedom to speak in association with other individuals, including association in the corporate form." *Citizens United v. FEC*, 558 U.S. 310, 386 (2010) (Scalia, J., concurring). To enjoy "the protections of the First Amendment," an association need not associate "for the 'purpose' of disseminating a certain message"; it need "merely engage in expressive activity." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000). The Court "give[s] deference" both to the association's "assertions regarding the nature of its expression" and to its "view of what would impair its expression." *Id.* at 653. In determining what to defer to, the Court

looks merely to the group's "official position" about what it intends to express. *Id.* at 655.

"Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018). The First Amendment therefore protects a speaker's choices about "both what to say and what *not* to say." *Riley v. Nat'l Fed. of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796-97 (1988); *Janus*, 138 S. Ct. at 2463. The protection against compelled speech covers not only government attempts to impose the government's message, but also government attempts to force a group to "host or accommodate another speaker's message." *Rumsfeld v. FAIR*, 547 U.S. 47, 63 (2006).

A government-imposed alteration of a company's commercial speech is subject to "exacting" scrutiny. *Janus*, 138 S. Ct. at 2464-65. The alteration cannot be "unjustified or unduly burdensome," and it cannot be imposed merely to cure a "purely hypothetical" harm. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2377 (2018). The government bears the burden of showing that the corporation should be forced to alter its speech. *Id.*

Forcing an employer to project speech it "find[s] objectionable" violates a "cardinal constitutional command." *Janus*, 138 S. Ct. at 2463.

C. The NLRB Erroneously Treats An Employee's Statutory Speech Right As Superior To An Employer's Constitutional Speech Right.

"The constitution controls any legislative act repugnant to it." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). A constitutional right trumps a statutory right. Yet the NLRB lets section 7 of the NLRA trump the First Amendment of the Constitution:

- Under the First Amendment, *the government* "has the burden to prove" that compelled commercial speech "is neither unjustified nor unduly burdensome." *NIFLA*, 138 S. Ct. at 2377. But under section 7—as read by the NLRB—"it is *the employer's* burden to overcome" a presumption that compelled speech is justified and reasonable. Pet. App. 10 (emphasis added).

- Under the First Amendment, *the government* may not use a "hypothetical" harm to justify compelled commercial speech. *NIFLA*, 138 S. Ct. at 2377. But under section 7—as read by the NLRB—*the employer* may not use "conjecture" to free itself of compelled speech. Pet. App. 11.

- Under the First Amendment, "it is not the role of the courts to reject a group's expressed values because they * * * find them internally inconsistent." *Dale*, 530 U.S. at 651. But under section 7—as read by the NLRB—a supposed inconsistency in an employer's position "undercut[s]" the employer's attempt

to free itself of compelled speech. Pet. App. 15.

- Under the First Amendment, regulation of commercial speech must be "narrowly drawn." *C. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 565 (1980). But under section 7—as read by the NLRB—it is an employer's attempt to *protect* its commercial speech from section 7 interference that must be "narrowly tailored." Pet. App. 11.

- Under the First Amendment, "a compelled-speech violation" presumptively arises when "the complaining speaker's own message [i]s affected by the speech it [i]s forced to accommodate." *FAIR*, 547 U.S. at 63. But under section 7—as read by the NLRB—an employer presumptively must tolerate compelled speech even if it offends the employer's customers. Pet. App. 14-15.

This case is a great opportunity for the Court to address the glaring inconsistency between its interpretation of the First Amendment and the NLRB's interpretation of section 7.

II. THE NLRB'S CONFUSED APPLICATION OF THE "SPECIAL CIRCUMSTANCES" RULE DESPERATELY NEEDS THIS COURT'S ATTENTION.

"The Board has repeatedly held that employer bans on all buttons or emblems, including union buttons, are not justified merely because employees

have contact with customers." *Casino Pauma*, 202 L.R.R.M. 2108 (2015) (collecting authority). There have been exceptions. See *Starwood Hotels & Resorts Worldwide, Inc.*, 348 NLRB 372 (2006). On the whole, however, the NLRB has been increasingly strict about compelling employers to play host to their employees' customer-directed speech. See *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 581 (1st Cir. 2016) (Stahl, J., concurring in part and dissenting in part) (noting the NLRB's "silent, unexplained creep" toward a presumptive bar on "*any* restrictions upon the wearing of union-related paraphernalia").

But "by tacitly encouraging employers to adopt narrower [bans] limited to offensive or controversial messages," the NLRB has "lured businesses into a legal bog":

> Such policies cannot be administered in any kind of predictable or coherent manner. Employers must examine each t-shirt, button, sticker, or hat and make an on-the-spot judgment call, in each instance, about whether a particular message in a particular context has "crossed the line." Thus, the employer risks liability every time human resources or in-house counsel draws that line (assuming the business can afford such experts) and bears the burden of proof to boot. And, of course, once that determination is made, employees are free to don a slightly altered piece of attire, leaving the employer in a quicksand of boundary-testing litigation.

Boch Imports, 826 F.3d at 585 (Stahl, J., concurring in part and dissenting in part).

The NLRB's attempt "to play 'fashion police,'" *id.*, has spurred interminable litigation. The interminable litigation, in turn, has given rise to a proliferation of irreconcilable results. See, e.g., *Healthbridge Mngmnt, LLC*, 360 NLRB 937 (2014) (no "special circumstances" when nursing-home workers wear stickers, in front of patients, that accuse the employer of being "Busted" by the NLRB for labor violations), enforced, 798 F.3d 1059 (D.C. Cir. 2015); *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170 (2011) (no "special circumstances" when an employee, in protest of the employer's employee-incentive program, wears a shirt, in an area frequented by clients, that says "I don't need a WOW to do my job"), not enforced in pertinent part, 701 F.3d 710 (D.C. Cir. 2012); *S. New Eng. Tel. Co.*, 356 NLRB 883 (2011) (no "special circumstances" when employees wear shirts in front of customers that say "Inmate" and "Prisoner of AT$T"), not enforced, 793 F.3d 93 (D.C. Cir. 2015); *Sacred Heart Med. Ctr.*, 347 NLRB 531 (2006) ("special circumstances" when nurses wear buttons, in front of patients, that say "RNs Demand Safe Staffing"), reversed, 526 F.3d 577 (9th Cir. 2008); *Pathmark Stores, Inc.*, 342 NLRB 378 (2004) ("special circumstances" when grocery-store employees wear shirts in front of customers that say "Don't Cheat About the Meat!"); *Bell-Atl.-Penn.*, 339 NLRB 1084 (2003) ("special circumstances" when employees try to protest a downsizing plan by wearing shirts, in front of customers, that depict employees as road kill).

This case raises exactly the kind of "special circumstances" quandary for which the NLRB offers

no good answer. The employer wants to present a message infused with positivity and placid wholesomeness. A few employees want to wear a button with a clenched fist—a message of rebellion, agitation, and discontent. Is the employees' message "too" prominent, "too" controversial, "too" negative? Does it alter the employer's speech "too" much? Woe unto the managers or lawyers who must answer these questions, and more woe yet unto those who answer yes. "Pick wrong, and the employer will be liable for a labor-rights violation. Pick right, and the employee may return the following day with a slightly smaller and [less controversial] button." *Boch Imports*, 826 F.3d at 586 (Stahl, J., concurring in part and dissenting in part).

"To businesses seeking to avoid liability, and courts seeking to ascertain administrable rules, the Board's standard is simply unworkable." *Id*. Yet so long as the NLRB insists on altering the message employers present at their tables, counters, and cash registers, cases like this one will continue to accumulate.

This Court should review this case and rescue employers (and employees) from the NLRB's haphazard policing of speech. The Court could at minimum provide a framework that curtails the subjectivity of the NLRB's test. The Court could declare, for instance, that a restriction on an employee's customer-facing speech is presumptively valid. Cf. *Boch Imports*, 826 F.3d at 581-84 (Stahl, J., concurring in part and dissenting in part) (arguing that this used to be the rule). The Court could also go a step further and order the NLRB to stop using section 7 to infringe employers' First

Amendment speech rights. Section 7 protects *employees*' speech; but it does not entitle employees to co-opt *employers*' speech. The Court could declare, therefore, that, whatever employees might get to say in the backroom or off the clock, the First Amendment allows an employer to choose what they may say around customers, in the public workspace, during business hours.

The NLRB does not treat as binding the decisions of the United States Courts of Appeals. *Pathmark Stores*, 342 NLRB at 378 n.1. It considers itself free to persist in its views until this Court steps in. *Id.* The NLRB's muddled "special circumstances" rule will continue generating labor disputes—and compelled speech—until (1) the NLRB drastically changes its approach (unlikely) or (2) this Court grants review in a case such as this one.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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