NO. 18-340

In the Supreme Court of the United States

IN-N-OUT BURGER, INCORPORATED,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

ARGUMENT

I. EXTRAORDINARY CIRCUMSTANCES JUSTIFY REVIEW OF THE LEGAL ISSUES RAISED IN THE PETITION

The Board's Opposition argues that the "extraordinary circumstances" exception to Section 10(e) of the Act is somehow confined to cases where the Board has exceeded its jurisdiction. (Opp., p. 8-9)[1]. As this Court has long recognized, the extraordinary circumstances exception is not so limited. Specifically, the Court has expressly held that post-decisional changes in operative facts or law constitute extraordinary circumstances on which the courts are entitled to act in overturning or modifying a Board decision. As this Court held in rejecting the Board's 10(e) defense in *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428 (1947):

> When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration.

The Court held likewise with regard to post-decisional changes in legal doctrine in *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 (1974), cited in the Petition but not addressed by the Board's

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[1] Citations to the NLRB's Opposition Brief shall be abbreviated herein: (Opp., p. ___).

Opposition. In that case, where an intervening change in the legal doctrine governing the Board's decision occurred during the pendency of the employer's appeal, this Court declared the matter should be remanded to the agency "to decide…whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act." *Id.*, 417 U.S. 10, n.10. The Court further held that remand is not always required where "crystal-clear Board error renders a remand an unnecessary formality." *Id.*, at 8.

In either case, in the extraordinary circumstance where governing law has changed following a Board decision while an appeal is pending, Section 10(e) poses no bar to judicial consideration of a party's objection based upon the change in the law. Inherently, such an objection could not have been made sooner, and/or it would have been frivolous for the employer to have done so.

The Board's specious argument that *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), did not change First Amendment law (Opp., p. 9), is simply wrong. In *Janus*, this Court unequivocally held that *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), a decision of 41 years standing, was "wrongly decided and is now overruled." 138 S. Ct. at 2486. The Court undeniably gave greater force to past holdings, which *Abood* had minimized, that protected individuals from being compelled to endorse ideas they find objectionable. *Id.* at 2484. The Court's parallel holding in *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. __, 138 S. Ct. 2361 (2018) gave new force to the contention that

businesses like the Petitioner are protected by the First Amendment from government regulations chilling protected speech.

Prior to this Court's rulings in *Janus* and *Becerra*, the Petitioner had no credible likelihood of success in arguing that the NLRB rule at issue here violated the First Amendment. But now the Court's recent rulings have given the First Amendment its intended force, requiring a reevaluation of the Board's unconstitutional employee button policy.

This Petition should be granted so that the Court can prevent the Board from unlawfully compelling the Petitioner to endorse objectionable messages on associate buttons visible to the public.

At a minimum, the case should be remanded to the Board to reevaluate its own policy in light of this Court's new holdings. In light of the change in the Court's First Amendment doctrine, which neither the Board nor the Fifth Circuit addressed, it would be entirely appropriate for the Court to issue a grant, vacate and remand ("GVR") order remanding the case. *See Lawrence v. Chater*, 516 U.S. 163 (1996).

II. REMAND TO THE BOARD IS APPROPRIATE UNDER THE NEW STANDARD ANNOUNCED IN *BOEING*

The Board asserts in its Opposition that the question of a possible remand under *The Boeing Company,* 365 NLRB No. 154 (2017) "is not properly before this Court." (Opp., p.10). However, the issue was raised by Petitioner in its petition for rehearing to the Fifth Circuit. The Fifth Circuit considered and

denied the rehearing petition. The question is properly before the Court.

The Board further asserts that the policy at issue in this case is a "flat ban on buttons" which is not subject to review under the new *Boeing* standard. (Opp. P. 10).

However, the core policy issues implicated in *Boeing* parallel those at issue in this case. In *Boeing,* the Board evaluated a "no camera" rule in a defense contractor's manufacturing plant. The Board found that "countervailing considerations" – in that case, the substantial interest of the American people in national security – must be given due consideration when evaluating work rules. 365 NLRB No. 154, Slip. Op. p. 21.

Here, a countervailing consideration also exists – Petitioner's First Amendment right to avoid compelled speech. With the publication of *Boeing,* the Board ushered in a new era in the evaluation of workplace rules, and remand is appropriate to determine whether the new standards also impact a flat ban on union insignia in customer-facing jobs. [2]

III. A SPLIT IN THE CIRCUITS EXISTS

The Fifth Circuit's Opinion in this case conflicts with the D.C. Circuit's Opinion in *Southern New England Telephone Co. v. NLRB,* 793 F.3d 93 (D.C. Cir. 2015).

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[2] In footnote 1 of the Petition, five cases were identified which had been remanded by Circuit Courts in the wake of *Boeing.*

The Board attempts to distinguish the D.C. Circuit in *Southern New England Telephone Co.,* noting that the messages worn by employees in that case were "obviously problematic." (Opp., p. 13) [3] The Board apparently contends that the "Fight for 15" message in this case is **not** obviously problematic, but the record is to the contrary. The image of the "clenched fist" and references to "fighting" on the button in this case are contrary to the image which Petitioner seeks to portray to its customers.

In any event, that distinction is not relevant in evaluating whether a split in the circuits exists. The D.C. Circuit concluded that evidence of a "relationship between [an Employer's] business and the banned message" would suffice to show special circumstances. This conflicts with the standard articulated by the Fifth Circuit in the instant case.

The Fifth Circuit's Opinion in this case also conflicts with the Ninth Circuit's Opinion in *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964).

The Board attempts to evade the Ninth Circuit's Opinion in *Harrah's* by noting that the Opinion is 55 years old, and that Petitioner relies only on a "discussion" which was mere *dicta* in the case. (Opp., p. 14). Neither assertion invalidates *Harrah's* support of the Petition.

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[3] This assertion is a reversal for the Board. In its decision in the *Southern New England* case, the Board concluded that the messages were protected, as they would **not** cause "fear or alarm among the [Employer's] customers." 356 NLRB No. 118 (2011). The D.C. Circuit reversed.

First, a split in the circuits exists even when the split spans several decades.

Second, the Petitioner relies on the actual holding of *Harrah's*, not mere *dicta*. The Board cites *Pay'n Save Corp. v. NLRB*, 641 F.2d 697, 701 (9th Cir. 1981) for the proposition that *Harrah's* is mere *dicta*. However, in *Pay'n Save,* the treatment by the Ninth Circuit of *Harrah's* focused on a key distinction – in *Harrah's,* there was no ongoing union organizing campaign, but the button ban in *Pay'n Save* was enforced against the backdrop of an ongoing union organizing drive.

Here, the facts are more similar to those in *Harrah's,* as Petitioner was not subjected to any union organizing activity at the time it enforced its no-button policy. The case which the Board uses to distinguish the ruling in *Harrah's* is itself distinguishable.

The actual holding of the Ninth Circuit in *Harrah's*, that special circumstances justified a ban on public-facing hotel employees adding items to their uniforms, conflicts with the holding of the Fifth Circuit here.

A split in the Circuits exists here; review by the Court is therefore urgently needed to resolve the split.

IV. THE BOARD'S "SPECIAL CIRCUMSTANCES" DOCTRINE IS INTERNALLY INCONSISTENT AND UNWORKABLE

In its Opposition, the Board describes its special circumstances doctrine as "settled law." (Opp., p. 11). True, the doctrine has been in place for decades. However, it has mutated over the years, assuming in just the last few years a mystical quality, providing little guidance to workers, unions and employers.

To establish public image special circumstances, the employer need not show actual harm to the customer relationship. But, the employer must show either (1) specific, non-speculative evidence that union insignia worn by an associate affected (past tense) its business, or (2) specific, non-speculative evidence that union insignia worn by an associate would affect its business. *Medco Health Solutions of Las Vegas, Inc.,* 364 NLRB No. 115 (2016) ("*Medco II*").

To satisfy prong # 1, the employer must show that the wearing of insignia affected its business. This is, in fact, a requirement that the employer show an adverse impact on the customer relationship. Yet, the Board stresses such evidence is not required.

To meet prong # 2, the employer must show that the wearing of union insignia by an associate would impact its business. But it can't speculate about such an impact.

The Board asserts in its Opposition that evidence of "foreseeable" or "likely" harm is actually "non-speculative." (Opp., p. 15). This supposed distinction is impossible to apply in practice.

Indeed, there is no way out of the conundrum created by the Board's policy – it simply is not possible to introduce "non-speculative" evidence about what **would** happen, or what would be likely to happen, or what would be foreseeable, if an associate wore union insignia on his uniform. [4]

The *Medco II* standard, adopted by the Fifth Circuit in its Opinion, is unworkable. Review by this Court is again urgently needed to resolve this issue of great public importance.

Finally, it is notable that the Board does not comment on the further conundrum, highlighted in the Petition, presented where a quick-service restaurant employer asserts **both** public image and food safety special circumstances. Larger buttons pose a lesser risk to food safety (they will be seen if they fall into food), but pose a greater risk to public image (according to the Board, a "highly conspicuous" button is a "far cry" from the button at issue in this case. (Opp, p. 16)). The Board, in its Opposition, offers no explanation as to how this puzzle can be

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[4] The Board's cites *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) for the proposition that there is a difference between "likely" and "speculative." However, in noting that difference, *Lujan* was focused on whether judicial intervention would be "likely" to redress a particular injury. This is an entirely different inquiry from assessing the admissibility of courtroom evidence.

solved under the Board's current policy. At a minimum, remand to the Board is appropriate to resolve this dilemma.

CONCLUSION

Contrary to the Opposition, the Petition in this case presents issues of great public importance. For each of the reasons stated above and in the Petition itself, the Court should grant the writ of certiorari.

In the alternative, the Court should grant, vacate and remand this matter to the Board for its further consideration, in light of the intervening legal developments noted in the Petition and this Reply.

Respectfully submitted,
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