NO. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The National Labor Relations Board ("NLRB" or "the Board") applied its "special circumstances" doctrine in this case to compel Petitioner In-N-Out Burgers to allow its associates to add unwanted messages to their work uniforms while interacting with the public, contrary to the message and public image Petitioner wants to communicate. In conflict with other circuits, the Fifth Circuit Court of Appeals enforced the Board's order, thereby compelling speech and departing from the Board's own precedent. The questions presented are:

1. Whether the Board's order compelling speech of a private employer violates the First Amendment, in light of this Court's recent holdings in *Janus v. AFSCME, Janus v. AFSCME*, 138 S. Ct. 2448 (2018), and *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

2. Whether the Board and Court of Appeals erred in their application of the Board's special circumstances test in this case, in conflict with the Board's own precedent and decisions of other Circuits, and/or whether the test is so muddled and internally inconsistent as to be unenforceable in light of its chilling effect on employers' First Amendment rights.

PARTIES TO THE PROCEEDING

Petitioner In-N-Out Burger, Incorporated was the Petitioner and Cross-Respondent in the Fifth Circuit Court of Appeals. Respondent National Labor Relations Board was the Respondent and Cross-Petitioner in the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 14.1(b) and 29.6, Petitioner and Cross Respondent. In-N-Out is a privately held corporation, and there is no corporation which is publicly held which owns 10% or more of the stock of In-N-Out Burgers.

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The Decision and Order of the National Labor Relations Board is reported at 365 NLRB 39.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 2018. A Petition for Panel Rehearing was denied on September 5, 2018. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an

> agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. §158(a)(3)].
>
> 29 U.S.C. § 158(a) provides, in relevant part:
>
> It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. § 157] ….
>
> 29 U.S.C. § 158(a) provides, in relevant part:
>
> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

STATEMENT OF THE CASE

A. In-N-Out's Public Image And Business Plan

In-N-Out operates quick service restaurants in Arizona, California, Nevada, Oregon, Texas and Utah. In-N-Out's public image (its brand identity) has been carefully cultivated and has remained basically unchanged since the opening of its first

store in 1948. A key component of In-N-Out's business philosophy is that the customer experience should be consistent from one store to another – all of the stores serve the exact same food, with the exact same attention to customer service, in the exact same environment. Associates wear the same uniforms in Texas as they do in California, and so on. This consistency is a part of In-N-Out's strong brand identity and a big reason for its success.

In-N-Out maintains sparkling clean restaurants, in which the customer can see everything – including the kitchen where food is prepared. Other quick service restaurants don their employees in dark colored apparel to hide stains and give the appearance of a clean environment. In-N-Out Associates wear white uniforms to demonstrate openly the clean environment of In-N-Out's restaurants. These clean, white uniforms are an important part of In-N-Out's public image.

In-N-Out has adopted a decades-old, rigorous and detailed associate uniform policy. The policy itself runs to eight pages in length, including detailed sections on hats, hair, shirts, undergarments, jackets, pants, name tags/pins, aprons, socks/shoes, jewelry, fingernails, makeup/facial features, sunglasses and prescribed transition lenses, personal hygiene and tattoos.

In-N-Out's managers enforce the uniform policy on a daily basis. Associates who are not in compliance with the requirements of the policy are subject to employment discipline.

A cornerstone of the policy, again in place and enforced for decades, is that associates may not add any items to their uniforms. In-N-Out has adopted and enforced this strict policy in order to project a sparkling clean, and consistent public image to its customers.

B. In-N-Out's Commitment To Food Safety

In-N-Out has a formal food safety program, with multiple layers of administration devoted to protecting the sanitation of its stores so as to provide safe food to the public. This program complies with, and exceeds, government food safety requirements.

Obviously, the associates who prepare, cook and serve the food to customers are the primary protectors of the safety of In-N-Out's food. All are required to possess a food handler card. All are provided with detailed and rigorous training regarding the importance of sanitation and the safe handling of food.

As part of its food safety program, In-N-Out strictly controls the items which may be brought into its food preparation areas. As a part of this control process, Associates are prohibited from adding any items to their uniforms.

C. An Associate In Austin Adds An Item To His Uniform Expressing An Unwanted Message

In April, 2015, an associate in an In-N-Out store in Austin, Texas, added a "Fight for 15" button to his uniform. In-N-Out does not endorse this message and does not want to convey such a message

to its customers. The button violated In-N-Out's policies. Accordingly, the Store Manager directed the associate to remove the button, and the associate complied. No other action was taken against him.

Also in April, 2015, an In-N-Out manager informed a different associate that a "Fight for 15" button is not part of the In-N-Out uniform.

D. Proceedings Before The NLRB And The Fifth Circuit

The associate who was told to remove the button from his uniform filed an unfair labor practice charge. Region 16 of the Board issued a complaint, and an ALJ conducted a hearing. The ALJ, the Board, and the Fifth Circuit all concluded that In-N-Out's ban on adding items to their uniforms violated the National Labor Relations Act. The ALJ, the Board and the Fifth Circuit found that neither public image nor food safety concerns justified In-N-Out's ban.

REASONS FOR GRANTING THE WRIT

In-N-Out Burger's Petition for Writ of Certiorari raises questions of great public importance regarding the Board's application of its special circumstances policy in such a manner as to compel employer speech in violation of the First Amendment and contrary to the Board's own precedent. The petition should be granted for the following reasons.

First, the Fifth Circuit erred in failing to reconcile its holding with this Court's recent ruling in *Janus v. AFSCME,* which held that the government

cannot compel private persons to endorse or subsidize messages with which they do not agree.

Second, the Fifth Circuit erred in failing to address the Board's recent decision in *The Boeing Company,* 365 NLRB No. 154 (2017), which introduced a new legal standard for evaluation of employer workplace policies. In conflict with other circuits and the holding of this Court in *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10, n. 10 (1974), the Fifth Circuit failed to remand this case to the Board so that the Board could determine in the first instance the applicability of the new *Boeing* standard to this case.

Third, the Board and the Fifth Circuit erred in their application of the "public image" prong of the special circumstances doctrine. In particular, both the Board and the court of appeal required In-N-Out to specifically prove adverse impact on the Company's business, contrary to Board precedent and in conflict with other circuits. The internal inconsistencies in applying the Board's doctrine in this case also should be denied enforcement in order to avoid chilling the First Amendment rights of employers.

A. The Supreme Court's Recent Decision In *Janus v. AFSCME* Requires A Re-Evaluation Of The Special Circumstances Doctrine

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the Court overturned a 41 year precedent, invalidating state "agency fee" laws as constituting compelled speech, in violation of the First Amendment. In doing so, the Court held as follows:

"Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." (Citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 633 (1943) and *Riley v. National Federation of Blind of N.C., Inc.* 487 U.S. 781, 796–797 (1988) (rejecting "deferential test" for compelled speech claims)).

In the context of commercial speech, the U.S. Supreme Court also recently issued an opinion expanding First Amendment protections for businesses, *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___, 138 S. Ct. 2361 (2018) (State law violated First Amendment by imposing a regulation that chilled protected speech of specified businesses).

In the present case, the NLRB is compelling the employer to endorse and/or subsidize a pro union message by allowing "Fight for 15" buttons to appear on the employer's official uniform. Whatever the merits of the Board's compelling employers to allow associates to convey such a pro union message prior to *Janus*, that policy must be revisited now to avoid violation of employer first amendment rights as implemented under section 8(c) of the National Labor Relations Act. *See also National Association of Manufacturers v. NLRB,* 717 F.3d 947, 956 (D.C. Cir. 2013) (Finding that compelling employers to post posters written by the NLRB violated section 8(c) of the Act.)

In-N-Out acknowledges that this First Amendment argument was not raised before the NLRB, but the change in law resulting from *Janus v. AFSCME* constitutes "extraordinary circumstances" as defined in section 10(e) of the NLRA, 29 U.S.C. § 160(e), justifying further review and consideration of this matter by this Court.

In essence, by compelling speech in this case, the Board has acted in excess of its authority. Such actions constitute "extraordinary circumstances" under Section 10(e) that excuse any failure to preserve an objection to a Board order in the court of appeals. *See Dresser-Rand Company v. NLRB,* 576 Fed.Appx. 332 (Mem) (5th Cir. 2014); *HTH Corp. v. NLRB,* 823 F.3d 668, 673 (D.C. Cir. 2016); *see also Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff'd on other grounds*, 134 S. Ct. 2550 (2014), where the Court considered objections to the Board's quorum, though no party had raised such objections to the Board itself. *Id. See also Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009) (finding extraordinary circumstances where the Board exceeded its jurisdiction regarding a religious institution); *NLRB v. Cheney California Lumber Co.*, 327 U.S. 385, 388 (1946) (finding extraordinary circumstances where the Board "has patently traveled outside the orbit of its authority"); and *Advanced Disposal Systems v. NLRB*, 820 F.3d 592 (3d Cir. 2016) (holding that "a challenge … which goes to the authority of the Board to act, constitutes an extraordinary circumstance under Section 160(e)").

The change in First Amendment doctrine announced by the Supreme Court in *Janus v. AFSCME* should qualify as extraordinary circumstances as defined in section 10(e) of the Act.

B. The Board's Recent Decision In *Boeing* Requires That This Case Be Remanded To The Board To Decide Whether To Give That Decision Retroactive Effect

In its recent decision in *The Boeing Company,* 365 NLRB No. 154 (2017), the Board announced an entirely new standard for evaluation of employer workplace rules. The Board identified three new categories of rules, the legality of which would be examined under three different sets of criteria. The Board declared that the new standard(s) would apply retroactively to all cases in whatever stage. *Id.* slip op. at 14.

In the instant case, the Fifth Circuit issued its opinion without any consideration of whether the new standards announced in *Boeing* impacts the Board's conclusions in this case. Accordingly, the Board has not had the opportunity to determine how the new *Boeing* standard might apply to the present case. In *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10, n. 10 (1974), this Court held that an appellate court "reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act."

Indeed, since the Board's decision in *Boeing*, no fewer than five cases have been remanded from the Circuit Courts to the Board, and the Appeals Court's failure to remand this case to the Board directly conflicts with the actions of those circuits which did remand cases to the Board for reconsideration in light of *Boeing*.[1]

C. The Court's Opinion Creates A Split In The Circuits As To The Application Of The Board's Special Circumstances Doctrine.

The Fifth Circuit's decision in this matter conflicts with both D.C. Circuit and Ninth Circuit precedent.

The Fifth Circuit's decision conflicts with the D.C. Circuit's decision in *Southern New England Telephone Co. v. NLRB,* 793 F.3d 93 (D.C. Cir. 2015). There, the D.C. Circuit concluded that, in order to establish public image special circumstances: "…Board precedent [does] not 'require the employer to offer additional evidence beyond a relationship between its business and the banned message.'" (citing *Medco Health Solutions of Las Vegas v. NLRB*, 701 F.3d 710, 717 (D.C. Cir. 2012).

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[1] *Grill Concepts Services, Inc. v. NLRB*, 722 Fed.Appx. 1 (D.C. Cir. 2018); *Dish Network, L.L.C. v. NLRB*, 731 Fed.Appx. 368 (5th Cir. 2018); *Everglades College, Inc. v. NLRB*, 893 F.3d 1290 (11th Cir. 2018); *Cowabunga, Inc. v. NLRB*, 893 F.3d 1286 (11th Cir. 2018); *Novelis Corporation v. NLRB*, 885 F.3d 100 (2d Cir. 2018).

In contrast, the Fifth Circuit here has required that such additional evidence actually be produced. The Fifth Circuit required that In-N-Out "…must put forth specific, non-speculative evidence of the adverse effects it claims justify its restriction." Slip. op. at 12-13. This requirement directly conflicts with the "no additional evidence" standard adopted by the D.C. Circuit.

The Fifth Circuit's decision in the instant matter also conflicts with the Ninth Circuit's decision in *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964). There, the Ninth Circuit found special circumstances where the employer had implemented a blanket prohibition on employees adding anything to their uniform, which was consistently enforced for years, as part of their effort to maintain a certain image to the public. Here, there is overwhelming evidence that In-N-Out has implemented a blanket prohibition on associates adding anything to their uniform, which has been consistently and rigorously enforced for decades, and which is part of the Company's effort to maintain their public image.

D. Insurmountable Internal Inconsistencies Exist Within The Board's Special Circumstances Doctrine, As Adopted By This Court

The decisions of the NLRB which form the foundation for the Fifth Circuit's opinion in this matter are confusing and virtually unworkable. In adopting those standards, the Fifth Circuit's opinion will lead to further confusion in the workplace.

As a primary example of the board's muddled approach to the special circumstances doctrine, the

evidentiary standard for public image special circumstances cases, as articulated by the Board in *Medco Health Solutions of Las Vegas Inc.,* (2016) ("*Medco II")*, is internally inconsistent. This standard was adopted by this Court in its opinion in this matter. The standard is confusing and does not provide clear guidance to employers, workers, or labor unions.

Specifically, in *Medco II*, the Board held: (1) an employer need not show actual harm to the customer relationship in order to show public image special circumstances, ***and*** (2) the only way to show an unreasonable interference with public image is by producing ***specific, non-speculative evidence*** that allowing employees to add to their uniforms adversely affect***ed*** the employer's business, or would adversely affect its business. 364 NLRB No. 115, slip. op. at 4-5. These two concepts simply cannot exist side-by-side. If no actual harm need be shown, then an employer should not need to show that something "affected" (past tense) its business. Further, how can one show something "would affect" a business, without some degree of speculation? In addition, in *Medco II,* the Board left intact its prior decisions in *Con-Way Central Express,* 333 NLRB 1073 (2001) and *Starwood Hotels & Resorts Worldwide, Inc. d/b/a W San Diego,* 348 NLRB 372 (2006), which contained no such "specific, non-speculative" evidence. Finally, it should be noted that one Board member in *Medco II* dissented from the "specific, non-speculative" evidence standard stating that the Board had created a new standard, requiring proof of actual harm. 364 NLRB No. 115, slip. op. at 11. In the words of the D.C. Circuit, the

Board's approach in *Medco* is "puzzling." *Medco Health Solutions of Las Vegas v. NLRB*, 701 F.3d 710, 717 (D.C. Cir. 2012).

Further, the Board has repeatedly failed to follow its own precedent in applying the public image prong of the special circumstances doctrine. Specifically, the Board has stated that an employer may establish public image special circumstances through a "fact specific demonstration" that it maintains (1) a "strict uniform policy," (2) which is intended to create "a specific and unique environment." *Boch Honda*, 362 NLRB 1, (2015), fn 6. The Board so ruled in *Con-Way Central Express,* 333 NLRB 1073 (2001), finding that a trucking company which maintained a strict uniform policy in order to cultivate a specific image was justified in banning additions to employee uniforms. However, in the instant case and in one other recent decision, the Board has invalidated employer bans on additions to employee uniforms in the face of overwhelming evidence of (1) a strict employee uniform policy, and (2) a specific and unique customer environment. *In-N-Out Burger, Inc. and Mid-South Organizing Committee,* 365 NLRB No. 39 (2017); *Grill Concepts Services, Inc. d/b/a The Daily Grill,* 364 NLRB 1 (2016).

In addition, the public image and food safety prongs of the NLRB's special circumstances doctrine cannot logically co-exist in a quick service restaurant environment. Specifically, if an associate adds a large union button to their uniform, it causes a greater interference with the public image of the employer. On the other hand, if the button is

smaller, such as a lapel pin, it poses a greater risk to food safety, as it is less likely to be noticed if it falls off of the uniform and ends up in the food itself.

Finally, regarding the size of a button with an employee or union message, challenging inconsistencies exist as well. For example, with regard to the size of an addition to an employee uniform, the Board has found that a smaller button, 1-1/4 inch in diameter, was large enough to be banned as impacting the public image of the employer (*Davidson-Paxon Co. v. NLRB,* 462 F.2d 364, 372 (5th Cir. 1972)), while a larger button, 1-3/4 inch in diameter, apparently did not impact public image, and therefore employees had a protected right to wear the button (*Ark Las Vegas Restaurant Corp.* 335 NLRB 1284 (2001)).

In its recent decision in *The Boeing Company,* 365 NLRB No. 154 (2017), the Board, engaging in a bit of self-critical analysis, acknowledged internal inconsistencies in its evaluation of employer policies, stating: "the conflicting outcomes of these cases are sometimes virtually impossible to rationalize." *Boeing,* 365 NLRB No. 154, fn. 51. The Board further acknowledged that when it promulgates its rules of the workplace, there is a need for "certainty beforehand." *Boeing,* 365 NLRB No. 154, fn. 74.

No such certainty exists here. Intervention by this Court and further clarification therefore is required.

E. Company-Issued Buttons Do Not Create An Inconsistency In In-N-Out's Uniform Policy

In its opinion, the Fifth Circuit concluded that In-N-Out's issuance of Company buttons "hurts, rather than helps the Company's case." Slip. op. at 12. The Fifth Circuit continued that the issuance of company buttons undermined its interest in maintaining a consistent public image.

The Fifth Circuit's conclusion in this regard is misplaced. Twice per year, the Company issues buttons to associates. (App'x A, 4a). These buttons ***are*** consistent – every associate is required to wear the same button. Every associate must wear the button in the same place on the uniform. Associates are provided information and instructions about the proper wearing and placement of these buttons. (App'x A, 4a).

Most importantly, these buttons are part of the public image which In-N-Out wishes to present. (As Board Chairman Miscimarra noted in dissent in the Board's decision in this case: "an employer's 'public image' can legitimately recognize certain holidays or charities without diminishing the importance of the public image to the employer's business." *In-N-Out Burger, Inc. and Mid-South Organizing Committee,* 365 NLRB No. 39 (2017), fn. 2.

This required element of the associate uniform should not disqualify In-N-Out from prohibiting associates from adding other items to their uniforms.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,
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