
In the Supreme Court of the United States

IN-N-OUT BURGER, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

**BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD IN OPPOSITION**

PETER B. ROBB
General Counsel
JOHN W. KYLE
Deputy General Counsel
LINDA DREEBEN
*Deputy Associate General
Counsel*
DAVID HABENSTREIT
Assistant General Counsel
MEREDITH JASON
*Deputy Assistant General
Counsel*
ELIZABETH HEANEY
Supervisory Attorney
JOEL A. HELLER
*Attorney
National Labor Relations
Board
Washington, D.C. 20570*

NOEL J. FRANCISCO
*Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that petitioner committed an unfair labor practice by maintaining and enforcing a total ban on employee insignia, in the absence of special circumstances justifying the ban.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument.....	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

<i>American Fed’n of Gov’t Emps.</i> , 278 N.L.R.B. 378 (1986).....	11
<i>Beth Israel Hosp. v. NLRB</i> , 437 U.S. 483 (1978)	2
<i>Boch Imports, Inc.</i> , 362 N.L.R.B. No. 83, 2015 WL 1956199 (2015), enforced, 826 F.3d 558 (1st Cir. 2016)	11
<i>Boch Imports, Inc. v. NLRB</i> , 826 F.3d 558 (1st Cir. 2016)	3, 14
<i>Boeing Co.</i> , 365 N.L.R.B. No. 154, 2017 WL 6403495 (Dec. 14, 2017)	7, 10
<i>Con-Way Cent. Express</i> , 333 N.L.R.B. 1073 (2001).....	16
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	9
<i>Eckerd’s Market, Inc.</i> , 183 N.L.R.B. 337 (1970)	3
<i>Guard Pub’g Co. v. NLRB</i> , 571 F.3d 53 (D.C. Cir. 2009)	3
<i>Healthbridge Mgmt., LLC</i> , 360 N.L.R.B. 937 (2014), enforced, 798 F.3d 1059 (D.C. Cir. 2015).....	3, 13, 14
<i>Janus v. AFSCME</i> , 138 S. Ct. 2448 (2018)	7, 8, 9
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	15
<i>Martin Luther Mem’l Home, Inc. (d/b/a Lutheran Heritage Village-Livonia)</i> , 343 N.L.R.B. 646 (2004)	10

IV

Cases—Continued:	Page
<i>Medco Health Solutions of Las Vegas, Inc.</i> , 364 N.L.R.B. No. 115, 2016 WL 4582495 (2016).....	12, 15
<i>Mt. Clemens Gen. Hosp. v. NLRB</i> , 328 F.3d 837 (6th Cir. 2003).....	3
<i>NLRB v. Harrah’s Club</i> , 337 F.2d 177 (9th Cir. 1964).....	14
<i>NLRB v. Malta Constr. Co.</i> , 806 F.2d 1009 (11th Cir. 1986).....	3
<i>Pay’n Save Corp. v. NLRB</i> , 641 F.2d 697 (9th Cir. 1981).....	15
<i>P.S.K. Supermarkets, Inc.</i> , 349 N.L.R.B. 34 (2007)	11
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945).....	2, 11
<i>Serv-Air, Inc. v. NLRB</i> , 395 F.2d 557 (10th Cir.), cert. denied, 393 U.S. 840 (1968)	3
<i>Southern New England Telephone Co. v. NLRB</i> , 793 F.3d 93 (D.C. Cir. 2015).....	13
<i>Starwood Hotels & Resorts Worldwide, Inc.</i> , 348 N.L.R.B. 372 (2006)	16
<i>United States v. Levy</i> , 379 F.3d 1241 (11th Cir. 2004), vacated and remanded on other grounds, 545 U.S. 1101 (2005).....	10
<i>Wal-Mart Stores, Inc. v. NLRB</i> , 400 F.3d 1093 (8th Cir. 2005).....	3
<i>Washington State Nurses Ass’n v. NLRB</i> , 526 F.3d 577 (9th Cir. 2008).....	3
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	8
Constitution, statutes, and rule:	
U.S. Const. Amend. I	8, 9

Statutes and rule—Continued:	Page
National Labor Relations Act, 29 U.S.C. 151 <i>et seq.</i>	2
29 U.S.C. 157 (§ 7)	2
29 U.S.C. 158(a)(1) (§ 8).....	2
29 U.S.C. 160(e) (§ 10(e)).....	7, 8, 9, 16
Fed. R. App. P. 28(j)	10

In the Supreme Court of the United States

No. 18-340

IN-N-OUT BURGER, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

**BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 894 F.3d 707. The decision and order of the National Labor Relations Board (Pet. App. 23a-72a) is reported at 365 N.L.R.B. No. 39.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2018. A petition for rehearing was denied on September 5, 2018 (Pet. App. 73a-74a). The petition for a writ of certiorari was filed on September 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, the owner of a chain of fast-food restaurants, bans its employees from wearing buttons on their

uniforms, except for certain buttons that petitioner requires them to wear. Pet. App. 3a-5a. When petitioner enforced its ban against an employee who wore a button advocating for a \$15 minimum wage, an organizing committee filed unfair-labor-practice charges, and the General Counsel of the National Labor Relations Board (NLRB or Board) issued a complaint. *Id.* at 5a, 32a. An Administrative Law Judge (ALJ) found that petitioner had committed an unfair labor practice. *Id.* at 31a-72a. The Board affirmed in relevant part. *Id.* at 23a-30a. The court of appeals denied a petition for review and enforced the Board's order. *Id.* at 1a-22a.

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, guarantees employees “the right to self-organization, to form, join or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. 157. Section 8 of the NLRA makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7. 29 U.S.C. 158(a)(1).

Among other things, Section 7 protects the right of employees to wear apparel or insignia related to unions or terms and conditions of employment. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802-803 & n.7 (1945). That presumptive right, however, may be limited in “special circumstances.” *Id.* at 801 & 804 n.10 (citation omitted); see *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 493 (1978) (explaining that “the Board is free to adopt * * * a rule that, absent special circumstances, a particular employer restriction is presumptively an unreasonable interference with § 7 rights”). The Board has accordingly developed a framework, long endorsed

by courts of appeals, for evaluating the legality of employer bans on insignia. See, e.g., *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 570-571 (1st Cir. 2016); *Guard Pub’g Co. v. NLRB*, 571 F.3d 53, 61-62 (D.C. Cir. 2009); *Washington State Nurses Ass’n v. NLRB*, 526 F.3d 577, 580-581 (9th Cir. 2008); *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1097-1098 (8th Cir. 2005); *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 846-848 (6th Cir. 2003); *NLRB v. Malta Constr. Co.*, 806 F.2d 1009, 1011 (11th Cir. 1986); *Serv-Air, Inc. v. NLRB*, 395 F.2d 557, 563 (10th Cir.), cert. denied, 393 U.S. 840 (1968). Under that framework, prohibitions on insignia are presumptively invalid, but an employer can overcome the presumption by showing that special circumstances justify the prohibition, and that the prohibition is narrowly tailored to address those circumstances. Special circumstances “may include, inter alia, ensuring employee safety, protecting the employer’s product, or maintaining a certain employee image (especially with respect to uniformed employees).” *Guard Pub’g*, 571 F.3d at 61. To overcome the presumption, an employer must present more than speculation about possible adverse effects from insignia, but it need not show actual harm. See *Healthbridge Mgmt., LLC*, 360 N.L.R.B. 937, 938-939 & n.5 (2014), enforced, 798 F.3d 1059 (D.C. Cir. 2015); *Eckerd’s Market, Inc.*, 183 N.L.R.B. 337, 337-338 (1970).

2. Petitioner operates a chain of fast-food restaurants in the western United States. Pet. App. 3a. Among other practices, petitioner “strictly enforces its uniform policy and appearance rules.” *Ibid.* As relevant here, a rule in the employee handbook provides that “[w]earing any type of pin or stickers is not permitted.” *Ibid.* Twice a year, however, petitioner requires employees to wear company-issued buttons. *Id.* at 4a.

Around Christmas, petitioner mandates that employees wear a button stating “Merry Christmas” and featuring an image of a sign reading “In-N-Out Hamburgers/No Delay.” *Id.* at 4a-5a (capitalization altered). In April, employees must wear one of a series of four buttons soliciting donations to the In-N-Out Foundation, a non-profit organization focused on preventing child abuse and neglect. *Ibid.*

In April 2015, an employee at one of petitioner’s restaurants in Austin, Texas, wore a button to work with the text “\$15” superimposed on an image of a fist. Pet. App. 3a. The button, which was about one-third the size of the Christmas and charity buttons that petitioner requires employees to wear, referred to the “Fight for \$15” movement, a campaign advocating for a \$15 minimum wage for fast-food workers. *Id.* at 3a-4a. When another employee asked a manager if he could wear a similar button, the manager responded that it was “not part of the In-N-Out uniform.” *Id.* at 3a. The next day, the store manager instructed a third employee wearing the \$15 button to remove it because he could not add anything to the uniform. *Id.* at 4a. The employee complied but informed the manager that “he would be filing an unfair labor practice charge with the” NLRB. *Ibid.*

3. In October 2015, an organizing committee filed unfair-labor-practice charges against petitioner. Pet. App. 32a. The Board’s General Counsel then issued a complaint alleging that petitioner had violated Section 8 of the NLRA because its ban on buttons interfered with employees’ rights under Section 7. *Id.* at 32a-33a. After a hearing, an ALJ found that petitioner had violated the NLRA “by maintaining a policy prohibiting the wearing of all buttons and insignia except for the

buttons it approved or required, and by instructing employees to remove the fight-for-\$15 button, the message of which related to a term or condition of employment and the wearing of which was protected by the” NLRA. *Id.* at 63a.

The ALJ rejected both of the “special circumstances” asserted by petitioner in support of the ban. Pet. App. 62a. First, the ALJ rejected petitioner’s contention that the ban was needed to preserve petitioner’s “public image.” *Id.* at 45a. The ALJ found that the button ban was irrelevant to most of the aspects of brand identity that petitioner identified, such as maintaining the restaurant’s original menu and logo. *Id.* at 45a-47a. The ALJ also concluded that petitioner presented “no reason to believe” that wearing a button would impact job performance, customer service, or teamwork. *Id.* at 47a; see *id.* at 56a. Nor, the ALJ concluded, was a blanket ban tailored to serve petitioner’s interest in presenting a clean environment. *Id.* at 53a. Finally, the ALJ noted that petitioner’s status as a retail operation did not constitute a special circumstance. *Id.* at 43a.

The ALJ likewise rejected petitioner’s contention that the button ban was necessary for safety reasons. Pet. App. 61a-62a. The ALJ emphasized that the ban was not limited to buttons that might pose a safety risk, and that petitioner had not examined the \$15 button for safety concerns before instructing employees not to wear it. *Id.* at 61a. The ALJ also noted that the \$15 buttons were not appreciably different from those petitioner required its employees to wear. *Id.* at 59a-61a.

4. Petitioner filed exceptions with the Board, which largely affirmed the ALJ’s decision. Pet. App. 23a-30a. The Board disavowed some of the ALJ’s findings and discussion, *id.* at 24a-26a n.2, but agreed that the button

ban constituted an unfair labor practice and ordered petitioner to rescind the rule and stop enforcing it, *id.* at 27a-28a.

5. The court of appeals denied a petition for review and enforced the Board's order. Pet. App. 1a-22a. The court emphasized that "Section 7 protects the right of employees to wear items—such as buttons, pins, and stickers—relating to terms and conditions of employment (including wages and hours), unionization, and other protected matters," subject only to a "'narrow' exception" for "'special circumstances.'" *Id.* at 8a-9a (citation omitted). Like the Board, the court concluded that neither of the special circumstances asserted by petitioner fell within that narrow exception.

The court of appeals first rejected petitioner's argument that banning buttons was narrowly tailored to its interest in maintaining a unique public image. Pet. App. 12a. The court concluded that the "record amply supports" the Board's determination that many of the components of petitioner's brand identity (such as "a consistent menu and ownership structure," "excellent customer service," and "a 'sparkling clean' environment") were irrelevant to its special-circumstances defense. *Id.* at 13a. The court described the public-image exception as "exceedingly narrow" and noted that an employer does not establish special circumstances just because it has a uniform requirement, is a retailer, has employees who interact with the public, or has customers who might be offended by the insignia's message. *Id.* at 13a-15a & nn.2-5. The court also agreed with the Board that petitioner's requirement that its employees wear buttons during two months of the year undercut its public-image argument by suggesting that "the com-

pany’s interest in maintaining a ‘consistent’ public image is not as great as it suggests, or, alternatively, the uniform does not play as critical a role in maintaining that public image as [petitioner] claims.” *Id.* at 16a.

The court of appeals likewise determined that the Board’s rejection of petitioner’s food-safety argument was reasonable and supported by substantial evidence. Pet. App. 20a. Because of the blanket nature of the ban on all buttons, regardless of size or other features, the court agreed that petitioner had “failed to show that its rule was narrowly tailored to” safety concerns. *Ibid.* (internal quotation marks omitted). The court also observed that petitioner’s failure to evaluate the \$15 button for safety concerns before prohibiting it suggested that the food-safety argument “is a post hoc invention.” *Ibid.* (citation and internal quotation marks omitted).

Finally, the court of appeals declined to address petitioner’s argument that the Board’s order would require it to allow any button of any type, because petitioner had not raised that issue to the Board. The court of appeals explained that it lacked jurisdiction to consider that forfeited argument under 29 U.S.C. 160(e), which provides that no “objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” Pet. App. 22a (quoting 29 U.S.C. 160(e)).

ARGUMENT

Petitioner contends (Pet. 5-16) that this Court should grant review for three reasons: (1) the decision below conflicts with *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), (2) the court of appeals erred in failing to remand the case to the Board in light of *Boeing Co.*, 365 N.L.R.B. No. 154, 2017 WL 6403495 (Dec. 14, 2017), and (3) the

decision below is wrong and conflicts with decisions of other circuits and the Board. The first two reasons were not argued below and are not properly before this Court. The third reason lacks merit. The Board and the court of appeals correctly applied settled law to the facts of this case, and their decisions do not conflict with any relevant precedents. The petition for a writ of certiorari should be denied.

1. Petitioner's principal argument (Pet. 6-9) in seeking this Court's review is that the decision below conflicts with *Janus, supra*, in which this Court held that the First Amendment prohibits public employers from requiring their employees to pay "agency fees" to public-sector unions. 138 S. Ct. at 2460. Even if *Janus* were relevant to the issues in this case, this Court lacks jurisdiction to consider petitioner's argument. Petitioner acknowledges (Pet. 8) that it never raised a First Amendment claim to the Board, and under Section 10(e) of the NLRA, "[n]o objection that has not been urged before the Board * * * shall be considered by the court" absent "extraordinary circumstances." 29 U.S.C. 160(e). As this Court has explained, Section 10(e)'s forfeiture principle is a jurisdictional bar to judicial review, and petitioner's failure to raise its First Amendment claim before the Board accordingly renders this Court "without jurisdiction to consider that question." *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982).

Petitioner suggests (Pet. 8) that "extraordinary circumstances" excuse its forfeiture because the Board "acted in excess of its authority" by ordering petitioner to cease the unfair labor practice. That argument lacks merit. Unlike the cases petitioner cites (*ibid.*), in which the Board lacked authority to act because it lacked a

quorum or jurisdiction over an employer, petitioner here simply disagrees with the Board's decision. That objection does not speak to the Board's authority or jurisdiction and does not constitute an "extraordinary circumstance" excusing forfeiture under the jurisdictional requirement of 29 U.S.C. 160(e).

Petitioner's assertion (Pet. 8) that *Janus* was an intervening "change in law" that creates an extraordinary circumstance is similarly misplaced. The First Amendment compelled-speech doctrine did not originate with *Janus*; indeed, the passage from *Janus* that petitioner quotes to support its First Amendment argument was itself citing cases from decades earlier. Pet. 6-7 (citing 138 S. Ct. at 2464). And the Court explained in *Janus* that parties had "been on notice for years" about the issue presented there. 138 S. Ct. at 2484. Petitioner thus could have raised the argument in a timely manner, but failed to do so and is barred from asserting it now.

Even aside from the statutory jurisdictional bar, this Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it should not address petitioner's novel constitutional arguments in the first instance. Not only was petitioner's compelled-speech claim not considered by the Board or the court of appeals in this case, such a claim has not been considered by the Board or a court in the context of workplace insignia in *any* case. Indeed, lower courts have had just over six months to consider the scope of *Janus*, and few decisions have yet applied it outside the agency-fee context in which it arose. Further percolation on this issue is plainly warranted.¹

¹ The arguments of amicus Washington Legal Foundation (WLF) on the same First Amendment compelled-speech issue (WLF Amicus Br. 7-12) are likewise not properly before this Court.

2. Petitioner also contends (Pet. 9-10) this Court should grant certiorari to remand the case to the Board in light of its decision in *Boeing Co.*, *supra*. That request is not properly before the Court. Although petitioner filed a letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure informing the court of appeals of the *Boeing Co.* decision prior to oral argument, petitioner did not seek a remand in that letter. Petitioner instead requested a remand for the first time in its rehearing petition. But courts do not generally consider issues raised for the first time in rehearing petitions, see, e.g., *United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004) (per curiam) (collecting cases), vacated and remanded on other grounds, 545 U.S. 1101 (2005), and this Court should not do so in the first instance.

In any event, no basis exists for a remand in light of *Boeing*. The Board's decision in *Boeing Co.* overruled a standard in an earlier NLRB decision, *Martin Luther Memorial Home, Inc. (d/b/a Lutheran Heritage Village-Livonia)*, 343 N.L.R.B. 646 (2004), which held that a workplace rule violates Section 7 if employees "would reasonably construe" the rule as restricting protected activity. *Boeing Co.*, 2017 WL 6403495, at *2 (citation omitted). Questions about employee construction of workplace rules have nothing to do with the dispute in this case; the parties agree that petitioner's rule is a flat ban on buttons, that the ban implicates Section 7, and that it can be justified only by special circumstances. See Pet. App. 12a. The absence of any dispute about employee construction of a rule distinguishes this case from others in which courts have remanded Board decisions based on *Boeing Co.* See Pet. 10 & n.1. In each of those cases, the Board had relied on the *Lutheran*

Heritage standard, and the Board itself asked for a remand. Here, the Board decision did not rely on *Lutheran Heritage*, and the Board has not asked for remand. This Court's intervention on this matter is accordingly unwarranted.

3. Finally, petitioner contends (Pet. 6, 10-15) that the decision below is incorrect and inconsistent with decisions of other courts of appeals and Board precedents. Those arguments are misplaced.

a. The Board and the court of appeals correctly applied settled law to the facts of this case. The "right of employees to wear union insignia" or apparel related to issues like wages or working conditions "has long been recognized as a reasonable and legitimate form of union activity." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.7 (1945); see Pet. App. 8a. To overcome the presumption that a ban on such apparel violates the NLRA, an employer must show that special circumstances justify the ban and that it is narrowly tailored to address those circumstances. See, e.g., *Boch Imports, Inc.*, 362 N.L.R.B. No. 83, 2015 WL 1956199, at *2, *8 (2015), enforced, 826 F.3d 558 (1st Cir. 2016); *American Fed'n of Gov't Emps.*, 278 N.L.R.B. 378, 384 (1986). Special circumstances may include, for example, situations where insignia would "unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees." *Boch Imports*, 2015 WL 1956199, at *2 (citation omitted). The fact that an employer maintains a uniform or dress code is not by itself, however, sufficient to prove special circumstances. *P.S.K. Supermarkets, Inc.*, 349 N.L.R.B. 34, 35 (2007). Nor is the fact that employees interact with the public. *Ibid.* Instead, the employer must show that insignia "adversely

affected or would adversely affect its business.” *Medco Health Solutions of Las Vegas, Inc.*, 364 N.L.R.B. No. 115, 2016 WL 4582495, at *7 (2016). The Board’s test “does not require actual proof of harm,” but it does require “specific evidence and not just mere speculation that [insignia] would or would be likely to harm.” *Id.* at *8 n.14.

Petitioner does not seriously dispute any aspect of that framework. Nor does petitioner offer any defense of its arguments below that its distinctive public image or safety concerns constitute special circumstances justifying the button ban. See Pet. App. 12a. The Board and the court of appeals thoroughly and correctly rejected those contentions, explaining the button ban was irrelevant to the aspects of petitioner’s public image that it identified as distinctive—such as its menu, ownership structure, and customer service—and that petitioner had offered no evidence that allowing the buttons would compromise food safety. *Id.* at 12a-20a. Petitioner challenges (Pet. 15) the court of appeals’ consideration of petitioner’s own button requirements in rejecting its assertion of special circumstances. But the court of appeals reasonably considered those requirements in assessing petitioner’s claims about the asserted need for consistency in uniforms and the purported dangers of buttons to food safety. See Pet. App. 15a-16a, 20a. In any event, the implications of petitioner’s own buttons for its special-circumstances arguments is a highly fact-specific issue that does not warrant this Court’s review.

b. Petitioner contends (Pet. 10-11) that the decision below conflicts with decisions of the D.C. Circuit and Ninth Circuit. No such conflict exists.

In *Southern New England Telephone Co. v. NLRB*, 793 F.3d 93 (2015) (Kavanaugh, J.), the D.C. Circuit concluded that Section 7 did not require AT&T to allow its employees who interacted with customers to wear a union-provided shirt that said “inmate” on the front and “prisoner of AT&T” with black-and-white stripes on the back. *Id.* at 94. After recounting the Board’s well-settled special circumstances doctrine, *id.* at 95-96, the court explained that “an employer can meet its burden” of establishing a special circumstance “by demonstrating a reasonable belief that the message may damage customer relations—even in the absence of evidence of actual harm,” *id.* at 96. Given the obviously provocative and “problematic” nature of the shirt declaring that AT&T’s employees were its “inmates” or “prisoners,” the court concluded that establishing a special circumstance “did not require the employer to offer additional evidence beyond a relationship between its business and the banned message.” *Id.* at 96-97 (citation and internal quotation marks omitted). The court did not, however, set forth a per se rule that an employer is never required to show evidence of potential adverse effect whenever a banned message relates to its business. To the contrary, the court relied on the same body of NLRB precedent invoked by the Board and court of appeals here. See *id.* at 95-96. And the D.C. Circuit subsequently reiterated in *Healthbridge Management, LLC v. NLRB*, 798 F.3d 1059 (2015), that the “evidence required to rebut a presumption of invalidity must go beyond mere speculation” and rejected an employer’s assertion that a ban on stickers related to its business constituted a special circumstance because the employer’s claim “was not based on any specific experience * * * or specific evidence of harm or likelihood of harm.” *Id.*

at 1064, 1070-1073 (citations and internal quotation marks omitted).

The button ban at issue here, moreover, is different from the prohibited shirt at issue in *Southern New England* in significant ways. Unlike the shirt, which frontally and provocatively attacked the employer by suggesting that its employees were its “inmates” or “prisoners,” the button at issue here made an indirect statement about an economic policy question, the minimum wage. See Pet. App. 3a-4a. Moreover, unlike the employer’s limited directive not to wear a specific shirt in *Southern New England*, petitioner’s rule is a blanket prohibition on all insignia. *Id.* at 16a. “Particularly” given the breadth of the ban, the Board appropriately required petitioner to come forward with more evidence than it did. *Ibid.*; accord *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 572 (1st Cir. 2016) (distinguishing *Southern New England* in case involving blanket ban).

The decision below likewise does not conflict with the Ninth Circuit’s 55-year-old decision in *NLRB v. Harrah’s Club*, 337 F.2d 177 (1964), which upheld a casino’s prohibition on wearing “jewelry or other adornments” on employee uniforms. *Id.* at 178. At most, petitioner suggests (Pet. 11) that the courts reached different outcomes in applying the special-circumstances test to the particular facts at issue in those two cases. But any fact-specific differences would not constitute a conflict warranting this Court’s review. Moreover, the Ninth Circuit has subsequently made clear that the discussion petitioner relies on from *Harrah’s Club* was dicta unnecessary to the decision in that case. See *Pay’n Save Corp. v. NLRB*, 641 F.2d 697, 701 (1981).

c. Petitioner also contends (Pet. 11-14) that the decision below renders the Board’s precedent regarding

the special-circumstances test “confusing” and in need of “further clarification.” This Court is not the proper body to perform such clarification, and in any event no such clarification is required.

Petitioner first asserts a logical inconsistency in the Board’s requirement that an employer making a public-image argument must produce “specific non-speculative evidence” but need not show “actual harm.” Pet. 12 (emphasis omitted). There is no conflict in that requirement, however, because “non-speculative” is not the same as “actual.” The Board has made clear, in this case and others, that what it requires is evidence that the banned insignia “foreseeably would adversely affect the [employer’s] business,” Pet. App. 62a, or “would be likely to harm” the employer, *Medco*, 2016 WL 4582495, at *8 n.14. Contrary to petitioner’s suggestion, showing that harm is likely or foreseeable is not the same as merely speculating. Cf., e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (contrasting “speculative” harm with “likely” harm).²

Petitioner is also mistaken in its assertion (Pet. 12) that the Board upheld insignia bans absent specific and non-speculative evidence in *Starwood Hotels & Resorts Worldwide, Inc.*, 348 N.L.R.B. 372 (2006), and *Con-Way Central Express*, 333 N.L.R.B. 1073 (2001). Both the

² As the Board’s and court of appeals’ language and the above discussion make clear, petitioner is incorrect in stating (Pet. 12) that employers “need to show that something ‘affected’ (past tense) its business” to prove special circumstances. As petitioner itself acknowledges (*ibid.*), the Board’s requirement is disjunctive—it requires a showing prohibiting insignia “adversely affected *or* would adversely affect” business. *Medco*, 2016 WL 4582495, at *7 (emphasis added). Evidence that insignia already have adversely affected the employer’s business would be relevant, but is not necessary.

Board and court of appeals thoroughly discussed *Starwood*, noting that the distinctive public-image evidence presented by the employer in that case was not present here. Pet. App. 17a-18a, 58a-59a. The employer in *Con-Way* (a decision that petitioner did not cite in its briefs to the Board or court of appeals) put forth similarly particularized evidence in support of its requirement that employees remove a “highly conspicuous” two-inch button with day-glow colors and capital letters—a far cry from the button at issue in this case. 333 N.L.R.B. at 1075. Petitioner accordingly fails to show any inconsistency or confusion in the Board’s decisions, much less an inconsistency of such dimensions and significance to warrant this Court’s intervention. As the court of appeals observed, a party challenging a Board order “must do more than point to a single . . . deviant precedent,” Pet. App. 18a (citation omitted), and petitioner has not even done that here.³

³ Amicus WLF’s assertion of “irreconcilable results” in the Board’s decisions (WLF Amicus Br. 14) is no more persuasive. Every case that WLF cites involved targeted bans on particular insignia, not a blanket ban on all insignia of the kind petitioner maintains. There is likewise no basis for amicus’s proposal (*id.* at 14-15) to make all bans on insignia for public-facing employees presumptively or even per se valid. Petitioner failed to make any such argument to the Board, so this Court lacks jurisdiction to consider it. See 29 U.S.C. 160(e). In any event, neither amicus nor petitioner cites any authority in support of this novel proposition, which would run counter to decades of precedent from the Board and this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
*Deputy Associate General
Counsel*

DAVID HABENSTREIT
Assistant General Counsel

MEREDITH JASON
*Deputy Assistant General
Counsel*

ELIZABETH HEANEY
Supervisory Attorney

JOEL A. HELLER
*Attorney
National Labor Relations
Board*

JANUARY 2019