Press Release

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WLF Asks Supreme Court to Review NLRB Commercial Speech Restriction

(*In-N-Out Burger, Inc. v. National Labor Relations Board*)

"Employees' statutory speech right stops 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."
—Corbin K. Barthold, WLF Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation today urged the U.S. Supreme Court to review a Fifth Circuit ruling that stifles commercial speech by enforcing an unconstitutional agency rule.

The National Labor Relations Act gives employees a constrained statutory right to free speech in the workplace on labor issues. Employers, meanwhile, enjoy a robust constitutional right, under the First Amendment, to free commercial speech. Elevating the employees' statutory right above the employers' constitutional right, the National Labor Relations 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.

In-N-Out Burger, Inc.—a popular West Coast burger chain—tried to enforce a company rule barring its employees from placing buttons on their uniforms. It argued that the need to preserve its distinct, clean image constituted a "special circumstance" justifying its no-button rule. The NLRB disagreed and declared In-N-Out's rule an unfair labor practice. The Fifth Circuit affirmed.

In its brief, WLF argues that 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. WLF also argues that, even if it does not violate the First Amendment, the NLRB's "special circumstances" test is incoherent and needs to be replaced.

Celebrating its 41st year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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