UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

STERICYCLE, INC.,

and

TEAMSTERS LOCAL 628,

Case Nos. 04-CA-137660,
04-CA-145466,
04-CA-158277 and
04-CA-160621

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive branch. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber represents both union and non-union employers, and many of its members are subject to the requirements of the National Labor Relations Act ("the Act"). The Chamber thus has a clear and important interest in the work rules jurisprudence of the National Labor Relations Board ("Board"). Employers of every size and type maintain employee handbooks and work rules that govern a variety of performance and behavioral standards for employees. To maintain order and fairness in the workplace, employers must be allowed to have reasonable work rules without fear that the Board will strike them entirely if they could conceivably be read to affect workers' right to engage in concerted activity. Chamber members need a work rules standard that fosters predictability and that balances their obligation to promote respectful workplace culture with employees' rights.

INTRODUCTION

The Board should maintain its current employer work rules standards under *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), and its progeny. These standards have provided a predictable and administrable framework for employers to maintain reasonable work rules and fulfill their duty to respect employee rights. In contrast, the previous Board standard under *Martin*

Luther Mem'l Home, Inc., 343 NLRB 646 (2004) ("*Lutheran Heritage*"), *overruled by Boeing*, 365 NLRB No. 154, & *overruled by AT&T Mobility, LLC*, 370 NLRB No. 121 (May 3, 2021), ! failed to appropriately balance the interests of employees and employers, as the Supreme Court has directed, and led to considerable confusion that even the NLRB's General Counsel could not clarify.

The interests of employers and employees alike are served by facially neutral, common sense work rules like those requiring basic standards of civility in the workplace; confidentiality during workplace investigations; restrictions on video or audio recording in the workplace for purposes that are unprotected by the NLRA; and non-disparagement rules relative to employers' products, services, customers, and brand. These types of rules help set expectations and establish guideposts for management and employees in terms of behavior and standards of conduct in the workplace. Moreover, rules that permit employers to insist on confidentiality during a workplace investigation protect victims, complainants, and witnesses, as well as investigative integrity and the preservation of evidence. For evaluating a variety of such important and beneficial workplace rules, *Boeing* sets the right standard. The Board should adhere to it.

BACKGROUND

Nearly eighty years ago, the U.S. Supreme Court addressed the Board's regulation of work rules in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). As the Court explained, work rules lie at the crossroads between "the undisputed right of self-organization assured to employees under [Section 7 of the Act] and the equally undisputed right of employers to maintain discipline in their establishments." *Id.* at 797–98. Neither is absolute; "[l]ike so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." *Id.* at 798. Put more simply,

the "[o]pportunity to organize and proper discipline are both essential elements in a balanced society." *Id.*

Consistent with that understanding, the Supreme Court affirmed the Board's balanced approach in that case. The Board had found it unlawful for employers to maintain a general rule against all union solicitation, but also recognized that employers could restrict solicitation during an employee's working time. *Id*. at 802 n.8 (summarizing Board opinion). In upholding the Board decision, the Court specifically recognized that Congress had tasked the Board with applying the "general prohibitory language [of the Act] in the light of the infinite combinations of events which might be charged as violative of its terms," which allows for "administrative flexibility within appropriate statutory limitations." *Id.* at 798.

For decades, the Board consistently applied this type of balancing between employee Section 7 rights and an employer's need to maintain discipline. *See, e.g.*, *Meier & Frank Co.*, 89 NLRB 1016 (1950) (allowing broader solicitation restrictions on department store selling floors because of potential interference with customers); *In re Standard Oil Co. of Cal.*, 168 NLRB 153 (1967) (finding employers could adopt broader rules restricting certain Section 7 activity if justified by legitimate safety concerns). And it continued through the turn of the century. *See Waco, Inc.*, 273 NLRB 746, 748 (1984) (weighing employer and employee interests in cases involving confidential wage data); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *review denied, enforcement granted sub nom*. *Lafayette Park Hotel v. NLRB*, 203 F.3d 52 (D.C. Cir. 1999) (considering employer interests in determining potentially chilling effect of work rules). In all these decisions, the Board considered *both* whether an employee might reasonably read a work

rule to restrict Section 7 activity, and whether an employer's legitimate interests might justify particular rules.

Somewhere along the way, however, the employer's interest dropped almost completely out of the Board's calculus. The Board purported to acknowledge an employer's interest in maintaining a "civil and decent work place" in *Lutheran Heritage*, and rejected an approach that "would require the Board to find a violation whenever the [workplace] rule could conceivably be read to cover Section 7 activity."[1] 343 NLRB at 647. But in cases decided since, the Board has interpreted *Lutheran Heritage* to stand for the proposition that a workplace rule could be deemed unlawful if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Fresh & Easy Neighborhood Mkt. & United Food & Commercial Workers Int'l Union*, 361 NLRB 72 (2014).

In applying this standard, most cases hinged on the "reasonably construe" prong of the analysis. *See* Report of the Gen. Counsel Concerning Emp'r Rules, Memorandum GC 15-04, 2015 WL 1278780 at *1 (Mar. 18, 2015). This gloss on *Lutheran Heritage* pushed employers' legitimate interest in maintaining challenged work rules to the back burner, and introduced significant unpredictability into the Board's case precedents. *See, e.g.*, *Lytton Rancherua of Cal.*, 361 NLRB 1350, 1351 (2014) ("*Casino San Pablo*") (finding rule against insubordination and disrespectful conduct toward supervisors violated the Act). The Board's General Counsel admitted

[1] Former Member Meisburg (undersigned), on the Board at the time *Lutheran Heritage* was decided, made clear his view that an employer should be able to prohibit misconduct and that the Board must consider an employer's "legitimate business concerns" in determining whether rules were lawful to maintain. 343 NLRB at n.14.

that, as applied, *Lutheran Heritage* outlawed "even well-intentioned rules" simply because they might, in theory, inhibit Section 7 activity. Memorandum GC 15-04, 2015 WL 1278780 at *1.

The Board rightly realigned its standard in *The Boeing Co.*, 365 NLRB No. 154, reintroducing employer interests into the work rules calculus. Under *Boeing*, when evaluating facially neutral work rules, the Board expressly considers (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. *Id*. And critically, to enhance predictability, the Board created categories for different types of rules:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .
>
> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

LA Specialty Produce Co., 368 NLRB No. 93, at *3 (Oct. 10, 2019). Taken together, *Boeing* and *LA Specialty Produce* returned balance and predictability to adjudications over employee and employer rights.

The Board now seeks to revisit its work rules jurisprudence. The newly constituted Board majority suggests *Boeing* "reversed well-established precedent sua sponte" and merits reexamination. The Chamber respectfully submits that *Boeing* and *LA Specialty Produce* were correctly decided and establish a work rules standard that both satisfies the Act and strikes the right balance between protecting employee and employer interests alike.

ARGUMENT

I. The Board Should Continue to Adhere to *Boeing*.

Predictability and certainty in this area of the law are vital to employers' ability to apply commonsense and fair standards in the workplace. Given that almost every employer maintains work rules of some kind, the Board's standards here reach nearly every employment relationship. Both employees and employers benefit from clear, well-defined workplace rules. Handbooks and rules reduce subjectivity in employment, encourage fairness, and make workplaces safer.

The Board's application of *Lutheran Heritage* in the years before *Boeing* clouded the ability of employers to maintain any work rules. The *Lutheran Heritage* standard's inherent flaw was its unpredictability. Its subjective approach frequently led to the invalidation of common, reasonable rules that employers had legitimate reasons to maintain. Employers were left unable to confidently assess whether their rules might run afoul of the seemingly arbitrary "reasonably construe" standard. *The Boeing Co.*, 365 NLRB No. 154.

For example, the Board found unlawful a rule prohibiting "insubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers)" in *Casino San Pablo*, 361 NLRB at 1352. Yet the Board also found "if the prohibition here were limited to 'insubordination,'" it would have dismissed the complaint. *Id*. In another case, the Board found employers could not maintain rules against "boisterous or disruptive conduct," even as it upheld more particular rules against "disloyal, disruptive, competitive, or damaging conduct." *Component Bar Prods., Inc. & James R. Stout*, 364 NLRB No. 140, at *1 (Nov. 8, 2016). Administrative law judges applying *Lutheran Heritage* acknowledged that "[t]he line between lawful and unlawful restrictions is very thin and often difficult to discern." *Quicken Loans, Inc. & Lydia E. Garza*, 359 NLRB 1201, 1204 (2013), *decision set aside sub nom.*, 200 LRRM. (BNA) ¶ 1304 (June 27, 2014), *aff'd as modified sub nom*., 361 NLRB 904 (2014), *review*

denied, enforcement granted sub nom. Quicken Loans, Inc. v. Nat'l Labor Relations Bd., 830 F.3d 542 (D.C. Cir. 2016).

Employers paid the price, as they could deem very few rules safe to maintain. Benign, commonplace work rules developed with no intent or likelihood to interfere with Section 7 rights routinely were found unlawful under the *Lutheran Heritage* standard. Even the General Counsel's attempt to explain the Board's work rules standards created more confusion than clarity. Memorandum GC 15-04, 2015 WL 1278780; *see also* U.S. Chamber of Commerce, Theater of the Absurd: The NLRB Takes on the Employee Handbook at 33-35, available at https://www.uschamber.com/assets/archived/images/documents/files/nlrb_theater_of_the_absurd.pdf (last accessed Mar. 4, 2022). Employers were left with a Hobson's choice—implement work rules and risk Board litigation, or abandon work rules altogether.

With *Boeing* and *LA Specialty Produce*, the Board restored much needed predictability and certainty in this area of law. The Board recognized in *Boeing* that the *Lutheran Heritage* standard put employers in an untenable situation and sought to right that wrong. The Board's adoption in *Boeing* of specific categories for different types of rules has provided increasing clarity in developing employee work rules generally, and handbooks specifically.

At the same time, *Boeing* ensures that employers do not infringe on employee rights under the Act. *Boeing* left unchanged the Board's well-established position that lawful work rules cannot be applied to restrict Section 7 activity. *See AT&T Mobility, LLC*, 370 NLRB No. 121. And it maintained the prohibition on rules that explicitly restrict Section 7 activity, as well the prohibition on rules enacted in response to protected activity. *Boeing*, 365 NLRB No. 154, at *8. In short, employees have all of the same rights and privileges to engage in protected, concerted activity today as they did before *Boeing*.

The Board's concern, expressed in its Invitation to File Briefs, about the "chilling effect" of certain work rules—such as those that require confidentiality in workplace investigations—on Section 7 activity is misplaced. It is premised on the mistaken view—developed in the *Lutheran Heritage* cases—that employees read work rules with hyper-technical scrutiny and with an eye toward finding some application, however remote, that would infringe on their Section 7 rights. That is simply not reality. Moreover, when the Board invoked "chilling effects" under *Lutheran Heritage*, it did so without regard to whether a rule was necessary to maintain workplace order. Not only is that wrong, but it also conflicts with established Supreme Court precedent. As the Court explained in *Republic Aviation*, the "[o]pportunity to organize and proper discipline are both essential elements in a balanced society." 324 U.S. at 798.

The Board should leave *Boeing* undisturbed. It has provided, and will continue to provide, the clarity and predictability needed for maintenance of reasonable work rules.

a. *Boeing* Restored the Balance Abandoned by *Lutheran Heritage*.

As noted above, the Supreme Court has long required the Board to balance its duties to enforce the Act with the realities that employers must be allowed to control their workplaces. *See supra* at 2. Although Section 7 provides broad employee protections, Congress did not intend it to eliminate the ability of employers to maintain discipline at work. *Republic Aviation*, 324 U.S. at 797–98.

For decades before *Lutheran Heritage*, the Board took seriously its balancing obligations. In *Lafayette Park Hotel*, for example, the Board explained that "[w]here the [work] rules are *likely* to have a chilling effect on Section 7 rights," they may be unlawful, but an employer's interest in maintaining the rule must be considered too. 326 NLRB at 825 (emphasis added). The Board thus weighed a reasonable interpretation of a given rule against the employer's "legitimate business

concerns," before deciding whether it was lawful to maintain. *Id*. (finding a rule prohibiting employees from interference with hotel's "goals and objectives" lawful). Importantly, the Board did not strain to find ambiguity where none existed, or attribute malintent to an employer absent evidence of a desire to interfere with Section 7 rights. *Id*. (refraining from employees' "strained construction" of the rule). While the *Lafayette Park* Board did not conduct the explicit balancing that *Boeing* endorses, it nevertheless recognized that handbook rules justified by legitimate business interests and having no more than a "speculative effect" on Section 7 rights should withstand scrutiny.

The Board all but abandoned this balancing approach after *Lutheran Heritage*. In *Stant USA Corp.*, No. 26-CA-024098, 2011 WL 7789839 (Oct. 13, 2021), for example, the General Counsel opined that employers could not maintain rules that require respect at work and prevent "harassing" behavior. The rules at issue required employees to "be respectful to the Company, other associates, customers, partners and competitors" and prohibited "commentary, content or images that are…harassing, libelous or that can create a hostile work environment." The General Counsel advised that both rules violated the Act merely because they *could* be read to restrict protected activity. The memo cited several cases finding similar rules about "respectful" behavior unlawful. *Id*. at *3-4, n.11. There was no consideration of the responsibilities and legitimate needs of employers to maintain healthy work environments and prevent workplace violence, bullying, harassment, and employee attrition.

The Board also applied *Lutheran Heritage* in an unpredictable and inconsistent manner, reaching contrary interpretations of seemingly similar work rules. *Boeing* pointed to numerous Board cases that reached different conclusions on the lawfulness of nearly identical rules. *Boeing*, 365 NLRB No. 154, at *13–14 (citing Board cases that found rules prohibiting "verbal abuse"

lawful, but rules prohibiting "abusive language" unlawful); *see also* Notice and Invitation to File Briefs at 5 (comparing *Hyundai Am. Shipping Agency, Inc.*, 357 NLRB 860, 861 (2011), *review granted in part, decision rev'd in part sub nom. Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309 (D.C. Cir. 2015), *and overruled by Apogee Retail LLC*, 368 NLRB No. 144 (Dec. 16, 2019), which allowed rule against "harmful gossip," with *KSL Claremont Resort, Inc.*, 344 NLRB 832, 832 (2005), which invalidated rule that prohibited "negative conversations about associates or managers").

Conversely, *Boeing* managed to foster both balance and predictability by adopting a categorical approach to work rules. As the Board wrote in *LA Specialty Produce*, in many instances it is "possible to strike a general balance of competing employee rights and employer interests for certain types of rules, thus eliminating the need for further case-by-case balancing." 368 NLRB No. 93, at *4. This "general balancing" approach acknowledges that workplaces often maintain similar rules, some of which are fundamental and necessary to disciplined and healthy work environments, and some of which infringe too severely on employee rights to be permitted. By using a balancing approach to sort rules into well-defined categories with clear guidance regarding the lawfulness of a rule depending on which category it fits, *Boeing* has brought predictability and stability back to the Board's precedent while still giving due consideration to both employer needs and employee rights.

Unsurprisingly, the *Boeing* approach has already spawned precedent that employers can understand and implement without stepping on employee Section 7 rights. Over the years since *Boeing*, the Board has denoted several common and important workplace rules—such as rules about civility and confidentiality during investigations—as Category 1 (or as always lawful to maintain). *See BMW Mfg. Co.*, 370 NLRB No. 56 (Dec. 10, 2020) (civility rules); *Apogee Retail*,

368 NLRB No. 144 (confidentiality). At the same time, the Board has denoted other work rules as Category 3 (or as presumptively unlawful to maintain). *See LA Specialty Produce Co.*, 368 NLRB No. 93 at *4 n.4 (finding "a facially neutral rule that an objectively reasonable employee would interpret as prohibiting discussion of wages with co-workers would be unlawful and fit within *Boeing* Category 3"); *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (June 18, 2019) (placing rules that require arbitration of all employment disputes into Category 3).

b. *Lutheran Heritage* Placed Employers in an Impossible Position.

Whatever its merits, *Lutheran Heritage* also placed heavy burdens on employers by requiring them to exercise nearly impossible "linguistic precision" in their employer handbooks. *Boeing*, 365 NLRB No. 154, at *2. When a standard allows employers to restrict "verbal abuse," but not "abusive language," there is hardly any discernable standard at all. Such exactitude in regulatory enforcement creates enormous compliance costs on employers, who must closely scrutinize each word of the handbook for potential violations, and makes total compliance impossible. *See* supra at 5. It also imposes particular burdens on small businesses, which cannot afford to continually rewrite their rules after each new (and potentially contradictory) Board decision. If even the most informed lawyers could not predict that the Board would uphold a rule restricting "verbal abuse," but not "abusive language," how can small businesses be expected to do so? The litigation risk is immense, to say the least—the General Counsel's 2015 Memorandum listed 57 rules deemed unlawful, which represents only a fraction of the cases brought in the first place. Memorandum GC 15-04, 2015 WL 1278780.

Almost as importantly, the litigation risk was exacerbated by the fact that employers generally distribute their rules handbooks to all employees. This wide distribution increases the cost and impact of a Board decision finding that a work rule is overbroad and, therefore, an unfair

labor practice under *Lutheran Heritage*. At minimum, an employer might need to revamp its entire handbook or reinstate any employees discharged for failure to meet a workplace standard later found unlawful. But the consequences could be far more sweeping. For example, under *Lutheran Heritage*, the Board allowed unions to weaponize work rules with no impact on Section 7 rights (but which had been distributed to all employees in handbooks) to obtain re-runs of lopsided elections and to block decertification efforts. *See Target Corp. & United Food & Commercial Workers Local 1500*, 359 NLRB 953, 955 (2013) (ordering re-run election based on maintenance of unlawful work rule after a vote when union lost 137-to-85); *Jurys Boston Hotel & Gregory B. Hatch, Petitioner & Unite Here, Local 26*, 356 NLRB 927, 929 (2011) (ordering re-run of decertification election even where "there [was] no evidence that any employees were actually deterred from engaging in campaign activity" by the rules). And the consequences could be even harsher now, as the General Counsel has pledged to revive practices like bargaining orders and enhanced monetary penalties to punish employers for violations of the Act. *See* Report of the Gen. Counsel Concerning Seeking Full Remedies, Memorandum GC 21-06, 2021 WL 4133940, at *3 (Sept. 8, 2021).

Lutheran Heritage also forced employers to wrestle with whether and how to comply with various state and federal employment laws without inviting liability as a result of their workplace rules. For example, numerous state and federal employment laws require employers to maintain civil and respectful workplaces free from harassment and discrimination.[2] Other laws require

[2] These include federal laws like Title VII of the Civil Rights Act of 1964, 42 USC. § 2000e–2 *et seq.*; the Americans with Disabilities Act, 42 U.S.C. § 12101 *et. seq.*; the Age Discrimination in Employment Act, 29 U.S.C. § 623; similar state laws like the New York Human Rights Law, N.Y. Exec. Law 290, *et seq*.; the California Fair Employment & Housing Act, Cal. Gov. Code § 12900 *et seq.*; and local laws like the New York City Human Rights Law, N.Y. Admin Code § 8-101, *et seq.*

employers to maintain workplaces free from safety hazards, including hazards related to workplace violence. *See, e.g.*, 29 U.S.C. § 654 (the OSH Act General Duty Clause).[3] The best way for employers to preemptively comply with these laws is to maintain workplace policies that regulate employee behavior before it escalates to illegal conduct. But employers who abandon or significantly curtail their workplace rules out of concern over the Board's standard could face liability under these other laws. And vice versa. The Board's work rules standard should not force employers to endure employee misbehavior until it reaches the threshold of legal impropriety. Nor should it create liability risk for employers who conscientiously and preemptively address employee workplace behavior in accordance with federal and state law.

II. The Board Should Continue to Hold that Certain Classes of Rules are Always Lawful to Maintain.

Beyond retaining the *Boeing* framework, the Board should also retain the following Board precedent that placed certain types of rules into *Boeing* Category 1.

First, the Board should uphold *Apogee Retail LLC*, 368 NLRB No. 144, which concerns confidentiality during internal investigations. The Board's earlier *Banner Estrella* decision hampered the ability of employers to conduct effective, thorough investigations by allowing confidentiality only where the employer could prove its investigation would otherwise be "corrupt[ed]," and requiring case-by-case analysis. *Banner Health Sys.*, 362 NLRB 1108, 1109 (2015), *enforcement granted in part and remanded sub nom. Banner Health Sys. v. NLRB.*, 851 F.3d 35 (D.C. Cir. 2017), & *overruled by Apogee Retail LLC*, 368 NLRB No. 144 (Dec. 16, 2019). In *Apogee*, the Board provided a workable and reasonable compromise, which allowed confidentiality *during the course* of workplace investigations and required case-by-case analysis

[3] OSHA takes the position that workplace violence may be covered by the General Duty Clause. https://www.osha.gov/workplace-violence/enforcement.

only where workplace rules mandated continued post-investigation confidentiality. Specifically, the Board found investigative confidentiality rules "that by their terms apply only to open investigations are categorically lawful under *Boeing*" Category 1, but it relegated to Category 2 rules that require confidentiality after an investigation, too. *Apogee*, 368 NLRB No. 144, at *3.

This makes sense. Employers should be able to request and to expect investigative confidentiality at least during the course of an open investigation. And the Board can still hold them accountable if they apply such rules to restrict protected activity, or unnecessarily expand rules to include discussions after the conclusion of an investigation. Such a standard is also consistent with recommendations from the EEOC that employers set up anti-harassment and complaint procedures that protect the confidentiality of complainants. In fact, the EEOC found that the NLRB's restrictions on investigative confidentiality can harm harassment victims.[4]

Second, the Board should uphold the decision in *Motor City Pawn Brokers Inc.* regarding non-disparagement rules. 369 NLRB No. 132 (July 24, 2020). In that case, the Board properly determined that any potential chilling effect of a non-disparagement rule did not outweigh the

[4] *See* Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace, *Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic*, June 2016 available at *https://www.eeoc.gov/select-task-force-study-harassment-workplace*. The report specifically encouraged the NLRB to work with the EEOC to harmonize rules related to confidentiality of harassment investigations. ("We heard strong support for the proposition that workplace investigations should be kept as confidential as is possible, consistent with conducting a thorough and effective investigation. We heard also, however, that an employer's ability to maintain confidentiality - specifically, to request that witnesses and others involved in a harassment investigation keep all information confidential - has been limited in some instances by decisions of the National Labor Relations Board ('NLRB') relating to the rights of employees to engage in concerted, protected activity under the National Labor Relations Act ('NLRA'). In light of the concerns we have heard, we recommend that EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA."); *see also* U.S. Chamber of Commerce, Theater of the Absurd: The NLRB Takes on the Employee Handbook at 6-7.

employer's legitimate justification for it, and categorized such rules in 1(b). *Id.* at *9. The Board first held that a reasonable employee could read a non-disparagement rule to infringe on Section 7 rights. *Id*. at *6. Unlike general civility rules, rules against disparaging an employer, if applied to protected activity, could restrict employees from criticizing an employer's wage scale or employment practices—speech that falls within Section 7 protections. These rules thus properly required a consideration of an employer's interest in maintaining the rule. The Board then correctly acknowledged that employers maintain a legally supported business interest in employee loyalty that is not inconsistent with an employee's right to engage in protected, concerted activity. As the Supreme Court has very clearly said, "[t]here is no more elemental cause for discharge of an employee than disloyalty," and nothing in the Act changed that. *NLRB v. Elec. Workers Local 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 472 (1953).

Motor City Pawn thus provides a good example of the benefits of the *Boeing* 1(a) and 1(b) categories. Non-disparagement rules do not fit neatly within Category 1(a) because reasonable employees could view a non-disparagement rule as restricting some types of concerted activity. But employers also have important, legitimate reasons to seek loyalty from employees and prohibit disparaging conduct unrelated to protected employment rights. As such, these rules land in Category 1(b) based on the proper balancing of rights and interests. Without this balancing, the Board might have invalidated such common and necessary workplace rules.

Third, the Board in *Nicholson Terminal & Dock Co.*, 369 NLRB No. 147 (July 30, 2020), correctly placed rules restricting outside employment in Category 1(a) as always lawful to maintain because they are not reasonably related to any protected activity under Section 7. As the Board explained, no reasonable employee would interpret restrictions on outside employment to interfere with their rights to organize or act collectively to improve their working conditions. *Id*. at *4.

Moreover, the Board correctly found that restrictions on moonlighting do not prevent employees from volunteering with unions or worker organizations on their own time. *Id*. at *3; *see also G&E Real Estate Mgmt. Servs. d/b/a Newmark Grubb Knight Frank*, 369 NLRB No. 121, at *3 (July 16, 2020) (reaching same conclusion and finding employees would not reasonably read moonlighting rules to restrict union organizing).

Fourth, though not specifically addressed in the Invitation to File Briefs, the Board should also affirm the *Boeing* Board's finding that general workplace civility rules are always lawful to maintain. These rules are fundamental to effectively functioning workplaces. Restricting employer use of these basic rules encourages disrespect and conflict at work. While conflict is a symptom of some labor organizing activity, it is not an inherent feature of it. If civility rules are *applied* to protected activity, they may, of course, be prohibited in that application.

III. Arbitrary Changes Threaten the Board's Long-Term Legitimacy.

It is no secret that the Board often changes policy drastically based on the politics of the President of the United States. *See* Zev J. Eigen, Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1887 (2014) (discussing the Board's "flip flop problem"). The Board's long history of flip-flopping on policy positions is well-documented and "frequently involves the agency's most fundamental policy determinations." *Id.* at 1890.

But there are limits, and they are tightening. Although the Act grants the Board wide discretion, that discretion is not unlimited. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) (holding judicial review of Board decisions limited to consistency with the Act and rationality). The Supreme Court is currently mulling limits on *Chevron* deference. *Am. Hosp. Ass'n v. Becerra*, No. 20-1114, 2021 WL 6051132 (Nov. 30, 2021) (examining *Chevron* in context of Department of Health and Human Services interpretation of reimbursement rate requirements for hospitals);

see also Brief for the Chamber of Commerce of the United States of America as Amicus Curiae, *Am. Hosp. Ass'n v. Becerra*, No. 20-1114, 2021 WL 4219174 (Sept. 10, 2021). And the Court has seemed to more closely scrutinize agency actions that go beyond the agency's statutory purview. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) ("The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The [OSH] Act empowers the Secretary to set *workplace* safety standards, not broad public health measures."). Even the ability of agencies to change positions has come under closer review. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (examining authority of Department of Homeland Security to change interpretations of Deferred Action for Childhood Arrivals (DACA) program). The writing may be on the wall. The wide latitude granted to administrative agencies in recent decades is narrowing, and courts are looking to reinforce critical and constitutionally compelled constraints on *Chevron* deference.

Rather than acknowledging this potential sea change in administrative law, the Board is moving further afield from its statutory mandates and Supreme Court precedent. *See NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (explaining the Board has the "delicate task" of "weighing the interests of employees … against the interest of the employer"). The current Board seems to be taking more radical policy positions, and it does so at its own peril. Treating precedent like sidewalk chalk endangers the continuing legitimacy of the Board and its ability to withstand judicial scrutiny. Where Board precedent accords with the Act and with the directive of the Court to balance employee and employer rights, as the *Boeing* standard does, the Board would be wise to keep course. If it does not, the courts may step in. And the Board may end up with less discretion and authority than it had before.

IV. If the Board Returns to *Lutheran Heritage*, It Should Explicitly Recognize and Provide Clear Guidance on Employer Savings Clauses.

If the Board insists on returning to the vague, unpredictable work rules standard of *Lutheran Heritage*, then it must remedy the uncertainties created for employers. For example, the Board could allow employers to include disclaimers or savings clause language in their work rules explicitly disclaiming any intrusion on Section 7 rights. Such disclaimers would notify employees that the rules will not be applied to restrict protected activity under the Act, which would address the Board's concerns about a "chilling effect" of work rules.

In the *Lutheran Heritage* era, the Board's position on savings clauses was unclear. Some cases accepted such language and others found it carried little or no weight. *Compare Cox Commc'n*, No. 17-CA-087612, 2012 WL 5866212, 40 NLRB Advice Memo. Rep. 25 (Oct. 19, 2012) (finding saving clause relevant to whether employees would reasonably interpret rules to interfere with Section 7 rights), *with First Transit, Inc.*, 360 NLRB 619, 621 (2014) (questioning the effectiveness of savings clause language). If the Board returns to *Lutheran Heritage*, it should clearly explain to employers how they can use savings clause language to inform employees that facially neutral workplace rules will not infringe on Section 7 rights.

CONCLUSION

The Board should not alter its *Boeing* work rules standard. *Boeing* and its progeny brought much-needed clarity and predictability to an area of law made unworkable by *Lutheran Heritage*. At the same time, the Board and employees have significant tools at their disposal to ensure Section 7 rights are respected. Because *Boeing* properly balances employer interests and employee rights under the Act, the Board should not disturb it.

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CERTIFICATE OF SERVICE

I certify that on March 7, 2022, I filed the Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* with the National Labor Relations Board and will serve a copy via email on the following:

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