**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| **STERICYCLE, INC.** | **Case Nos. 04-CA-137660** |
| | **04-CA-145466** |
| **and** | **04-CA-158277** |
| | **04-CA-160621** |
| **TEAMSTERS LOCAL 628** | |

**THE GENERAL COUNSEL'S BRIEF IN RESPONSE TO THE BOARD'S JANUARY 6, 2022 NOTICE AND INVITATION TO FILE BRIEFS**

The Board's prior standards for evaluating facially neutral work rules in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and investigative-confidentiality rules in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), *enf. denied on other grounds*, 851 F.3d 35 (D.C. Cir. 2017), gave appropriate weight to both employees' Section 7 rights and employers' legitimate business interests in maintaining such rules. In *Boeing Co.*, 365 NLRB No. 154 (2017), the Board replaced *Lutheran Heritage* with a standard that fails to protect employees from the chilling effects of overbroad rules on the exercise of statutory rights. Compounding this error, in *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019), the Board misapplied that standard to hold investigative-confidentiality rules of limited duration categorically lawful. To correct these errors, the Board should overrule *Boeing* and *Apogee* in favor of standards based on *Lutheran Heritage* and *Banner*.

## I. THE BOARD SHOULD EVALUATE FACIALLY NEUTRAL WORK RULES UNDER A STANDARD BASED ON *LUTHERAN HERITAGE*.

Section 7 of the Act protects employees' right to engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. The Board and courts have long recognized that employers' maintenance of overbroad workplace rules may chill employees in the exercise of Section 7 rights. *See, e.g.*, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998),

*enfd. mem.*, 203 F.3d 52 (D.C. Cir. 1999).[1] However overbroad rules are conveyed—through employee handbooks, arbitration or severance agreements, or other means—"[e]mployees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Sec[tion] 7 activity for fear of running afoul of a rule whose coverage is [at best] unclear." *Whole Foods Mkt.*, 363 NLRB 800, 803 n.11 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)), *enfd.*, 691 F. App'x 49 (2d Cir. 2017) (summary order). Indeed, the presence of fear—even just a "dash" of it—magnifies perceived risks and embeds pessimism and paralysis in employees. Michael M. Oswalt, *The Content of Coercion*, 52 U.C. Davis L. Rev. 1585, 1589-90, 1634, 1636 (2019). And the fear necessary to trigger such reactions is generally present when employees must decide whether to engage in Section 7 activity, both because fear is ubiquitous in hierarchical work settings, *see id.* at 1637, 1638 & n.246, 1644 n.277, and because the prospect of challenging authority is an especially potent fear trigger.[2]

Consistent with the foregoing, from 2004 to 2017, the Board appropriately responded to the problem of overbroad work rules with the *Lutheran Heritage* standard. That standard, which

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[1] Such overbreadth may exist in rules concerning, among many other topics, civility, *see, e.g.*, *William Beaumont Hosp.*, 363 NLRB 1543, 1544 (2016) (prohibition on conduct that "impedes harmonious interactions and relationships" reasonably encompassed protected discussions between employees); confidentiality and non-disclosure, *see, e.g.*, *Victory Casino Cruises II*, 363 NLRB 1578, 1580-81 (2016) (prohibition on disclosing "personnel information" reasonably included protected discussion of employment terms); and non-disparagement, *see, e.g.*, *S. Md. Hosp.*, 293 NLRB 1209, 1222 (1989) (prohibition of "derogatory attacks" on employer representatives overbroad where criticisms of working conditions could fairly be regarded as "derogatory" toward employer), *enfd. in relevant part per curiam*, 916 F.2d 932 (4th Cir. 1990).

[2] *See* Jennifer J. Kish-Gephart, et al., *Silenced by Fear: The Nature, Sources, and Consequences of Fear at Work*, 29 Res. Organizational Behav. 163, 169, 173-74 (2009), available at https://www.researchgate.net/publication/238382691_Silenced_by_fear (last visited Mar. 1, 2022).

had the circuit courts' unanimous approval,[3] generally prohibited the maintenance of employer rules if "employees would reasonably construe the language to prohibit Section 7 activity." 343 NLRB at 647. Adhering closely to the Board's general approach to employer statements,[4] this standard recognized the fact that "a reasonable employee is a vulnerable employee, easily chilled." *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 10 (2019) (Member McFerran, dissenting). And because context affects how employees interpret employer rules, *Lutheran Heritage* also "appropriately t[ook] account of the surrounding circumstances." *The Roomstore*, 357 NLRB 1690, 1690 n.3 (2011).[5]

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[3] *Boeing*, 365 NLRB No. 154, slip op. at 24 & n.5 (Member Pearce, dissenting) (collecting circuit court cases); *id.*, slip op. at 30-31 (Member McFerran, dissenting).

[4] *See Double D Constr. Grp.*, 339 NLRB 303, 303-04 (2003) (employer statements are unlawful if "the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").

[5] Consistent with that principle, the Board has relied on circumstances including:

- specific events revealing the significance of a policy, *see David Van Os & Associates, PC*, 346 NLRB 804, 807 n.10, 813-14 (2006) (relying on employees' awareness of recent, specific problems of employee misconduct in finding lawful rules demanding honesty and loyalty of employees, which were narrowly framed to address that misconduct);
- special characteristics of specific workplaces, *see, e.g.*, *Flagstaff Med. Ctr.*, 357 NLRB 659, 662-63 (2011) (hospital's employees would reasonably construe a no-camera policy as a legitimate means of protecting the "weighty" privacy interests of patients), *enf. denied in part on other grounds*, 715 F.3d 928 (D.C. Cir. 2013);
- employer statements linking rule language to protected activity, *see The Roomstore*, 357 NLRB at 1690 n.3 (employees would reasonably interpret rule prohibiting "[a]ny type of negative energy or attitudes" as applying to protected activity in part based on employer's repeated warnings linking "negativity" to employees' protected discussions); *Care One at Madison Ave.*, 361 NLRB 1462, 1464 (2014) (employees would understand employer's references to recent union election and their purported failure to treat each other with "dignity and respect" during the campaign as explicitly targeting protected union activity), *enfd.*, 832 F.3d 351 (D.C. Cir. 2016);
- other unfair labor practices, such as unlawful discharges giving an "authoritative indication" of the unlawful scope of a rule, *Triple Play Sports Bar & Grill*, 361 NLRB 308, 314 (2014) (employer indicated prohibition against inappropriate discussions included Section 7 activity by unlawfully discharging employees for participating in protected Facebook discussions about employer), *aff'd*, 629 F. App'x 33 (2d Cir. 2015) (unpublished); *accord Care One*, 361

While protecting employee rights, *Lutheran Heritage* was also sufficiently responsive to legitimate business interests. The Board under *Lutheran Heritage* routinely considered justifications associated with rules in determining how employees would reasonably interpret the rules. *See Boeing*, 365 NLRB No. 154, slip op. at 24 & n.6, 25 n.12 (Member Pearce, dissenting). When the Board found employees would not reasonably construe a rule to prohibit Section 7 activity, it was typically because the rule was tailored such that the employer's legitimate business interests would be sufficiently apparent to a reasonable employee. *See id.*, slip op. at 35 (Member McFerran, dissenting). *Lutheran Heritage* also left employers free to adopt more narrowly tailored rules instead of overbroad ones, *see id.* (Member McFerran, dissenting), and permitted them to achieve this through sufficiently detailed savings clauses, *see First Transit*, 360 NLRB at 621-22.

In addition, *Lutheran Heritage* implicitly permitted employers to maintain narrowly tailored rules that infringe on employees' Section 7 rights in the limited circumstances where conflicting legitimate business interests outweigh those rights. *See Menorah Med. Ctr.*, 362 NLRB 1746, 1746 n.3, 1767 (2015) (applying balancing test to overbroad confidentiality rule),

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NLRB at 1465; *First Transit, Inc.*, 360 NLRB 619, 622 (2014); *but see Albertson's, Inc.*, 351 NLRB 254, 258 (2007) (rejecting judge's reliance, in evaluating rule, on "unrelated unfair labor practices involving other rules"), *overruled on other grounds*, *AT&T Mobility*, 370 NLRB No. 121 (2021);

- employees' prior exercise of Section 7 rights, *see Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1690 n.4 (2015) (relying in part on evidence that employees frequently wore union-message clothing to find that employees would not reasonably construe appearance rule to prohibit Section 7 activity); and
- employer testimony indicating the unlawful scope of a rule, *see Longs Drug Stores California*, 347 NLRB 500, 500-01 (2006) (relying in part on manager's testimony that wage rates were confidential to find confidentiality provisions unlawful).

However, extrinsic evidence was not required to find a work rule overbroad under *Lutheran Heritage*. *See Hills & Dales Gen. Hosp.*, 360 NLRB 611, 611 (2014); *accord Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007).

*enfd. in relevant part sub nom. Midwest Div.-MMC, LLC v. NLRB*, 867 F.3d 1288, 1302 (D.C. Cir. 2017) ("An employer *presumptively* violates the Act 'when it maintains a work rule that . . . tends to chill employees in the exercise of their Section 7 rights.'" (emphasis added) (quoting *Lutheran Heritage*, 343 NLRB at 646)).

In 2017, a sharply divided Board in *Boeing* sua sponte overruled *Lutheran Heritage* and adopted in its stead a standard so forgiving of overbroad work rules as to effectively abdicate the Board's role in protecting employees from their chilling effect.[6] In doing so, the *Boeing* majority mischaracterized the standard it was replacing. Several of the more egregious examples of this are the majority's assertions that *Lutheran Heritage* permitted no consideration of employer justifications underlying rules, *see Boeing*, 365 NLRB No. 154, slip op. at 7, 8 & nn.31-32,[7] no

[6] Under *Boeing*, as subsequently clarified in *LA Specialty*, 368 NLRB No. 93, it is the General Counsel's initial burden "to prove that a facially neutral rule *would* in context be interpreted by a reasonable employee . . . to potentially interfere with the exercise of Section 7 rights." *Id.*, slip op. at 2. If the General Counsel fails to satisfy this burden, maintenance of the rule is deemed lawful without further inquiry. *See id.*; *Boeing*, 365 NLRB No. 154, slip op. at 16. Otherwise, the Board evaluates (i) "the nature and extent of the potential impact on NLRA rights," and (ii) "legitimate justifications" associated with the rule. *Boeing*, 365 NLRB No. 154, slip op. at 14; *see also LA Specialty*, 368 NLRB No. 93, slip op. at 3. The rule's maintenance violates Section 8(a)(1) "if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7." *Boeing*, 365 NLRB No. 154, slip op. at 16. Next, the Board places rules into three categories: Category 1 (rules always lawful to maintain either because (a) when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights or (b) the potential adverse impact on protected rights is outweighed by the justifications associated with the rules); Category 2 (rules warranting individualized scrutiny in each case); and Category 3 (rules never lawful 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 rules). *See id.*, slip op. at 14-15; *see also LA Specialty*, 368 NLRB No. 93, slip op. at 2 & n.2.

[7] In this respect, the *Boeing* majority imagined a conflict between *Lutheran Heritage* and other Board law where no conflict existed. For example, the majority claimed that prohibitions on all employee solicitation during working time and prohibition on off-duty employees accessing the interior of the employer's facility should be unlawful under *Lutheran Heritage*. *See Boeing*, 365 NLRB No. 154, slip op. at 8. Unsurprisingly, the majority failed to cite any *Lutheran Heritage* case where the Board had so held. The majority failed to recognize that *Lutheran Heritage* implicitly respected balances that the Board strikes between employees' rights to engage in specific Section 7 activities and conflicting legitimate employer interests, e.g., that employers

consideration of "events that reveal the importance of a particular policy," *id.*, slip op. at 11, and insufficient consideration of "characteristics of . . . work settings and different industries," *id.*, slip op. at 10-11. All three contentions are refuted above, *supra* pp. 3-5.[8] The *Boeing* majority's mischaracterization of the *Lutheran Heritage* doctrine is "enough to demonstrate that its reconsideration of the [doctrine was] arbitrary and capricious." *Boeing*, 365 NLRB No. 154, slip op. at 36 (Member McFerran, dissenting).

More importantly, *Boeing* is misguided because it is more complicated, less predictable, and much less protective of employee rights than *Lutheran Heritage*. Indeed, "it simply fails to address the labor-law problem . . . that employees may be chilled from exercising their statutory

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may lawfully maintain facially neutral rules that prohibit union solicitation during working time and certain off-duty access to employer facilities for Section 7 purposes, *see id.*, slip op. at 8 nn.31-32 (collecting cases).

[8] The Board members who dissented in *Boeing* have identified additional mischaracterizations of *Lutheran Heritage* by the majority:

- *Lutheran Heritage* conflicts with *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), and other Supreme Court decisions. *Compare Boeing*, 365 NLRB No. 154, slip op. at 7, *with id.*, slip op. at 30 & n.9 (Member McFerran, dissenting).
- *Lutheran Heritage* required impossible "linguistic perfection." *Compare Boeing*, 365 NLRB No. 154, slip op. at 9 & n.41, *with id.*, slip op. at 36 (Member McFerran, dissenting).
- The Board under *Lutheran Heritage* consistently misapplied the evidentiary principle that ambiguity in general work rule language must be construed against the drafter. *Compare id.*, slip op. at 9 n.43, *with id.*, slip op. at 28 n.25 (Member Pearce, dissenting), *and id.*, slip op. at 36 n.31 (Member McFerran, dissenting).
- *Lutheran Heritage* was based on the premise that employees are better served by having no rules, and, accordingly, made employees more vulnerable to sexual harassment and assault. *Compare id.*, slip op. at 10, 20-21, *with id.*, slip op. at 24 n.9 (Member Pearce, dissenting), *and id.*, slip op. at 36, 39-40, 40 n.47 (Member McFerran, dissenting).
- The Board has "struggled" when attempting to apply *Lutheran Heritage*. *Compare id.*, slip op. at 2-3, 11-13, *with id.*, slip op. at 24 (Member Pearce, dissenting), *and id.*, slip op. at 37 (Member McFerran, dissenting).
- *Lutheran Heritage* was not well-received by the courts of appeals. *Compare id.*, slip op. at 14, *with id.*, slip op. at 24 & nn.5, 7 (Member Pearce, dissenting), *and id.*, slip op. at 30-31 (Member McFerran, dissenting).

rights by overbroad employer rules." *Id.*, slip op. at 30 (Member McFerran, dissenting). At the outset, the *Boeing* majority promised more certainty and clarity, *see id.*, slip op. at 14, but failed to deliver them in any acceptable way. Notably, how employees would reasonably construe a rule is still part of the analysis under *Boeing*. From that starting point, the majority added several amorphous moving parts to the test, belying its promise of certainty and clarity. *See Boeing*, 365 NLRB No. 154, slip op. at 26-27 (Member Pearce, dissenting); *id.*, slip op. at 38-39 (Member McFerran, dissenting). As shown below, the only certainty under *Boeing* has been the Board's commitment to finding lawful all but the most obviously overbroad rules and even removing them from Board scrutiny altogether.

*Boeing*'s skewing against employee rights begins with its "reasonably construe" step. *Boeing* primes this test for irrational results by imagining ostensibly "reasonable" employees who naïvely presume their employers would not apply work rules to prohibit Section 7 activity, concluding otherwise only where a rule's coercive interpretation is the inevitable and necessary result. *See Medic Ambulance Serv., Inc.*, 370 NLRB No. 65, slip op. at 8 (2021) (Member McFerran, dissenting); *LA Specialty*, 368 NLRB No. 93, slip op. at 10-11 (Member McFerran, dissenting). *Boeing* also charges employees with constructive knowledge of their rights under the Act—contrary to evidence that many or most employees lack such knowledge[9]—seemingly to bolster the assumption that employees would interpret rules as consistent with those rights. *See LA Specialty*, 368 NLRB No. 93, slip op. at 10 n.17 (Member McFerran, dissenting). This approach turns on its head the long-established principle that employer conduct violates Section 8(a)(1) if it has a "reasonable tendency" to "interfere with, restrain, or coerce employees"—not

[9] *See, e.g.*, Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights under the National Labor Relations Act*, 32 Harv. J. on Legis. 431, 435-38 (1995).

whether it "most likely, much less inevitably, would have that effect." *Medic Ambulance Serv.*, 370 NLRB No. 65, slip op. at 8 (Member McFerran, dissenting). Relatedly, it is also inconsistent with the Board's test for unlawful employer statements, which provides that a statement is unlawful if "the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Constr.*, 339 NLRB at 303-04. More importantly, it is also inconsistent with core premises of the Act—that "employers have power over their employees" and "employees require countervailing statutory protection"[10]—as well as the reality that employer disregard for Section 7 rights generally[11] and unlawful applications of work rules specifically[12] are widespread. Yet *Boeing* effectively assumes that "reasonable" employees ignore the bounds of English usage and common sense to read rules as consistent with their Section 7 rights (of which those employees are often unaware), even conjuring up clarifying language to compensate for the employer's failure to adopt such language in reality. *See, e.g.*, *LA Specialty*, 368 NLRB No. 93, slip op. at 12-13 (Member McFerran, dissenting) (identifying "distortion of plain English and common sense" in majority's interpretation of media-contact rule prohibiting employees from providing media with "any information" as only prohibiting making statements on behalf of employer). In short, *Boeing*'s conception of the "reasonable employee" is anything but reasonable.

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[10] *LA Specialty*, 368 NLRB No. 93, slip op. at 10 (Member McFerran, dissenting)

[11] *See* Celine McNicholas et al., Economic Policy Institute, *Unlawful: U.S. employers are charged with violating federal law in 41.5% of all union election campaigns*, Dec. 11, 2019, https://www.epi.org/179315.

[12] *See, e.g.*, *AT&T Mobility*, 370 NLRB No. 121, slip op. at 4-5; *BMW Mfg. Co.*, 370 NLRB No. 56, slip op. at 7 n.9 (2020) (Member McFerran, dissenting in part) (explaining how facially neutral non-disparagement provisions chill protected activity in light of employers' practice of using "ambiguously-worded condemnations as thinly veiled references to employees' protected activity") (collecting cases).

Next, *Boeing* further stacks the deck against the protection of employee rights with its balancing step, pursuant to which the Board upholds overbroad rules whose legitimate business reasons it deems to outweigh their infringement of Section 7 rights. In this regard, relying on inapposite Supreme Court decisions addressing motive-based violations, the Board adopted a mechanism of minimizing the significance of Section 7 rights and thus deeming incursions on them "comparatively slight." *Boeing*, 365 NLRB No. 154, slip op. at 26 n.13 (Member Pearce, dissenting). *Boeing*'s balancing step ignores that where employers can narrowly tailor rules to their legitimate interests without chilling Section 7 activity, *see supra* p. 4, those interests cannot justify a rule's overbreadth. *See AT&T Mobility*, 370 NLRB No. 121, slip op. at 14 (Chairman McFerran, dissenting) ("The failure to narrowly tailor a rule does not defeat the employer's justification for *a* rule, only the justification for the rule as drafted . . . .").[13] Yet, under *Boeing*, employers may lawfully chill Section 7 activity through facially neutral rules if they have justifications for prohibiting other, unprotected activity that the same rules also prohibit, effectively providing employers with "a how-to manual . . . on stifling protected concerted activity before it begins." 365 NLRB No. 154, slip op. at 23 (Member Pearce, dissenting).[14] As a result, post-*Boeing*, more workers than ever are likely to forego protected activity to avoid

[13] The *Boeing* majority also failed to explain which party has the burden of proof with respect to the balancing. *LA Specialty*, 368 NLRB No. 93, slip op. at 11 (Member McFerran, dissenting). Under Supreme Court precedent, it should be the employer's burden to prove that its legitimate business interests should prevail over Section 7 rights. *See id.* (Member McFerran, dissenting) (collecting cases).

[14] Subsequent to *Boeing*, the Board has further eroded Section 7 rights by selectively extending the reach of its balancing test to displace precedent applying balancing tests more protective of employee rights. *See, e.g.*, *Wal-Mart Stores*, 368 NLRB No. 146, slip op. at 8-10 (2019) (Member McFerran, dissenting); *Apogee*, 368 NLRB No. 144, slip op. at 2-7 (discussed *infra* pp. 16-20); *cf. Medic Ambulance Serv.*, 370 NLRB No. 65, slip op. at 1 n.4 (refusing to disturb precedent concerning rules restricting solicitation and distribution in the workplace, which "already strikes a balance between employee rights and employer interests").

violating overbroad workplace rules. *See AT&T Mobility*, 370 NLRB No. 121, slip op. at 10 (Chairman McFerran, dissenting).

*Boeing*'s most arbitrary feature, however, is its categorization step. When the Board finds a rule lawful through the steps discussed above, the Board labels the rule as being of a certain general type (e.g., a "civility" rule), and then frequently places that entire type of rule into the always-lawful Category 1, thus insulating all future rules of the same general type from Board scrutiny "regardless of their exact language or context." *BMW*, 370 NLRB No. 56, slip op. at 8, 10 n.52 (Member McFerran, dissenting in part) (collecting cases). Because the Board must analyze a rule's specific language and context to determine its potential chilling effect in *every* case, *see LA Specialty*, 368 NLRB No. 93, slip op. at 12 (Member McFerran, dissenting), declaring rules lawful merely because they can be mechanically labeled with a general type is clearly arbitrary, *see BMW*, 370 NLRB No. 56, slip op. at 9-10 (Member McFerran, dissenting in part).[15] Given its categorization process, it is ironic that the *Boeing* majority faulted *Lutheran Heritage* for giving insufficient consideration to context. *BMW*, 370 NLRB No. 56, slip op. at 9-10 (Member McFerran, dissenting in part). And the harm to Section 7 rights cannot be overstated: the categorization step encourages not only the widespread maintenance of chilling

[15] That is especially so where the Board has declared a type of rule always-lawful in cases not even involving a rule of the relevant type, *see Boeing*, 365 NLRB No. 154, slip op. at 27 (Member Pearce, dissenting); *id.*, slip op. at 33 (Member McFerran, dissenting), or when the Board relies on employer-specific evidence to find lawful a rule that then serves as the basis for declaring an entire type of rule to be lawful, *see, e.g.*, *AT&T Mobility*, 370 NLRB No. 121, slip op. at 13 (Chairman McFerran, dissenting) ("The justifications offered by [an aircraft manufacturer performing security-classified work for the federal government] for its no-camera rule have no obvious bearing in other American workplaces . . . .").

work rules,[16] but also the application of those rules to stifle protected activity. *See Boeing*, 365 NLRB No. 154, slip op. at 28 (Member Pearce, dissenting).[17]

In sum, both the *Boeing* majority's decision to overrule *Lutheran Heritage* and the framework it adopted in its stead are arbitrary. "*Boeing* is a blunt instrument . . . us[ed] to force aside the statutory concerns of the [Act] and clear a path for employers to promulgate workplace rules without regard to their impact on employees' statutory rights." *BMW*, 370 NLRB No. 56, slip op. at 6 (Member McFerran, dissenting in part). Accordingly, *Boeing* should be overruled. Instead, the Board should adopt a standard based on *Lutheran Heritage*, under which the Board considered employer rules in context on a case-by-case basis to determine whether "employees

[16] The decisions raised by the Board in Question 3 of its notice and invitation to file briefs further illustrate how *Boeing* improperly validates overbroad rules as categorically lawful. First, some non-disparagement rules chill Section 7 activity because such activity typically involves dissatisfaction with working conditions and thus reflects negatively on employers. *See BMW*, 370 NLRB No. 56, slip op. at 6-8 (Member McFerran, dissenting in part). Second, some rules prohibiting outside employment implicitly prohibit, among other things, working as a paid union salt. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995); *cf. Schwan's Home Serv.*, 364 NLRB 170, 173-74 (conflict-of-interest rule). Finally, some investigative-confidentiality rules chill a broad array of protected communications, as explained in detail *infra* pp. 16-20. Although the Board should abandon its practice of finding such types of rules categorically lawful, specific rules of these types may be sufficiently tailored to legitimate business interests to render them lawful.

[17] Employees unlawfully discharged pursuant to an overbroad rule may experience further economic and psychological hardship by losing out on unemployment benefits because the employees, their advocates, and/or administrators may erroneously believe that the employees' rule violation disqualifies them. *See* Steven A. Mazurak, *Effects of Unemployment Compensation Proceedings on Related Labor Litigation*, 64 Marq. L. Rev. 133, 156 (1980) (describing the post-termination denial of unemployment benefits as a "double blow to [the employee's] psyche"); Monica Halas et al., Massachusetts Law Reform Institute et al., *An Advocate's Guide to Unemployment in Massachusetts*, May 14, 2020, at 66-67, 69, https://www.masslegalservices.org/unemploymentadvocacyguide (follow "Download" hyperlink to obtain PDF) (recognizing generally that claimants may not be disqualified if they were discharged for violating unlawful employer rules, but without mentioning the NLRA).

would reasonably construe the language to prohibit Section 7 activity." 343 NLRB at 647. However, the Board should also refine that standard as follows.

First, the Board should explicitly define the "reasonable employee" in a manner consistent with Supreme Court and pre-*Boeing* Board precedent. Initially, the Board should not presume that employees—most of whom work in non-unionized workplaces—are aware of their rights under the NLRA. *See, e.g.*, DeChiara, *supra* note 9. Even when they *are* aware of their rights, "the Board should . . . assum[e] that workers would be inclined to read [rules] to potentially prohibit protected activity, not . . . assum[e] that workers will grasp to find any possible reading that would not be in any way coercive." *Medic Ambulance Serv.*, 370 NLRB No. 65, slip op. at 8 (Member McFerran, dissenting); *see also supra* pp. 2, 7-8. Consistent with the foregoing, the Board should clarify that a presumptive violation occurs when one reasonable interpretation of a rule is to prohibit Section 7 activity, even if that is not the only reasonable interpretation. *See Lutheran Heritage*, 343 NLRB at 650 (Members Liebman and Walsh, dissenting). As before, the Board should consider the surrounding circumstances in conducting this inquiry. *See The Roomstore*, 357 NLRB at 1690 n.3; *supra* p. 3 & note 5.

Second, the Board should adopt two minor modifications to its articulation of the *Lutheran Heritage* standard. First, the Board should substitute the word "could" for "would." Although both terms are arguably equivalent when, as here, they are used in conjunction with the term "reasonably," *see Cintas Corp.*, 482 F.3d at 467 n.1, at least one court of appeals has found the difference in terms meaningful, *see T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 272 (5th Cir. 2017). To the extent the words differ in meaning, "could" is more consistent with the Board's actual application of *Lutheran Heritage* in subsequent cases, as well as with the Board's general standard for employer statements. *See Double D Constr.*, 339 NLRB at 303-04 (employer

statements are unlawful if "the words *could* reasonably be construed as coercive, whether or not that is the only reasonable construction") (emphasis added). Second, the Board should add the word "unlawfully" so that the test states as follows: a rule is unlawful if "employees [c]ould reasonably construe the language to [unlawfully] prohibit Section 7 activity." *Lutheran Heritage*, 343 NLRB at 647. The second addition would remove any appearance of a conflict between *Lutheran Heritage* and lawful restrictions of Section 7 activity, such as facially neutral rules limiting solicitation to non-working time. *See supra* note 7.

Relatedly, the Board should make explicit another implicit characteristic of *Lutheran Heritage*: that even when one reasonable reading of a rule is that it prohibits Section 7 activity, in a small minority of situations the rule may be lawful based on overriding employer interests. *See supra* pp. 4-5. In that regard, the Board should apply the well-established *Republic Aviation* framework under which a rule that infringes on Section 7 rights is lawful if the employer demonstrates that this infringement is justified by "special circumstances" outweighing employees' Section 7 rights and that the rule is narrowly tailored to those circumstances. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 & n.10, 804 (1945); *see also, e.g.*, *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 493 (1978); *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714-15 (5th Cir. 2018).[18] Adopting this framework as a generally available affirmative defense—applicable to rules conveyed not only in employee handbooks but also by means such as

[18] This general approach is consistent with context-specific Board law pre-dating *Boeing* explaining how certain types of employer interests may justify certain work rules' infringements on Section 7 rights. *See, e.g.*, *Banner*, 362 NLRB at 1109-13 (discussed *infra* pp. 16-20). It also recognizes that certain types of restrictions are presumptively lawful notwithstanding that they infringe on Section 7 rights, in essence because special circumstances apply. *See, e.g.*, *Our Way, Inc.*, 268 NLRB 394, 394-95 (1983).

arbitration and severance agreements[19]—would avoid any perceived confusion stemming from *Lutheran Heritage*'s heretofore implicit approach, assure that employee rights are not unnecessarily subjugated to employer interests, and promote the enforceability of Board decisions in the courts of appeals. *See Midwest Div.-MMC*, 867 F.3d at 1302 (interpreting *Lutheran Heritage* framework as including affirmative defense).

Finally, the Board should formulate a model prophylactic statement of rights, which affirmatively and specifically sets out employee statutory rights and explains that no rule should be interpreted as restricting those rights, that employers may—at their option—include in handbooks to mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights and simplify compliance. *See Boeing*, 365 NLRB No. 154, slip op. at 43 (Member McFerran, dissenting); *cf. Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964) (establishing safeguards employers must observe to minimize coercive impact on exercise of Section 7 rights when interrogating employees to prepare defense in unfair labor practice hearings), *enf. denied*, 344 F.2d 617 (8th Cir. 1965). Use of such a statement of rights would mitigate chill "by making explicit that the employer's rules will not be applied to protected concerted activity . . . and by making clear to employees, at an appropriate level of detail, what their basic statutory rights are." *Boeing*, 365 NLRB No. 154, slip op. at 43 (Member McFerran, dissenting).[20] When a statement

[19] Although the Board currently evaluates severance agreements under a different standard than handbook rules, *see, e.g.*, *IGT d/b/a International Game Technology*, 370 NLRB No. 50, slip op. at 2 (2020), the same principles should be applied to such agreements, *see S. Freedman & Sons, Inc.*, 364 NLRB 1203, 1204 (2016) ("[A]n employer may condition a settlement on an employee's waiver of Section 7 rights if the waiver is narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return for the waiver."), *enfd. per curiam*, 713 F. App'x. 152 (4th Cir. 2017).

[20] The description of statutory rights should focus on Section 7 activities that are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees (particularly in non-union workplaces, since they do not have union representatives available to bargain over rules and guide employees as to their rights), and likely to be chilled by overbroad

of rights is prominently placed in a handbook—ordinarily towards the front of a hard-copy handbook and at least referenced in the facially neutral rules under review[21]—the Board should apply a presumption that employees could not reasonably construe those rules to prohibit Section 7 activity. *See Boeing*, 365 NLRB No. 154, slip op. at 43 (Member McFerran, dissenting).[22] Such presumption may be rebutted by evidence that, under the circumstances, the more reasonable interpretation of such rules is that they unlawfully prohibit Section 7 activity. This approach would "mak[e] compliance with the Act simpler and easier." *Id.* And, in tandem with the above-described standard based on *Lutheran Heritage*, it is consistent with the Board's responsibility to safeguard employees' exercise of Section 7 rights.

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rules. The Board may consider including the following rights in its model statement: (1) discussing wages and other working conditions with co-workers or a union; (2) taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union; (3) striking and picketing, depending on its purpose and means; (4) taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present; (5) organizing a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment; (6) forming, joining, or assisting a union, such as by sharing employee contact information; (7) talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms; (8) wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choosing not to engage in any of these activities.

[21] *See First Transit*, 360 NLRB at 621-22 (finding savings clause insufficient where it was "neither prominent nor proximate to the rules it purports to inform").

[22] If an employer's statement of rights does not strictly adhere to the Board's model, the Board may consider whether the variant statement is appropriate under the circumstances of the workplace at issue such that the same presumption should apply to the employer's rules.

## II. THE BOARD SHOULD EVALUATE INVESTIGATIVE-CONFIDENTIALITY RULES UNDER A STANDARD BASED ON *BANNER*.

Employee communications with each other regarding terms and conditions of employment are vital to employees' ability to exercise their statutory rights to mutual aid in addressing workplace concerns. *See Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 155-56 (2014). So are employee communications with third parties who may help them improve their working conditions; this includes labor unions, the Board and other government agencies, the media, civil rights organizations, and others. *See Apogee*, 368 NLRB No. 144, slip op. at 14, 17 (Member McFerran, dissenting). And both types of communications are particularly important during employer-conducted workplace investigations, when protected discussions might concern discipline, the investigation itself, or a host of workplace issues that could be the subject of the investigation, such as racial discrimination and harassment, sexual harassment, and misconduct.[23]

The Board recognized the importance of employees' Section 7-protected communications in *Banner Estrella Medical Center*, where it held that confidentiality requirements in workplace investigations may be imposed on employees only when legitimate and substantial justifications outweigh employees' Section 7 rights in a particular investigation. 362 NLRB at 1110. Specifically, the Board properly placed on employers the burden to prove that confidentiality

[23] *See, e.g.*, *Westside Cmty. Mental Health Ctr.*, 327 NLRB 661, 666 (1999) (discipline); *Indep. Stations Co.*, 284 NLRB 394, 394, 402-04 (1987) (disciplinary practices); *Caesar's Palace*, 336 NLRB 271, 272 (2001) (discipline or disciplinary investigations); *Vought Corp.*, 273 NLRB 1290, 1294 (1984) (racial discrimination), *enfd.*, 788 F.2d 1378 (8th Cir. 1986); *J. W. Microelectronics Corp.*, 259 NLRB 327, 327 (1982) (racial harassment), *enfd.*, 688 F.2d 823 (3d Cir. 1982); *Fresh & Easy*, 361 NLRB at 156-58 (sexual harassment); *cf. Hyundai Am. Shipping Agency, Inc.*, 357 NLRB 860, 860-61 (2011) (multiple employees complained that coworker left threatening messages and used drugs at work), *enfd. in relevant part*, 805 F.3d 309 (D.C. Cir. 2015), *overruled in part by Apogee*, 368 NLRB No. 144.

was necessary for a particular investigation, on a case-by-case basis, based on objectively reasonable grounds for believing that the integrity of an investigation would be compromised without it. *Id.* at 1109-11. Thus, *Banner* gave due regard to the chilling effect of confidentiality rules on employees' Section 7 rights while also accounting for employers' legitimate business interests in maintaining the integrity of workplace investigations. *See id.* at 1110, 1112 n.16.

In *Apogee,* the Board abandoned the *Banner* framework. Applying *Boeing*, a Board majority concluded that confidentiality rules applicable to open investigations are always lawful. *Apogee*, 368 NLRB No. 144, slip op. at 8. On the other hand, rules not limited to open investigations would require individualized scrutiny in each case. *Id.*, slip op. at 9.

*Apogee* overruled *Banner* based on three faulty premises. First, the majority mistakenly asserted that *Banner* was inconsistent with precedent recognizing the Board's role in balancing employers' legitimate business justifications and employees' Section 7 rights, even though *Banner* required just this type of balancing. *See Apogee*, 368 NLRB No. 144, slip op. at 19-20 (Member McFerran, dissenting). Similarly, the majority erroneously asserted that *Banner* failed to consider the importance of maintaining confidentiality, even though that framework permitted employers to demonstrate why confidentiality was necessary in particular situations. *See id.*, slip op. at 20 (Member McFerran, dissenting). Finally, the majority baselessly asserted that *Banner* conflicts with EEOC guidelines. *See id.*, slip op. at 20-21 (Member McFerran, dissenting).[24]

But *Apogee*'s greatest flaw—and its key premise—is that it mistakenly assumes that the "potential adverse impact" of investigative confidentiality rules on employees' Section 7 rights is

[24] In this regard, the General Counsel would not construe *Banner* as forcing employers to abandon any promise of confidentiality that a victim may have sought. In that situation, if the victim's identity comes to light in the course of interviewing other witnesses, the employer could, for example, ask the witnesses to keep the victim's identity confidential, which would be more narrowly tailored to the privacy considerations at stake.

"comparatively slight," regardless of the circumstances, at least when they are limited to open investigations. 368 NLRB No. 144, slip op. at 8. The majority arrived at this assumption in part by baselessly reading nonexistent limitations into broad investigative-confidentiality rules. *See id.*, slip op. at 18-19 (Member McFerran, dissenting).[25] The majority also ignored the broad ambit of protection that Section 7 provides employees, whether represented by a union or not, to "help each other and to protect each other" at work. *Id*., slip op. at 13 (Member McFerran, dissenting). Indeed, because communications between employees are often the first step toward taking action for mutual aid or protection, the Board has recognized that they "lie[] at the heart of protected Section 7 activity." *Id.* (Member McFerran, dissenting) (quoting *St. Mary Margaret Mercy Healthcare Ctrs.*, 350 NLRB 203, 205 (2007), *enfd.*, 519 F.3d 373 (7th Cir. 2008), *abrogated on other grounds by General Motors LLC*, 369 NLRB No. 127 (2020)). In addition, *Apogee*'s approach casually dismisses the statutory right to discuss workplace matters not only with coworkers but also with third parties who may help them improve their working conditions, such as the Board and other government agencies. *See* 368 NLRB No. 144, slip op. at 14, 17-18 (Member McFerran, dissenting). Under *Apogee*, an employer can effectively quash all these discussions, and any concerted activity that may flow from them,[26] with one simple workplace

[25] For example, the majority found that interviewees would interpret certain rules as only banning them from disclosing information "either learned or provided in the course of the investigation," thereby allowing them to also discuss the underlying incident. *Apogee*, 368 NLRB No. 144*,* slip op. at 8. How, exactly, an interviewee could discuss the underlying events with a coworker, or anyone else, without also revealing information they had already provided to investigators is puzzling at best and unexplained in the decision.

[26] *See Gearhart-Owen Indus.,* 226 NLRB 246, 261-62 (1976) (employee engaged in protected concerted activity by speaking to coworker about getting union to intercede because she was dissatisfied with employer's investigation into her sexual harassment complaint); *Mobil Oil Exploration & Producing, U.S.,* 325 NLRB 176, 178-79 (1997) (seeking support from fellow employees in the face of possible discipline where employee unexpectedly became the target of

rule: "keep investigations and investigative interviews confidential until the investigation is closed"—no matter how long that may be.

Thus, *Apogee* enables employers to stifle key labor-law rights at a time when employees' interests are arguably at their apex—that is, when their actions might actually affect the outcome of an investigation. *See Banner*, 362 NLRB at 1112. Whether employees are coming to the defense of a coworker who has been wrongly accused, ensuring that discrimination or harassment allegations are not swept under the rug, or advocating improvements to safety measures after witnessing a coworker suffer an on-the-job accident, employees' ability to effectively impact their working conditions hinge on being able to exercise their Section 7 rights *before* an investigation is closed. Indeed, an employee's need to reach out to coworkers for help is rarely greater than when facing "the industrial equivalent of capital punishment." *Griffin v. Auto Workers*, 469 F.2d 181, 183 (4th Cir. 1972).

Although *Apogee* promised that investigative-confidentiality rules would not chill Section 7 activity because "an employer may not discipline an employee for exercising the protected right to pursue collective action," 368 NLRB No. 144, slip op. at 11, few employees would find comfort in that assurance since employees could reasonably fear discipline based on a violation of said rule. Thus, it is more likely that employees faced with such a rule would feel compelled to "choose safe silence over risky speech," even where that speech would be protected

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an investigation was protected, notwithstanding that he was given investigative confidentiality instruction), *enfd.*, 200 F.3d 230 (5th Cir. 1999).

by the Act. *Id.*, slip op. at 13 (Member McFerran, dissenting). Accordingly, the Board should overrule *Apogee*[27] and reinstate the framework set forth in *Banner*.[28]

## CONCLUSION

The Board should abandon the flawed frameworks in *Boeing* and *Apogee* and instead adopt standards based on *Lutheran Heritage* and *Banner*. Under the latter standards, the Board should affirm the judge's findings that the Respondent violated Section 8(a)(1) by maintaining overbroad work rules.

Respectfully submitted,

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[27] The Board should likewise overrule *Watco Transloading, LLC*, 369 NLRB No. 93, slip op. at 8-9 (2020), and *Alcoa Corp.*, 370 NLRB No. 107, slip op. at 2-3 (2021), in which the Board extended *Apogee*'s flawed analysis to one-on-one confidentiality instructions.

[28] In one respect, the Board should clarify the *Banner* standard. In *Banner*, the Board vacillated between quoting relevant factors supporting confidentiality—that witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, *and/or* there is a need to prevent a cover up—in the conjunctive and the disjunctive. *See Apogee*, 368 NLRB No. 144, slip op. at 3 n.5. While the presence of all these factors need not be a "threshold" for finding a confidentiality request permissible, *Banner*, 362 NLRB at 1110 n.10, proof of a single one should not necessarily be sufficient. The ultimate inquiry is whether there are objectively reasonable grounds for believing that the integrity of the investigation will be compromised, and the Board should consider the above-mentioned factors as well as any "other comparably serious threats to the integrity of an employer investigation." *Id.* at 1111.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the General Counsel's Brief in Response to the Board's January 6, 2022 Notice and Invitation to File Briefs in Case Nos. 04-CA-137660 et al. was filed with the National Labor Relations Board via the NLRB E-Filing System and served in the manner indicated to the parties listed below on this 7th day of March 2022.

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