WILLIAMS PARKER
HARRISON DIETZ & GETZEN
ATTORNEYS AT LAW
EST. 1925

Gail Farb
gfarb@williamsparker.com
T: (941) 552-2557
F: (941) 954-3172

June 4, 2018

Via CM/ECF

David J. Smith
Clerk of Court
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *Everglades College, Inc. v. National Labor Relations Board*, No. 16-10341

Dear Mr. Smith:

Petitioner/Cross-Respondent Everglades College, Inc. ("Everglades" or "Petitioner") respectfully submits this letter brief pursuant to the Court's May 23, 2018, Order, which directed the parties to submit separate letter briefs regarding the effect of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, No. 16-285 (May 21, 2018) on the issues presented in this case.

1. The Supreme Court's recent decision in *Epic Systems* fully supports Petitioner's position that Respondent/Cross-Petitioner National Labor Relations Board ("NLRB" or "Respondent") erred in concluding that Petitioner's arbitration agreement violates Section 8(a)(1) of the National Labor Relations Act ("NLRA") by virtue of its collective and class action waiver. In *Epic Systems*, the

majority held that employers can include a clause in their employment contracts that requires employees to arbitrate their disputes individually, and to waive the right to resolve those disputes through joint legal proceedings. *Epic Systems* at 25.

As held by the Court, and discussed in Petitioner's initial brief, the Court's decision that employers can use class and collective action waivers in arbitration agreements was dictated by federal law favoring arbitration, the Federal Arbitration Act ("FAA"). (Pet. Br. 25). The *Epic Systems* majority emphasized that Congress enacted the FAA "in response to a perception that courts were unduly hostile to arbitration." In doing so, it not only instructed courts to enforce agreements to arbitrate, but it "also specifically directed them to respect and enforce the parties' chosen arbitration procedures" – for example, as here, an agreement to "use individualized rather than class or collective action procedures." *Epic Systems* at 5.

As noted in Petitioner's initial brief, the FAA's limited exceptions for possibly invalidating its arbitration agreement are not met here. (Pet. Br. 37). Nothing in the NLRA, the *Epic Systems* majority concluded, trumps the FAA's requirement that arbitration agreements must be enforced. *Epic Systems* at 9. First, no contrary congressional command exists in the NLRA. The Court rejected Respondent's conclusion that the NLRA trumps the FAA. Such deference is not appropriate, the majority explained, because the NLRB is not simply interpreting the NLRA, but is instead doing so "in a way that limits the work of" the FAA, which it does not have any authority to administer. *Epic Systems* at 19-20. Furthermore, the Court noted it is significant that the NLRA "does not express approval or

disapproval of arbitration" and "does not mention class or collective action procedures." Indeed, the majority stressed, the statute "does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand." *Epic Systems* at 25. There is no mention in the NLRA about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance provided similar to other concerted activities, it is not clear what procedures Section 7 might protect. *Epic Systems* at 14.

Additionally, the Court rejected the argument that the NLRA's reference to the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection" supersedes the FAA's command to enforce arbitration agreements. Moreover, the FAA's savings clause does not preclude enforcement. Lastly, no conflict exists between the FAA and NLRA. As discussed by the Court, until relatively recently the consensus of courts and the Board was that such agreements must be enforced according to their terms. *Epic Systems* at 12-13.

As Petitioner discusses in its initial brief, and the Court notes in its *Epic Systems* opinion, the holding is based on the Court's longstanding precedent. Pointing to *Italian Colors and CompuCredit*, the Court recognizes that given "so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here." *Epic Systems* at 17; Pet. Br. 44.

The Court also rejects the Board's argument that deference is owed to an administrative agency's interpretation of a law that it does not administer.

Congress does not implicitly delegate to an agency the authority to address the meaning of a second statute it does not administer. *Epic Systems* at 20. Accordingly, the NLRB is not due *Chevron* deference in its interpretation of the FAA. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes." *Epic Systems* at 15, citing *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

In *Epic Systems*, the Court further rejected the NLRB's argument that the Norris La Guardia Act supported its position, as did Petitioner in its reply. The statute "adds nothing here" and "does not conflict with Congress's statutory directives favoring arbitration." *Epic Systems* at 16. Although the Court does not opine on policy considerations, "the law is clear" and the Court notes that Congress can always pass new legislation to reach a different result.

Based on *Epic Systems*, Everglades' arbitration agreement containing a class and collective action waiver is lawful and enforceable.

2. Whether the arbitration agreement would be reasonably read to prohibit the filing of unfair labor practice charges with the NLRB

While this issue is not specifically addressed in *Epic Systems*, the Court's decision supports Petitioner's argument that its arbitration agreement would not be reasonably read to prohibit the filing of unfair labor practice charges with the NLRB.[1] Additionally, the Board has recently overruled its previous standard

[1] Petitioner addressed these issues in its initial and reply briefs. Moreover, in her opinion, the administrative law judge commented that the NLRB's General Counsel does not claim that

governing whether the agreement would unlawfully interfere with rights protected by the NLRA. *See The Boeing Co.*, 365 NLRB No. 154 (2017) (attached hereto as Exhibit 1).

In *The Boeing Co.*, the NLRB overruled *Lutheran Heritage Village-Livonia*, 343 NLRB, 646 (2004), which articulated the Board's previous standard governing whether facially neutral workplace policies, rules and handbook provisions unlawfully interfere with NLRA protected rights. Under the prior standard, applied by the Board in analyzing Petitioner's arbitration agreement, the Board found that employers violated the NLRA by maintaining workplace rules that do not explicitly prohibit Section 7 activity, were not adopted in response to such activities, and were not applied to restrict such activities, if the rules would be "reasonably construed" by an employee to prohibit the exercise of NLRA rights. *Lutheran Heritage* at 647.

In place of its previous "reasonably construe" standard, the Board established a new test: when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise

---

Petitioner's earlier version of its arbitration agreement, which was signed by Fikki and did not contain a prohibition on class or collective actions, violated the Act. [Vol. 1, 61-62, 64, 115, 137; Vol. 2, GC-13; Vol. 3, Item 1 at 5 n.5] In other words, the NLRB did not object to Petitioner's earlier arbitration agreement that required "[a]ny controversy or claim arising out of or relating to this Agreement or Employee's employment to be referred to and finally resolved by arbitration…." [Vol. 2, GC-13] Like the current arbitration agreement, the earlier arbitration agreement did not specifically remind employees that they have a right to file charges with the NLRB, and did not even have language like the current agreement that requires arbitration of claims "except where specifically prohibited by law." Therefore, to the extent *Lutheran Heritage* rationale is applied, as the NLRB General Counsel did not find the initial arbitration agreement objectionable, the current agreement should be held lawful as well.

of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. *The Boeing Co.*, 365 NLRB No. 154, at 3.

The Board's previous rationale articulated in *Lutheran Heritage* is no longer valid pursuant to its recent decision in *Boeing* and, therefore, Petitioner's agreement does not violate the NLRA pursuant to such rationale. Even applying the new standard articulated in *Boeing*, Petitioner should prevail because its agreement, when reasonably interpreted does not interfere with the exercise of NLRA rights and Petitioner is justified in utilizing an arbitration agreement regarding employment disputes. Given the Board's recent decision in *Boeing*, which would be applied retroactively to this case, Petitioner respectfully requests the opportunity to brief this issue more fully. *The Boeing Co.*, 365 NLRB No. 154, at 16-17.

3. Whether the employer violates Section 8(a)(1) by discharging an employee for refusing to sign the arbitration agreement

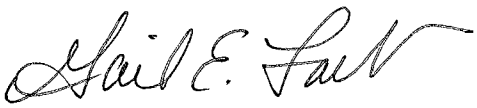
Based upon the holding in *Epic Systems*, an employer does not violate Section 8(a)(1) by discharging an employee for refusing to sign an arbitration agreement containing a collective or class action waiver. As discussed fully in Petitioner's initial brief, Fikki was discharged because she failed to sign reboarding documents, including an arbitration agreement, by an established deadline. (Pet. Br. 54-55).

Given that Petitioner's arbitration agreement does not violate the NLRA, it therefore did not impact Fikki's Section 7 rights. Because Fikki was not

terminated for refusing to sign an "unlawful" agreement, and the agreement was lawful, Petitioner could not have interfered with, restrained, or coerced Fikki in the exercise of her Section 7 rights in violation of Section 8 of the NLRA.

Additionally, to the extent *Lutheran-Heritage* applied to the Board's finding that Petitioner's termination of Fikki was unlawful, the reasoning above regarding issue 2 similarly applies. Because the rationale in *Lutheran Heritage* is no longer valid, it cannot be relied upon by the NLRB. Under the Board's decision in *Boeing*, Petitioner's agreement is lawful and, therefore, it cannot have terminated Fikki for refusing to sign an unlawful agreement. Petitioner respectfully requests the opportunity to further brief this issue as it was not specifically addressed in *Epic Systems*.

Very Truly Yours,



Gail Farb
For the Firm

GEF:lld

Attachments: Exhibit 1
4624035.v3

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2018, the foregoing document was filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

Gail E. Farb

4624035.v3

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

The Boeing Company *and* Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001. Cases 19–CA–090932, 19–CA–090948, and 19–CA–095926

December 14, 2017

DECISION AND ORDER[1]

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE, MCFERRAN, KAPLAN, AND EMANUEL

This case involves the legality of an employer policy, which is one of a multitude of work rules, policies and employee handbook provisions that have been reviewed by the Board using a test set forth in *Lutheran Heritage Village-Livonia*.[2] In this case, the issue is whether Respondent's mere maintenance of a facially neutral rule is unlawful under the *Lutheran Heritage* "reasonably construe" standard, which is also sometimes called *Lutheran Heritage* "prong one" (because it is the first prong of a three-prong standard in *Lutheran Heritage*). Thus, in *Lutheran Heritage*, the Board stated:

> [O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (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.[3]

Most of the cases decided under *Lutheran Heritage* have involved the *Lutheran Heritage* "reasonably construe" standard,[4] which the judge relied upon in the instant case. Specifically, the judge ruled that Respondent, The Boeing Company (Boeing), maintained a no-camera rule that constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act).[5]

Boeing designs and manufactures military and commercial aircraft at various facilities throughout the United States. The work undertaken at Boeing's facilities is highly sensitive; some of it is classified. Boeing's facilities are targets for espionage by competitors, foreign governments, and supporters of international terrorism, and Boeing faces a realistic threat of terrorist attack. Maintaining the security of its facilities and of the information housed therein is critical not only for Boeing's success as a business—particularly its eligibility to continue serving as a contractor to the federal government—but also for national security.

Boeing maintains a policy restricting the use of camera-enabled devices such as cell phones on its property. For convenience, we refer to this policy (which is contained in a more comprehensive policy Boeing calls "PRO-2783") as the "no-camera rule." Boeing's no-camera rule does not explicitly restrict activity protected by Section 7 of the Act, it was not adopted in response to NLRA-protected activity, and it has not been applied to restrict such activity. Nevertheless, applying prong one of the test set forth in *Lutheran Heritage*, the judge found that Boeing's maintenance of this rule violated Section 8(a)(1) of the Act. Based on *Lutheran Heritage*, the judge reasoned that maintenance of Boeing's no-camera rule was unlawful because employees "would reasonably

[1] On May 15, 2014, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply to each answering brief. The General Counsel filed cross-exceptions, the Charging Party filed cross-exceptions and a supporting brief, the Respondent filed an answering brief to the General Counsel's and Charging Party's cross-exceptions, and the Charging Party filed a reply brief. The National Association of Manufacturers filed an amicus brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 343 NLRB 646 (2004) (*Lutheran Heritage*).

[3] Id. at 646–647 (emphasis added; footnote omitted).

[4] For ease of reference, we refer hereafter to prong one of the *Lutheran Heritage* standard as "*Lutheran Heritage*." Also, we use the term "facially neutral" to describe policies, rules and handbook provisions that do not expressly restrict Sec. 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity.

[5] Sec. 8(a)(1) of the Act makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In pertinent part, Sec. 7 states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ."

construe" the rule to prohibit Section 7 activity.[6] In finding the no-camera rule unlawful, the judge gave no weight to Boeing's security needs for the rule.

The judge's decision in this case exposes fundamental problems with the Board's application of Lutheran Heritage when evaluating the maintenance of work rules, policies and employee handbook provisions. For the reasons set forth below, we have decided to overrule the Lutheran Heritage "reasonably construe" standard. The Board will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee "would reasonably construe" a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.[7] In our view, multiple defects are inherent in the Lutheran Heritage test:

- The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases.
- The *Lutheran Heritage* standard, especially as applied in recent years, reflects several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks. Employees are disadvantaged when they are denied general guidance regarding what standards of conduct are required and what type of treatment they can reasonably expect from coworkers. In this respect, *Lutheran Heritage* has required perfection that literally is the enemy of the good.
- In many cases, *Lutheran Heritage* has been applied to invalidate facially neutral work rules *solely* because they were ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of "just cause" provisions, benefit plans, and other types of employment documents, and *Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself. See fns. 41, 42 & 43, infra.
- The *Lutheran Heritage* "reasonably construe" test has improperly limited the Board's own discretion. It has rendered unlawful every policy, rule and handbook provision an employee might "reasonably construe" to prohibit *any* type of Section 7 activity. It has not permitted the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur. Nor has *Lutheran Heritage* permitted the Board to afford *greater* protection to Section 7 activities that are central to the Act.
- *Lutheran Heritage* has not permitted the Board to differentiate, to a sufficient degree, between and among different industries and work settings, nor has it permitted the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity.
- Finally, the Board's *Lutheran Heritage* "reasonably construe" test has defied all reasonable efforts to make it yield predictable results. It has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.

Paradoxically, *Lutheran Heritage* is too simplistic at the same time it is too difficult to apply. The Board's responsibility is to discharge the "special function of applying the general provisions of the Act to the complexities of industrial life."[8] Though well-intentioned, the *Lutheran Heritage* standard prevents the Board from giving meaningful consideration to the real-world "complexities" associated with many employment policies, work rules and handbook provisions. Moreover, *Lutheran Heritage* produced rampant confusion for employers, employees and unions. Indeed, the Board itself has struggled when attempting to apply *Lutheran Heritage*:

[6] The judge additionally found that the Respondent engaged in unlawful surveillance when its security guards photographed employees engaged in union activity, and that it created an impression of surveillance when a security guard told employees that he had been directed to document all union activity and that he was taking photographs of "non-Boeing" activity. We agree with the judge, for the reasons stated in his decision, that the Respondent engaged in surveillance and created the impression of surveillance in violation of Sec. 8(a)(1) of the Act.

Member Emanuel does not pass on whether the concerted activity by employees on the Respondent's property in this case was protected by the Act, because the Respondent does not contend that the activity was unprotected.

[7] 343 NLRB at 647.

[8] *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

since 2004, Board members have regularly disagreed with one another regarding the legality of particular rules or requirements, and in many cases, decisions by the Board (or a Board majority) have been overturned by the courts of appeals.[9]

These problems have been exacerbated by the zeal that has characterized the Board's application of the *Lutheran Heritage* "reasonably construe" test. Over the past decade and one-half, the Board has invalidated a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain. We do not believe that when Congress adopted the NLRA in 1935, it envisioned that an employer would violate federal law whenever employees were advised to "work harmoniously"[10] or conduct themselves in a "positive and professional manner."[11] Nevertheless, in *William Beaumont Hospital*, the Board majority found that it violated federal law for a hospital to state that nurses and doctors should foster "harmonious interactions and relationships," and Chairman (then-Member) Miscimarra stated in dissent:

> Nearly all employees in every workplace aspire to have "harmonious" dealings with their coworkers. Nobody can be surprised that a hospital, of all workplaces, would place a high value on "harmonious interactions and relationships." There is no evidence that the requirement of "harmonious" relationships actually discouraged or interfered with NLRA-protected activity in this case. Yet, in the world created by *Lutheran Heritage*, it is unlawful to state what virtually every employee desires and what virtually everyone understands the employer reasonably expects.[12]

Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,"[13] focusing on the perspective of employees, which is consistent with Section 8(a)(1).[14] As the result of this balancing, in this and future cases, the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as "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

[9] See, e.g., *William Beaumont Hospital*, 363 NLRB No. 162 (2016) (Board majority, contrary to dissenting Member Miscimarra, invalidates rule prohibiting conduct that "impedes harmonious interactions and relationships"); *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015) (Board majority, contrary to dissenting Member Miscimarra, invalidates no-recording rule aimed at fostering employee free expression), enfd. mem. 691 Fed. Appx. 49 (2d Cir. 2017); *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014) (Board majority, contrary to dissenting Member Miscimarra, invalidates rule stating that social media use "may be violating the law and is subject to disciplinary action" if the employee engages in "inappropriate discussions about the company"), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015); *Fresh & Easy Neighborhood Market*, 361 NLRB 72 (2014) (Board majority, contrary to dissenting Member Johnson, invalidates rule requiring employees to "[k]eep customer and employee information secure"); *Flagstaff Medical Center*, 357 NLRB 659 (2011) (Board majority, contrary to dissenting Member Pearce, finds lawful an employer's no-camera rule in an acute-care hospital), petition for review granted in part and denied in part 715 F.3d 928 (D.C. Cir. 2013); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011), enf. denied in part 805 F.3d 309 (D.C. Cir. 2015) (court rejects Board's invalidation of rule stating "[v]oice your complaints directly to your immediate superior or to Human Resources through our 'open door' policy"); *Guardsmark, LLC*, 344 NLRB 809 (2005), enf. denied in relevant part 475 F.3d 369 (D.C. Cir. 2007) (court rejects Board's finding that a rule lawfully stated employees must not "fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees").

[10] *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1817 (2011).

[11] *Hills & Dales General Hospital*, 360 NLRB 611, 612 (2014).

[12] *William Beaumont Hospital*, supra, slip op. at 8 (Member Miscimarra, concurring in part and dissenting in part).

[13] *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967) (emphasis added). See also *Republic Aviation v. NLRB*, 324 U.S. 793, 797–798 (1945) (referring to "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments"); *NLRB v. Erie Resistor Corp.*, 373 U.S. at 229 (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct").

[14] See fn. 80, infra and accompanying text. As discussed later in this decision, Member Kaplan agrees that the Board has the duty to strike the balance between employees' Sec. 7 rights and employers' business justifications in determining the legality of employment policies, rules, and handbooks. In his view, however, the threshold inquiry of whether the rule, when reasonably interpreted, prohibits or interferes with Sec.7 should be determined by reference to the perspective of an objectively reasonable employee who is "aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA." *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, at 271 (5th Cir. 2017). If that objective employee would not reasonably view a challenged rule as interfering with Sec. 7 rights, then the need for the Board to engage in a balancing test is mooted. In the absence of any potential interference, the rule is a fortiori lawful. See text accompanying fn. 17, infra.

outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.[15]

- *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. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

The above three categories will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself. The Board will determine, in future cases, what types of additional rules fall into which category. Although the legality of some rules will turn on the particular facts in a given case, we believe the standard adopted today will provide far greater clarity and certainty to employees, employers and unions. The Board's cumulative experience with certain types of rules may prompt the Board to redesignate particular types of rules from one category to another, although one can expect such circumstances to be relatively rare.

We emphasize that Category 1 consists of two subparts: (a) rules that are lawful because, when reasonably interpreted,[16] they would have no tendency to interfere with Section 7 rights and therefore no balancing of rights and justifications is warranted, and (b) rules that are lawful because, although they do have a reasonable tendency to interfere with Section 7 rights, the Board has determined that the risk of such interference is outweighed by the justifications associated with the rules.[17] Of course, as reflected in Categories 2 and 3, if a particular type of rule is determined to have a potential adverse impact on NLRA activity, the Board may conclude that maintenance of the rule is *unlawful*, either because individualized scrutiny reveals that the rule's potential adverse impact outweighs any justifications (Category 2), or because the type of rule at issue predictably has an adverse impact on Section 7 rights that outweighs any justifications (Category 3). Again, even when a rule's *mainte-*

[15] Although the *maintenance* of Category 1 rules (and certain Category 2 rules) will be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case. See fn. 76, infra and text accompanying fn. 84, infra.

To the extent the Board in past cases has held that it violates the Act to maintain rules requiring employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace, those cases are hereby overruled. As then-Member Miscimarra observed in his dissent in *William Beaumont Hospital*, such rules reflect common-sense standards of conduct that advance substantial employee and employer interests, including the employer's legal responsibility to maintain a work environment free of unlawful harassment based on sex, race or other protected characteristics, its substantial interest in preventing workplace violence, and its interest in avoiding unnecessary conflict that interferes with patient care (in a hospital), productivity and other legitimate business goals; and nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace. We do not believe these types of employer requirements, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights. However, even if basic civility requirements are viewed as potentially interfering with NLRA rights, we believe any adverse effect would be comparatively slight, because a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility; therefore, rules requiring workplace harmony and civility would have little if any adverse impact on these types of protected activities. Moreover, under the standard we announce today, when an employer lawfully maintains rules requiring employees to foster harmony and civility in the workplace, the *application* of such rules to employees who engage in NLRA-protected conduct may violate the Act, which the Board will determine based on the particular facts in each case.

[16] As indicated in fn. 14, supra, Member Kaplan emphasizes this is an objective standard, and the reasonable interpretation of the rule is conducted from the perspective of a reasonable employee.

[17] Member Kaplan agrees with Chairman Miscimarra and Member Emanuel on the three categories described in the text. However, Member Kaplan would have preferred a structure in which Category 1's subparts would be separate, rather than being grouped into a single category.

Nonetheless, Chairman Miscimarra and Members Kaplan and Emanuel agree that in every future work-rules case, the Board will make the following distinctions when determining the legality of different types of rules: (i) rules that are generally lawful because, when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights; (ii) rules that are generally lawful even though they potentially interfere with the exercise of NLRA rights, but where this risk is outweighed by legitimate justifications; (iii) rules that warrant individualized scrutiny in each case; and (iv) rules that are generally unlawful because their potential interference with the exercise of protected rights outweighs any possible justifications. Under the three categories outlined in the text, groups "i" and "ii" will both be included in Category 1 (rules that the Board will find to be generally lawful).

Again, Member Kaplan would have preferred a four-part framework that separately enumerated each of the four groups outlined in the preceding paragraph, because such a framework would better conform to distinctions made by the Board when determining the legality of different rules. However, Member Kaplan agrees with the three-category structure adopted by the Board today, with the understanding that, in every case, the Board will make precisely the same distinctions when evaluating particular rules, except the rules included in groups "i" and "ii" will both be considered part of Category 1.

nance is deemed lawful, the Board will examine circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act.[18]

The balancing of employee rights and employer interests is not a new concept with respect to the Board's analysis of work rules. For example, in *Lafayette Park Hotel*, the Board expressly stated that "[r]esolution of the issue presented by the contested rules of conduct involves 'working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society.'"[19] Since *Lutheran Heritage*, the Board has far too often failed to give adequate consideration and weight to employer interests in its analysis of work rules. Accordingly, we find that the Board must replace the *Lutheran Heritage* test with an analysis that will ensure a meaningful balancing of employee rights and employer interests.

Applying these standards to the instant case, we find below that the Respondent's justifications for Boeing's restrictions on the use of camera-enabled devices on Boeing property outweigh the rule's more limited adverse effect on the exercise of Section 7 rights. We therefore reverse the judge's finding that Boeing's maintenance of its no-camera rule violates Section 8(a)(1) of the Act.

I. BACKGROUND

For decades, Boeing has had rules in place restricting the use of cameras to capture images or videos on Boeing property.[20] As technology has evolved and changed, so have Boeing's camera-related policies, and they now extend to camera-enabled devices such as cell phones and personal digital assistants (PDAs) with built-in cameras. The current version of Boeing's "camera rule," updated November 7, 2011, is PRO-2783,[21] which provides in relevant part as follows:

> Possession of the following camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements.
>
> However, **use** of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security:
>
> 1. Personal Digital Assistants (PDAs)
>
> 2. Cellular telephones and Blackberrys and iPod/MP3 devices
>
> 3. Laptop or personal computers with web cameras for desktop video conferencing, including external webcams.
>
> 4. Bar code scanners and bar code readers, or such devices for manufacturing, inventory, or other work, if those devices are capable of capturing images

GC Exh. 8 (punctuation and emphasis in original).[22] Boeing's no-camera rule defines "business need" as "a determination made by the authorizing manager that images or video are needed for a contractual requirement, training, technical manuals, advertising, technical analysis, or other purpose that provides a positive benefit to the company." Id. Boeing's no-camera rule applies to "all Boeing."

Boeing Senior Security Manager James Harris testified concerning the several purposes of Boeing's no-camera rule. His testimony, which is undisputed, establishes the following.

First, Boeing's no-camera rule is an integral component of Boeing's security protocols, which are necessary to maintain Boeing's accreditation as a federal contractor

[18] See text accompanying fns.83–84, infra.

[19] 326 NLRB 824, 825 (1998) (quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 797–798 (1945)), enfd. 203 F.3d 52 (D.C. Cir. 1999); see also *Caesar's Palace*, 336 NLB 271, 272 (2001) ("We also agree that the Respondent's rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right. It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweigh[] the Respondent's asserted legitimate and substantial business justifications."); *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015) ("Maintaining a rule reasonably likely to chill employees' Section 7 activity amounts to an unfair labor practice unless the employer 'present[s] a legitimate and substantial business justification for the rule' that 'outweigh[s] the adverse effect on the interests of employees.'").

[20] Boeing's Administrative Procedure No. 137, dated August 1979, states that "[t]his procedure establishes a system and delineates responsibilities for the issuance of camera permits, and control and use of cameras and photographic equipment at Company locations." It goes on to state that "[e]mployees or visitors shall not carry or use cameras (including those associated with video tape recording) or other photographic equipment in any Company facility (Seattle area or remote location) unless authorized to do so in the performance of work assignments." R. Exh. 3.

[21] "PRO" is short for "procedure."

[22] Boeing's no-camera rule also states that *possession* of other camera-enabled devices, as well as any other photographic device not described above, is prohibited on Boeing property without a valid business need and an approved Camera Permit that has been reviewed and approved by Security. The complaint does not allege that this portion of PRO-2783 is unlawful.

to perform classified work for the United States Government.[23]

Second, Boeing's no-camera rule plays a key role in ensuring that Boeing complies with its federally mandated duty to prevent the disclosure of export-controlled information or the exposure of export-controlled materials to unauthorized persons.[24]

Third, Boeing's no-camera rule helps prevent the disclosure of Boeing's proprietary information, which Harris defined as "any nonpublic information that has potential economic value to Boeing" (Tr. 395), such as "manufacturing methods and processes" and "material usage" (Tr. 395, 399).[25]

Fourth, Boeing's no-camera rule limits the risk that employees' personally identifiable information will be released. Besides the invasion of employee privacy, photographs and videos that permit Boeing employees to be identified could also compromise proprietary information.[26] In addition, if a photograph shows an employee's badge, that image could be used to create a counterfeit badge that an unauthorized person may use to gain entry to Boeing property (Tr. 401–402).

Fifth and finally, Boeing's no-camera rule limits the risk of Boeing becoming a target of terrorist attack. Harris testified that Boeing has "documented evidence" of surveillance by potentially hostile actors "to determine vulnerabilities" on Boeing property, and "[u]ncontrolled photography" could inadvertently disclose such vulnerabilities—such as "gaps in the fence line," "key utility entry points," "gas lines, hazardous chemical pipelines, [and] electrical substations" (Tr. 402).

Camera use has occasionally occurred in Boeing facilities in circumstances where Boeing has addressed the above concerns in various ways. For example, Boeing has conducted public or VIP tours at some facilities. Although Boeing does not search tour participants for camera-enabled devices, and tour guides do not confiscate personal camera-enabled devices from individuals who may have used them during a tour, Boeing's 777 Director of Manufacturing and Operations Jason Clark testified that tour participants are briefed beforehand regarding what is and is not permitted during the tour, and Boeing security personnel review tour participants' photos and video footage afterwards.[27] Boeing also cre-

[23] These protocols involve layers of security, including the physical construction of the facilities themselves, a fenced perimeter, security officers, and background checks for personnel granted access to classified information. Harris testified that PRO-2783 regulating the use of camera-enabled devices is another of these layers of security. It furnishes a fail-safe to ensure that classified information will not be released outside of Boeing in the event that such information finds its way into a non-classified area.

[24] "Export-controlled" materials include "sensitive equipment, software and technology," the export of which is controlled by the federal government "as a means to promote our national security and foreign policy objectives." Department of State, "A Resource on Strategic Trade Management and Export Controls," https://www.state.gov/strategictrade/overview/ (last visited July 31, 2017).

For example, the export-control system "[p]revent[s] proliferation of weapons and technologies, including weapons of mass destruction, to problem end-users and supporters of international terrorism." Id. Senior Security Manager Harris testified that the term *export* means "delivering information, technology or hardware to a non-U.S. person," and he added that "[a]n export can occur visually, orally or otherwise either within the United States or outside the United States" (Tr. 388). In other words, export-controlled materials can be "delivered" visually, and therefore an "export" can occur when a "non-U.S. person" merely *sees* export-controlled materials. Boeing regulates the export of export-controlled materials in a variety of ways, including through the enforcement of standoff distances. Harris testified that a "standoff distance" is the distance from an object at which the eye "cannot see enough detail to constitute an export" (Tr. 393). However, camera-enabled devices can defeat the purpose of a standoff distance. Thus, Harris testified that even cell phones "are high enough resolution that if someone took a photograph even at the 25-foot standoff distance of an export-controlled item, that resolution could be refined and expanded to be able to get enough detail to determine what about it might be export controlled" (Tr. 393–394). Export-controlled information can be found at nearly every Boeing site in the Puget Sound region (Tr. 390). Export violations may subject Boeing to fines of up to $1 million per incident, and they may result in Boeing being debarred from government contracts (id.)—not to mention the injury an export violation potentially may inflict on national security.

[25] Proprietary information routinely may be found on the factory floor. Such information includes layout documents that "assist mechanics and technicians . . . in properly assembling an aircraft," and it may exist in a variety of forms, including (i) paper documents and digital renderings displayed on large screens (Tr. 396); (ii) tooling, such as "large framework[s]" that are "subjected to a specific manufacturing technique to shape an aircraft frame or part" (Tr. 396); and (iii) quality control information (Tr. 397). Even the layout of a production area may be proprietary (Tr. 395). As to the role played by measures such as Boeing's no-camera rule to protect Boeing's proprietary information, Senior Security Manager Harris testified that Boeing "regularly receives reports" of "efforts" by "non-U.S. Government agencies" to "task visitors to . . . Boeing . . . with gaining specific kinds of manufacturing technologies, parts, processes, [and] material usage" (Tr. 398). Harris further testified concerning "documented circumstances" of "foreign powers . . . combing . . . through social media to gain knowledge about manufacturing techniques, manufacturing processes, and material usage that they do not currently have within their own countries in order to develop their own aircraft industries" (Tr. 399). Photographs or videos posted on social media websites "can be used as a tool to exploit [the] . . . mission" of such "foreign powers" (Tr. 398).

[26] For example, Harris testified that if a member of "the economic intelligence community"—i.e., an industrial spy—obtains a photograph that identifies someone as a Boeing employee, that photograph could potentially serve as a starting point to establish a seeming friendship for the ulterior purpose of eliciting proprietary information (Tr. 400).

[27] Employee Shannon Moriarty testified that she participated in one VIP tour of Boeing's Everett, Washington facility. According to Moriarty, she was permitted to take photos during that tour, she was the last tour participant to leave, and at no time did Boeing personnel review her photos or anyone else's. No evidence was introduced, however, that disputed Clark's testimony that such reviews are standard practice. Moreover, the tour in which Moriarty participated was a VIP tour, and Senior Security Manager Harris testified that an effort is made to en-

ated a time-lapse video of the 777 production line for public release. However, the video was produced by Boeing itself, which permitted Boeing to ensure that the video did not reveal confidential or proprietary information and was safe to release to the public.[28]

The judge rejected Boeing's justifications for its restrictions on the use of camera-enabled devices on Boeing property. He found those justifications contradicted by Boeing's "contrary practice of allowing free access to its manufacturing processes" by releasing to the public a time-lapse video of the 777 production line and by permitting "unfettered photography" during VIP tours. Applying prong one of *Lutheran Heritage*, the judge found that Boeing violated Section 8(a)(1) of the Act by maintaining its no-camera rule because the judge concluded that employees would reasonably construe the no-camera rule to prohibit Section 7 activity. Boeing filed exceptions challenging the judge's invalidation of its no-camera rule.

II. DISCUSSION

A. Lutheran Heritage Is Overruled

Under *Lutheran Heritage*, even when an employer's facially neutral employment policies, work rules and handbook provisions do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity, the Board will still determine that the maintenance of these requirements violates Section 8(a)(1) if employees "would reasonably construe the language to prohibit Section 7 activity."[29] For the following reasons, we overrule the *Lutheran Heritage* "reasonably construe" standard.

First, the *Lutheran Heritage* "reasonably construe" standard is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions. These justifications are often substantial, as illustrated by the instant case. More importantly, the Supreme Court has repeatedly required the Board to take these justifications into account. A five-member Board recognized this in *Lafayette Park Hotel*, where it quoted the Supreme Court's decision in *Republic Aviation v. NLRB*, supra, and held:

> Resolution of the issue presented by . . . contested rules of conduct involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society."[30]

Nor does *Republic Aviation* stand alone. The Supreme Court elsewhere has similarly required the Board to weigh the interests advanced by a particular work requirement or restriction before the Board concludes that its potential adverse impact on employee rights warrants a finding of unlawful interference with NLRA rights. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. at 33–34 (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *NLRB v. Erie Resistor Corp.*, 373 U.S. at 229 (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"); cf. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) ("[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved.").

---

sure that VIP tour participants in particular are not exposed to proprietary information (Tr. 407–408).

[28] Boeing also occasionally holds "rollouts" of new products, at which time the large factory bay doors are open, and persons standing in proximity to the facility may be able to look inside the facility. However, Boeing ensures that sensitive information is not visible to such persons. President Obama visited Boeing's Everett facility in February 2012, and employees were permitted to use personal camera-enabled devices to take photographs in the factory during the President's visit. However, Senior Security Manager Harris testified that prior to the visit, Boeing's intellectual property team along with various other departments, such as security and legal, worked closely with the United States Secret Service to "sanitize" the area to ensure that no sensitive materials or processes were visible.

[29] 343 NLRB at 647.

[30] 326 NLRB at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. at 797–798). The Board in *Lafayette Park Hotel* stated that "[i]n determining whether the mere maintenance of [disputed] rules violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." However, Member Hurtgen observed that a rule may reasonably chill the exercise of Sec. 7 rights but still be justified by significant employer interests. 326 NLRB at 825 fn. 5. Member Hurtgen noted that no-solicitation rules restrict the exercise of Sec. 7 rights (by subjecting employees to discipline or discharge if they engage in solicitation—including union solicitation—during working time), but these restrictions have been deemed lawful under Board precedent dating back more than 70 years establishing that "[w]orking time is for work" and that the employer's interest in production outweighs the Sec. 7 right of employees to engage in solicitation during working time. *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944). See also text accompanying fn. 31, infra.

Second, the *Lutheran Heritage* "reasonably construe" standard is contradicted by NLRB case law. For example, the Board has recognized that it is lawful for an employer to adopt no-solicitation rules prohibiting *all* employee solicitation—including union-related solicitation—during working time, and no-distribution rules prohibiting *all* distribution of literature—including union-related literature—in work areas.[31] Employers may also lawfully maintain a no-access rule that prohibits off-duty employees from accessing the interior of the employer's facility and outside work areas, even if they desire access to engage in protected picketing, handbilling, or solicitation.[32] Similarly, employers may lawfully adopt "just cause" provisions and attendance requirements that subject employees to discipline or discharge for failing to come to work, even though employees have a Section 7 right to engage in protected strikes.[33] Each of these rules fails the *Lutheran Heritage* "reasonably construe" test because each one clearly prohibits Section 7 activity. Yet each requirement has been upheld by the Board, based on a determination that legitimate employer interests and justifications outweighed any interference with Section 7 rights.

Third, in many cases involving facially neutral policies, rules and handbook provisions, the Board *has explicitly* balanced employees' Section 7 rights against legitimate employer interests rather than narrowly examining the language of a disputed rule solely for its potential to interfere with the exercise of Section 7 rights, as the *Lutheran Heritage* "reasonably construe" test requires. As noted above, in *Lafayette Park Hotel* the Board expressly acknowledged that "[r]esolution of the issue presented by . . . contested rules of conduct involves 'working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.'"[34] Moreover, the Board in *Lafayette Park* gave weight to the justifications underlying particular work rules as well as to the potential adverse impact of those rules on the exercise of Section 7 rights.[35] In *Caesar's Palace*,[36] the Board upheld a confidentiality rule pertaining to a workplace investigation, even though the rule limited the right of employees to engage in NLRA-protected discussions. The Board's analysis in *Caesar's Palace* has equal application here:

> We agree with the judge that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. We also agree that the Respondent's rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right. It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment *outweigh[] the Respondent's asserted legitimate and substantial business justifications.*[37]

The Board also upheld a no-photography rule in a subsequent case, *Flagstaff Medical Center*,[38] in part because the rule implicated "weighty" patient confidentiality interests.[39]

[31] See *Our Way, Inc.*, 268 NLRB 394 (1983); *Essex International*, 211 NLRB 749 (1974); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962); *Peyton Packing*, 49 NLRB at 843. See also discussion in fn. 30, supra.

[32] See *GTE Lenkurt, Inc.*, 204 NLRB 921, 921–922 (1973); *Tri-County Medical Center*, 222 NLRB 1089 (1976). In *GTE Lenkurt*, the Board upheld an employee handbook no-access provision limiting the right of off-duty employees to be on the premises. Stating that determining the legality of the no-access rule "requires a balancing of the employees' Section 7 rights against the employer's private property rights," the Board held that the rule was lawful. 204 NLRB at 921–922. In *Tri-County*, the Board reiterated that a no-access rule applicable to off-duty employees will be lawful, provided that the rule "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." 222 NLRB at 1089.

[33] See, e.g., *Health Management, Inc.*, 326 NLRB 801 (1998) (employee lawfully discharged for just cause for continuing attendance and tardiness problems); *Cambridge Chemical Corp.*, 259 NLRB 1374 (1981) (same); *South Carolina Industries*, 181 NLRB 1031 (1970) (same).

[34] 326 NLRB at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. at 797–798).

[35] See, e.g., 326 NLRB at 825 (observing that the disputed rule "addresses legitimate business concerns"), 826 (in finding confidentiality rule lawful, observing that "businesses have a substantial and legitimate interest in maintaining the confidentiality of private information"), 827 (noting "legitimate business reasons" for rule requiring employees to secure permission before using the hotel's restaurant or cocktail lounge to entertain friends or guests).

[36] 336 NLRB 271 (2001).

[37] 336 NLRB at 272 (emphasis added) (citing *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976)).

[38] 357 NLRB at 659.

[39] Id. at 663. In *Flagstaff*, the Board majority upheld a rule prohibiting employees from taking photographs of patients or hospital property. The majority emphasized the "weighty" privacy interests of hospital patients and the hospital's "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography." Id. The majority reasoned that "[e]mployees would reasonably interpret [the hospital's] rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity." Id. However, Member Pearce relevantly dissented because under *Lutheran Heritage* the analysis turns exclusively on how an employee would "reasonably construe" the language of the no-photography rule, and he found that "employees would reasonably construe the rule's language to prohibit Section 7 activity." Id. at 670 (Member Pearce, dissenting in part).

In all these decisions, the Board has deemed it necessary, when evaluating the legality of one or more work rules, to consider both Section 7 rights *and* the legitimate business interests associated with particular rules.

Fourth, *Lutheran Heritage* is predicated on false premises that are inconsistent with the Act and contrary to the Board's responsibility to promote certainty, predictability and stability.[40] Several considerations are relevant here:

- Because the Act protects so many potential concerted activities (including the right to refrain from such activities), a wide variety of facially neutral rules can be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity.
- *Lutheran Heritage* requires employers to eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity, but this disregards the fact that generalized provisions related to employment—including those relating to discipline and discharge—have been deemed acceptable throughout the Act's history.[41]
- Another false premise of *Lutheran Heritage* is the notion that employers drafting facially neutral policies, rules and handbook provisions *can* anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities. This disregards the fact that ambiguities pervade the NLRA itself.[42] Even if employment policies and rules reproduced the full text of the NLRA, they will never attain a level of clarity greater than what Congress incorporated into the statute itself. Therefore, it is likely that one can "reasonably construe" even the most carefully crafted rules in a manner that prohibits some hypothetical type of Section 7 activity.[43]

---

[40] One of the Board's primary responsibilities under the Act is to promote labor relations stability. See, e.g., *Northwestern University*, 362 NLRB No. 167 (2015) (Board declines to exercise jurisdiction over scholarship football student-athletes because doing so would not promote stability in labor relations). See also *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (describing "the Act's goal of achieving industrial peace by promoting stable collective-bargaining relationships"); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations."). The Supreme Court has also stressed the need to provide "certainty beforehand" for employers and unions so employers can "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and so a union may discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board." *First National Maintenance Corp. v. NLRB*, 452 U.S. at 678-679, 684–686.

[41] Linguistic perfection has not been required in other types of employment provisions enforced by the Board and the courts. As then-Member Miscimarra has stated:

> It does not per se violate Federal labor law to use a general phrase to describe the type of conduct that may [result in discipline or discharge]. If it did, "just cause" provisions contained in most collective-bargaining agreements that have been entered into since the Act's adoption nearly 80 years ago would be invalid. However, "just cause" provisions have been called "an obvious illustration" of the fact that many provisions "must be expressed in general and flexible terms." More generally, the Supreme Court has stated, in reference to collective-bargaining agreements, that there are "a myriad of cases which the draftsmen cannot wholly anticipate," and "[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words . . . the exclusive source of rights and duties."

Triple Play Sports Bar & Grille, 361 NLRB 308, 318 (Member Miscimarra, dissenting in part) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578–579 (1960); Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 (1959)) (other citations and internal quotation marks omitted).

Ironically, the Board itself in *Lutheran Heritage* stated: "Work rules are necessarily general in nature . . . . We will not require employers to anticipate and catalogue in their work rules every instance in which [prohibited types of speech] might conceivably be protected by (or exempted from the protection of) Section 7." 343 NLRB at 648. The Board has disregarded this language in applying *Lutheran Heritage*.

[42] Nobody can reasonably suggest that employers can incorporate into policies, rules and handbooks the precise contours of Sec. 7 protection when these contours have produced so much disagreement between and among the General Counsel, administrative law judges, different Board members, and the courts. See, e.g., *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (divided opinions regarding whether a single employee's complaint asserting statutory rights constituted protected concerted activity); *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (divided opinions regarding whether employees have a statutory right to use employer email systems for Sec. 7 purposes); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (rejecting Board majority's finding that arbitration agreements containing class-action waivers unlawfully interfere with Sec. 7 activity); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (same), cert. granted 137 S. Ct. 809 (2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) (agreeing with Board majority's finding that arbitration agreements containing class-action waivers unlawfully interfere with Sec. 7 activity), cert. granted 137 S. Ct. 809 (2017); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016) (same), cert. granted 137 S. Ct. 809 (2017). As the Supreme Court stated in one case, some provisions of the Act "could not be literally construed," there was no "glaringly bright line" between permitted and prohibited activity, and "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." *Local 761, International Union of Electrical Workers v. NLRB*, 366 U.S. 667, 672–674 (1961).

[43] In cases involving important employee benefits documents such as summary plan descriptions that are required under the Employee Retirement Income Security Act (ERISA), substantial *deference* is usually afforded the plan administrator—often, the employer—whose determinations may be deemed final and binding whenever relevant benefit documents so provide. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (indicating that a court will not engage in de novo review of a plan administrator's decisions if the "benefit plan gives the administrator or fiduciary discretionary authori-

The broader premise of *Lutheran Heritage*, which is even more seriously flawed, is the notion that employees are better served by *not* having employment policies, rules and handbooks. After all, when parties are held to a standard that cannot be attained, the natural and predictable response is that they will give up trying to create written rules, policies and employee handbooks. Nothing in the NLRA *requires* employers to adopt policies, rules and handbook provisions.[44] Employees in the United States remain generally subject to the doctrine of employment at will, which means employees can be discharged for any reason or no reason at any time.[45] Therefore, it would be lawful for employers to make all decisions regarding the potential discipline or discharge of employees on a case-by-case basis, with no expectations or requirements communicated in advance. This would impose substantial hardship on employers that strive for consistency and fairness when making such decisions, and employees would not know what standards of conduct they must satisfy to keep their jobs. This would also be irreconcilable with the Act's emphasis on stability, certainty and predictability.[46] However, this is the logical and predictable outgrowth of the *Lutheran Heritage* "reasonably construe" standard.

Fifth, the *Lutheran Heritage* "reasonably construe" test imposes too many restrictions on the Board itself. By making the legality of a rule turn on whether employees would "reasonably construe" its language to prohibit *any* type of Section 7 activity, *Lutheran Heritage* requires a "one-size-fits-all" analysis that gives equal weight to every potential intrusion on Section 7 rights, however slight it might be and however remote the possibility that employees would actually engage in that type of protected activity. The "reasonably construe" test also permits no consideration of the justifications for a particular rule, which in turn prevents the Board from treating some justifications as warranting greater weight than others. In sum, *Lutheran Heritage* leaves no room for the Board to draw important distinctions between different types of rules, different business justifications, and different Section 7 rights, and it disregards differences between and among rules with respect to their potential impact on protected rights. Abandoning *Lutheran Heritage* would permit the Board to engage in a more refined evaluation of these significant variables.[47]

Sixth, when applying the *Lutheran Heritage* "reasonably construe" standard, the Board has not given sufficient consideration to unique characteristics of particular work settings and different industries. For example, the Board

ty to determine eligibility for benefits or to construe the terms of the plan").

In Board decisions applying *Lutheran Heritage*, the Board has consistently misapplied an evidentiary principle that ambiguity in general work rule language must be construed against the drafter. See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 1 (2015); *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1–2 fn. 4 (2015); *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012) ("Board law is settled that ambiguous employer rules—rules that reasonably *could* be read to have a coercive meaning—are construed against the employer" (emphasis added).), enfd. 746 F.3d 205 (5th Cir. 2014); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 870 (2011), enfd. in part 805 F.3d 309 (D.C. Cir. 2015). The word *ambiguous* means "capable of being understood in two or more possible senses or ways." http://www.merriam-webster.com/dictionary/ambiguous (last viewed Jul. 18, 2017). Thus, a rule is ambiguous if it *could* be read to prohibit Sec. 7 activity, among other possible interpretations, regardless whether employees reasonably *would* read it that way. The cited cases demonstrate the Board's abandonment, *sub silentio*, of the *Lutheran Heritage* limitation that a rule will not be found unlawful "simply because the rule *could* be interpreted" to reach Sec. 7 activity. 343 NLRB at 647 (emphasis in original). Again, the (unattainable) requirement of linguistic perfection, which uniquely applies to facially neutral policies, rules and handbook provisions, stands in stark contrast to the wide latitude with which the Board and courts have always treated generalized language in collective-bargaining agreements.

[44] Employers are required to maintain certain documentation under state and federal statutes other than the NLRA. For example, to avoid liability under Title VII of the Civil Rights Act of 1964, employers are required to have procedures to investigate and remedy complaints of various types of workplace harassment. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). ERISA requires employers to have certain plan documents and summary plan descriptions regarding employee benefits. See, e.g., 29 U.S.C. § 1022. The Workers Adjustment and Retraining Notification Act (WARN Act) requires employers to provide 60 days' written notice to various parties in advance of business changes that constitute a "plant closing" or "mass layoff." 29 U.S.C. §§ 2101 et seq. Ironically, under *Lutheran Heritage*, these types of documentation, where made available to employees—even though *required* by other legal obligations—would be deemed unlawful by the Board whenever they could be "reasonably construed" to prohibit NLRA-protected activity.

Putting aside whether an employer's facially neutral rules violate Sec. 8(a)(1), employers must comply with the Act's other provisions. Thus, if there is a certified or recognized union, for example, the employer's obligation to bargain under Sec. 8(d) and 8(a)(5) may require negotiations over existing or potential policies, rules or handbook provisions.

[45] There are exceptions to the employment-at-will doctrine where a discharge would violate a statutory requirement or prohibition (for example, Title VII or the Age Discrimination in Employment Act), constitute wrongful discharge in violation of public policy in certain states (see, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978)), or violate a "just cause" provision in a collective-bargaining agreement or a similar provision in some other type of employment contract.

[46] See fn. 40, supra.

[47] It is the Board's responsibility—not the responsibility of employers, unions or employees—to balance the legitimate interests served by a facially neutral policy, rule or handbook provision with the potential chilling effect of the rule on the exercise of Sec. 7 rights. Carrying out this responsibility will permit the Board to develop more detailed standards for specific types of rules, particular types of Sec. 7 activity, and whether or when certain justifications do or do not outweigh a risk of interference with employee rights.

and the courts have long recognized the importance of avoiding conflict and disruptions in an acute-care hospital setting.[48] And in *Flagstaff*, the Board majority upheld a hospital's no-photography rule—notwithstanding its potential impact on Section 7 activity—after considering the "weighty" privacy interests of patients and the hospital's "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography."[49] Yet *Flagstaff* dealt merely with "privacy" and the "wrongful disclosure of . . . information," which pale in comparison to the interests implicated in the instant case, which bear on national security. The "reasonably construe" standard also prevents the Board from taking into consideration specific events that reveal the importance of a particular policy, rule, or handbook provision. For example, in *William Beaumont Hospital*, supra, 363 NLRB No. 162, a full-term newborn infant had unexpectedly died, and the ensuing investigation of that tragic event showed that the infant's death resulted in part from inadequate communication among the hospital's personnel. In addition, when a highly regarded obstetrics nurse resigned, the hospital learned that two other obstetrics nurses had been mean, nasty, intimidating, negative, and bullying. Id., slip op. at 8 (Member Miscimarra, concurring in part and dissenting in part). These events revealed the importance of the interests served by the hospital's rule against conduct that impedes "harmonious interactions and relationships." Nevertheless, a Board majority in *William Beaumont Hospital*, applying prong one of the *Lutheran Heritage* standard, found this rule unlawful, reasoning that since some inharmonious interactions are protected by the NLRA, employees would reasonably construe the rule to prohibit Section 7 activity. Id., slip op. at 2.

Finally, *Lutheran Heritage* has caused extensive confusion and litigation for employers, unions, employees and the Board itself. The "reasonably construe" standard has defied all reasonable efforts to apply and explain it.[50] Indeed, even with the benefit of hindsight, it is still difficult to understand Board rulings that uphold some facially neutral rules while invalidating others.[51] Taking, for

[48] See *NLRB v. Baptist Hospital*, 442 U.S. 773, 783 fn. 12 (1979) ("Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed."); *St. John's Hospital*, 222 NLRB 1150, 1150 (1976) ("We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function.").

[49] 357 NLRB at 663.

[50] See GC Memorandum 15-04 (March 18, 2015); GC Operations Memorandum 12-59 (May 30, 2012); GC Operations Memorandum 12-31 (Jan. 24, 2012); GC Operations Memorandum 11-74 (Aug. 18, 2011). See also U.S. Chamber of Commerce, *Theater of the Absurd: The NLRB Takes on the Employee Handbook* (available at https://www.uschamber.com/sites/default/files/documents/files/nlrb_theater_of_the_absurd.pdf, last accessed Sept. 29, 2017) (criticizing the Board's decisions regarding employee handbook policies as "seem[ing] to run counter to any balanced reading of the NLRA"); Dagen-Sunsdahl, *Navigating Through Hills and Dales: Can Employers Abide by the NLRA While Maintaining Civil Work Environments?*, 31 ABA J. Lab. & Emp. L. 363 (2016) (advocating for a standard that "strike[s] a better balance between protecting employee labor rights and legitimate employer interests"); Flomenhoft, *Balancing Employer and Employee Interests in Social Media Disputes*, 6 Am. U. Lab. & Emp. L.F. 1 (2016) (criticizing NLRB's standards for "fail[ing] to strike a proper balance between the interests of employers and employees"); Brice, Fifer, and Naron, *Social Media in the Workplace: The NLRB Speaks*, 24 No. 10 Intell. Prop. & Tech. L.J. 13 (2012) (calling the Board's disapproval of some social media rules under the *Lutheran Heritage* test "far from intuitively obvious"); Liss, *Beware That Your Social Media Policies Do Not Draw the Ire of the National Labor Relations Board*, 70 J. Mo. B. 324 (2014) (discussing the difficulty of understanding and applying the Board's recent interpretations of the *Lutheran Heritage* "reasonable employee" standard to rules governing employees' use of social media); Green, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 Berkley Tech. L.J. 837 (2012) (same); O'Brien, *The National Labor Relations Board: Perspectives on Social Media*, 8 Charleston L. Rev. 411 (2014) (same); Hemenway, *The NLRB and Social Media: Does the NLRB "Like" Employee Interests?*, 38 J. Corp. L. 607 (2013) (citing inconsistencies in the Board's interpretation of social media policies); Link, *Employers Beware*, 284-OCT N.J. Law. 24 (2013) (calling the Board's guidance on social media policies "internally inconsistent at times, and frequently ambiguous"); Logan, *Social Media Policy Confusion: The NLRB's Dated Embrace of Concerted Activity Misconstrues the Realities of Twenty-First Century Collective Action*, 15 Nev. L.J. 754 (2014) ("The Board's inconsistent adaptation of the NLRA to social media policies is 'causing concern and confusion.'"); McNamara, *The Times are Changing: Protecting Employers in Today's Evolving Workplace*, 2011 WL 601173 (2011) (citing the Board's "confusing" application of *Lutheran Heritage* to employer work rules); Rojas, *The NLRB's Difficult Journey Down the Information Super Highway: A New Framework for Protecting Social Networking Activities Under the NLRA*, 51 Washburn L.J. 663 (2012) (asserting that application of the Board's current standards under *Lutheran Heritage* to social networking is "impractical, inefficient, and inconsistent with the purposes of the Act").

[51] Since *Lutheran Heritage* was decided in 2004, the Board has evaluated a variety of facially neutral policies, work rules, and handbook provisions. See, e.g., *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38 (2017); *Minteq International, Inc.*, 364 NLRB No. 63 (2016), review denied 855 F.3d 329 (D.C. Cir. 2017); *Schwan's Home Service, Inc.*, 364 NLRB No. 20 (2016); *T-Mobile USA, Inc.*, 363 NLRB No. 171 (2016), enf. denied in part 865 F.3d 265 (5th Cir. 2017); *William Beaumont Hospital*, supra, 363 NLRB No. 162; *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34 (2015); *Sheraton Anchorage*, 362 NLRB No. 123 (2015); *Lily Transportation Corp.*, 362 NLRB No. 54 (2015); *Battle's Transportation, Inc.*, 362 NLRB No. 17 (2015); *Casino San Pablo*, 361 NLRB 1350 (2014); *Purple Communications, Inc.*, 361 NLRB 575 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed.

example, a sampling of cases dealing with rules regarding civility in the workplace, it is difficult to view the different outcomes reached by the Board as anything other than arbitrary.

- In *Lafayette Park Hotel*,[52] it was *lawful* to have a rule prohibiting "conduct that does not support the . . . Hotel's goals and objectives," even though this arguably encompassed conduct that did not support the Hotel's goal of remaining nonunion, i.e., union organizing. However, it was deemed unreasonable to assume, without more, that remaining nonunion was one of the goals encompassed by the rule.
- In *Lafayette Park Hotel* as in a similar case,[53] it was *unlawful* to maintain a rule prohibiting "false, vicious, profane or malicious statements toward or concerning the . . . [employer] or any of its employees" because such statements could occur in the context of activities protected under Section 7.
- In *Adtranz ABB Daimler-Benz Transportation v. NLRB*, the court found it was *lawful* to have a rule prohibiting "abusive or threatening language to anyone on company premises," which the court found merely required employees to "comply with generally accepted notions of civility."[54] The court deemed this "quite different" from *Lafayette Park Hotel* and a similar Board case,[55] in which the Board found that it was *unlawful* to maintain rules "threatening to punish 'false' statements without evidence of malicious intent."[56]
- In *Lutheran Heritage*,[57] it was *lawful* to maintain rules prohibiting "verbal abuse," "abusive or profane language," and "harassment." Although *Lutheran Heritage* renders unlawful every rule that an employee would "reasonably construe" to prohibit Section 7 activity, the Board stated that a rule would not be unlawful merely because it "*could* be interpreted that way."[58]
- In *Palms Hotel & Casino*,[59] it was *lawful* to have a rule prohibiting "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees because the rule was not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace."[60]
- In *Flamingo Hilton-Laughlin*,[61] it was *unlawful* to have a rule prohibiting "loud, abusive or foul language" because this was so broad that it "could reasonably be interpreted as barring lawful union organizing propaganda."[62]
- In *2 Sisters Food Group*,[63] it was *unlawful* to maintain a rule subjecting employees to discipline for "inability or unwillingness to work harmoniously with other employees" because the employer did not "define what it means to 'work harmoniously' (or to fail to do so)," and the rule was "sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7."[64]
- In *The Roomstore*, it was *unlawful* to maintain a rule prohibiting "[a]ny type of negative energy or

Appx. 33 (2d Cir. 2015); *Fresh & Easy Neighborhood Market*, 361 NLRB 72 (2014); *Laurus Technical Institute*, 360 NLRB 1155 (2014); *Hills & Dales General Hospital*, supra, 360 NLRB at 611; *MCPc*, 360 NLRB 216 (2014), enfd. in relevant part 813 F.3d 475 (3d Cir. 2016); *Quicken Loans, Inc.*, 359 NLRB 1201 (2013), affd. 361 NLRB 904 (2014), enfd. 830 F.3d 542 (D.C. Cir. 2016); *Knauz BMW*, 358 NLRB 1754 (2012), invalidated by *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB 144 (2012), invalidated by *NLRB v. Noel Canning*, supra; *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012), enfd. 746 F.3d 205 (5th Cir. 2014); *Heartland Catfish Co.*, 358 NLRB 1117 (2012), invalidated by *NLRB v. Noel Canning*, supra; *Costco Wholesale Corp.*, 358 NLRB 1100 (2012), invalidated by *NLRB v. Noel Canning*, supra; *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *The Roomstore*, 357 NLRB 1690 (2011); *Arkema, Inc.*, 357 NLRB 1248 (2011), enf. denied 710 F.3d 308 (5th Cir. 2013); *Tenneco Automotive, Inc.*, 357 NLRB 953 (2011), enfd. in relevant part 716 F.3d 640 (D.C. Cir. 2013); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011), enf. denied in part 805 F.3d 309 (D.C. Cir. 2015); *Boulder City Hospital*, 355 NLRB 1247 (2010); *NLS Group*, 352 NLRB 744 (2008), affd. 355 NLRB 1154 (2010), enfd. 645 F.3d 475 (1st Cir. 2011); *River's Bend Health & Rehabilitation Services*, 350 NLRB 184 (2007); *Inter-Disciplinary Advantage*, 349 NLRB 480 (2007); *Palms Hotel & Casino*, 344 NLRB 1363 (2005); *Cintas Corp.*, 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007); *Claremont Resort & Spa*, 344 NLRB 832 (2005); *Guardsmark, LLC*, 344 NLRB 809 (2005), enfd. in part 475 F.3d 369 (D.C. Cir. 2007). As explained in the text, the conflicting outcomes of these cases are sometimes virtually impossible to rationalize. Other than the cases addressed specifically in this opinion, we do not pass on the legality of the rules at issue in past Board decisions that have applied the *Lutheran Heritage* "reasonably construe" standard. In all future cases, the legality of such rules will turn on the principles set forth in today's decision.

[52] 326 NLRB at 824.

[53] *Cincinnati Suburban Press, Inc.*, 289 NLRB 966, 975 (1988).

[54] 253 F.3d 19, 27 (D.C. Cir. 2001).

[55] *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

[56] 253 F.3d at 26-27.

[57] 343 NLRB at 646.

[58] 343 NLRB at 647 (emphasis in original).

[59] 344 NLRB 1363 (2005).

[60] Id. at 1368.

[61] 330 NLRB at 287.

[62] Id. at 295.

[63] 357 NLRB at 1816.

[64] Id. at 1817.

attitudes."[65] Similarly, in *Claremont Resort & Spa*, it was *unlawful* to maintain a rule prohibiting "[n]egative conversations about associates and/or managers" because the employer did not "clarif[y] any potential ambiguities in its rule by providing examples."[66]

The above cases comprise an extremely small sampling of Board and court cases addressing a single, narrow category of policies, rules and handbook provisions dealing with civility, decorum and respect. Do these cases permit one to understand what the "lawful" rules do correctly and what the "unlawful" rules do incorrectly? We believe the rather obvious answer is no. The above cases yield the following results:

Lawful Rule

- no "abusive or threatening language to anyone on Company premises"
- no "verbal abuse," "abusive or profane language," or "harassment"
- no "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfereing with" other employees
- prohibiting "conduct that does not support the . . . Hotel's goals and objectives"

Unlawful Rule

- no "loud, abusive, or foul language"
- no "false, vicious, profane or malicious statements toward or concerning the . . . Hotel or any of its employees"
- no "inability or unwillingness to work harmoniously with other employees"
- no "negative energy or attitudes"
- no "[n]egative conversations about associates and/or managers"

These examples reveal that to a substantial degree, the *Lutheran Heritage* "reasonably construe" standard has led to arbitrary results. Would an employee "reasonably construe" a difference between prohibiting "abusive or threatening language to anyone on Company premises" (held lawful in *Adtranz*) and prohibiting "loud, abusive, or foul language" (deemed unlawful in *Flamingo Hilton*)? Would employees be unlawfully discouraged from engaging in NLRA-protected activity by a rule prohibiting "false, vicious, profane or malicious statements" (deemed unlawful in *Lafayette Park Hotel*) while perceiving they may freely engage in protected activity when a handbook prohibits conduct that is "injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees (deemed lawful in *Palms Hotel & Casino*)? We think not.

It bears emphasis that the above questions relate to cases regarding a *single, narrow category* of rules aimed at fostering workplace civility. The challenges become orders of magnitude greater if one attempts to address the entire spectrum of issues that warrant treatment in policies, work rules or handbook provisions. The Board can and should do better in this area, and employees, unions and employers deserve better.

We do not fault our predecessors on the Board who, with good intentions, articulated the "reasonably construe" standard in *Lutheran Heritage*. After all, the *Lutheran Heritage* majority *included* the employer's legitimate business purposes in their evaluation of how reasonable employees would construe the rules at issue in that case. Thus, the majority observed that those rules—prohibiting "abusive or profane language," "harassment," and "verbal, mental and physical abuse"—served the "legitimate business purposes" of "maintain[ing] order in the workplace" and "protect[ing] the [r]espondent from liability by prohibiting conduct that, if permitted, could result in such liability"; and the Board concluded that in light of these purposes, "reasonable employees would infer that the [r]espondent's purpose in promulgating the challenged rules was to ensure a civil and decent workplace, not to restrict Section 7 activity."[67] Additionally, *Lutheran Heritage* contained qualifications that more recent decisions have improperly disregarded.[68] With rare exceptions, however, in decisions issued since *Lutheran Heritage* the Board has applied the "reasonably construe" standard in a manner that dispenses with any consideration of the employer's legitimate business pur-

[65] 357 NLRB at 1690 fn. 3.

[66] 344 NLRB at 836.

[67] 343 NLRB at 647, 648 (internal quotations omitted).

[68] For example, the Board majority in *Lutheran Heritage* stated: "Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach." 343 NLRB at 647 (emphasis in original). Thus, the Board majority rejected the view expressed by dissenting Members Liebman and Walsh, who contended that a facially neutral work rule should be deemed unlawful whenever it could be interpreted to encompass Sec. 7 activity. Nonetheless, the latter view has been effectively adopted in many subsequent decisions through application of the principle that ambiguity is construed against the employer as the drafter of the rule. See fn. 43, supra.

poses.[69] Indeed, when Chairman Miscimarra argued that the Board is required to give some consideration to a rule's reasonable justifications, the Board majority rejected this proposition, invoking *Lutheran Heritage* and asserting it was improper to go "far beyond [the] text" when evaluating disputed work rules.[70]

The D.C. Circuit has criticized the Board's failure to give adequate weight to justifications associated with reasonable work rules. In *Medco Health Solutions of Las Vegas, Inc. v. NLRB*,[71] the court of appeals stated:

> In the past we have found the Board "remarkably indifferent to the concerns and sensitivity" that lead employers to adopt rules intended "to maintain a civil and decent workplace." *Adtranz ABB Daimler–Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 25, 27 (D.C.Cir.2001). In *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2003), the Board appeared to accept *Adtranz*'s holding on employers' rights to maintain such a workplace. Moreover, when a rule neither expressly nor inherently restricts protected activity, the Board appeared in *Lutheran Heritage* to condition any decision that the rule's mere existence violated the Act on a finding either that the rule was promulgated in response to union activity or that a reasonable employee reading the rule would construe it to prohibit protected conduct. Id. For no apparent reason the Board seems to have abandoned that analysis in proscribing Medco's ban on provocative and confrontational words.[72]

Our experience with the "reasonably construe" standard has revealed its substantial limitations, as well as its departure from the type of balancing required by Supreme Court precedent and the Board's own decisions. For all these reasons, we overrule *Lutheran Heritage* and adopt a new standard, as explained in Part B below.

B. The New Standard Governing Maintenance of Facially Neutral Rules, Employment Policies, and Employee Handbook Provisions

In cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the requirement(s). Again, we emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."[73]

When engaging in the above analysis, the Board will place particular emphasis on the following considerations.

First, this is an area where the Board has a special responsibility to give parties certainty and clarity.[74] Most work rules, employment policies, and employee handbook provisions exist for the purpose of permitting employees to understand what their employer expects and requires. Therefore, the chaos that has reigned in this area has been visited most heavily on employees themselves. In the best case, under *Lutheran Heritage* nobody (not even Board members themselves)[75] can reliably predict what rules are permissible and what rules are

[69] See, e.g., *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38 (2017); *Southern Bakeries, LLC*, 364 NLRB No. 64 (2016); *Minteq International, Inc.*, 364 NLRB No. 63 (2016); *Schwan's Home Service*, 364 NLRB No. 20 (2016); *T-Mobile USA, Inc.*, 363 NLRB No. 171 (2016); *William Beaumont Hospital*, 363 NLRB No. 162 (2016); *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34 (2015); *Sheraton Anchorage*, 362 NLRB No. 123 (2015); *Lily Transportation Corp.*, 362 NLRB No. 54 (2015); *Battle's Transportation, Inc.*, 362 NLRB No. 17 (2015); *Casino San Pablo*, 361 NLRB 1350 (2014); *Purple Communications, Inc.*, 361 NLRB 575 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014); *Fresh & Easy Neighborhood Market*, 361 NLRB 72 (2014); *Laurus Technical Institute*, 360 NLRB 1155 (2014); *Hills & Dales General Hospital*, 360 NLRB 611 (2014); *MCPc*, 360 NLRB 216 (2014); *Quicken Loans, Inc.*, 359 NLRB 1201 (2013), affd. 361 NLRB 904 (2014); *Knauz BMW*, 358 NLRB 1754 (2012); *J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB 144 (2012); *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012); *Heartland Catfish Co.*, 358 NLRB 1117 (2012); *Costco Wholesale Corp.*, 358 NLRB 1100 (2012); *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *The Roomstore*, 357 NLRB 1690 (2011); *Arkema, Inc.*, 357 NLRB 1248 (2011); *Tenneco Automotive, Inc.*, 357 NLRB 953 (2011); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011); *Boulder City Hospital*, 355 NLRB 1247 (2010); *NLS Group*, 352 NLRB 744 (2008), affd. 355 NLRB 1154 (2010); *Cintas Corp.*, 344 NLRB 943 (2005); *Claremont Resort & Spa*, 344 NLRB 832 (2005).

[70] *Schwan's Home Service*, supra, 364 NLRB No. 20, slip op. at 1 fn. 3.

[71] 701 F.3d 710 (D.C. Cir. 2012) (denying enforcement of a Board order invalidating a rule prohibiting employees from wearing clothing bearing provocative and confrontational expressions).

[72] Id. at 718.

[73] *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. at 33–34 (1967) (emphasis added). See also fn. 13, supra.

[74] The Supreme Court has stressed the need to provide "certainty beforehand" for employers and unions so employers can "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and so a union may discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board." *First National Maintenance Corp. v. NLRB*, 452 U.S. at 678-679, 684–686.

The D.C. Circuit has also criticized the Board—albeit in a different context—for applying an "open-ended rough-and-tumble of factors" without a sufficient explanation of "which factors are significant and which less so, and why," a manner of proceeding that can become "a cloak for agency whim—or worse." *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (internal citations and quotations omitted), denying enf. 338 NLRB No. 92 (2003); see also *Pacific Lutheran University*, 361 NLRB 1404, 1419 (2014).

[75] See fn. 9, supra.

unlawful under the NLRA. In the worst case, employees may be subjected to intimidation, profanity, harassment, or even workplace violence because their employers rightfully believe the NLRB is likely to overturn reasonable standards regarding respect and civility in the workplace, or such standards will be upheld only after many years of NLRB litigation. Henceforth, consistent with the Board's responsibility to interpret the Act, we will engage in the above analysis and we will delineate three categories of employment policies, rules and handbook provisions:

- *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. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.[76]
- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of 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. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

As noted previously, the above three categories will represent a classification of results from the Board's application of the new test. The categories are not part of the test itself. The Board will determine, in future cases, what types of additional rules fall into which category. Although the legality of some rules will turn on the particular facts in a given case, we believe adherence to the analysis we announce here will ultimately provide far greater clarity and certainty to employees, employers and unions regarding whether and to what extent different types of rules may lawfully be maintained. Although the Board's cumulative experience with certain types of rules may prompt the Board to re-designate particular types of rules from one category to another, one can expect such circumstances to be relatively rare.[77]

Second, when deciding cases in this area, the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral), and the Board must recognize those instances where the risk of intruding on NLRA rights is "comparatively slight."[78] Similarly, the Board may distinguish between substantial justifications—those that have direct, immediate relevance to employees or the business—and others that might be regarded as having more peripheral importance. In some instances, the impact of a particular rule on NLRA rights may be self-evident, or the justifications associated with particular rules may be apparent from the rule itself or the Board's experience with particular types of workplace issues. Parties may also introduce evidence regarding a particular rule's impact on protected rights or the work-related justifications for the rule. The Board may also draw reasonable distinctions between or among different industries and work settings. We may also take

[76] Although the *maintenance* of Category 1 rules (and certain Category 2 rules) will be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case. The Board will determine in future cases what other types of rules fall into Category 1.

Again, to the extent the Board in past cases has held that it violates the Act to maintain rules requiring employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace, those cases are hereby overruled. See the explanation set forth in fn. 15, supra.

[77] As stated in fn. 17 above, Chairman Miscimarra and Members Kaplan and Emanuel agree that, in every future work-rules case, the Board will make the following distinctions: (i) rules that are generally lawful because, when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights, without any need for a balancing of rights and interests or justifications; (ii) rules that are generally lawful even though they potentially interfere with the exercise of NLRA rights, but where this risk is outweighed by legitimate justifications; (iii) rules that warrant individualized scrutiny in each case; and (iv) rules that are generally unlawful because their potential interference with the exercise of protected rights outweighs any possible justifications. Under the three-category structure adopted by the Board today, groups "i" and "ii" are both included in Category 1 (rules that the Board will find to be generally lawful).

Again, Member Kaplan would have preferred a four-part framework that separately enumerated each of the four groups outlined in the preceding paragraph, because he believes such a framework would better conform to distinctions made by the Board when determining the legality of different rules. However, Member Kaplan agrees with the three-category structure because, under either approach, the Board will make the same distinctions (as summarized in the preceding paragraph), except in the three-category structure that the Board adopts today, the rules included in groups "i" and "ii" will both be considered part of Category 1. See text accompanying fn. 17, supra.

[78] *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. at 34.

into consideration particular events that may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights.[79]

Third, when a facially neutral rule, reasonably interpreted, would *not* prohibit or interfere with the exercise of NLRA rights, maintenance of the rule is lawful without any need to evaluate or balance business justifications, and the Board's inquiry into maintenance of the rule comes to an end.[80] Even under *Lutheran Heritage*—in which legality turned *solely* on a rule's potential impact on protected rights—a rule could lawfully be maintained whenever it would not "reasonably" be construed to prohibit NLRA-protected activity, even though it "could conceivably be read to cover Section 7 activity."[81] Conversely, when a rule, reasonably interpreted, *would* prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful. Again, the Board must carefully evaluate the nature and extent of a rule's adverse impact on NLRA rights, in addition to potential justifications, and the rule's maintenance will violate Section 8(a)(1) if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7.

Fourth, when the Board interprets any rule's impact on employees, the focus should rightfully be on the employees' perspective. This is consistent with established Board and court case law,[82] and it is especially important when evaluating questions regarding alleged interference with protected rights in violation of Section 8(a)(1). As the Board stated in *Cooper Thermometer Co.*, 154 NLRB 502, 503 fn. 2 (1965), Section 8(a)(1) legality turns on "whether the employer engaged in conduct, which, it may reasonably be said, *tends to interfere with the free exercise of employee rights under the Act*" (emphasis added).

Fifth, as indicated above,[83] the Board may find that an employer may lawfully *maintain* a particular rule, notwithstanding some possible impact on a type of protected Section 7 activity, even though the rule cannot lawfully be *applied* against employees who engage in NLRA-protected conduct.[84] For example, if the Board finds that an employer lawfully maintained a "courtesy and respect" rule, but the employer invokes the rule when imposing discipline on employees who engage in a work-related dispute that is protected by Section 7 of the Act, we may find that the discipline constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1).

C. Retroactive Application of the New Standard

When the Board announces a new standard, a threshold question is whether the new standard may appropriately be applied retroactively, or whether it should only be applied in future cases. In this regard, "[t]he Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe*

---

[79] For example, if an employer operates a coal mine where fatal mine collapses have occurred as the result of loud talking, and the employer has adopted a rule prohibiting "loud talking" in the coal mine, such a rule would be unlawful under *Lutheran Heritage* because many types of NLRA-protected activity involve loud talking—e.g., situations where loud verbal exchanges occur among employees or between employees and supervisors over wages, overtime or working conditions. Obviously, when these types of conversations occur, they are not rendered unprotected merely because the employee-participants may express their views loudly.

Under the standard we announce today, in this hypothetical example the Board would appropriately consider the fact that the rule against "loud talking" has a significant justification pertaining to workplace safety, and the rule's maintenance is also supported by the nature of the business (operating a coal mine) and recent events (past fatal mine collapses resulting from loud talking). Workplaces are not all the same, and the standard we announce today will permit the Board to discharge its "special function" of addressing "complexities" that arise from different work settings. *NLRB v. Erie Resistor Corp.*, 373 U.S. at 236; *NLRB v. J. Weingarten, Inc.*, 420 U.S. at 266-267.

Contrary to our dissenting colleagues, the considerations set forth above do not constitute a multi-factor standard. Rather, they are common-sense guidelines for analyzing challenged rules under the structure we adopt today.

[80] Member Kaplan agrees with this statement, but he would explain further. In his view, the Board's initial inquiry in any rule maintenance case must focus on whether there is any reasonable tendency for the rule to interfere with employee's Sec. 7 rights. As with any number of other cases involving whether an employer statement (e.g., alleged threats or interrogation) or action (e.g., surveillance) violates Sec. 8(a)(1), the reasonable tendency inquiry focuses on an objective employee in the particular workplace. *Lutheran Heritage* failed to provide an adequate definition of this objective employee, thus permitting Board members in subsequent decisions to decide the legality of rules as if *they* were the objective employee, focused only on potential interference with Sec. 7 rights. In Member Kaplan's opinion, the 5th Circuit's criticism in *T-Mobile*, supra, of this aspect of the *Lutheran Heritage* test is just as relevant and important to the application of the new test we announce today. Accordingly, he would expressly adopt that court's definition of an objective employee as a person "aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job," *T-Mobile*, supra, 865 F.3d at 271. Member Kaplan believes that charging employees, when they interpret work rules, with an awareness of an employer's legitimate needs for discipline and production in their particular workplace is essential to our new test's stated goal of assuring adequate consideration of those needs in every instance.

[81] *Lutheran Heritage*, 343 NLRB at 647.

[82] Cf. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) ("This emphasis on the employees' perspective furthers the Act's policy of industrial peace.").

[83] See fn. 76, supra.

[84] See, e.g., *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996); *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001).

Metal Furniture Co., 121 NLRB 995, 1006–1007 (1958)). Yet, the Supreme Court has indicated that "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

Based on the above standards, we find that it is appropriate to apply the standard we announce today retroactively to the instant case and to all other pending cases. We do not believe retroactivity will produce any "ill effects." To the contrary, we believe all parties will benefit from Board decisions that take into account not only whether a work rule, when reasonably interpreted, would prohibit or interfere with the exercise of Section 7 rights, but also any justifications associated with the rule and whether or not such justifications are outweighed by the rule's adverse impact on protected rights. Moreover, failing to apply the new standard retroactively would "produc[e] a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, supra. As explained above, the Board has long recognized that, under Supreme Court precedent dating back more than 70 years, "[r]esolution of the issue presented by . . . contested rules of conduct involves 'working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society.'" *Lafayette Park Hotel*, 326 NLRB at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. at 797-798).[85] Accordingly, we find that application of our new standard to this case and all pending cases will not work a "manifest injustice." *SNE Enterprises*, supra.

D. Application of the New Standard to Boeing's No-Camera Rule

To determine the lawfulness of Boeing's no-camera rule under the standard we adopt today, the Board must determine whether the no-camera rule, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, and if so, the Board must evaluate two things: (i) the nature and extent of the no-camera rule's adverse impact on Section 7 rights, *and* (ii) the legitimate business justifications associated with the no-camera rule. Based on our review of the record and our evaluation of the considerations described above, we find that the no-camera rule in some circumstances may potentially affect the exercise of Section 7 rights, but this adverse impact is comparatively slight. We also find that the adverse impact is outweighed by substantial and important justifications associated with Boeing's maintenance of the no-camera rule. Accordingly, we find that Boeing's maintenance of its no-camera rule does not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act. Although the justifications associated with Boeing's no-camera rule are especially compelling, we believe that no-camera rules, in general, fall into Category 1, types of rules that the Board will find lawful based on the considerations described above.

As stated above, the policy at issue here is Boeing's no-camera rule, which provides in relevant part as follows:

> Possession of the following camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements.
>
> However, **use** of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security:
>
> 5. Personal Digital Assistants (PDAs)
>
> 6. Cellular telephones and Blackberrys and iPod/MP3 devices
>
> 7. Laptop or personal computers with web cameras for desktop video conferencing, including external webcams.
>
> 8. Bar code scanners and bar code readers, or such devices for manufacturing, inventory, or other work, if those devices are capable of capturing images

Boeing's no-camera rule defines "business need" as "a determination made by the authorizing manager that images or video are needed for a contractual requirement, training, technical manuals, advertising, technical analysis, or other purpose that provides a positive benefit to the company."

Boeing Senior Security Manager James Harris furnished undisputed testimony concerning Boeing's justifi-

[85] See also *NLRB v. Great Dane Trailers*, 388 U.S. at 33-34 (stating that it is the "duty" of the Board "to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *NLRB v. Erie Resistor Corp.*, 373 U.S. at 229 (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct").

cations for maintaining its no-camera rule. His testimony establishes the following.

First, Boeing's no-camera rule is an integral component of Boeing's security protocols, which are necessary to maintain Boeing's accreditation as a federal contractor to perform classified work for the United States Government. These protocols involve layers of security, including the physical construction of the facilities themselves, a fenced perimeter, security officers, and background checks for personnel granted access to classified information. Boeing's rule regulating the use of camera-enabled devices is another of these layers of security. It furnishes a fail-safe to ensure that classified information will not be released outside of Boeing in the event that such information finds its way into a non-classified area.

Second, Boeing's no-camera rule plays a key role in ensuring that Boeing complies with its federally mandated duty to prevent the disclosure of export-controlled information or the exposure of export-controlled materials to unauthorized persons. "Export-controlled" materials include "sensitive equipment, software and technology," the export of which is controlled by the federal government "as a means to promote our national security and foreign policy objectives."[86] For example, the export-control system "[p]revent[s] proliferation of weapons and technologies, including weapons of mass destruction, to problem end-users and supporters of international terrorism."[87] Senior Security Manager Harris testified that the term *export* means "delivering information, technology or hardware to a non-U.S. person," and he added that "[a]n export can occur visually, orally or otherwise either within the United States or outside the United States." In other words, export-controlled materials can be "delivered" visually, and therefore an "export" can occur when a "non-U.S. person" merely *sees* export-controlled materials. Boeing regulates the export of export-controlled materials in a variety of ways, including through the enforcement of standoff distances. Harris testified that a "standoff distance" is the distance from an object at which the eye "cannot see enough detail to constitute an export." However, *camera-enabled devices can defeat the purpose of a standoff distance.* Thus, Harris testified that even cell phones "are high enough resolution that if someone took a photograph even at the 25-foot standoff distance of an export-controlled item, that resolution could be refined and expanded to be able to get enough detail to determine what about it might be export controlled." Export-controlled information can be found at nearly every Boeing site in the Puget Sound region. Export violations may subject Boeing to fines of up to $1 million per incident, and they may result in Boeing being debarred from government contracts—not to mention the injury an export violation potentially may inflict on national security.

Third, Boeing's no-camera rule helps prevent the disclosure of Boeing's proprietary information, which Harris defined as "any nonpublic information that has potential economic value to Boeing," such as "manufacturing methods and processes" and "material usage." Proprietary information routinely may be found on the factory floor. Measures such as Boeing's no-camera rule to protect Boeing's proprietary information are critically important. Senior Security Manager Harris testified that Boeing "regularly receives reports" of "efforts" by "non-U.S. Government agencies" to "task visitors to . . . Boeing . . . with gaining specific kinds of manufacturing technologies, parts, processes, [and] material usage." Harris further testified concerning "documented circumstances" of "foreign powers . . . combing . . . through social media to gain knowledge about manufacturing techniques, manufacturing processes, and material usage that they do not currently have within their own countries in order to develop their own aircraft industries." Photographs or videos posted on social media websites "can be used as a tool to exploit their . . . mission."

Fourth, Boeing's no-camera rule limits the risk that employees' personally identifiable information will be released. Besides the invasion of employee privacy, photographs and videos that permit Boeing employees to be identified could also compromise proprietary information. For example, Harris testified that if a member of "the economic intelligence community"—i.e., an industrial spy—obtains a photograph that identifies someone as a Boeing employee, that photograph could potentially serve as a starting point to establish a seeming friendship for the ulterior purpose of eliciting proprietary information. In addition, if a photograph shows an employee's badge, that image could be used to create a counterfeit badge that an unauthorized person may use to gain entry to Boeing property.

Fifth, Boeing's no-camera rule limits the risk of Boeing becoming a target of terrorist attack. Harris testified that Boeing has "documented evidence" of surveillance by potentially hostile actors "to determine vulnerabilities" on Boeing property, and "[u]ncontrolled photography" could inadvertently disclose such vulnerabilities—such as "gaps in the fence line," "key utility entry points," "gas lines, hazardous chemical pipelines, [and] electrical substations."

[86] Department of State, "A Resource on Strategic Trade Management and Export Controls," https://www.state.gov/strategictrade/overview/ (last visited July 31, 2017).

[87] Id.

The General Counsel sought to counter Boeing's claims regarding the justifications for maintaining the no-camera rule. For example, it is undisputed that Boeing conducts both public and VIP tours of some of its facilities, Boeing does not search tour participants for camera-enabled devices, and tour guides are not authorized to confiscate personal camera-enabled devices from individuals who have used them during a tour. However, Boeing's 777 Director of Manufacturing and Operations Jason Clark testified that tour participants are briefed before the tour begins regarding what is and is not allowed during the tour, and Boeing security personnel review tour participants' photos and video footage after the tour. The General Counsel sought to contest Clark's testimony by introducing the testimony of employee Shannon Moriarty. Moriarty testified that she participated in one VIP tour of Boeing's Everett, Washington facility. According to Moriarty, she was permitted to take photos during that tour, she was the last tour participant to leave, and at no time did Boeing personnel review her photos or anyone else's. Notwithstanding this evidence of a single instance when the practice of reviewing tour participants' photos may not have been followed, no evidence was introduced that disputed Clark's testimony that such reviews are standard practice. Moreover, the tour in which Moriarty participated was a VIP tour, and Senior Security Manager Harris testified that an effort is made to ensure that VIP tour participants in particular are not exposed to proprietary information.

Boeing occasionally holds "rollouts" of new products, at which time the large bay doors of the factory are open, and persons standing in proximity to the facility but off Boeing property are able to look inside the facility. During a rollout, however, Boeing ensures that sensitive information is not visible to such persons. In addition, President Obama visited Boeing's Everett facility in February 2012, and employees were permitted to use personal camera-enabled devices to take photographs in the factory during the President's visit. However, Senior Security Manager Harris furnished undisputed testimony that prior to the visit, Boeing's intellectual property team along with various other departments, such as security and legal, worked closely with the Secret Service to "sanitize" the area to ensure that no sensitive materials or processes were visible. Finally, Boeing created a time-lapse video of the 777 production line for public release; but since the video was produced by Boeing itself, Boeing was able to ensure that it was free of confidential or proprietary information and safe to release to the public.

Accordingly, we find that the General Counsel failed to undermine the record evidence establishing the several purposes served by Boeing's no-camera rule's restrictions on the use of camera-enabled devices on its property, and we also find that those purposes constitute legitimate and compelling justifications for those restrictions. Indeed, many of the reasons why Boeing restricts the use of camera-enabled devices on its property provide a sobering reminder that we live in a dangerous world, one in which many individuals—foreign and domestic—may inflict great harm on the United States and its citizens.

Conversely, the adverse impact of Boeing's no-camera rule on NLRA-protected activity is comparatively slight. The vast majority of images or videos blocked by the policy do not implicate any NLRA rights. Moreover, the Act only protects concerted activities that two or more employees engage in for the purpose of mutual aid or protection.[88] Taking photographs to post on social media for the purpose of entertaining or impressing others, for example, certainly falls outside of the Act's protection. It is possible, of course, that two or more Boeing employees might, in the future, engage in protected concerted activity—for example, by conducting a group protest based on an employment-related dispute—and Boeing's no-camera rule might prevent the employees from taking photographs of their activity. However, the no-camera rule would not prevent employees from engaging in the group protest, thereby exercising their Section 7 right to do so, notwithstanding their inability to photograph the event. Additionally, in the instant case, there is no allegation that Boeing's no-camera rule has actually interfered with any type of Section 7 activity, nor is there any evidence that the rule prevented employees from engaging in protected activity.

We find that any adverse impact of Boeing's no-camera rule on the exercise of Section 7 rights is comparatively slight and is outweighed by substantial and important justifications associated with the no-camera rule's maintenance. Accordingly, we find that Boeing's maintenance of the no-camera rule did not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act.[89]

---

[88] See NLRA Sec. 7, quoted in fn. 5, supra.

[89] Consistent with our analysis of Boeing's no-camera rule, we reaffirm the Board's holding in *Flagstaff Medical Center*, supra, that the no-camera rule at issue there was lawful because the rule's maintenance was supported by substantial patient confidentiality interests, and any potential impact on Sec. 7 rights was comparatively slight. Also, we overrule the Board's finding in *Caesar's Entertainment d/b/a Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 3–5 (2015), that a similar rule was unlawful. In this regard, we agree with dissenting Board Member Johnson in that case that the Board majority in *Rio All-Suites Hotel* improperly limited *Flagstaff* to the facts of that case and failed to give appropriate weight to the casino operator's interests in "safeguarding guest privacy and the integrity of the Respondent's gaming operations." Id., slip op. at 5 fn. 12. As with the Boeing no-camera

E. Response to the Dissents

We respectfully disagree with the views expressed by our dissenting colleagues. In several respects, as the preceding discussion makes clear, we believe Members Pearce and McFerran misunderstand or misrepresent the standard that we adopt today, and they advance arguments that are palpably incorrect.

First, our dissenting colleagues argue against our abandonment of *Lutheran Heritage* based on the mistaken premise that the Board, prospectively, will never declare unlawful the maintenance of work rules that interfere with the exercise of Section 7 rights. Under the standard adopted today, the Board will continue to carefully evaluate the Section 8(a)(1) legality of work rules alleged to be unlawful. In appropriate cases, the Board will continue to find that the maintenance of challenged rules violates Section 8(a)(1). Under the *Lutheran Heritage* standard that we have overruled, the Board upheld certain rules and invalidated others. Under the standard we adopt today, the Board will likewise uphold certain rules and invalidate others. In all cases, the Board will consider whether a facially neutral rule, when reasonably interpreted, has a potential adverse impact on the exercise of NLRA-protected rights. If so, the Board will then consider the justifications associated with the challenged rule to determine whether maintenance of the rule violates the Act. As explained previously, this balancing process has ample support in Board and court cases, including numerous Supreme Court decisions.[90] Moreover, even when the Board concludes that a challenged rule was lawfully maintained, the Board will independently evaluate situations where, in reliance on the rule, an employer disciplines an employee who has engaged in NLRA-protected activity; and the Board may conclude that the discipline violated Section 8(a)(1) even though the rule's maintenance was lawful. This approach is consistent with decisions of the D.C. Circuit that have criticized Board rulings in this area.[91]

Second, our colleagues' adherence to *Lutheran Heritage*'s "reasonably construe" standard prompts them to focus on a challenged rule's potential effect on the exercise of Section 7 rights to the exclusion of everything else.[92] In this regard, the dissenting opinions reflect stereotypes regarding workplace conduct and protected activity that fail to adequately address problems have become more prominent in recent years—indeed, in recent weeks. As to these issues, the Board is obligated to "adapt" our statute to "changing patterns of industrial life."[93] Without question, the NLRA confers vitally important protection on employees by giving them the right

rule, based on the balancing of considerations similar to those described in the text above, we find that the rules in *Flagstaff* and *Rio All-Suites Hotel* fall within Category 1.

Member Kaplan agrees that the no-camera rules in this case, *Flagstaff*, and *Rio All-Suites Hotel* are lawful under a balancing of interests test, and Member Kaplan agrees that no-camera rules appropriately fall within Category 1 as described in the text. However, Member Kaplan notes that Category 1 includes two subparts: (a) rules that are generally lawful because, when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights, without any need for a balancing of rights and interests or justifications; and (b) rules that are generally lawful even though they potentially interfere with the exercise of NLRA rights, but where this risk is outweighed by legitimate justifications. The no-camera rules at issue in this case, *Flagstaff*, and *Rio All-Suites Hotel* fall within subpart "b" above. Such rules are separate from those considered to fall within subpart "a" above, which have no reasonable tendency to interfere with Sec. 7 rights and therefore do not require any balancing of interests or justifications. More generally, as previously stated in fn. 17, supra, Member Kaplan agrees with the three-category structure adopted today, but he would have preferred a framework that treated subparts "a" and "b" separately, because he believes such a framework would better conform to distinctions made by the Board when considering different rules.

[90] See text accompanying fns. 30–39, supra. Member McFerran rejects any balancing of Sec. 7 rights with justifications associated with particular rules, and at the same time, she protests that the *Lutheran Heritage* standard already provided for the consideration of a rule's justifications. As our colleague makes clear, however, she believes that a challenged rule's justifications should be taken into account for the sole purpose of determining whether they can be accommodated by a more narrowly tailored rule. If so, the rule is struck down. As we have explained, however, it is impossible to craft reasonable workplace rules to the exacting standard our dissenting colleague demands. See supra fns. 42–43; infra fn. 92.

[91] See fn. 76, supra and the text accompanying fns. 83–84, supra.

[92] Our dissenting colleagues exhibit new-found enthusiasm for certain passages in *Lutheran Heritage* that emphasize the employer interests served by workplace rules, and our colleagues now ostensibly reject the notion that a rule is to be invalidated merely because it is ambiguous. However, our colleagues' professed leniency in these respects is contradicted by the Board cases that have been decided by our dissenting colleagues and other Board members. Even without conducting an exhaustive survey, we have found at least 31 cases in which the Board has applied the "reasonably construe" standard without treating the challenged rule's justifications as a factor favoring its lawful maintenance. See cases cited in fn. 69, supra. Instead, in the few cases in which the Board has given *any* consideration to a rule's legitimate justifications, it has nearly always done so in the context of conclusory Board findings (endorsed by our dissenting colleagues in this case) that the challenged rule must be "more narrowly tailored" to advance the employer's interests. See, e.g., *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 4 (whenever a rule "threatens to have a chilling effect" on the exercise of Sec. 7 rights, the employer may "protect his legitimate business interests" only by adopting "a more narrowly tailored rule"). This disregards what the Board's cases applying *Lutheran Heritage* have demonstrated: it is impossible to craft reasonable rules and policies addressing a range of issues without having some ambiguity and potential overlap with one or more types of possible NLRA-protected conduct. See fns. 42–43, supra. And contrary to our colleagues' current portrayal, the Board has consistently supported findings of illegality by declaring that ambiguity must be construed against the employer as the rule's drafter. See cases cited in fn. 43, supra.

[93] *NLRB v. J. Weingarten, Inc.*, supra fn. 8, 420 U.S. at 266–267.

to engage in, and refrain from, concerted activities undertaken for the purpose of mutual aid or protection. However, nobody can doubt that employees have equivalent rights—guaranteed by federal, state, and local laws and regulations—to have protection from unlawful workplace harassment and discrimination based on sex, race, national origin, age, disability and numerous other impermissible considerations; protection from workplace assaults and life-threatening violence; and protection from workplace fatalities, accidents and injuries caused by inappropriate employee conduct. Employers have an obligation to maintain work rules and policies to assure these rights. The Board's past decisions have disregarded entirely the overwhelming number of employees and others whose interests are *protected* by rules that the Board has invalidated based on *Lutheran Heritage*. The public has a substantial interest in receiving medical care, for example, in hospitals where physicians and employees have been advised to maintain "harmonious interactions and relationships" affecting patient care.[94] In the instant case, the American people have a substantial interest in permitting one of the country's most prominent defense contractors to prohibit the use of cameras in facilities where work is performed that directly affects national security. Under the standard adopted today, we do not find that the Act's protection is necessarily subordinate to these countervailing considerations. We merely find that, in every present-day workplace, these other considerations must at least be taken into account. The *Lutheran Heritage* "reasonably construe" standard was deficient in this respect, which is a problem resolved by the Board, at long last, in today's decision.

Third, there is no merit in our dissenting colleagues' protest that we cannot or should not overrule *Lutheran Heritage* in this case without inviting *amicus* briefing, nor is there merit in their contention that the Board is required to engage in rulemaking regarding the issues addressed in today's decision.[95] As Member McFerran acknowledges, the Supreme Court has clearly stated the "Board is not precluded from announcing new principles in an adjudicative proceeding and ... the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."[96] Obviously, the Board decided *Lutheran Heritage* without engaging in rulemaking, and with extremely rare exceptions, the Board has strongly favored case adjudication over rulemaking. The Board has similar discretion with respect to whether to invite briefing prior to adjudicating a major issue. As we recently stated, "[n]either the Act, the Board's Rules, nor the Administrative Procedures Act requires the Board to invite amicus briefing before reconsidering precedent." *UPMC*, 365 NLRB No. 153, slip op. at 10 (2017). Further, we respectfully disagree with Member McFerran's contention that soliciting *amicus* briefing in major cases has become routine in the past decade, "particularly those where the Board is contemplating reversal of longstanding precedent." In the past decade, the Board has freely overruled or disregarded established precedent without supplemental briefing. See, e.g., *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (overruling 12-year-old precedent in *Courier-Journal*, 342 NLRB 1093 (2004), and 52-year-old precedent in *Shell Oil Co.*, 149 NLRB 283 (1964), without inviting briefing); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (overruling 9-year-old precedent in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), without inviting briefing); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (overruling 32-year-old precedent in *Wells Fargo Corp.*, 270 NLRB 787 (1984), without inviting briefing); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (overruling 53-year-old precedent in *Bethlehem Steel*, 136 NLRB 1500 (1962), without inviting briefing); *Pressroom Cleaners*, 361 NLRB 643 (2014) (overruling 8-year-old precedent in *Planned Building Services*, 347 NLRB 670 (2006), without inviting briefing); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (overruling 10-year-old precedent in *Holling Press*, 343 NLRB 301 (2004), without inviting briefing). Finally, our dissenting colleagues obviously have no blanket commitment to "public participation in agency policymaking" or "public input." Just this past week, Members Pearce and McFerran dissented from a request for information that merely asked interested members of the public whether the Board's extensive rewriting of its representation-election procedures should be retained, modified or rescinded.[97]

We likewise reject any suggestion that the Board lacks authority to resolve issues based on a legal standard that has not been expressly raised the parties. When the Board decides cases, it performs an appellate function.[98]

[94] Member McFerran was part of the Board majority in *William Beaumont Hospital*, 363 NLRB No. 162 (2016), where the Board invalidated a rule requiring hospital physicians and employees to foster "harmonious interactions and relationships."

[95] Indeed, Member McFerran goes so far as to accuse us of engaging in "secret rulemaking in the guise of adjudication, an abuse of the administrative process."

[96] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

[97] See 82 Fed. Reg. 58784-58790 (2017) (NLRB Notice and Request for Information, Representation-Case Procedures) (dissenting views of Members Pearce and McFerran).

[98] In typical unfair labor practice cases, the Board engages in appellate review of decisions and orders of the Agency's administrative law judges, and in typical representation cases, the Board engages appellate review of decisions by Regional Directors.

And the Supreme Court has instructed that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services,* 500 U.S. 90, 99 (1991).[99]

In sum, the Board has the responsibility to decide all matters that are properly before it, based on our "special function of applying the general provisions of the Act to the complexities of industrial life."[100] In the present case, the issue of a work rule's legality is directly presented to us. In addressing that issue, we have the authority and the obligation to apply the law as we believe it should be, regardless of whether any party has directly challenged *Lutheran Heritage*, and the test we adopt is one of general application, not limited to the particular work rule at issue in this case.

As a final matter, both of our dissenting colleagues have had many opportunities to consider possible alternatives to the *Lutheran Heritage* standard and to solicit briefing regarding the Board's treatment of work rules. Nor did our dissenting colleagues lack notice regarding the problems in this area. Commencing with *MCPc, Inc.*,[101] decided in February 2014, Chairman (then-Member) Miscimarra expressed disagreement with the *Lutheran Heritage* "reasonably construe" standard in every workplace-rules case in which he participated; and in every rules case commencing with *William Beaumont Hospital*,[102] decided in April 2016, he described the deficiencies of the *Lutheran Heritage* standard. More than one General Counsel has also attempted to make sense of the Board's often-contradictory rulings in this area.[103] Our dissenting colleagues and other Board members unfailingly applied *Lutheran Heritage* without expressing or even signaling potential interest in exploring any alternative approach. Nor has the Board ever requested supplemental briefing regarding these issues, notwithstanding repeated opportunities to do so.[104]

Regarding the Act's requirement of good faith in collective bargaining, parties are not required to engage in "fruitless marathon discussions at the expense of frank statement and support of [their] position."[105] Neither does the Act require the Board to postpone or refrain from the appropriate resolution of cases that are properly before us. In today's decision, we have carefully evaluated the *Lutheran Heritage* "reasonably construe" standard, and we have evaluated many Board and court decisions that support the consideration of justifications associated with particular requirements and rules in addition to the potential impact of those rules on the exercise of NLRA-protected rights. We have examined numerous Board decisions applying *Lutheran Heritage* that appear to contradict each other and that make it difficult or impossible for everyone—employees, employers, unions, Board members, and courts—to distinguish between rules that may lawfully be maintained and those that are impermissible. For the reasons explained above, the Board has concluded that numerous policy considerations favor abandoning the *Lutheran Heritage* "reasonably construe" standard. In its place, based on the same policy considerations, we substitute the standard described in today's decision.

ORDER

The National Labor Relations Board orders that the Respondent, The Boeing Company, Renton and Everett, Washington, and Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[99] In *Dish Network Corp.*, 359 NLRB 311, 312 (2012), Member Pearce expressly endorsed the applicability of the *Kemper Financial Services* rationale to the Board's adjudicatory authority. Although *Dish Network* was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), based on the absence of a quorum of validly appointed Board members who decided the case, we agree with Member Pearce that the description in *Kemper Financial Services* appropriately explains the scope of the Board's authority.

[100] *NLRB v. Erie Resistor Corp.*, 373 U.S. at 236.

[101] 360 NLRB 216, 216 fn. 4 (2014) (Member Miscimarra, concurring).

[102] 363 NLRB No. 162, slip op. at 7–24 (Member Miscimarra, concurring in part and dissenting in part).

[103] See, e.g., GC Mem. 15-4 (March 18, 2004); *Walmart*, Case 11-CA-067171 (Advice Memo, May 30, 2012). See also fn. 50, supra (citing numerous authorities attempting to address and explain the Board's treatment of facially neutral rules).

[104] Although Member McFerran ends her dissent by contemplating possible alternatives to the *Lutheran Heritage* standard (e.g., the "notion of rule categories," more clearly communicating the "legitimate employer interests behind the rules," making rules more "narrowly tailored," and approving "standard disclaimer" language or other "safe harbor" that could make rules immune from challenge), these options have either been rejected in many cases applying *Lutheran Heritage*, or experience has shown they are impractical. For example, the Board majority invalidated the no-recording rule in *Whole Foods Market, Inc.*, supra fn. 9, even though the rule clearly explained its purpose: "to eliminate a chilling effect on the expression of views." Cases applying *Lutheran Heritage* have demonstrated the impossibility of making rules sufficiently "narrowly tailored" to exclude any potential overlap with NLRA-protected conduct. See fns. 41–43, supra. Nor does Member McFerran endorse any alternatives to the extent of indicating that she and Member Pearce would adopt them; rather, these alternatives are mentioned merely to justify arguments favoring "public" input. In any event, as indicated above, the Board has carefully considered the *Lutheran Heritage* standard, and we have concluded that substantial policy reasons favor overruling *Lutheran Heritage* and adopting the standard described in this opinion.

[105] *NLRB v. American National Insurance*, 343 U.S. 395, 404 (1952).

(a) Photographing and videotaping employees engaged in workplace marches and rallies on or near its property.

(b) Creating the impression that its employees' union and/or protected concerted activities are under surveillance.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent it has not already done so, rescind all policies and procedures requiring security and/or management personnel to photograph or videotape employees engaged in workplace marches and rallies on or near its property.

(b) Within 14 days after service by the Region, post at its facilities in Everett and Renton, Washington, and Portland, Oregon, copies of the attached notice marked "Appendix."[106] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 19, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 14, 2017

Philip A. Miscimarra, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[106] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER PEARCE, dissenting in part.[1]

Overruling 13-year-old precedent, the majority today institutes a new standard for determining whether the maintenance of a challenged work rule, policy, or employee handbook provision is unlawful. Although characterized by the majority as a balancing test, its new standard is essentially a how-to manual for employers intent on stifling protected concerted activity before it begins. Overly protective of employer interests and under protective of employee rights, the majority's standard gives employers the green light to maintain rules that chill employees in the exercise of rights guaranteed by the National Labor Relations Act. Because the new standard is fundamentally at odds with the underlying purpose of the Act, I dissent.

The core purpose of the National Labor Relations Act is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or mutual aid or protection."[2] Consonant with this objective, Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" 29 U.S.C. §157. Section 8(a)(1) implements this guarantee by making it

[1] I agree with the majority that Boeing violated Sec. 8(a)(1) of the Act by engaging in surveillance and creating the impression of surveillance.

[2] Sec. 1 of the Act sets forth Congress' findings that employer denials of the right of employees to organize and bargain collectively and the inequality of bargaining power between employers and employees, who do not possess full freedom of association, lead to industrial strife that adversely affects commerce. Congress therefore declared it the United States' policy to mitigate or eliminate those adverse effects by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151.

an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1). "The central purpose of these provisions was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employers." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965).

The Board and courts have long recognized that overbroad and ambiguous workplace rules and policies may have a coercive impact as potent as outright threats of discharge, by chilling employees in the exercise of their Section 7 rights. Accordingly, the Board, with court approval, has held that the mere maintenance of a rule likely to chill Section 7 activity can amount to an unfair labor practice even absent evidence of enforcement.[3] In *Lutheran Heritage Village-Livonia*,[4] the Board set forth an analytical framework for determining whether an employer rule or policy would reasonably tend to chill Section 7 activity. Under the *Lutheran Heritage* framework, the Board first considers whether an employer's rule "*explicitly* restricts activities protected by Section 7." Id. at 646 (emphasis in original). "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (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." Id. at 647.

In the 13 years since it was adopted, the *Lutheran Heritage* standard has been upheld by every court to consider the matter.[5] Furthermore, no party in this case has asked the Board to overrule *Lutheran Heritage* or to apply a different standard.

The majority's rationale for overruling *Lutheran Heritage* crumbles under the weight of even casual scrutiny. Its assertion that *Lutheran Heritage* "does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions" (majority's emphasis) is demonstrably false,[6] as is its assertion that *Lutheran Heritage* has not been well-received by the courts.[7] The majority also disingenuously claims that the Board "has struggled when attempting to apply *Lutheran Heritage*" and that "Board members have regularly disagreed" regarding the legality of challenged rules. It fails to acknowledge, however, that most of the dissents are attributable to Chairman Miscimarra's personal disagreement with the test or the manner in which it has been applied.[8] Once the majority's melodramatic flourishes and mischaracterizations are stripped away, what remains is a stratagem to greatly increase protection for employer interests to the detriment of employee Section 7 rights.[9]

---

[3] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999); see also *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374–380 (D.C. Cir. 2007) (explaining and applying *Lafayette Park's* "mere maintenance" policy).

[4] 343 NLRB 646 (2004).

[5] *G4S Secure Solutions Inc. v. NLRB*, --- Fed. Appx. ----, 2017 WL 3822921, fn. 2 (11th Cir. 2017) (mem); *Midwest Division-MMC, LLC v. NLRB*, 867 F.3d 1288, 1302 (D.C. Cir. 2017); *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 270 (5th Cir. 2017); *Mercedes-Benz U.S. International, Inc. v. International Union, UAW*, 838 F.3d 1128, 1139 (11th Cir. 2016); *Care One at Madison Avenue, LLC v. NLRB*, 832 F.3d 351, 362 (D.C. Cir. 2016); *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 545 (D.C. Cir. 2016); *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 568 (1st Cir. 2016); *Three D, LLC v. NLRB*, 629 Fed. Appx. 33, 38 (2nd Cir. 2015) (mem); *World Color (U.S.A.) Corp. v. NLRB*, 776 F.3d 17, 20 (D.C. Cir. 2015) (approving standard but finding that it was misapplied); *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208–209 (5th Cir. 2014); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 318 (5th Cir. 2013) (approving standard but finding that it was misapplied); *NLRB v. Northeastern Land Services, Ltd.*, 645 F.3d 475, 482 (1st Cir. 2011); *Auto Workers v. NLRB*, 520 F.3d 192, 197 (2nd Cir. 2008); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007); *Guardsmark, LLC v. NLRB*, supra, 475 F.3d at 374-376.

[6] In *Lutheran Heritage* itself, the majority upheld work rules prohibiting "abusive or profane language," "harassment," and "verbal, mental and physical abuse," because they clearly served "legitimate business purposes." 343 NLRB at 646–647. The majority therefore concluded that "reasonable employees would infer that the [r]espondent's purpose in promulgating the challenged rules was to ensure a civil and decent workplace, not to restrict Section 7 activity." Id. at 648 (internal quotation marks omitted). Contrary to the majority's portrayal, the crux of my disagreement with the new standard is not that it requires the Board to consider the justifications associated with a challenged rule (the Board has routinely done so in rules cases), but that it requires the Board to apply a poorly constructed test with numerous amorphous factors, and the review is not undertaken from the appropriate perspective, i.e., from the perspective of the employees who are expected to abide by the rules.

[7] See fn. 5, supra.

[8] I find it presumptuous that the majority faults the dissent for not previously inviting briefing on the "problems" with *Lutheran-Heritage*—notwithstanding that courts have adopted it and parties have not sought to reverse it –simply because then-Member Miscimarra concocted a different analysis in his dissent in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016). The *William Beaumont* majority comprehensively addressed his dissent, and pointed out the obvious flaws in the alternative standard he proposed (id., slip op. at 2-6). It is no surprise, then, that the majority's analysis in this case -- which is erected on the flawed foundation of that dissent -- has produced an equally flawed standard.

[9] Taking a page out of a familiar playbook, the majority seeks to leverage a hyped-up fear of terrorism and a host of other conjured-up horribles to chip away at fundamental employee rights. I find particularly repellent the majority's unfounded suggestion that the Board's protection of Sec. 7 rights has left employees more vulnerable to sexual harassment and assault. This crude attempt to link *Lutheran Heritage* to sexual harassment and assault—for no discernible reason other than to appeal to emotion and fear—represents a new low in advocating for a position. There has never been - and I cannot even imagine—a case in which the Board would strike down a rule prohibiting sexual harassment, assault, or other workplace violence on the grounds that it interferes with the exercise of Sec. 7 rights. The majority's professed

Further, in upending the clear analytical framework in *Lutheran Heritage,* the majority announces a sweeping new standard for evaluating facially neutral work rules that goes far beyond the issues presented in this case. Moreover, it does so without seeking public input, and without even allowing the parties in this and other pending rules cases to be heard on whether the new standard is appropriate. Parties to this and the numerous pending cases are also denied the opportunity to introduce evidence on the application of the majority's new standard.[10]

I agree with my dissenting colleague, Member McFerran, that the majority's new standard lacks a rational basis and is inconsistent with the Act. I also agree with her that, before the Board abandons or modifies a decade old standard, without prompting by adverse court precedent or any party to this case, it should notify the public and the parties that a reversal of important precedent is under consideration, solicit the informed views of affected stakeholders in industry and labor, and allow the parties to introduce evidence under the new standard.[11]

That the new Board members eschewed a full and fair consideration of the issue is particularly troubling, given their representations in the confirmation process that they would approach issues with an open mind. The majority's rush to impose its ill-conceived test and its disregard for public input are revealed by its statement that it should not be bound by "fruitless marathon discussions" of the relevant legal principles and considerations.[12] Is

concern for the safety and well-being of employees-- to justify weakening fundamental employee protections -- is offensive and disrespectful to the victims of sexual harassment, assault, and other workplace violence.

Chairman Miscimarra's concern over workplace harassment rings rather hollow in light of his repeated efforts to undermine NLRA and other statutory protections for its victims. See, e.g., *G4S Secure Solutions(USA)*, 364 NLRB No. 92, slip op. at 17–20 (2016) (then Member Miscimarra, dissenting from the majority's finding that employer violated Sec. 8(a)(1) by discharging employee for her protected concerted complaint of sexual harassment); *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 161–172 (2014) (then Member Miscimarra, dissenting from majority's decision to overrule *Holling Press, Inc.*, 343 NLRB 301 (2004), and extend Sec. 7 protection to an employee who solicited the assistance of her coworkers in raising a complaint of sexual harassment to management, by asking them to sign a statement as witnesses). See also then-Member Miscimarra's dissenting opinion in *Murphy Oil*, which he has subsequently reiterated in numerous Board decisions. *Murphy Oil USA, Inc.*, 361 NLRB 774, 795–807 (2014) (finding employer violated Sec. 8(a)(1) by maintaining mandatory arbitration agreement that employees would reasonably read to restrict their Sec. 7 right to pursue class or collective claims, including claims of sexual harassment and discrimination, in all forums), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). Chairman Miscimarra would deny employees the right to stand together for "mutual aid and protection" when seeking to confront sexual harassment and other violations of workers' rights. Even when there is a clear pattern of harassment or discrimination, Chairman Miscimarra would allow the employer to require each employee to pursue their claim individually in a private arbitration proceeding, making it almost impossible for employees to obtain effective representation and allowing employers to avoid the risk of significant financial penalties that might serve as a deterrent to future violations.

[10] The majority erroneously relies on *Dish Network Corp.*, 359 NLRB 311, 311–312 (2012), a case that was invalidated by the Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), for the proposition that the Board has the power to overrule precedent *sua sponte*. In any event, that invalidated decision provides no cover. In *Dish Network*, the charging party expressly requested that the Board overrule existing precedent, but it failed to raise the issue until its reply brief. Id. at 311. Moreover, although the Board in *Dish Network* mused in dicta that it had the power to overrule precedent even though the issue was first raised in a reply brief, it wisely chose not to, and it emphasized that the cases in which the Board does so "should continue to be the exception." Id. at 311 fn. 3. It also acknowledged that overruling precedent in such circumstances could raise due process concerns which "could be easily addressed by requesting supplemental briefing: i.e., providing the party or parties an opportunity to be heard on the specific point in question," citing *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 San Diego L. Rev. 1253 (2002). 359 NLRB at 313 fn. 12. It bears repeating that no party has ever requested that the Board overrule *Lutheran Heritage* in this case. Moreover, the majority has refused to provide the parties an opportunity to be heard on the application of its new standard, thus depriving them of due process.

[11] Indeed, I expressly voted to issue a notice and invitation to the parties and the public to file briefs that would assist the Board in reaching an informed decision in this case.

[12] In place of informed decision making and mature and fair consideration of the issues, the majority claims it is primed to reverse 13-year precedent, uniformly adopted by courts that have reviewed it, because it has "evaluated many Board and court decisions," including "numerous Board decisions applying *Lutheran Heritage*." Given the sheer volume of the Board and court cases, the very short tenure of the newly constituted majority, and the plethora of decisions it is overruling in short order, I can only marvel that the majority was able to undertake such a comprehensive review.

Indeed, the majority's persistent mischaracterization of the Board's decisions applying *Lutheran Heritage* casts doubt upon the efficacy of its review. The majority claims, for example, to have identified "at least 31 cases in which the Board has applied the 'reasonably construe' standard without treating the challenged rule's justifications as a factor favoring its lawful maintenance." See cases cited in the majority opinion at fn. 69. The majority's review of the cited cases was either embarrassingly careless or intentionally myopic. Contrary to the majority, in several of the cited cases, the Board found that challenged rules were lawfully maintained because they were narrowly tailored to serve legitimate business justifications. For a sample of such cases, see *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 1 fn. 3 and 2 fn. 5 (2017) (Board found employer lawfully maintained rule prohibiting use of email system to transmit "offensive" or "harassing" content and "chain letters" "because employees would not reasonably read those terms. . . to encompass protected communications"; Board also found employer lawfully maintained privacy rule that "specifically lists the type of confidential information covered to include social security numbers, identification numbers, passwords, bank account information, and medical information," because the rule was narrowly tailored and would not reasonably be read to encompass protected activity); *William Beaumont*, supra, 363 NLRB No. 162, slip op. at 1, 2, 4, 32–33 (Board found employer lawfully maintained rules prohibiting employees from, among other things: making willful and intentional

the majority convinced that the parties and the public have nothing to offer or is it afraid that it might learn that its emperor of a test has no clothes?

threats and engaging in intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors; using profane and abusive language directed at employees, physicians, patients or visitors; engaging in behavior that is rude, condescending or otherwise socially unacceptable; and engaging in behavior that is disruptive to maintaining a safe and healing environment: the Board aptly explained that when the Board upholds a challenged rule "it is typically because the rule is tailored such that the employer's legitimate business interest in maintaining the rule will be sufficiently apparent to a reasonable employee").

In many of the other cases cited by the majority, the Board and/or the administrative law judge considered the proffered business justifications, but found that they were not substantial and legitimate or would not be sufficiently apparent to a reasonable employee, or that the rule was not appropriately tailored to protect the employer's legitimate interests without unnecessarily chilling Sec. 7 rights. See, e.g., *Verizon Wireless*, supra, 365 NLRB No. 38, slip op. at 1 (Board recognized that "employers have a substantial and legitimate interest in maintaining the privacy of certain business information," but found that rule was not tailored to employer's legitimate interests and was so broadly worded that employees would reasonably interpret it to prohibit any discussion of terms and conditions of employment); *T-Mobile USA*, 363 NLRB No. 171, slip op. at 4 (2016) (Board considered employer's assertion that recording ban was justified by, among other things, its interest in maintaining employee privacy and promoting open communication, but found that the rule was not "narrowly tailored to protect legitimate employer interests or to reasonably exclude Section 7 activity"), enfd. in relevant part 865 F.3d at 274–275; *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 8 (2015) (judge, affirmed by the Board, considered employer's argument that confidentiality agreement was promulgated to comply with HIPAA, but found that "[t]he laundry list of items deemed to be 'confidential information'. . . broadens the rule beyond the scope of HIPAA under any reasonable reading"); *Purple Communications, Inc.*, 361 NLRB 575, 583 (2014) (judge, affirmed by the Board, found rule prohibiting "disruption of any kind" unlawful, notwithstanding employer's argument that it was entitled to prevent disruptions during working time, because rule was not limited to working time and would reasonably be interpreted to restrict Sec. 7 activity); *Flex Frac Logistics*, 358 NLRB 1131, 1131 (2012) (finding broadly worded confidentiality rule unlawful because employer never asserted that it had a legitimate business interest in prohibiting discussion of wages or other terms and conditions of employment); *Heartland Catfish Co.*, 358 NLRB 1117, 1124 (2012) (considering employer's argument that safety considerations justified prohibition on leaving workstation without permission).

In some of the cited cases, the challenged rules were so clearly overbroad that even then-Member Miscimarra had no difficulty finding them unlawful without considering the employer's business justification. See, e.g., *Sheraton Anchorage*, 362 NLRB No. 123 (2015) (rule against behavior that violates common decency or morality or publicly embarrasses employer); *Lily Transportation Corp., 362 NLRB No. 54 (2015) (rule restricting employees from posting any information about employer on the internet)*; *MCPc, Inc.*, 360 NLRB 216, 216 fn. 4 (2014) (rule prohibiting dissemination of "personal or financial information"). The majority also cites *Laurus Technical Institute*, 360 NLRB 1155 (2014), but the Board in that case had no occasion to consider the justifications associated with the challenged rule, because no exceptions were filed to the judge's finding that the rule was unlawful. Id. at 1155 fn. 1.

I

With no public input, and so little time for reasoned decision making, it is presumptuous of the newly-constituted majority to believe – when stating that "the Board can and should do better in this area, and employees, unions, and employers deserve better" – that they have achieved this result. Indeed, the majority's new standard is an obviously flawed conceptual framework that fails to provide critical guidance to the Board, employers, unions and employees.

The new standard is an incomprehensible hodgepodge of factors that will be impossible to apply. In addition to the actual text of challenged rules, the Board, employers who implement rules, and workers who interpret them, must also consider seven vague factors and then three dubious categories in order to determine the lawfulness of rules.[13] Contrary to the majority, the fact that its test

[13] Among the factors that must be considered in order to determine the legality of work rules, the majority would require the Board, employers, workers, and unions to "differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)"; to "recognize those instances where the risk of intruding on NLRA rights is 'comparatively slight'"; to "distinguish between substantial justifications . . . and others that might be regarded as having more peripheral importance"; and to strike the proper balance between the asserted business justifications and the potential invasion of employee rights. In support of these criteria, the majority cites *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). The Board has never applied the *Great Dane* and *Erie Resistor* framework in the context of rules cases, and for good reason. In *Great Dane* and *Erie Resistor*, the Supreme Court provided an analytical model for resolving cases that turn on employer motivation, in which the conduct appears to be discriminatory on its face. In *Great Dane*, the Court explained that there are two categories of facially discriminatory conduct which, depending on the nature of their impact on employee rights, require a different analysis in assessing employer motivation. Under this framework, if an action is deemed inherently destructive of employee rights, improper motivation is inferred and the conduct may be found unlawful, whether or not the conduct was based on legitimate business considerations. However, if the action is deemed to have only a "comparatively slight" impact on employee rights, an affirmative showing of improper motive must be made to sustain a violation, if the employer has come forward with evidence of a legitimate and substantial business justification. 388 U.S. at 34. In *Erie Resistor*, the Court explained that an employer's proffer of legitimate business reasons for inherently destructive conduct "present[s] a complex of motives and preferring one motive to another is in reality the far more delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner . . . ." 373 U.S. at 228–229. The majority's application of this analytical model conflicts with the settled principle that, in rules cases, as in 8(a)(1) cases generally, interference, restraint, and coercion does not turn on the employer's motive. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act, regardless of whether that was the intent of the employer.

has more moving parts than *Lutheran Heritage* does not make it clearer; it is just the opposite.[14]

Ironically, although the majority criticizes the *Lutheran Heritage* standard for producing conflicting outcomes (based on the majority's purely textual analysis of rules it has taken out of context), the new standard, with its multitude of variables, will yield far less predictable and more inconsistent results. Indeed, it will inevitably result in similar or even identical rules being found lawful in some circumstances and unlawful in others.[15]

As Member McFerran points out in her dissent, the uncertainty and unpredictability inherent in the new standard is not cured by the majority's dubious system of categorizing rules as always lawful, sometimes lawful, and always unlawful. Although stating that this is an area where the Board has a special responsibility to give parties certainty and clarity, the majority's abstruse standard will make it substantially more difficult for employers to anticipate conflict with NLRA policies when drafting new rules, and will produce burdensome and wasteful litigation.

II

I find particularly troubling the majority's designation of rules "requiring employees to abide by basic standards of civility" as always lawful to maintain (Category 1). First, no civility rules are involved in this case. By declaring civility rules always lawful, the majority goes far beyond the issue presented in this case and essentially provides an advisory opinion. The absence of any factual context or evidentiary record – not to mention argument from parties on both sides of the issue - renders its conclusion wholly abstract. It is well established that the Board does not give advisory opinions except on narrow jurisdictional questions.[16] This is no more than "seat-of-the-pants" rulemaking without context.

Second, since early in the history of the Act, the Board and courts have interpreted Section 7 as protecting the right of employees to engage in robust debate, to complain to their employer and fellow employees, and to criticize their employer to government agencies and the public.[17] Section 7 protection is not dependent on whether these activities are carried out in a courteous or civil manner. In other contexts, the Board and courts have repeatedly held that negative, disparaging, disrespectful, intemperate, and vulgar remarks uttered during the course of protected activities will not remove the activities from the Act's protection unless they are flagrant, violent, or extreme.[18]

Our experience demonstrates, moreover, that the fear of reprisal that is instilled in employees by overbroad "civility rules" is well-founded.[19] The cases in which

[14] With due respect to the majority, the component parts of its new standard are not "common-sense guidelines," but a grab bag of arcane factors. Indeed, the majority protests that Member McFerran and I have misunderstood their new standard. But if knowledgeable Board members cannot divine the majority's standard, what hope is there for employers, much less the employees at whom the rules are aimed?

[15] To use the majority's hypothetical, under its standard, if an employer operates a coal mine where fatal mine collapses have occurred as the result of loud talking, and the employer has adopted a rule prohibiting loud talking in the mine, such a rule would be lawful to maintain because it has a significant justification pertaining to workplace safety, and the rule's maintenance is also supported by the nature of the business (operating a coal mine) and recent events (past fatal mine collapses resulting from loud talking). The same rule, however, would presumably be unlawful to maintain in the parking lot or administrative offices of the same mine where the business justification is absent, in a mine where there was no history of mine collapses, or in a different industry.

[16] See Sec. 102.98 and 102.99 of the Board's Rules and Regulations. See also *ITT Job Training Services, Inc.*, 297 NLRB 259, 259-260 (1989); *James M. Casida*, 152 NLRB 526 (1965); *Broward County Port Authority*, 144 NLRB 1539 (1963).

[17] See *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 58–61 (1966), observing:

> Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language . . . .
>
> * * *
>
> We note that the Board has given frequent consideration to the type of statements circulating during labor controversies, and that it has allowed wide latitude to the competing parties. . . . .
>
> * * *
>
> [T]he Board tolerates intemperate, abusive and inaccurate statements . . . . .

[18] See *USPS*, 364 NLRB No. 62, slip op. at 1-4 (2016) (finding that employer unlawfully discharged union steward who engaged in heated discussion, peppered with profanity, during presentation of grievance); *Hawaii Tribune-Herald*, 356 NLRB 661, 680 (2011) ("The Board has repeatedly held that strong, profane, and foul language, or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity.") (collecting cases), enfd. 677 F.3d 1241 (D.C. Cir. 2012); accord *Noble Metal Processing, Inc.*, 346 NLRB 795, 799 (2006); *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998) (union solicitations "do not lose their protection simply because a solicited employee rejects them and feels 'bothered' or 'harassed' or 'abused' when fellow workers seek to persuade him or her about the benefits of unionization"); *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991) ("a certain amount of salty language and defiance" is to be expected and "must be tolerated" in disputes over employees' terms and conditions of employment), enfd. mem. 953 F.2d 1384 (6th Cir. 1992).

[19] The majority's assurance that, although the maintenance of overly broad and ambiguous civility rules will be lawful, the application of such rules to punish NLRA-protected conduct may violate the Act, badly misses the point. The proper role of the Board is to "prevent[] employees from being chilled in the exercise of their Section 7 rights

employers have applied such rules to discipline or discharge employees for engaging in protected concerted activity are numerous.[20] These cases confirm the tendency of employers to interpret overbroad and ambiguous civility rules to prohibit conduct that is clearly protected under the Act. In holding unlawful the promulgation and maintenance of such rules, therefore, the Board not only eliminates a clear restraint on Section 7 activity, it also discourages a second, independent violation – enforcement of such rules to punish employees for engaging in protected concerted activity.[21]

III

There are other serious problems with the majority's standard. To begin, in rules cases, as in 8(a)(1) cases generally, "interference, restraint, and coercion . . . does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."[22] As explained by the Court of Appeals for the District of Columbia Circuit, "That objective inquiry serves an important prophylactic function: it allows the Board to block rules that might chill the exercise of employees' rights by cowing the employees into inaction, rather than forcing the Board to 'wait[ ] until that chill is manifest,' and then try to 'undertake the difficult task of dispelling it.'"[23]

It follows that, in order to determine the legality of a challenged rule, the rule must be interpreted from the employees' perspective. Although the majority pays lip service to this principle, it ignores it in practice. Under the majority's standard, the legality of a rule turns on a balance of myriad factors that employees could not reasonably be expected to comprehend, including distinctions between different types of protected activities; the risk that the rule will intrude on Section 7 rights; distinctions between justifications that have direct, immediate relevance and those that are peripheral; and specific events and other evidence associated with a rule, regardless of whether they are known to employees. Additionally, the majority emphasizes "that *the Board* will conduct this evaluation" (majority's emphasis). But the question is not whether the Board thinks a challenged rule restricts Section 7 rights; the question is whether a reasonable employee would think that it does. The rule is there to be read by the employees, and thus "what counts is the knowledge and understanding of a reasonable employee."[24]

As the Board explained in *Whole Foods Market*, 363 NLRB No. 87, slip op. at 4, fn. 11 (2015):

> Where reasonable employees are uncertain as to whether a rule restricts activity protected under the Act, that rule can have a chilling effect on employees' willingness to engage in protected activity. Employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Sec. 7 activity for fear of running afoul of a rule whose coverage is unclear.[25]

. . . instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it." *Flex Frac Logistics*, supra, 358 NLRB at 1132.

[20] See e.g. *Component Bar Products, Inc.*, 364 NLRB No. 140, slip op. at 1 fn. 1 (2016) (citing overly broad rule prohibiting "insubordination or other disrespectful conduct," employer unlawfully discharged employee for calling coworker and warning him that his job was in danger); *Hitachi Capital America Corp.*, 361 NLRB 123, 123–125 (2014) (employer unlawfully enforced overly broad rule prohibiting "inappropriate conduct" against employee for sending concerted, protected email protesting employer's inclement weather policy); *Laurus Technical Institute*, supra, 360 NLRB at 1162–1164 (citing overly broad no-gossip policy, employer unlawfully discharged employee for protected concerted conversations regarding terms and conditions of employment); *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 and 1706 (2011) (citing overly broad rule prohibiting "[a]ny type of negative energy or attitudes," employer unlawfully threatened to suspend employees for protected concerted conversations regarding terms and conditions of employment).

[21] It is no wonder that the majority significantly underestimates the coercive impact of overly broad and ambiguous rules, given its restrictive understanding of concerted activity. The majority asserts that "the Act only protects concerted activities that two or more employees engage in for the purpose of mutual aid or protection." That is clearly wrong and would significantly narrow the scope of concerted activity. See *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 830 (1984) (single employee asserting a right may constitute concerted activity even without prior discussion with other employees); *Meyers Industries*, 281 NLRB 882, 887 (1986) (concerted activity includes not only activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management), enfd. sub nom. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); *Fresh & Easy Neighborhood Market*, supra, 361 NLRB at 153 ("the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much concerted activity as is ordinary group activity") (citation and internal quotation marks omitted).

[22] *American Freightways Co.*, 124 NLRB 146, 147 (1959).

[23] *Quicken Loans*, supra, 830 F.3d at 549 (citing *Flex Frac Logistics*, supra, 358 NLRB at 1132).

[24] *Auto Workers*, supra, 520 F.3d at 197.

[25] It is this natural tendency of employees to steer clear of any conduct that might violate a work rule in order to avoid jeopardizing their employment that supplies the rationale for the long-standing and judicially approved principle that any ambiguity in a rule must be construed against the employer as the drafter of the rule. See *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 3 (2016) "([E]mployees should not have to decide at their peril what activities a rule prohibits. . . . Faced with . . . ambiguity, and fearing potential discipline, employees would reasonably err on the side of caution and refrain from exercising their Section 7 right." (citations omitted)); *Lafayette Park*, supra, 326

This is the very essence of the problem that the *Lutheran Heritage* standard was intended to prevent. The majority's wrongheaded approach shifts the focus away from the employees' perspective and, in doing so, diminishes the Act's proactive role in safeguarding Section 7 rights, a result that Congress could not have intended.

Finally, although the majority writes at great length about the importance of considering an employer's legitimate business interests in determining the legality of a challenged rule, it ignores an important corollary: an employer's interests, even if legitimate, will not excuse interference with Section 7 rights if "[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient" to accomplish the employer's goals. *Cintas Corp.*, supra, 482 F.3d at 470. Contrary to the majority's claim, in applying the *Lutheran Heritage* standard to determine whether employees would reasonably construe a rule to restrict Section 7 activity, the Board has routinely considered legitimate employer interests associated with the rule. However, in order to protect the rights of employees guaranteed by Section 7, the Board and courts have required employers to show that a challenged rule is narrowly tailored to serve its legitimate interests. See *Guardsmark*, supra, 475 F.3d at 380 (an employer "ha[s] an obligation to demonstrate its inability to achieve [its] goal with a more narrowly tailored rule that would not interfere with protected activity"). See also *Quicken Loans*, supra, 830 F.3d at 549 (employer's legitimate interest in protecting *some* of the information covered by its confidentiality rule "does nothing to legitimate the blunderbuss sweep" of the rule). By casting aside this requirement, the majority allows employers to maintain overly broad rules that chill the exercise of NLRA-protected activities, even when it does not serve a substantial and legitimate employer interest.[26] Such a standard cannot be reconciled with the Board's statutory mandate.[27]

Because the majority's new standard is based on an unreasonable and indefensible interpretation of Section 8(a)(1)'s prohibition, I dissent.

Dated, Washington, D.C. December 14, 2017

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.[1]

The Board's approach to employer work rules is worth getting right. Those rules are virtually everywhere, and they surely affect nearly every employee and employer covered by the National Labor Relations Act. For more than 13 years, the Board has applied the analytical framework adopted in *Lutheran Heritage*[2] for assessing whether challenged work rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Even though no court has ever rejected this test, despite many opportunities, it is not surprising that a newly-constituted majority is nonetheless revisiting precedent. What *is* surprising is the arbitrary and capricious process the majority has followed in its rush to replace the current test and the alarmingly flawed result of that process.

NLRB at 828 ("any ambiguity in [a] rule must be construed against the [employer] as the promulgator of the rule"), enfd. 203 F.3d 52; *Advance Transportation Co.*, 310 NLRB 920, 925 (1993) (finding rule barring "intimidation, distraction, or disruption of another employee" unlawful because it is ambiguous and over broad "thereby fortifying [r]espondent with power to define its terms and inhibit employees in exercising rights under Section 7 of the Act"); *Marlene Industries Corp.*, 166 NLRB 703, 704 (1967) (same), enfd. in relevant part 406 F.2d 886 (6th Cir. 1969). See also *Quicken Loans*, supra, 830 F.3d at 550 (employer cannot "compel employees to hazard potentially career-imperiling guesses about whether the Employment Agreement—that [the employer] unilaterally drafted and required them to sign—means what it says and says what it means"); *NLRB* v. *Miller-Charles and Company*, 341 F.2d 870, 874 (2d Cir. 1965) ("The true meaning of the rule might be the subject of grammatical controversy. However, the employees of respondent are not grammarians. The rule is at best ambiguous and the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it."). To the extent the majority implies that I have rejected this principle, they have mischaracterized my position.

[26] Indeed, so much does the majority's test skew in favor of employer interests, the most the majority can offer is that its standard will not necessarily subordinate the fundamental right of employees to employer interests. Clearly that is at odds with the Agency's obligation to safeguard Sec. 7 rights.

[27] Applying the *Lutheran Heritage* standard, I would find that Boeing failed to meet its burden of establishing that its "no camera" rule – which encompasses any and all photography on Boeing premises at any time without permission -- is tailored to its legitimate interest in protecting classified, export-controlled, and proprietary information. I would therefore find that Boeing violated Sec. 8(a)(1) by promulgating and maintaining the rule. See *T-Mobile USA*, supra, 865 F.3d at 275 (finding that rule prohibiting all photography or recording on corporate premises at any time without permission from a supervisor was unlawfully over broad because it "plainly forbid[s] a means of engaging in protected activity"). See also *Flagstaff Memorial Hospital*, 357 NLRB 659, 670 (2011), where I dissented in relevant part from the majority's holding lawful a rule prohibiting "the use of cameras for recording images of patients *and/or hospital equipment, property, or facilities*" (emphasis added), because, in my view, employees would reasonably believe that the rule prohibited protected activity, and its stated prohibition extended beyond Flagstaff's legitimate interest in protecting patient privacy.

[1] I agree with the majority in adopting the judge's decision that Boeing violated Sec. 8(a)(1) of the Act by engaging in surveillance and creating the impression of surveillance.

[2] *Lutheran Heritage Village –Livonia*, 343 NLRB 646 (2004).

No party and no participant in this case—which involves a single, no-photography rule—has asked the Board to overrule *Lutheran Heritage*.[3] Nor has the Board asked anyone whether it should. Over the minority's objection, the Board majority has refused to notify the public that it was contemplating a break with established precedent. It has refused to invite amicus briefing from interested persons, even though this has become the Board's wise norm in the years following *Lutheran Heritage*. Without the benefit of briefs from the parties or the public, the majority invents a comprehensive new approach to work rules that goes far beyond any issue presented in this case and, indeed, beyond the scope of *Lutheran Heritage* itself. This is secret rulemaking in the guise of adjudication, an abuse of the administrative process that leaves Board law not better, but demonstrably worse: The majority has devised a new test that is more complicated, more unpredictable, and much less protective of the statutory rights of employees than the standard it replaces. Indeed, it simply fails to address the labor-law problem before the Board: that employees may be chilled from exercising their statutory rights by overbroad employer rules.

I.

This case involves a facial challenge to a single employer policy restricting the use of camera-enabled devices on Boeing's property. Applying the test established in *Lutheran Heritage*, the administrative law judge found the policy unlawful, concluding that although the policy did not explicitly restrict activity protected by Section 7 of the Act, "employees would reasonably construe the language [of the policy] to prohibit Section 7 activity." 343 NLRB at 647.[4] As I will explain (see Part III, below), the judge correctly held that Boeing's rule was unlawfully overbroad under the controlling test. In short, Boeing's rule is closer to the no-photography and/or no-recording rules that the Board has struck down than it is to the rule that the Board has upheld. Of course, Boeing and amicus National Association of Manufacturers disagree on the correct result here under *Lutheran Heritage* and the Board's relevant precedent applying that standard. But what no party to this case has argued is that the Board should or must reverse *Lutheran Heritage* and apply some new test. The majority overrules precedent entirely on its own initiative. That step is suspect – as is the process followed by the majority.

The Board is certainly not responding to the invitation or the order of a federal appellate court. No court has rejected the *Lutheran Heritage* test in the 13 years since it was decided. Then-Member Miscimarra's dissenting observation in an earlier case was misplaced there, but apt here: "It is simply impossible that all the courts of appeals would have missed [the] train wreck" that *Lutheran Heritage* supposedly amounts to.[5]

Indeed, the courts have applied *Lutheran Heritage* themselves, even striking down certain employer rules that had been *upheld* by the Board.[6] The District of Columbia Circuit has endorsed the Board's "focus[] on the text of the challenged rule,"[7] explaining that the Board is entitled to judicial deference in its interpretation of Section 8(a)(1) when it "faithfully applies [its] standard, and adequately explains the basis for its conclusion."[8] The First Circuit, meanwhile, has explicitly rejected the basic claim of the majority here, that the Board is compelled by the Act to adopt a balancing test giving greater weight to employer business interests.[9] And the Eleventh Circuit, too, has rejected the argument that *Lutheran Herit-*

[3] Like the majority, I use the term "*Lutheran Heritage*" to refer to rules alleged to be unlawful because "employees would reasonably construe the language to prohibit Section 7 activity." Id. at 647.

[4] Sec. 7 of the Act provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157.

"Employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015). Accordingly, the Board has found some no-photography and/or no-recording rules unlawful under *Lutheran Heritage*—with judicial approval in two Circuits. *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 3–5 (2016), enfd. in relevant part 865 F.3d 265 (5th Cir. 2017); *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3 & fns. 7–9 (2015), enfd. mem. 691 F. Appx. 49 (2d Cir. 2017). It has also upheld such a rule maintained by a hospital, again with judicial approval. *Flagstaff Medical Center*, 357 NLRB 659, 662–663 (2011), enfd. in relevant part 715 F.3d 928 (D.C. Cir. 2013).

[5] *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 35 (2015) (Members Miscimarra and Johnson, dissenting).

[6] See, e.g., *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209–210 (5th Cir. 2014) (enforcing Board's finding that rule was unlawful); *International Union, UAW v. NLRB*, 520 F.3d 192, 197 (2d Cir. 2008) (reversing Board's finding that rule was lawful); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007) (enforcing Board's finding that rule was unlawful); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 378-380 (D.C. Cir. 2007) (reversing Board's finding that rule was lawful).

[7] *Guardsmark*, supra, 475 F.3d at 374.

[8] Id. (quoting *Adtranz ABB Daimler-Benz Transp. V. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001)).

[9] *NLRB v. Northeastern Land Services, Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011). The First Circuit explained that "[n]othing in *Republic Aviation* [*Corp. v.* NLRB, 324 U.S. 793 (1945)] compel[s] the Board to apply a balancing test" in cases like this one and that "[w]hile the Board could have chosen to structure its rule differently and engage in a balancing analysis, [the courts] owe[] deference to its decision not to do so."

age is not a reasonable construction of the National Labor Relations Act.[10]

It is not the case, in turn, that the Board has somehow failed to consider and address criticisms of *Lutheran Heritage*. Only last year, the Board carefully explained why the dissenting view of then-Member Miscimarra was unpersuasive. *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 3–6 (2016). Today's majority opinion is based on that dissent, with all of its demonstrated flaws. I continue to agree with the majority's opinion in *William Beaumont*. I am no more persuaded by this majority now than by Member Miscimarra's dissent then.[11]

Of course, the Board has a new majority.[12] But the change in the composition of the Board is not a reason for us to revisit our earlier decisions—as the Board itself has held, repeatedly, since the mid-1950's.[13]

Just as troubling as the majority's decision to reverse precedent sua sponte is the manner in which it has proceeded to that result. In an unexplained and unwarranted break with the Board's practice of the last several years, the majority has refused to notify the public and the parties that a reversal of *Lutheran Heritage* was under consideration and has refused to solicit briefs from the parties and the public.[14] This is particularly ironic for two reasons: (1) because the Board, only weeks ago, for the first time adopted a rule codifying its practice of accepting, and on appropriate occasions inviting, amicus briefs;[15] and (2) because *Lutheran Heritage*, which the majority excoriates, was itself decided without inviting briefs – a cautionary example that should have given the majority pause.

Since at least the 1950's, the Board has solicited briefing in some major cases.[16] In the last decade, this has become the Board's routine practice in significant cases, particularly those where the Board is contemplating reversal of longstanding precedent.[17] Cases that involve

[10] *G4S Secure Solutions, Inc. v. NLRB*, ___ Fed. Appx. ___, 2017 WESTLAW 3822921 at *2 fn. 2 (11th Cir. Sept. 1, 2017), citing *Mercedes-Benz U.S. Int'l, Inc. v. Int'l Union, UAW*, 838 F.3d 1128, 1135, 1138–1139 (11th Cir. 2016).

[11] It is particularly disappointing to see today's majority reiterate then-Member Miscimarra's canard in *William Beaumont* that either the Board's approach to work rules generally, or its holding with respect to the rule at issue there, had any connection whatsoever to the death of a baby at the hospital involved. The *William Beaumont* Board dismantled the insinuation there, see, supra, 363 NLRB No. 162, slip op. at 3, and its repetition here is regrettable.

[12] Indeed, for two members of the majority who have just joined the Board (Member Kaplan was sworn in August 10, 2017, and Member Emanuel, September 26, 2017), this case is the first matter involving employer rules they have ever considered.

[13] See *Brown & Root Power & Mfg. Inc.*, 2014 WL 4302554 (Aug. 29, 2014); *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074, 1074 (2003) (full Board), citing *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1237, 1239 (1954).

[14] I requested that the Board issue a notice and invitation to file briefs. Member Pearce and I voted to approve that request. The notice and invitation was not issued because a majority of the Board did not approve the request.

[15] Board's Rules & Regulations Sec. 102.46(i); see also 82 Fed. Reg. 43695 (Sept. 19, 2017).

[16] See, e.g., *Keystone Coat, Apron & Towel Supply Company*, 121 NLRB 880, 881 fn. 1 (1958); *Hershey Chocolate Corporation*, 121 NLRB 901, 901 (1958).

[17] See, e.g., *Temple University Hospital, Inc.*, Case No. 04-RC-162716, Order Granting Review in Part and Invitation to File Briefs (filed Dec. 29, 2016), available at https://apps.nlrb.gov/link/document.aspx/09031d45822fb922 (whether the Board should exercise its discretion to decline jurisdiction over the employer); *Postal Service*, 364 NLRB No. 116 (2016) (whether the Board may continue to permit administrative law judges to issue a "consent order," incorporating the terms proposed by a respondent to settle an unfair labor practice case, to which no other party has agreed, over the objection of the General Counsel); *King Soopers, Inc.*, 364 NLRB No. 93 (2016) (whether the Board should revise its treatment of search-for-work and interim employment expenses as part of the make-whole remedy for unlawfully discharged employees), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017); *Columbia University*, 364 NLRB No. 90 (2016) (whether the Board should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), in which it held that graduate assistants who perform services at a university in connection with their studies are not statutory employees under the National Labor Relations Act); *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016) (whether the Board should adhere to its decision in *Oakwood Care Center*, 343 NLRB 659 (2004), which disallowed inclusion of solely employed employees and jointly employed employees in the same unit absent consent of the employers, and if not, whether the Board should return to the holding of *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which permits the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers); *Service Workers Local 1192 (Buckeye Florida Corp.)*, 362 NLRB No. 187 (2015) (whether the Board should reconsider its rule that, in the absence of a valid union-security clause, a union may not charge nonmembers a fee for processing grievances); *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (whether the Board should adhere to its existing joint employer standard or adopt a new standard); *Northwestern University*, 362 NLRB No. 167 (2015) (whether the Board should find grant-in-aid scholarship football players are employees under the NLRA); *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (whether the Board should adopt a rule that employees who are permitted to use their employer's email for work purposes have the right to use it for Sec. 7 activity, subject only to the need to maintain production and discipline); *Pacific Lutheran University*, 361 NLRB 1404 (2014) (whether a religiously-affiliated university is subject to the Board's jurisdiction, and whether certain university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managerial employees); *Latino Express, Inc.*, 361 NLRB 1171 (2014) (whether, in awarding backpay, the Board should routinely require the respondent to: 1) submit documentation to the Social Security Administration so that backpay is allocated to the appropriate calendar quarters, and 2) pay for any excess federal and state income taxes owed as a result of receiving a lump-sum payment); *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014) (whether the Board should change the standard for determining when the Board should defer to an arbitration award), rev. denied sub nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017); *New York University*, Case No. 02-RC-023481, Notice

the reconsideration of precedent mean not only determining the right result in a specific case, but also devising a general standard that is consistent with the Act and sound going forward.[18] While the Board may be expert in the National Labor Relations Act, employers, employees, and unions are expert in the effects of the Board's decisions in workplaces around the country.[19] It should be clear that the Board benefits from public input and that the public is interested in being heard. In response to invitations to file briefs, we have received briefs from (among others) employer groups, trade associations, international and local unions, law firms, academics, Congressmen and Senators, federal and state agencies, public interest groups, and individuals, as well as our own General Counsel.[20]

---

and Invitation to File Briefs (filed June 22, 2012), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3252/ntc_02-rc-23481_nyu_and_polytechnic_notice___invitation.pdf (whether graduate student assistants who perform services at a university in connection with their studies are or are not statutory employees within the meaning of Sec. 2(3) of the National Labor Relations Act); *Point Park University*, Case No. 06-RC-012276, Notice and Invitation to File Briefs (filed May 22, 2012), available at https://apps.nlrb.gov/link/document.aspx/09031d4580a0ee7d (whether university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managers); *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) (whether mandatory arbitration agreements that preclude employees from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial, violate the NLRA), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013); *Hawaii Tribune-Herald*, Case No. 37-CA-007043, Notice and Invitation to File Briefs (filed Mar. 2, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/stephensmediainvite.pdf (whether the Respondent had a duty to provide the Union with a statement provided to it by an employee or any other statements that it obtained in the course of its investigation of another employee's alleged misconduct); *Chicago Mathematics and Science Academy Charter School, Inc.*, Case No. 13-RM-001768, Notice and Invitation to File Briefs (filed Jan. 10, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/chicago_mathematics_brief.pdf (whether an Illinois charter school should fall under the jurisdiction of the NLRB or the Illinois Educational Labor Relations Board); *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (what constitutes an appropriate bargaining unit), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *Roundy's Inc.*, Case No. 30-CA-017185, Notice and Invitation to File Briefs (filed November 12, 2010), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/roundys_notice_and_invitation.pdf (what standard the Board should apply to define discrimination in cases alleging unlawful employer discrimination in nonemployee access); *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (what duties a successor employer has toward an incumbent union); *Lamons Gasket Co.*, 357 NLRB 739 (2011) (whether, and how long, employees and other unions should have to file for an election following an employer's voluntary recognition of a union); *J. Picini Flooring*, 356 NLRB 11 (2010) (whether Board-ordered remedial notices should be posted electronically and, if so, what legal standard should apply and at what stage of the proceedings any necessary factual showing should be required); *Kentucky River Medical Center*, 356 NLRB 6 (2010) (whether the Board should routinely order compound interest on backpay and other monetary awards in backpay cases and if so, what the standard period for compounding should be); *Long Island Head Start Child Development Services*, 354 NLRB No. 82 (2009) (two-member Board decision) (whether the Board should find contract termination based on bargaining even in the absence of any contractually-required notice); *Register Guard*, 351 NLRB 1110 (2007) (whether employees have a Sec. 7 right to use their employer's e-mail system to communicate with one another, what standard should govern that determination, and whether an employer violates the Act if it permits other nonwork-related e-mails but prohibits e-mails on Sec. 7 matters), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *Can-Am Plumbing, Inc.*, 350 NLRB 947 (2007) (whether the job targeting program at issue violated the Davis-Bacon Act), enfd. 340 Fed.Appx. 354 (9th Cir. 2009); *Dana Corp.*, 351 NLRB 434 (2007) (whether the Board should modify its recognition bar doctrine as articulated in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), *Smith's Food & Drug Centers.*, 320 NLRB 844 (1996), and *Seattle Mariners*, 335 NLRB 563 (2001)); *Alyeska Pipeline Service Co.*, 348 NLRB 808 (2006) (whether a systemwide presumption is warranted in the circumstances of the instant case); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) (seeking comment relating to (1) the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Sec. 2(11) of the Act; and (2) an appropriate test for determining unit placement of employees who take turns or "rotate" as supervisors), see also *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Golden Crest Heath Center*, 348 NLRB 727 (2006); *Firstline Transportation Security*, 347 NLRB 447 (2006) (whether the Board should assert jurisdiction over the employer, a private company contracting with the Transportation Security Administration).

[18] See, e.g., *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552, 560 (6th Cir. 2013) ("'An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.'"), quoting *State of Mich. v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986); see also Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163, 181 fn. 66 (1985) (advocating for rulemaking pursuant to public notice-and-comment procedures of the Administrative Procedures Act when overruling Board precedent over the Board's case-by-case adjudication, or, as an alternative measure, "reversal [of Board precedent] on a prospective-only basis and only after a proceeding involving oral argument and amici participation.").

[19] See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (finding that Board was not required to employ rulemaking before determining the issue of whether particular employees were managerial employees excluded under the Act's coverage, but noting that opportunity for public input during the rulemaking process "would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course."). Cf. Luther T. Munford, Essay, *When Does the Curiae Need An Amicus?*, 1 J.App. Prac. & Process 279, 281 (1999) ("Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." (internal citations omitted)).

[20] For example, in recent years the Board has received amicus briefs from the AFL–CIO, the American Staffing Association, Associated Builders and Contractors, the Chamber of Commerce of the United States of America, the American Hospital Association, the American Staffing Association, the Equal Employment Opportunity Commission, the Higher Education Council of the Employment Law Alliance, Mem-

In refusing to seek briefs, the Board has deprived itself of the benefits of public participation in agency policymaking. And it has done so arbitrarily. None of the cases cited by the majority diminishes the fact that inviting briefs has become an established Board norm – and the majority tellingly cites no recent case in which the Board refused to seek briefing over objections from a member.[21] There was no compelling reason not to issue a notice and invitation to file briefs here. True, seeking briefs would have delayed disposition of the case (as, of course, did the decision not to straightforwardly apply existing law, i.e., *Lutheran Heritage*). But there is no pressing deadline for issuing a decision here.

Today's decision—although it was reached entirely without public participation—looks very much like rulemaking, not adjudication. The Board majority does not decide the rules issue actually presented by the parties in this case—the legality of Boeing's no-photography policy under *Lutheran Heritage*—but instead adopts a comprehensive new approach to rules issues generally and even designates two particular *categories* of rules ("no-camera" rules perhaps and "rules requiring employees to abide by basic standards of civility" for sure) as always "lawful to maintain," regardless of the context or the circumstances presented. To be clear, no "civility" rule whatsoever is at issue in this case. In the process, the majority overrules not just *Lutheran Heritage*, but also *Rio All-Suites Hotel*, supra, involving a no-photography rule, and the Board's 2016 decision in *William Beaumont Hospital*, supra, as well as all prior decisions (unidentified) in which the Board "has held that it violates the Act to maintain rules requiring employees to foster 'harmonious interactions and relationships' or to maintain basic standards of civility in the workplace."

The scope of today's decision demonstrates that the Board is going far beyond the adjudication of a single case. It is making policy and reaching more broadly even than *Lutheran Heritage* did. At the same time, the Board has deliberately and arbitrarily excluded the public from participating in the policymaking process. As the Supreme Court has made clear, the Board's adjudication is subject to the requirement of the Administrative Procedure Act that an agency engage in "reasoned decisionmaking." *Allentown Mack Sales and Service, Inc. v.*

---

bers of the United States Senate Committee on Health, Education, Labor, and Pensions and the United States House of Representatives Committee on Education and the Workforce, the National Association of Manufacturers, the National Employment Law Project, the National Restaurant Association, the National Retail Federation, the National Right to Work Legal Defense and Education Foundation, the Retail Litigation Center, SEIU, the United States Postal Service, and the United States Secretary of Labor.

[21] The majority asserts that, "[i]n the past decade, the Board has freely overruled or disregarded established precedent without supplemental briefing." But the six decisions the majority cites are easily distinguishable from this one. See *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (considering whether unilateral changes made after expiration of a collective-bargaining agreement violate the Act); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (considering, inter alia, whether the Board is precluded from considering an unalleged failure to timely disclose that requested information does not exist when the unalleged issue is closely connected to the subject matter of the complaint and has been fully litigated); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (considering whether an employer, having voluntarily recognized a "mixed-guard union" as the representative of its security guards, lawfully may withdraw recognition if no collective-bargaining agreement is in place, even without an actual loss of majority support for the union); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (considering whether an employer's obligation to check off union dues from employees' wages terminates upon expiration of a collective-bargaining agreement); *Pressroom Cleaners*, 361 NLRB 643 (2014) (considering, inter alia, whether an employer can limit its backpay liability in compliance through an evidentiary showing or whether the predecessor employer's terms and conditions of employment should continue until the parties bargain to agreement or impasse), reconsideration denied 361 NLRB 1166 (2014); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (considering, inter alia, whether an employee was engaged in "concerted activity" for the purpose of "mutual aid or protection" when she sought assistance from her coworkers in raising a sexual harassment complaint to her employer).

First, in all six cited cases a party explicitly and publicly asked the Board to overrule precedent, a fact surely not lost on persons interested in the development of federal labor law. (The General Counsel asked the Board to revisit or overrule precedent in *Fresh & Easy*, *Lincoln Lutheran*, *Loomis*, *Graymont*, and *Du Pont*. In *Pressroom Cleaners*, the Charging Party asked the Board to overrule precedent.)

In two cited cases, *Loomis* and *Lincoln Lutheran*, amicus briefs were actually filed. See *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (amicus brief filed by SEIU urging the Board to overrule *Wells Fargo Corp.*, 270 NLRB 787 (1984)); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (amicus brief filed by National Right to Work Legal Defense Foundation urging the Board not to overrule *Bethlehem Steel*, 136 NLRB 1500 (1962)).

Both *Du Pont* and *Lincoln Lutheran*, meanwhile, were the culmination of long-running discussions of the precedent they ultimately overruled. In *Du Pont*, the Board accepted a remand from the United States Court of Appeals for the District of Columbia Circuit for the express purpose of deciding between two conflicting branches of precedent. See *E.I. Du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). *Lincoln Lutheran*, in turn, was the culmination of a 15-year dialogue with the United States Court of Appeals for the Ninth Circuit about *Bethlehem Steel*. See *WKYC-TV, Inc.*, 359 NLRB 286, 286 (2012) (discussing history).

And, as already pointed out, in none of the cases cited by the majority did the Board refuse to request briefing over the objection of one or more Board members.

The cases cited by the majority throw into even sharper relief the aberrance of the majority's process in this case. Unlike the six cases cited by the majority, here, no party—not the General Counsel, the Respondent, the Charging Party, or amicus National Association of Manufacturers--has asked us to revisit or overrule precedent. This decision is not the culmination of a long-running dialogue with a federal court of appeals. Neither the parties nor the public knew that the Board was planning to overrule 13 years of precedent in this case. And the majority has rebuffed a request from Member Pearce and me to seek input from the parties and the public through briefing.

NLRB, 522 U.S. 359, 374 (1998). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." Id. To be sure, the "Board is not precluded from announcing new principles in an adjudicative proceeding and ... the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). But the Supreme Court has left open the possibility that in some "situations ... the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." Id.[22] This is such a case. Without good reason, the Board has failed to "solicit[] the informed views of those affected in industry and labor before embarking on a new course" and has made no effort to acquire the "relevant information necessary to mature and fair consideration of the issues" resolved by the majority. Id. at 295. As I will explain, however, the majority's decision is fundamentally flawed in other respects as well.[23]

II.

The arbitrary process followed by the majority has led, not surprisingly, to an arbitrary result. The majority reverses and replaces *Lutheran Heritage* based on a fundamental, even willful, misunderstanding of the labor-law problem that the *Lutheran Heritage* doctrine is intended to address. That misunderstanding is reflected in the majority's persistent mischaracterization of *Lutheran Heritage* and its progeny—in the face of judicial authority—and it results in a "solution" that creates significant challenges in interpretation and implementation while leaving the key statutory consideration facing the Board largely unaddressed. The Supreme Court has explained that, when an administrative agency changes course, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[24] And an agency decision is arbitrary if it has "entirely failed to consider an important aspect of the problem" before it.[25]

A.

The problem before the Board is how to address the fact that some work rules maintained by employers will discourage employees subject to the rules from engaging in activity that is protected by the National Labor Relations Act. An employee who may be disciplined or discharged for violating a work rule may well choose not to do so—whether or not a federal statute guarantees her right to act contrary to her employer's dictates. Not surprisingly, then, it is well established (as the *Lutheran Heritage* Board observed) "that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." 343 NLRB at 646, citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The aspect of the *Lutheran Heritage* test that the majority attacks is its approach to a subset of employer work rules that do "not explicitly restrict activity protected by Section 7" of the Act, were not "promulgated in response to union activity," and have not been "applied to restrict the exercise of Section 7 rights." 343 NLRB at 647. For such rules, the *Lutheran Heritage* Board explained, the "violation is dependent upon a showing ... [that] employees would reasonably construe the language to prohibit Section 7 activity." Id.

Thirteen years after this standard was adopted, the majority belatedly concludes that the Board was not permit-

[22] Under the Administrative Procedure Act, the Board's decision may be set aside if a reviewing court finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706.

[23] Contrary to the majority's apparent assertion, I do not argue that in order to address the *Lutheran Heritage* standard, the Board must engage in rulemaking, rather than adjudication. My argument here, rather, is that given its scope, today's decision amounts to rulemaking in fact – but rulemaking without the statutorily required public participation. In particular, as explained, the majority's determination that "civility" rules are always and everywhere lawful—although no such rule is at issue in this case—exceeds the proper bounds of an adjudication.

Had the majority wished to comprehensively review the Board's *Lutheran Heritage* jurisprudence, there are several different procedural mechanisms—aside from rulemaking or today's adjudicative overreaching—that would have been available to the Board.

The Board has previously extended an invitation for briefing in several cases presenting similar or related issues. Although the Board did not consolidate the cases for decision, the Board extended an invitation for briefing in *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest Health Center*, because each raised similar supervisory status issues. See *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); *Golden Crest Heath Center*, 348 NLRB 727 (2006). Likewise, the Board considered issues related to an employer's withdrawal of recognition when it issued a notice and invitation to file briefs in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), and *Chelsea Industries*, 331 NLRB 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002).

Alternatively, the Board has previously consolidated multiple cases for decision where the cases presented similar or related issues. In *California Saw & Knife Works*, cases originating in unfair labor practice charges against the application of the union's rules and procedures under its voluntary *Beck* program to employees of a number of different employers were consolidated for trial. The consolidated cases presented "a range of questions respecting rights and duties under union-security clauses authorized by Section 8(a)(3) that [had] been triggered by the holding in *Beck* but were unanswered by the Supreme Court." 320 NLRB 224, 224–225 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998); see also *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[24] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

[25] *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

ted to do so, insisting that the "*Lutheran Heritage* 'reasonably construe' standard is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions." This premise is simply false.

The Board has never held that legitimate business justifications for employer work rules may not be considered—to the contrary. As the Board recently explained in *William Beaumont*, supra, responding to then-Member Miscimarra's dissent, the claim made by the majority here:

> reflects a fundamental misunderstanding of the Board's task in evaluating rules that are alleged to be unlawfully *overbroad.*
>
> * * *
>
> [T]he appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.
>
> * * *
>
> That a particular rule threatens to have a chilling effect does not mean, however, that an employer may not address the subject matter of the rule and protect his legitimate business interests. Where the Board finds a rule unlawfully overbroad, the employer is free to adopt a more narrowly tailored rule that does not infringe on Section 7 rights.
>
> * * *
>
> When, in contrast, the Board finds that a rule is *not* overbroad – that employees would not "reasonably construe the language to prohibit Section 7 activity" (in the *Lutheran Heritage Village* formulation) – it is typically because the rule is tailored such that the employer's legitimate business interest in maintaining the rule will be sufficiently apparent to a reasonable employee . . . . [citing *First Transit, Inc.*, 360 NLRB 619, 620-621 (2014).] Here, too, the *Lutheran Heritage Village* standard demonstrably does take into account employer interests.

363 NLRB No. 162, slip op. at 4 (emphasis in original; quotation marks and footnotes omitted).[26]

No court, meanwhile, has ever understood *Lutheran Heritage*, as the majority does, to prohibit the Board from considering an employer's legitimate business interests—again, to the contrary. Consider, for example, the District of Columbia Circuit's recent unanimous decision upholding the Board's conclusion that an employer confidentiality rule was unlawful under *Lutheran Heritage*. The court observed:

> An employer presumptively violates that Act "when it maintains a work rule that ... tends to chill employees in the exercise of their Section 7 rights." [Citation to *Lutheran Heritage.*] That situation occurs when "employees would reasonably construe the language [of a work rule] to prohibit Section 7 activity." [Id.] We construe any ambiguity in such a rule against the employer. [Citation omitted.]
>
> Maintaining a rule reasonably likely to chill employees' Section 7 activity amounts to an unfair labor practice unless the employer "present[s] a legitimate and substantial business justification for the rule" that "outweigh[s] the adverse effect on the interests of employees." *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015).

Midwest Division-MMC, LLC v. NLRB, 867 F.3d 1288, 1302 (D.C. Cir. 2017).

Oddly, the majority follows up its claim that *Lutheran Heritage* prohibits the Board from considering an employer's legitimate interests by asserting that "in many cases involving facially neutral policies, rules and handbook provisions, the Board *has explicitly* balanced employees' Section 7 rights against legitimate employer interests rather than narrowly examining the language of a disputed rule solely for its potential to interfere with the exercise of Section 7 rights, as the *Lutheran Heritage* 'reasonably construe' test requires." Of course, the cited cases—including a decision applying *Lutheran Heritage* to uphold a no-photography rule (*Flagstaff Medical Center*, supra)—simply demonstrate that *Lutheran Heritage* does not impose the prohibition that the majority attributes to it. *Lutheran Heritage*, by its terms, does not preclude the Board from considering employer interests. It did not overrule any earlier work-rules decision in which the Board did consider employer interests. And in cases applying its standard, the Board has considered employer

[26] The courts have recognized that invalidating an overbroad rule under *Lutheran Heritage* does not prevent the employer from adopting a more narrowly tailored, lawful rule. See, e.g., *Flex Frac*, supra, 746 F.3d at 210 fn. 4; *Northeastern Land Services*, supra, 645 F.3d at 483; *Cintas Corp.*, supra, 482 F.3d at 470. Accord *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 503 (1978) (observing that in invalidating a hospital's work rule, the "Board ha[d] not foreclosed the hospital from imposing less restrictive means of regulating organizational activity more nearly directed toward the harm to be avoided").

interests.[27] Indeed, when *Lutheran Heritage* was decided, the dissenting Board members faulted the majority for placing too *much* weight on employer interests[28] and scholars understood the decision as reflecting a new and greater emphasis by the Board on employer interests.[29]

The majority's mischaracterization of *Lutheran Heritage* is enough to demonstrate that its reconsideration of the decision is arbitrary and capricious. Before an agency changes a policy, it surely must have a reasonable understanding of what its prior policy actually is.[30]

Apart from the matter of employer interests, however, the majority attributes to *Lutheran Heritage* other features that are simply conjured up. According to the majority, *Lutheran Heritage* "requires employers to eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity." But the *Lutheran Heritage* Board rejected precisely the notion that the Board was "require[d] . . . to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable" and observed that "[w]here ... the rule does not refer to Section 7 activity, [the Board] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way." 343 NLRB at 647 (emphasis in original).[31] According to the majority, "[a]nother false premise of *Lutheran Heritage* is the notion that employers drafting facially neutral policies, rules and handbook provisions *can* anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities." But *Lutheran Heritage* actually says just the opposite, observing that "[w]ork rules are necessarily general in nature and are typically drafted by and for laymen, not experts in the field of labor law." Id. at 648. Finally, the majority insists that the "broader premise of *Lutheran Heritage* ... is the notion that employees are better served by *not* having employment policies, rules and handbooks." There is no support at all for this claim – and certainly no support for the claim that *Lutheran Heritage* has in any way caused employers to abandon, or fail to adopt, any lawful policy, rule, or handbook. If that was the goal of *Lutheran Heritage* (and, of course, it was not), then the obvious ubiquity of workplace rules—reflected, for example, in the many cases applying *Lutheran Heritage*—would demonstrate that the decision had failed completely.

B.

In addition to fundamentally mischaracterizing the *Lutheran Heritage* test itself, the majority attacks the way the test has been applied, taking the language of particular work rules out of context and then insisting that the Board's case law is inconsistent and unpredictable. The *William Beaumont* Board addressed this same charge when it was previously leveled by then-Member Miscimarra:

> Certainly, cases involving allegedly overbroad employer rules and implicating the *Lutheran Heritage Village* standard may raise difficult issues, complicated, too, by

[27] This is certainly true in cases where the Board has considered the lawfulness of employer rules prohibiting photography and/or recording. See, e.g., *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 5–6 (2016) (considering employer interest in protecting customer privacy), enfd. on other grounds ___ Fed. Appx. ___, 2017 WESTLAW 3822921 (11th Cir. Sept. 1, 2017); *Whole Foods Market, Inc.*, supra, 363 NLRB No. 87, slip op. at 3–5 (considering employer interest in preserving the privacy of personal and medical information about employees, comments about employee performance, details about employee discipline, criticism of store leadership, and confidential business strategy and trade secrets); *T-Mobile USA, Inc.*, supra 363 NLRB No. 71, slip op. at 3–5 (considering employer interest in maintaining employee privacy, protecting confidential information, and promoting open communication); *Rio All-Suites Hotel and Casino*, supra, 362 NLRB No. 190, slip op. at 3–5 (considering the fact that the employer failed to link any articulated interest to the allegedly unlawful rule); *Flagstaff Medical Center*, supra, 357 NLRB at 662–663 (considering employer interest in preventing the wrongful disclosure of individually identifiable health information).

[28] 343 NLRB at 650 (Members Liebman and Walsh, dissenting). The dissenters argued that that the majority had "[i]gnor[ed] the employees' side of the balance" and had retreated from a broad application of the principle announced in *Lafayette Park Hotel*. Id.

[29] See, e.g., Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of* Chevron *and* Brand X, 89 Boston U. L. Rev. 189, 229–233 (2009); William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 Berkeley J. Emp. & Lab. L. 23, 41–45 (2006).

[30] The majority's view is similarly unfounded in asserting that I "reject[] any balancing of Sec. 7 rights with justifications associated with particular rules." Here, too, the majority mischaracterizes both *Lutheran Heritage* and the new standard. As explained, *Lutheran Heritage* balances those competing interests by, in effect, requiring that a work rule be narrowly tailored to address an employer's legitimate interests. The majority's new standard reflects no such requirement at all.

[31] The majority at one point acknowledges what *Lutheran Heritage* actually says, but insists that the Board has since abandoned that approach "in many subsequent decisions through application of the principle that ambiguity is construed against the employer as the drafter of the rule." But that commonsense principle has been endorsed by the courts, as already observed. See, e.g., *Midwest Division-MMC*, supra, 867 F.3d at 1302; *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1090 (8th Cir. 2016).

If, on occasion, the Board arguably has applied the *Lutheran Heritage* standard too loosely, the problem is not the standard, but rather the Board's decision in a particular case. The solution, in turn, is not to abandon the standard altogether, but to apply it with greater care and, as needed, to refine it in a way that promotes clarity and consistency. One need not agree with every decision under *Lutheran Heritage* in order to defend the standard, especially as compared to the majority's proffered—and inferior—alternative. Indeed, in light of the number of cases that the Board must decide, no Board member would ever say that the Board has *always* applied any given legal standard correctly.

> the need to harmonize the Board's decisions over time. But this challenge is not a function of the Board's legal standard. Rather, it is inherent in the remarkable number, variety, and detail of employer work rules (and the larger documents in which they appear), drafted with differing degrees of skill and levels of legal sophistication. Already 30 years ago, one legal scholar described the "bureaucratization of work" as having "enmeshe[d] the worker in a 'web of rules.'" This phenomenon, whatever drives it, is largely out of the Board's hands.

363 NLRB No. 162, slip op. at 5 (footnotes omitted).

The Board's decisions under *Lutheran Heritage*, for all their number and variety, do, in fact, yield clear, guiding principles that allow employers and employees to grasp what sorts of rules are prohibited and what sorts are permitted. The Board has uniformly found that confidentiality rules prohibiting the disclosure of "employee" or "personnel" information, without further clarification, would be reasonably construed by employees to restrict Section 7 activity.[32] The Board has also provided guidelines for employers seeking to address attendance matters and, in so doing, has found that employees would reasonably construe rules prohibiting them from "walking off" the job as unlawfully prohibiting Section 7 strike activity, while they would construe rules that, on their face, only prevent an employee from taking unauthorized leave or breaks and do not expressly restrict concerted activity as being lawful.[33] In addition, while acknowledging that an employer may regulate who makes official statements on its behalf, the Board has consistently held that employees would reasonably construe rules prohibiting them from communicating with third parties, such as unions or the media, as unlawfully restricting their Section 7 right to discuss an ongoing labor dispute.[34] Even in the often challenging context of so-called civility rules, our precedent establishes that an employer may maintain rules seeking to prevent disparagement, so long as any such rules are focused on its products or services and do not cover disparaging statements more generally such that employees would reasonably construe the prohibition to include matters protected by Section 7.[35] The Board has also made clear its view that employees would not reasonably construe rules prohibiting insubordination or insubordinate conduct alone to restrict them in the exercise of their Section 7 rights.[36] And, finally, the Board has long been tolerant of language that seeks to regulate severe or extreme behavior, or conduct which is reasonably associated with actions that fall outside of the Act's protections. For example, the Board has found that employees would not reasonably construe rules prohibiting intimidating, coercive, harassing, or threatening behavior to be unlawful.[37] It is thus hardly accurate for the majority to contend that the Board's jurisprudence involving the "reasonably construe" prong of *Lutheran Heritage* defies all reasonable efforts at explanation and application.[38] But even if the majority were correct that the Board's experience in applying *Lutheran Heritage* demonstrates the need to revisit and refine the standard, it would not follow that that the majority has used the proper process to replace the prior standard or, as I explain next, that the majority's new standard is even tenable in the abstract, much less superior to *Lutheran Heritage*.

C.

It is hard to know precisely what the majority's new standard for evaluating work rules *is*. The majority opinion is a jurisprudential jumble of factors, considerations, categories, and interpretive principles. To say, as the

[32] *Quicken Loans, Inc.*, 361 NLRB 904, 904 fn. 1 (2014), affirming 359 NLRB 1201 (2013), enfd. 830 F.3d 542 (D.C. Cir. 2016) (personnel information); *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 72-73 (2014), reconsideration denied 2014 WL 5286315 (Oct. 15, 2014) (employee information); *MCPC, Inc.*, 360 NLRB 216, 216 (2014), enfd. in relevant part 813 F.3d 475 (3d Cir. 2016) (personal or financial information); *Cintas Corp.*, 344 NLRB 943, 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007) (policy referred to employees as "partners" and prohibited disclosure of information about its "partners").

[33] *2 Sisters Food Group*, 357 NLRB 1816, 1817-1818 (2011).

[34] *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 3–4 (2016); *Sheraton Anchorage*, 362 NLRB No. 123 (2015) (incorporating by reference 359 NLRB 803, 806 (2013)); *DirecTV U.S. DirecTV Holdings*, 362 NLRB No. 48 (2015) (incorporating by reference 359 NLRB 545, 545–546 (2013)), enf. denied on other grounds 650 Fed.Appx. 846 (6th Cir. 2016); *HTH Corp.*, 356 NLRB 1397, 1398, 1422 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012); *Trump Marina Casino Resort*, 355 NLRB 585 (2010) (incorporating by reference 354 NLRB 1027, 1027 fn.2 (2009)), enfd. 435 Fed.Appx. 1 (D.C. Cir. 2011).

[35] *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 5 (2016); *Chipotle Services, LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72, slip op. at 1 fn.3, 9 (2016), rev. denied 690 Fed. Appx. 277 (mem.) (5th Cir. 2017); *UPMC*, 362 NLRB No. 191, slip op. at 2 fn. 5, 24–25 (2015), reconsideration denied 2016 WL 7100574 (Dec. 5, 2016); *Quicken Loans, Inc.*, supra, 361 NLRB at 904 fn. 1; *Triple Play Sports Bar & Grille*, 361 NLRB 308, 313–315 (2014), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015).

[36] *Component Bar Products*, 364 NLRB No. 140, slip op. at 1 fn. 1 and 10 (2016); *Casino San Pablo*, 361 NLRB 1350, 1351–1352 (2014).

[37] *Palms Hotel & Casino*, 344 NLRB 1363, 1367–1368 (2005); *Lutheran Heritage*, supra, 343 NLRB at 648.

[38] It is worth noting that, in asserting that the Board's application of the reasonably construe prong of *Lutheran Heritage* has led to inconsistent, inexplicable results, the majority relies on several cases decided *prior to* the *Lutheran Heritage* and not applying the "reasonably construe" standard. If the majority's goal is to identify (and ultimately rectify) a problem with the *Lutheran Heritage* precedent, then it seems odd to point to this pre-*Lutheran Heritage* precedent as evidence of the problem.

majority does, that its approach will yield "certainty and clarity" is unbelievable, unless the certainty and clarity intended is that work rules will almost never be found to violate the National Labor Relations Act. Indeed, without even the benefit of prior discussion, the majority reaches out to declare an entire, vaguely-defined category of workplace rules—those "requiring employees to abide by basic standards of civility"—to be always lawful. That today's decision narrows the scope of Section 7 protections for employees is obvious.[39] Put somewhat differently, the majority solves the problem addressed by *Lutheran Heritage* – how to guard against the chilling effect of work rules on the exercise of statutory rights – by deciding it is no real problem at all where a rule does not explicitly restrict those rights and was not adopted in response to Section 7 activity.

1.

To begin, the majority effectively abandons the key premise of *Lutheran Heritage*: that for purposes of administering the National Labor Relations Act, an employer's work rules should be evaluated from the perspective of the employees subject to the rules—and protected by the statute. The majority emphasizes that "*the Board* [its emphasis] will conduct this evaluation." One might ask, "Who else would?" But what the majority means is quite clear: going forward, the Board's primary focus will not be on the potential chilling effect of work rules on employees, but rather on the interests of employers in imposing rules on their employees. This new focus—a sharp break from the Board's long-established approach – is unreasonable.[40]

We are dealing here with Section 8(a)(1) of the Act, which 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]" of the Act. 29 U.S.C. §158(a)(1). When the Board evaluates an employer's statements under Section 8(a)(1), it does so "'from the standpoint of employees over whom the employer has a measure of economic power.'"[41] The Supreme Court itself has made clear that the Board *must* adopt this perspective:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [Section] 7 and protected by [Section] 8(a)(1).... *And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.*

NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (emphasis added). An employer's work rules are a particular form of employer expression—and one that obviously implicates the potential of coercion, because rules are intended to be the basis for discipline and discharge. The Board's approach under *Lutheran Heritage* is firmly grounded in this simple fact. "Employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Sec. 7 activity for fear of running afoul of a rule whose coverage is unclear."[42]

2.

Coupled with its unwarranted, and impermissible, break from the premise of *Lutheran Heritage* is the majority's false promise of "certainty and clarity." The majority begins by announcing that there are "three categories of employment policies, rules and handbook provisions," essentially the always-lawful, the sometimes-lawful, and the never-lawful. So long as the sometimes-lawful category includes many or most rules, of course, the majority's new framework does very little to create "certainty and clarity"—and that is before taking into account the majority's statement that even these categories are fluid: "[t]he Board's cumulative experience with certain types of rules," the majority observes, "may prompt the Board to re-designate particular types of rules from one category to another." So much for certainty.

What about the sometimes-lawful rules ("Category 2"), which "warrant individualized scrutiny in each case"? Under the majority's new framework, the Board

[39] That result is excused (in the majority's view) because the "chaos that has reigned in this area has been visited most heavily on employees themselves." This claim only adds insult to injury. It goes without saying that no employees, and no organizations representing employees, have ever begged the Board to save employees from the awful effects of *Lutheran Heritage*.

[40] The majority places *fourth* among its analytical "considerations" the notion that "when the Board interprets any rule's impact on employees, the focus should rightfully be on the employees' perspective." What the majority actually understands this "consideration" to mean is entirely unclear from its opinion. The majority refers to "interpret[ing]" the "impact" of a rule on employees, not to how economically-dependent employees themselves would reasonably interpret an employer rule—precisely the prong of *Lutheran Heritage* that the majority vehemently rejects. What is clear, however, is that the employee-perspective "consideration" is far subordinate to the other "considerations" endorsed by the majority.

[41] *Mesker Door, Inc.*, 357 NLRB 591, 595 (2011), quoting *Henry I. Siegel Co. v. NLRB*, 417 F.2d 1206, 1214 (6th Cir. 1969).

[42] *Whole Foods Market*, supra, 363 NLRB No. 87, slip op. at 4 fn. 11, citing *Gissel Packing*, supra.

will apply a balancing test that differentiates on the one hand among "different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)" and, on the other hand, among different "substantial justifications" for work rules, "those that have direct, immediate relevance to employees or the business" versus "others that might be regarded as having more peripheral importance." In this exercise, the Board may consider several factors, including "reasonable distinctions between or among different industries and work settings."[43] To pretend that this ill-defined, multi-factor balancing test will yield "certainty and clarity" is laughable.

The majority offers no hint at all as to precisely which "NLRA-protected activities" are entitled to more weight and which to less weight. Nor, similarly, does it actually identify which particular employer justifications are weightiest. Which industries and which work settings might warrant particular work rules (and which not) is also almost entirely unclear. How, then, are employees to know how the Board's balancing test will come out beforehand, when they are deciding to engage in Section 7 activity that may cost them their jobs, for violating their employer's rule? And, for that matter, how are employers to know whether their work rules will survive the Board's scrutiny and why?

Thirteen years of experience under *Lutheran Heritage*—resulting in some guidance (however imperfect) for employees and employers, as already explained—is now largely discarded. It seems obvious that years of litigation under the Board's *new* approach will be required before employees and employers have even a clue as to what Board law permits and what it prohibits—unless, as suggested, the Board means to give employers far more scope to adopt rules that trench on employees' statutory rights. In that case, there will be certainty, but at the expense of the policies of the National Labor Relations Act.

3.

On that score, consider the majority's holding today that "rules requiring employees to abide by basic standards of civility" are *always* lawful. These are "Category 1" rules, under the majority's new scheme. For these rules, in contrast to "Category 2" rules, it makes absolutely no difference what Section 7 rights are at stake, what justification the employer might offer (or fail to offer), what industry the employer is in, what the "work setting" is, or what "particular events ... may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights." Instead, the majority holds that all employers everywhere may always demand that employees "abide by basic standards of civility." That approach—foregoing "individualized scrutiny" altogether—is arbitrary and capricious, particularly as adopted in an adjudication where no such work rule is even before the Board.

First, the majority makes no genuine attempt to *define* the "basic standards of civility." What are those standards—and what are they, in particular, in a workplace setting? Are they really the same, moreover, in every workplace setting? The same on a construction site as in a hospital? The same on a loading dock as in a retail store? Second, the majority seems oblivious to the possibility that common forms of protected concerted activity under the National Labor Relations Act may reasonably be understood as uncivil. Does walking off the job to protest unsafe working conditions conform to "basic standards of civility"? Or distributing literature that, in impolite language, criticizes an employer's failure to pay employees what they are owed and urges employees to resist? The majority's apparent decision to permit all employers to maintain whatever "civility" rules they wish simply ignores the reality of the labor disputes that can arise in various workplaces and move employees to act to defend themselves—just as federal labor law aims to encourage. With respect to uncivil language, for example, the Supreme Court has observed that "[l]abor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions."[44]

It adds insult to injury for the majority to assert that recognizing the potential for statutorily-protected conflict in the workplace amounts to endorsing "stereotypes regarding workplace conduct and protected activity that fail to adequately address problems [that] have become more prominent in recent years." Nothing in the Board's *Lutheran Heritage* jurisprudence prevents an employer from adopting tailored rules that genuinely serve to pro-

[43] The majority here invokes a silly hypothetical in which a coal mine owner adopts a rule prohibiting "loud talking" after fatal mine collapses have occurred "as the result of loud talking." In contrast to, say, adequate roof support, loud talking has no connection to mine collapses: modern mining equipment obviously makes more noise than talking miners do. See generally Mine Safety and Health Administration (MSHA), *Roof fall accidents decline, but remain leading cause of coal miner injuries* (news release posted July 6, 2017), *available at* https://www.msha.gov/news-media/press-releases/2017/07/06/roof-fall-accidents-decline-remain-leading-cause-coal-miner. Hopefully the majority is better informed about the realities of American workplaces than this hypothetical suggests.

[44] *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974), quoting *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 58 (1966). Accordingly, the Supreme Court has established a heightened standard for allegedly defamatory statements made in the course of labor disputes.

tect employees from illegal discrimination or harassment in the workplace – and the majority points to no decision in which the Board has invalidated such a rule.[45] Indeed, in *Lutheran Heritage* itself, the Board upheld a rule prohibiting "[h]arassment of other employees, supervisors and any other individuals in any way."[46] Nothing in the majority's new test, meanwhile, makes it better suited to "address problems [that] have become more prominent in recent years—indeed, in recent weeks"—to the contrary, many aspects of the majority's approach today could have precisely the opposite effect. Categorically approving any and all rules that permit discipline or termination for violating norms of "civility" is the most obvious example. Workers facing harassment or assault often have to act "uncivilly" to protect their safety and their rights. Knowing that their employer has promulgated a workplace rule to make it crystal clear that raising a fuss can be a fireable offense hardly makes it easier on victims reluctant to speak up about assault or harassment.

Consider a workplace where employees are required, under penalty of discipline and discharge, to "work harmoniously" at all times. No one is likely to consider it a "harmonious" workplace interaction when several employees join together to speak up and demand better treatment, or to file reports of sexual harassment against a powerful, high-level manager. Or, when a given workplace is rife with racist or sexist slurs, surely two employees working under such circumstances are not promoting positive "harmony" with their coworkers when they blow the whistle on perceived wrongdoing by reporting the conduct internally at the workplace or threatening to file charges with a government agency.

The majority suggests that maintaining the sort of "civility" rules that it champions (as opposed to clearly lawful rules directly prohibiting harassment or assault) will foster a workplace where employees are less likely to experience discrimination, harassment, or violence. I would suggest instead that when such "civility" rules are unlawfully overbroad, they tend to perpetuate hostile environments and cultures of discrimination, to the detriment of workers, by making employees scared to speak up, and forcing them to choose between being "good" and following the rules, or joining together with colleagues to speak up and report inappropriate behavior.[47]

There can be no doubt, then, that employees who contemplate engaging in basic types of protected concerted activity will be discouraged from doing so by the sort of "civility" rules that the majority give blanket authorization to today. It is no answer to say that employers can only maintain such rules, but cannot enforce them against Section 7 activity. The employee who is chilled from exercising her rights will never have the rule enforced against her, but the harm to the policies of the Act will be the same. The majority seems not to grasp this basic point.

* * *

The issues that the Board must decide in this context are not easy, and perfection cannot be fairly demanded from the Board or any other administrative agency. But the majority's decision fails so badly to address the problem before it, and the process by which it was reached

[45] Indeed, the General Counsel has declined to challenge such rules. See, e.g., *Sears Holdings (Roebucks)*, Case No. 18–CA–019081, 2009 WESTLAW 5593880 (NLRB Div. of Advice, Dec. 4, 2009) (concluding that social media policy preventing employees from discussing on social media "[e]xplicit sexual references" and "[d]isparagement of any race, religion, gender, sexual orientation, disability or national origin" was lawful).

[46] 343 NLRB at 646 fn. 3, 648. In cases where context and circumstances make clear that a rule is actually targeted toward preventing harassment and discrimination, the Board has been quick to recognize that employees would reasonably understand the rule as a restriction on harassment and/or discrimination, not protected activity. See, e.g., *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 1 fn. 3 (2017) (distinguishing as lawful portions of rule prohibiting employees from transmitting "offensive" or "harassing" content and "chain letters," from unlawfully overbroad portions of the same rule prohibiting "unauthorized mass distributions," and "communications primarily directed to a group of employees inside the company on behalf of an outside organization."), reconsideration denied 2017 WL 1462126 (Apr. 21, 2017). The Board knows how to distinguish between a rule that is properly tailored to avert harassment and a rule that has an evident potential to interfere with employees in the exercise of statutory rights. Compare *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 187 (2007) (in the context of a workplace where employee reported that she was threatened to join a strike "or else," employer lawfully issued a policy asking that employees report harassment or threats to management, where policy contained assurances that employees have the right to strike and described its concern as limited to ensuring that all employees "can continue to work in a non-threatening environment."); with *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 363–364 (D.C. Cir. 2016) (affirming the Board's conclusion that employer's posting of a memorandum reiterating its pre-existing Workplace Violence Prevention policy, posted 3 days after a union victory, is unlawful) ("[A] reasonable employee could understand the memorandum as not merely an entreaty to respectful behavior, but as a warning that [the employer] would discipline protected activity such as occurred during the 'NLRB election.' . . . The memorandum emphasized with explicit reference to the just-concluded election that the employees should 'let go' of their differences and start treating one another with 'dignity and respect,' or risk being in violation of the [policy]."), enfg. 361 NLRB 1462 (2014).

[47] Over then-Member Miscimarra's unfortunate dissent, the Board has held that such conduct is protected concerted activity under Sec. 7 of the Act. See *Fresh & Easy Neighborhood Market*, supra, 351 NLRB at 154–158. The majority's view seems to be that employees must rely on their employers to protect them from discrimination and harassment, and that employees' efforts to protect themselves are of secondary, if any, importance—precisely contrary to the policies of the National Labor Relations Act.

was so flawed, that the Board's new approach seems unlikely to survive judicial review.

III.

The majority's unwarranted rush extends to applying its new test retroactively. None of the parties to this case, or any pending case, had any clear idea that the Board was contemplating a change in the law or any fair opportunity either to influence that change or to argue whether and, if so, how the new standard should be applied in this case. Only by filing a motion for reconsideration of today's decision would the General Counsel and the Charging Party be able to put their views before the Board.[48] Because I do not believe it was properly adopted, much less properly given retroactive effect, I decline to apply the majority's new standard here.

Instead, I would decide this case under established law, as reflected in the *Lutheran Heritage* standard, and I would find that Boeing's no-photography rule was unlawfully overbroad. Such a finding, of course, does *not* mean that Boeing is prohibited from adopting a no-photography rule. Rather, Boeing would be free to adopt a more narrowly-tailored rule that did not impermissibly infringe on the Section 7 rights of its employees.

Under *Lutheran Heritage*, employees "would reasonably construe the language [of Boeing's no-photography rule] to prohibit Section 7 activity." 343 NLRB at 647. It is well established that:

> Employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. Such protected conduct may include, for example, employees recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules.

Rio All-Suites Hotel & Casino, supra, 362 NLRB No. 190, slip op. at 4 (internal reference omitted).[49]

Under Boeing's no-photography rule, known as PRO-2783, use of a camera-enabled device to capture images or video is categorically prohibited on all Boeing property absent "a valid business need" and approval from the Respondent. Although some conduct—for example, documenting unsafe equipment or hazardous working conditions—might arguably have "a valid business need," the vast majority of protected concerted photographing and video recording would not serve any "business need" as defined in PRO-2783. Moreover, to the extent that PRO-2783 leaves uncertain whether particular acts of protected concerted photographing or video recording may serve a defined "business need," that very uncertainty would chill Section 7 activity. See *Whole Foods Market*, supra, 363 NLRB No. 87, slip op. at 4 fn. 11. And even in those rare instances where protected concerted photographing and video recording might arguably serve a defined "business need," PRO-2783's requirement that employees first secure the approval of an authorizing manager would certainly tend to chill the exercise of Section 7 rights. See *Rio All-Suites Hotel & Casino*, supra, 362 NLRB No. 190, slip op. at 4 fn. 10.[50] In addition, because PRO-2783 restricts employees' use of camera-enabled devices to capture images or video "on all company property and locations," it limits employees' use of their camera-enabled devices even on employees' own time in nonwork areas. See id.

Flagstaff Medical Center, 357 NLRB 659 (2011), enfd. in relevant part 715 F.3d 928 (D.C. Cir. 2013),which the Respondent cites and on which it principally relies, is distinguishable. In *Flagstaff*, a Board majority found that an employer policy prohibiting the use of cameras for recording images in a hospital setting did not violate the Act. The *Flagstaff* majority found that in light of weighty patient privacy interests and the employer's well-understood obligation under the Health Insurance Portability and Accountability Act (HIPAA) to prevent the wrongful disclosure of individually identifiable health information, employees would reasonably interpret the rule as a legitimate means of protecting those interests, not as a prohibition of protected activity. The Respondent asserts that, similar to *Flagstaff*, PRO-2783 is supported by compelling interests: namely, that PRO-2783 was adopted to protect classified, trade secret, pro-

[48] See Sec. 102.48(c) of the Board's Rules and Regulations. It seems to me that the Board would be obligated to grant such a motion given the "extraordinary circumstances" presented here: the retroactive application of a new legal standard, adopted by sua sponte overruling existing precedent, without prior notice or an opportunity to submit briefs.

[49] See *G4S Secure Solutions (USA)Inc.*, supra, 364 NLRB No. 92, slip op. at 5-6; *T-Mobile USA, Inc.*, supra, 363 NLRB No. 171, slip op. at 3-5; *Whole Foods Market, Inc.*, supra, 363 NLRB No. 87, slip op. at 3 & fns. 7–9 (collecting cases); see also *White Oak Manor*, 353 NLRB 795, 795 fn. 2, 798–799 (2009), reaffirmed by and incorporated by reference in 355 NLRB 1280 (2010), enfd. 452 Fed. Appx. 374 (4th Cir. 2011); *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), enfd. mem. 976 F.2d 743 (11th Cir. 1992)).

[50] A different Boeing procedure, PRO-3439, includes safe-harbor language providing that "[n]othing in this procedure should be construed as preventing employees" from engaging in Sec. 7–protected activity. However, in its exceptions brief, Boeing expressly rejects adding such a provision to PRO-2783, stating that it "would eviscerate the rule and license unfettered photography on Boeing property." Respondent's Exceptions Brief at 37.

prietary, and export-controlled information, employee privacy, and physical security. The rule at issue in *Flagstaff*, however, is distinguishable because it expressly referenced "recording images of patients." PRO-2783, by contrast, does not tie the restrictions it places on the use of camera-enabled devices to the interests it now articulates in defense of the policy. See *Rio All-Suites Hotel & Casino*, supra, 362 NLRB No. 190, slip op. at 4 (similarly distinguishing *Flagstaff*).[51]

Moreover, the interests Boeing now articulates, however weighty in the abstract—preventing disclosure of classified, proprietary, and export-controlled information; protecting Boeing against threats of violence—are undermined by evidence of what Boeing actually does (and does not do) in practice. Thus, the record establishes that when Boeing conducts tours of its facilities, tour participants are not searched for camera-enabled devices, and tour guides are not authorized to confiscate such devices from individuals who have used them to take pictures or shoot video during a tour. Although 777 Director of Manufacturing and Operations Jason Clark testified that security personnel review photos and video footage after each tour, his testimony was contradicted by that of employee Shannon Moriarty. Moriarty testified that she took part in a VIP tour, during which she took photographs. She further testified that she was the last person to leave after the tour ended and that Boeing personnel did not at any point review her photos or anyone else's. Besides Clark's general testimony regarding Boeing's purported practice, no security personnel employed by Boeing testified that he or she has actually screened tour participants' photos or videos.

The Respondent's defense is further undermined by conduct in circumstances other than during tours. For instance, during "rollouts," the large bay doors of the Everett facility are open, and those in the vicinity of the facility may take photographs. In addition, Boeing itself created a time-lapse video of the 777 production line that was made available for public viewing. Thus, Boeing's actual *practice* regarding camera-enabled devices, such as permitting their use by tour groups, makes it even more unlikely that employees would view PRO-2783 as designed to protect legitimate security and confidentiality interests. Furthermore, Boeing *does* permit employees to take photographs or video in its facilities when it determines that a "business need" justifies doing so. In contrast, the rule in *Flagstaff* admitted no exceptions. This suggests that Boeing's purported "overriding interest" is actually one of a number of considerations that Boeing balances in deciding when or if it will permit employees to use their personal camera-enabled devices to take photographs or video on its property.

Boeing's justifications thus fail to justify PRO-2783's unqualified restriction on Section 7 activity. Accordingly, applying *Lutheran Heritage Village* and Board precedent, I would find that by maintaining PRO-2783 as written, Boeing violated Section 8(a)(1) of the Act.

IV.

If the Board had genuinely attempted to revise and refine the *Lutheran Heritage* standard in a way that was consistent with the National Labor Relations Act and the Administrative Procedure Act, there are other possibilities it could have considered (but did not). I turn to those possibilities next.

As the *William Beaumont* Board acknowledged, employer work rules come in great number and variety, inevitably posing difficult questions for the Board in some cases where an unfair labor practice charge is filed, the General Counsel issues a complaint, and the matter reaches the Board. The way to minimize these difficult cases is not to adopt a standard that simplifies the Board's work by drastically restricting the scope of the Act's protections. Administrative ease is not the overriding statutory goal established by Congress.

Instead, the Board should explore possible solutions by inviting the participation of the persons whose rights and interests are directly involved and whose experience with work rules is lived firsthand: employees, employers, and their organizations. Students of the workplace, too, could surely contribute. These parties can provide the Board with factual information, from the broad range of American workplaces, on how employees actually understand and abide by work rules, as well as how and to what extent they understand their statutory rights, and why and how employers devise and adopt particular types of rules.

If, in fact, the notion of rule categories is a valuable one, then this sort of information is obviously important for the Board to have. The same information, in turn, would put any refined balancing test ultimately adopted by the Board on a firmer, real-world foundation. Indeed, there is virtually no aspect of the analytical framework adopted by the majority today that might not be improved by being first exposed to public notice and comment *before* becoming the law. Were today's decision a notice of proposed rulemaking instead, the final "rule" would almost certainly look quite different from what the majority now decrees. Rulemaking is one way of ensuring public participation, to be sure, but as I explained earlier at Part I, seeking amicus briefing would have been

[51] Another section of PRO-2783, dealing with webcams, does refer to some (but not all) of the interests Boeing articulates. But nothing in PRO-2783 connects those interests to the separate section of the policy dealing with camera-enabled devices.

the bare minimum the Board could have done to ensure thoughtful and reasoned decision-making. To repeat: there is no legitimate reason *not* to seek such public participation. Even if it failed to illuminate the issues confronting the Board, the Board would have at least demonstrated a commitment to informed decision-making.[52]

In conjunction with seeking public participation, the Board could direct attention to particular factors that might minimize the potential for work rules to chill the exercise of Section 7 rights. One such factor, reflected in Board cases where work rules have been found *lawful*, is the practice of drafting rules that clearly communicate to employees the legitimate employer interests behind the rules and that are narrowly tailored to serve those interests.[53] To the extent that employers explain *to employees* their lawful purposes in adopting a particular rule, employees are surely less likely to reasonably construe the rule to restrict or prohibit protected concerted activity. (For an employer to invoke a rule's uncommunicated purposes before the Board is too little, too late.) There is no reason why, with public participation, the Board could not devise some number of basic model rules that would achieve important employer purposes without the potential for unlawful coercion, building on the rules that the Board has already found *lawful* in its 13 years of applying the *Lutheran Heritage* standard. Each such rule would provide a safe harbor for employers. They could adopt the rule with certainty that it is immune from legal challenge under the Act, because the Board has said so specifically. That genuine certainty stands in sharp contrast to the majority's approach (except where the majority has unwisely declared entire categories of rules to be lawful, no matter how they are written or in what context they appear).

In the same safe-harbor vein, the Board could consider developing, with public participation, a standard disclaimer that employers—at their option—could include in employee handbooks that would mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights, by making explicit that the employer's rules will not be applied to protected concerted activity under the Act and by making clear to employees, at an appropriate level of detail, what their basic statutory rights are. Employees who read the disclaimer—in which the employer itself clearly and specifically informs them of their rights under Act—would be much less likely to construe even an ambiguous work rule as bearing on their statutory right to engage in conduct that might, in theory, violate the rule. Use of such a disclaimer might establish a rebuttable presumption that any particular rule that did not explicitly restrict Section 7 activity was lawful. The Board has already held that an "employer's express notice to employees of their Section 7 rights may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule," although a "vague reference to 'rights under federal law' is insufficient to inform employees that the [rule] does not prohibit conduct protected by Section 7." *G4S Secure Solutions (USA) Inc.*, supra, 364 NLRB No. 92, slip op. at 6, citing *First Transit*, supra, 360 NLRB at 621–622. The virtue of the disclaimer approach is clear, inasmuch as it would cover every employer work rule at once, making compliance with the Act simpler and easier. It is hard to see any legitimate objection, meanwhile, to voluntarily informing employees of the rights guaranteed them by federal law, using language provided by the Board, in order to minimize the potential for engaging in unfair labor practices.

Finally, the Board might take heed of the Fifth Circuit's recent observation that the Board has not "specifically defined" the "reasonable employee" reflected in the *Lutheran Heritage* standard. *T-Mobile USA*, supra, 865 F.3d at 271. A more specific definition—necessarily grounded in the already-discussed observation of the *Gissel* Court that employees are economically dependent on their employers and thus particularly sensitive to coercive implications in employer statements—might aid the Board, the courts, and the public. Such a refined definition would want to take into account the level of knowledge concerning their Section 7 rights that may reasonably be attributed to employees, as well as an informed understanding of what forms of Section 7 activity are most commonly undertaken—or considered—in the typical workplace, where most workers are not represented by a union.

I have no doubt that there are many other options that the Board might consider, options that public participation in the process of reexamining the Board's approach to work rules might reveal. I sketch out these examples only as illustrations of what the Board might consider, rather than proceeding as the majority does today—in a hurry and on its own. The majority faults me for not endorsing any particular alternative to its test, but, of

[52] The majority tries to justify its failure to seek briefing in this case by asserting that the Board should have revisited *Lutheran Heritage* before today—based on Member Miscimarra's dissenting view in *William Beaumont* and other cases (which no court has endorsed)—and sought briefing then. That claim is absurd on its face, not least because two members of the majority here have never before decided a work-rules case. If nothing else, one might have expected that the new Board majority might have wished to hear the views of the Board's new General Counsel.

[53] See, e.g., *Rio All-Suites Hotel*, supra, 362 NLRB No. 190, slip op at 1 fns. 3–4.

course, that is precisely my point—the Board should hear from the public *before* making a wholesale change in existing law and that the choice here is not between two limited options, *Lutheran Heritage* and the test articulated in Chairman Miscimarra's *William Beaumont* dissent.

V.

Today's decision, I predict, will be a Pyrrhic victory at best for the majority. The majority establishes a new standard that is worse, not better, than the old standard, burdening the Board and the public with more uncertainty and even less clarity. Mess *ipsa loquitur*. And the Board's rush to an ill-considered judgment will do real damage to the Board's institutional reputation – and, if not corrected by a reviewing court, to the fair administration of the National Labor Relations Act, and to the statutory rights of American workers. Accordingly, I dissent.

Dated, Washington, D.C. December 14, 2017

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT photograph or videotape employees engaged in workplace marches and rallies on or near our property.

WE WILL NOT create the impression that we are watching your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, to the extent we have not already done so, rescind all policies and procedures requiring security and/or management personnel to photograph or videotape employees engaged in workplace marches and rallies on or near our property.

THE BOEING COMPANY

The Board's decision can be found at www.nlrb.gov/case/19-CA-090932 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Irene Hartzell Botero, for the General Counsel.
Charles N. Eberhardt, Esq. (Perkins, Coie LLP), for the Respondent Company.
Thomas B. Buescher, Esq. (Buescher, Goldhammer, Kelman & Perera, P.C.), for the Union.

DECISION

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Seattle, Washington, from September 24–26, 2013. Charging Party, The Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001 (Engineers' Union, SPEEA, or Union) filed the charges and amended charges in these three consolidated cases beginning on October 9, 2012,[1] and at various times through April 12, 2013.[2]

The General Counsel issued the consolidated complaint and notice of hearing on April 29, 2013.[3]

[1] All dates are in 2012 unless otherwise indicated.

[2] A portion of this consolidated action was severed in a late August 2013 conference call with the parties' counsel and administrative law judge prior to hearing and confirmed at the beginning of hearing such that for this decision pars. 7(b), 8, 11, and 13 of the consolidated complaint are severed and litigated subsequently at a later hearing. Tr. at pp. 5–8; General Counsel Exhibit (GC Exh.) 1(v). For ease of reference, testimonial evidence cited here will be referred to as "Tr." (Transcript) followed by the page number(s).

[3] Fn. 2, at p. 3 of Respondent's closing brief (R. Br.) refers to Respondent's earlier motion to dismiss based on allegations that the complaint in this case "was unauthorized and void" because the prior Acting General Counsel lacked authority to delegate the issuance of the complaint in this case to the Regional Director. I find no merit in the Respondent's contention that the Acting General Counsel lacked the authority to prosecute this case. The Acting General Counsel (AGC) was properly appointed under the Federal Vacancies Reform Act, 5

The complaint alleges that Respondent, The Boeing Company (Respondent/Employer), violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when on four separate dates it engaged in surveillance or created an impression of surveillance and photographed Engineers' Union employees during a union march[4] or while participating in protected concerted activities at Respondent's facilities in Everett and Renton, Washington, and Portland, Oregon. The complaint also alleges that Respondent violated Section 8(a)(1) of the Act when it promulgated and maintained Procedure PRO 2783 (the Rule) which states that use of employees' personal camera-enabled devices "to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security." Respondent denies that it has violated the Act in any way.

On the entire record,[5] including my observation of the demeanor of the witnesses, and after considering the posthearing briefs[6] filed by the General Counsel, Respondent, and the Engineers' Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties admit and I find that Respondent is a Delaware corporation with its headquarters in Chicago, Illinois, who manufactures and produces military and commercial aircraft at various facilities throughout the United States, including Everett and Renton, Washington, and Portland, Oregon. The parties further admit and I further find that during the preceding 12 months of the relevant dates of the various charges in this case, Respondent derived gross revenues in excess of $500,000 in conducting its business operations and during the same time periods while also conducting its business operations, it both sold and shipped from, and purchased and received at, the facility goods valued in excess of $50,000 directly to and from points outside the State of Washington.

I further find and it is also admitted that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

It is also admitted, and I so find, that the Engineers' Union is a labor organization within the meaning of Section 2(5) of the Act at all relevant times leading to this proceeding.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations And Facilities In The Pacific Northwest

1. Respondent

Respondent operates a division of its company in the States of Washington and Oregon known as the Commercial Airplanes Division (CAD) which designs and builds airplanes for the commercial passenger and freight market and produces military derivatives of commercial aircraft for the U.S. Government. This case involves Respondent's CAD operations at its facilities in Everett and Renton, Washington and Portland, Oregon where Respondent primarily performs commercial airplane work, but it also performs military systems and aircraft work, including some classified work which is conducted in marked areas or behind closed doors that require further security clearance not involved in this case.

2. Two separate Unions—Engineers' Union and Machinists' Union

The Engineers' Union represents salaried professional (engineering) and technical employees in Washington and Oregon. These units comprise approximately 24,000 Respondent employees, most of who work in the Puget Sound region in Washington, with the highest concentration at the Everett facility. Approximately 200 of Engineers' Union's members work at Respondent's Portland facility.

Respondent and Engineers' Union have a long and stable collective-bargaining history dating back to 1946 for the professional unit and 1972 for the technical unit. In the fall of 2012, the parties were negotiating successor labor contracts which were signed in the first half of 2013, retroactive to October 2012. Many of the Engineers' union employees at Respondent are white collar workers with extensive secondary education who work primarily in office environments away from the factory and production floor though many of them walk the factory floor to and from their jobs. Prior to August 2012, the Engineer's Union had not engaged in any marches inside Respondent's facilities during contract negotiations.

Respondent's other larger union, the International Association of Machinists (the Machinists' Union) comprise the vast majority of Respondent's hourly-wage employees in the factory

---

U.S.C. § 3345 and not pursuant to Sec. 3(d) of the Act. See *Muffley v. Massey Energy Co.*, 547 F.Supp. 2d 536, 542–543 (S.D.W.Va. 2008), affd. 570 F.3d 534 (4th Cir. 2009) (upholding authorization of a 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act). See *The Ardit Co.*, 360 NLRB 74 (2013). In addition, the motion to dismiss was denied because at the time of hearing the AGC was still actively considering an appeal of the [8/13 D.Ct. Order]" As such, I find that the 8/13 D.Ct. Order is not final and currently has no relevance to this administrative adjudication of the complaint or the instant motion. Moreover, I further find that Respondent's argument that the Board lacks a constitutionally valid quorum is inapplicable to this case because this question about the Board's validity remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Bloomingdale's Inc.*, 359 NLRB 1015 (2013) (Board rejects same argument for the same reasons.). More importantly, as pointed out by the AGC, I further find that the AGC's authority to issue and prosecute a complaint is unaffected by any issue concerning the composition of the Board. See e.g. *NLRB v. Food Workers Union*, 484 U.S. 112, 126–128 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)).

[4] The terms solidarity walk(s) and mass march(es) are used interchangeably in this decision and mean the same thing. In this case, they are basically a group of Respondent employees belonging to the Engineers' Union who got together to walk and march through various areas on or near Respondent's facilities during contract negotiations for a new collective-bargaining agreement.

[5] I hereby correct the transcript as follows: Tr. 608, line 16: "I will offer it as substantive evidence" should be "I will not offer it as substantive evidence."; Tr. 659, line 9: "March" should be "march"; Tr. 661, line 17: "formed" should be "informed."

[6] Documentary evidence is referred to either as "GC Exh." for a General Counsel Exhibit, or "R. Exh." for a Respondent exhibit. References to posttrial briefs shall be either "GC Br.", "R. Br.", or "CP Br." followed by the page numbers. Citing to specific evidence in the record is for emphasis and there may be additional evidence in the record that supports a finding of fact or conclusion of law.

and production floor areas in Washington and Oregon and they perform blue collar production and maintenance work, including machining, assembly, tooling, material support, and parts movement, including forklift and crane operation. Unlike the Engineer's Union, for many years prior to 2012, the Mechanic's Union held lunchtime marches with staggered lunches. (Tr. 40–41, 53, 57.) Respondent admits to never trying to stop the Machinist marches. (Tr. 708.)

As a result of these Machinists' Union marches, Respondent created a document in 2008 which it used to train its managers and security guards regarding procedures to follow during workplace marches (the March Rule). (Tr. 34–35, 60; GC Exh. 27.) This included security guards providing bicycle or patrol car escorts to Machinists' marchers over the years before 2012 at the front and back of each march.[7] The lead guard would stop vehicles and forklifts and clear transportation aisles along the march route, and the guard in the back of the march would prevent vehicles from approaching or passing the marchers from behind. The Machinists' Union never questioned or objected to Respondent's developed its own practices or rules for Machinists' Union marches.

Respondent's security personnel also prepare and file written Uniformed Security Incident Reports (USIR's) when they respond to various incidents on Respondent property that affect people, buildings, equipment, safety, or accidents. These reports evolved over time as they also summarize pertinent details of the incident and began to include photographs taken of individuals, equipment, or property related to the incident.[8]

No violence, rioting or safety issues were recorded nor did security record any incidents of Machinists' union employees disrupting production during a march. (Tr. 61–62.) What further evolved from the Machinists' marches and the March Rule was that the security guards routinely completed and filed USIR's documenting the time, location, march participants, route, and any notable interactions of each Machinist march. In addition, Respondent's security guards' practice during the Machinists' marches was to provide an escort in the front and rear of the march and to stop vehicular traffic along the route. (Tr. 442, 501.) No evidence was presented that the Machinists' Union ever objected to the taking of photos by Respondent's security personnel documenting the Machinists' marches.

3. Respondent's secured facilities

Access to Respondent's facilities is controlled through fences and security guards and authorized personnel use security badges to gain access to various parts of the facilities through pedestrian gates. Once access is gained to the general factory areas, additional stricter levels of security are required to gain further access within the facilities to classified areas designated by additional locked doors or cordoned-off areas marked as top secret or containing classified information.[9]

In addition to personnel, vehicles must also pass through gates staffed at Respondent's facilities by uniformed security guards. More than protecting personnel and property by staffing perimeter gates, Respondent's security guards also support special events, perform traffic control, enforce vehicle and pedestrian safety rules, respond to incidents and medical emergencies, perform first aid, supply security escorts, and help employees with car unlocks, jumpstarting dead batteries, and computer cable unlocks.

At Respondent's factories, a constant stream of truck, forklift, and other vehicle and equipment traffic inside and around these large factory buildings throughout the workday sometimes puts employees at risk. Respondent has developed and published various specialized safety rules to address dangers unique to the factory environment, including rules for pedestrian walkways, transportation aisles, interactions between pedestrians and vehicles inside the factory, overhead-door safety, over-head crane safety, and eye safety. Respondent's employees do not always follow these safety rules yet in this case no evidence was presented that any Engineers' Union employee was cited or disciplined by Respondent for any alleged safety violation during the last half of 2012.

B. Respondent's Challenged Rules

1. The Revised March Rule

In late summer, early fall 2012, Engineers' Union employees began to wear red union shirts on Wednesdays and engage in peaceful solidarity walks or marches in and around Respondent's facilities in Everett and Renton, Washington, and Portland, Oregon, to show their support for the Union during contract negotiations. Prior to late summer 2012, there had been no marches at Respondent's facilities by the Engineers' Union. (Tr. 36, 56, 664.) The decision to photograph was made by Respondent before any of the Engineers' Union marches in the fall of 2012. (Tr. 35–36; GC Exh. 27.)[10]

Respondent updated the March Rule in August 2012 and presented it to its managers and security guards in September for training in connection with the Engineers' Union contract negotiations taking place at that time. (Tr. 35–36, 469, 479, 536; GC Exhs. 27, 31 and 32.) Respondent's express instructions to its security guards before the Engineers' Union marches took place was to "[o]penly communicate with picketing employees when a safety hazard exists." GC Exh. 32 at 4.) The 2008 security officer etiquette training, however, instructed security guards *not* to record peaceful picket line conduct. (GC Exh. 31.) Respondent's directive to its guards *not* to record peaceful picket line conduct was removed from the security officer etiquette training document by September 2012 and the Engineers' Union marches. (GC Exh. 32.)

[7] The Machinists' Union did not conduct mass marches in 2012. R. Br. at 9.

[8] This is in contrast to Respondent's earlier instructions to its security personnel not to photograph or record "peaceful" picketing. See GC Exh. 31 at 4. The Machinists' marches also resulted in further instruction that Respondent's security personnel photograph and document "behavior which is disruptive or unsafe." Id.

[9] None of the facts in this case involve allegations that any Engineers' Union members tried to march or gain access to top secret or classified areas at Respondent's facilities anytime in late 2012.

[10] Respondent's security guards' training provides that if a march occurs management is supposed to notify security "immediately for video-tape support . . . ." GC Exh. 27 at 4. This training was created in 2008 in anticipation of Machinists' union marches. Tr. 40.

Also as of August 2012, Respondent's managers were required by the March Rule to notify security immediately for videotape support if a workplace march occurred. (GC Exh. 27 at 4.) The March Rule also requires managers to notify employees of the potential for corrective action and pay impact for unacceptable conduct during mass marches. (GC Exh. 27 at 5.) Respondent completed USIR's and photographed and videotaped the Engineers' Union members during these walks in the Everett factory facility on September 19 and December 12, at the Portland 85–001 Building on October 3, and outside the Renton plant near the D-9 gate on September 26, 2012 as referred to below in more detail. (Tr. 45–48, 51, 453, 529–530, and 663; GC Exhs. 24, 25, 29(b), 30, 33–35.)

The lunchtime walks were peaceful and no Engineers' Union member was disciplined for their conduct during any of these four walks. (Tr. 470, 718, and 721; GC Exh. 29(b); GC Exh. 33.) Respondent's admitted custom and practice is not to discipline any groups of employees or march participants who may violate safety rules during marches such as failing to wear safety glasses in the factory or walking briefly outside the pedestrian walkway. (Tr. 527–528, 722.)

(a.) The Everett, WA facility

Respondent's Everett facility is where the Engineers' Union conducted its September 19 and December 12 lunchtime redshirt walks. The walks took place on the factory floor where there are no classified areas. (Tr. 73–74, 93, 151–153, 430–431, 437–438: GC Exhs. 2–3.)

The Everett factory building is one of the largest enclosed buildings in the world estimated to measure six football fields in total volume. (Tr. 216, 218.) It is approximately six or seven stories high with offices above the factory floor at certain locations. (Tr. 74, 216.) The factory building houses the main manufacturing areas for Respondent's airplane models 747, 767, 777, and 787. (Tr. 567; GC Exh. 3.)[11] Production of the airplanes moves from north to south, with all but the 767 model moving out of the south bay doors on completion. (Tr. 568.)

Approximately 42,000 employees worked at the Everett facility in 2012 and of these, about 19,500 were Machinists' employees and about 12,000 were Engineers' union employees. (Tr. 703, 715.) Engineers' union members worked on the factory floor in cubicles with Machinists, in closed offices and elsewhere and approximately 1800 Engineers' union members working in the entire factory building on three shifts with 1200 of them on first shift. (Tr. 200, 716.) Of the 1800 Engineers union members working in the factory building, at least 300 worked directly on the factory floor in cubicles and 200 of those worked the first shift. (Tr. 92, 127, 633–634, 704.) Approximately 150–300 Engineers' Union members walked at lunch on September 19 and December 12, 2012.

A main transportation aisle, which is referred to by employees as "main street" runs east to west through the factory building. (GC Exh. 3.) Forklifts and other vehicles use the transportation aisles to move equipment and parts around the factory. Forklift traffic is intermittent and employees are trained to be aware of this traffic as they move around the factory. (Tr. 203.) A pedestrian aisle parallels the main aisle on the north side. (Tr. 105, 207–208; GC Exh. 3.) Another major transportation aisle paralleled by a pedestrian aisle on the west side runs north to south in the 40–25 factory building through the model 777 final assembly line. (Tr. 217–218; GC Exh. 3.) There are a number of pedestrian aisles running throughout the factory that are stand-alone aisles which do not parallel transportation aisles and there are pedestrian tunnels running under the factory floor for employees to use though they do not always connect with each other. (Tr. 188, 201, 216, 218.) There are crosswalks at most intersections throughout the factory with accompanying stop signs for both pedestrians and vehicles. (Tr. 296; GC Exh. 3.)

All Respondent employees whose jobs take them to the factory floor are required to take an annual safety course on factory operations. (Tr. 236.) The course instructs employees regarding the guidelines to follow in the event of an overhead crane move—to stop, look up, to watch and to stay out of the area of the crane envelope, and, if possible, to stand under a structure. (Tr. 236, 297.) During crane moves, large signs measuring 8–10 feet long and about 4 feet high are moved by the crane crew near the crane move area to alert employees that there is an impending move. (Tr. 156, 297–298; GC Exh. 22.) The crane crew wears orange and white helmets and gathers and arranges the crane in position, the crane operator sounds the crane horn, cords are lowered down from the crane, the crane horn usually goes off again and indicator lights start flashing. (Tr. 237.) Employees are not notified in advance that there is going to be a crane move, and they simply follow the training they have received when encountering workers about to begin to move and operate the crane. (Tr. 238–239.)

Employees and managers, however, frequently walk in the transportation aisles of the factory building and not the adjacent pedestrian lane during shift changes which occur approximately three times per day, during break times, during emergency evacuations, when parts or equipment block the pedestrian lanes, and when employees are cutting across the factory taking the shortest route between two points. (Tr. 130, 137–139, 188, 241–242, 246–247, 641; GC Exhs. 17–19.) There are often hundreds of employees in the transportation lane during shift breaks and changes. (Tr. 243.) Employees have not observed security guards taking photos of workers in the transportation aisles under these circumstances. (Tr. 189, 302–3-03.)

Non-material handling pedestrians are often in the apron area outside the factory building. (Tr. 174.) It is the normal custom and practice for employees at Respondent to regularly walk through large overhead bay doors in the factory as well as overhead doors inserted within the bay doors, despite guidelines advising employees not to do so. (Tr. 172–173, 175, 244, 254–255.) Respondent does not discipline employees for disregarding this safety guideline. (Tr. 256, 473–474.) Nonetheless, the overhead doors have a switch that pedestrians can flip to keep the doors locked open. (Tr. 623, 644–645.) Security

[11] GC Exh. 3 is a to-scale schematic of the Everett facility, which shows the different airplane production lines and major transportation corridors. It also shows the alpha-numeric column grid used to identify locations and features within the factory. Columns on the east-west axis are identified by letters from A (at the west extreme) to R (at the east extreme) of the 40–26 building. Columns on the north-south axis are identified by numerals from 1 (at the south wall) to 17 (to the north).

guards do not normally take photos of employees walking through overhead doors, or of employees who are walking through the factory without their safety glasses on, or generally at any other time other than during Engineers' Union member marches or walks. (Tr. 176, 240, 246, 291.)

(i) The September 19 Engineers' Union March at the Everett Plant

On September 19, approximately 150–300 Engineers' Union employees gathered for approximately 10 minutes near the in-house Tully's Coffee Shop (Tully's) location within the factory building during their lunch hour around 11 a.m. for their first Everett march wearing their red Union shirts and carrying various signs which read, "No nerds No birds," "We delivered," "We're Boeing," "Not my pension," and "I'm voting No." (Tr. 73, 78–79, 105, 119–120, 124, 183, 187, 214; GC Exh. 4, GC Exh. 5.)

The described purpose of this red-shirt walk was to march around the factory to show solidarity among Engineers' Union members during their contract negotiations with the Respondent. (Tr. 72–73, 118, 183, 213–214.) Engineers' Union employee Suzanne Kamiya recognized the walk participants as mostly comprised of those working in the factory building. (Tr. 95, 200.) The employees were chatting with each other and chanting slogans, such as "I'm voting No." (Tr. 79, 151.)

Respondent was advised of the march prior to its occurrence and had dispatched guards Jeffery J. Catalini (Catalini) and Dave Lopez (Lopez) for bike patrol duty along the walk. (Tr. 503.) Security guard Kelly Hess (Hess), Catalini's and Lopez' supervisor, was also present during the walk. (Tr. 282, 445, 483.) These guards photographed Engineers' Union members who were gathering mainly along the pedestrian aisles and crosswalks located at the intersection closest to the Tully's. (Tr. 79–80, 107, 234–235, 482; GC Exh. 3.) As per the guards, the purpose of their photographing the walk was to show the scope of the crowd size for the first Engineers' Union walk at the facility. (Tr. 451, 473.) Catalini testified that before the September 19 march he and Lopez were instructed by Hess to "[d]ocument the scope and size of the crowd, any intimidating factors." (Tr. 480, 538.) These guards did not speak with or say anything to the employees at the time other than to ask them what their planned route was. (Tr. 235, 470.)

While gathered at Tully's, workers not participating in the walk were able to navigate down the transportation aisles riding tricycles with cargo boxes. (Tr. 494; GC Exh. 29(b), photo 1.) If vehicles could not get through the Tully's intersection, it was because security guards prevented them from passing. (Tr. 492.) After gathering for approximately 10–15 minutes by the Tully's, employees walked south down the H transportation aisle, using the pedestrian walkway that paralleled it as much as possible. (Tr. 81–82, 106, 108, 110, 262; GC Exh. 3.)

The employees in the red-shirt walk then continued out of the factory building onto the apron, moved east on the apron, re-entered the factory at the 40–25 building, proceeded north on the pedestrian aisle located in the middle of the 777 final assembly line, up to the main transportation aisle, and turned west on the pedestrian aisle paralleling the main transportation aisle back to Tully's. (Tr. 85–86, 91, 110, 185; GC Exh. 3; GC Exh. 29(b).)

Engineers' Union members Suzanne Kamiya and Scott Steffen convincingly testified that as walkers left Tully's and began the walk, a security guard photographed the marchers while on a bicycle from about 20-50 feet away, blocked their path and continued to take photos of the walkers as they approached him, forcing them to walk around him on their way down the H aisle. (Tr. 83–84, 109; GC Exh. 3.) Guard Catalini, who was on a bicycle during the march, admitted he took photographs of walk participants when they entered the 40–24 production area. Photo 7 of GC Exh. 29(b), taken by Catalini, documents the scene as testified by Kamiya, Steffen, and Catalini. (Tr. 451, 472; GC Exh. 29(b).)

Engineers' Union employee Scott Peters observed a guard on a bicycle photographing employees while they were out on the apron for a few minutes. (Tr. 187, 469.) Peters credibly noted that he had never previously seen a Respondent guard take photos of employees during the course of his 23-year employment with Respondent. (Tr. 178, 191.) Catalini admitted taking photographs of employees who had gathered on the apron for a couple of minutes until the full group came out of the building and headed east and testified that he took photos on September 19 "just to show the scope of the crowd size for the first SPEEA march that we encountered." (Tr. 451, 468, 473.) Catalini's September 19 USIR corroborates employee testimony regarding photographs taken by security guards of the walkers at various points along the route. (Tr. 452–453; GC Exh. 29(b).) Security guards did not instruct the walkers to stay in the pedestrian lanes nor did they direct any of the walkers to or out of a particular area. (Tr. 247, 474.) In addition, guards testified it was not their role to direct or interact with the walkers; rather, their role was to provide an escort in the front and the rear of the walk, and to document the walk with photography. (Tr. 447, 474.)

The Engineers' Union members testifying at hearing believably expressed that as a group it was not their intent as marchers to block pedestrian or vehicular traffic or to shut down work being performed by the Machinists' Union members or others during the walk. (Tr. 82, 145–146, 189–190.) The Respondent's guards, and not the Engineers' Union members, temporarily stopped vehicular traffic to allow the marchers to proceed along their route. (82, 85, 145–147, 176, 190–191, 262, 462, 465, 545, 553.) While Guard Lopez estimated that the September 19 walk took approximately 15–25 minutes to complete, generally the estimate by employees was that the walk took from 40–45 minutes to complete and was conducted primarily during the Engineers' Union members' lunch period. (Tr. 83, 86, 114, 187, 540.)

The march did not materially impact or slowdown work being performed at the factory, production which occurs generally nonstop 24 hours a day, 5 days a week at Respondent. (87, 111–112, 123, 151, 577–578, 642, 648.) Any chanting or other noisemaking engaged in by the marchers blended in or was drowned out by the usual loud factory noise made by non-march workers in the normal course of their workday from operating forklifts, rivet guns, scissor lifts, welding guns, and cranes. (88–89, 151, 477.) The single witness testimony to the

contrary is rejected as outweighed by more credible testimony denying the use of air horns and by the fact that Guard Catalini's USIR did not indicate that air horns were used by the marchers, the path taken by the marchers did not pass by any marked restricted areas, and the USIR itself provides that "the rally was conducted without incident" and that "[n]o derogatory signs or chants were seen or heard." (Tr. 153, 164, 711; GC Exh. 29(b).) While the photos taken by Catalini were not of individual marchers, the faces of various marchers in most of the photos are clear enough to identify individual SPEAA employee marchers. (GC Exh. 29(b).)

(ii) The December 12 Engineers' Union March at the Everett Plant

Like its earlier September march, the Engineers' Union conducted a December 12 red-shirt walk that started and ended at the Tully's in the Everett factory building during the union members' lunchbreak and took approximately 40 minutes to complete.[12] (Tr. 218–219.) Also as before, approximately 150–250 Engineers' Union members participated in the march to show solidarity during contract negotiations with Respondent. (Tr. 214–215, 219, 282, 284; GC Exh. 34.) The Engineers' Union did not instruct its members to disrupt factory work during the march. (Tr. 241.)

The march began at approximately 11 a.m. at the Tully's location and security guards Hess and Lopez were dispatched to control traffic for the march after a guard reported employees wearing red Engineers' Union shirts gathering in the factory at Tully's. (Tr. 222, 283, 504.) Guard Lopez prepared a USIR for the march and attached to the report photographs taken by guards of the marchers at various points along the way. (Tr. 514; GC Exh. 34.)

Similar to the September march, employees held posters during the march that said. "No Nerds No Birds," "We Don't Need Corporate Greed," "We Delivered, Will Boeing," and "Respect be it to the Max," and chanted slogans throughout various points along the route. (Tr. 219, 229.) Slogans were chanted repeating the various posters messages and the spelling of the members' union "S-P-E-E-A." (Tr. 220.) As before, any chanting or other noisemaking engaged in by the marchers blended in or was drowned out by the usual loud factory noise made by non-march workers in the normal course of their workday from operating forklifts, robotic machines, rivet guns, general banging or hammering, scissor lifts, welding guns, and cranes. (Tr. 221, 291–292.)

At the start of the march, a vehicle stopped for the marchers as they were heading west along the pedestrian aisle adjacent to the transportation lane. (Tr. 293, 308.) The vehicle waited no more than a minute or two for the remaining 75 marchers to pass before passing though. (Tr. 293.) On two other occasions, vehicles moved adjacent to the marchers who were in pedestrian aisles and throughout the march, employees made an effort to stay in the pedestrian walkways and out of the transportation aisles during the march. (Tr. 250, 254, 294, 511, 521: GC Exh. 3; GC Exh. 34.) On one other occasion, marchers encountered a truck at the end of the 40-21 building and waited for the truck to pass on before they crossed over the transportation aisle. (Tr. 295; GC Exh. 3.)

The marchers moved west down the main transportation aisle, headed south halfway down the transportation aisle located in the middle of the 40–21 building, and followed the pedestrian paths heading eastbound through the 40–22, 40–23, 40–24, and 40–25 buildings. They next intersected the transportation aisle in the 40-25 building, headed south along that lane until intersecting another pedestrian aisle, and turned east until arriving at the building 40-26 bay. At that point, they headed northward in the pedestrian aisle of the same 40-26 building until it intersected with the main transportation aisle, crossed over that aisle and then headed west along the pedestrian pathway back to the Tully's. (Tr. 222–223, 230, 250–252, 285; GC Exh. 3; GC Exh. 34.)

Marchers followed the pedestrian aisle which was located between two aircraft in positions one and two when employees entered the 777 area of the factory in the 40–25 building. (Tr. 618; GC Exh. 3; R. Exh. 5.) Machinists performing prep work for functional tests up around the vertical stabilizer paused for approximately 10–25 minutes to continue their work while the marchers completely passed by. (Tr. 619, 642, 647–648.) Jason Clark (Clark), Respondent's director of manufacturing and operations of the 777 airplane, opined that this brief pause in work and even a 20 minute pause in work did not delay the delivery date of any of the aircraft. (Tr. 563, 605, 642.) In addition, no crane moves were noted by the marchers along the route used on December 12. (Tr. 237, 300.)

Engineers' Union member Sandra Hastings (Hastings) witnessed a Respondent security guard taking photos of the marchers with what appeared to her to be a cell phone when the marchers were walking east between building 40–24 and building 40–25 through rows J, K, and L. (Tr. 290; GC Exh. 3.) At that same time, marchers were walking and chanting but they were not blocking vehicular or pedestrian traffic nor were they interfering with any work going on at the factory. (Tr. 290, 292.)

Because there was no crosswalk across the transportation aisle, marchers looked both ways and crossed over the main transportation aisle to get to the pedestrian path located along the north side of the main transportation aisle when marchers first arrived at the end of the pedestrian aisle as they headed north along the 40-26 building. (Tr. 223–224; GC Exh. 3; GC Exh. 10; GC Exh. 34.) It took the entire group of marchers less than 5 minutes to all cross between the two pedestrian walkways across the main transportation aisle – a common practice by all Respondent employees, union and nonunion, who frequently cross the main transportation aisle at this location to get to the pedestrian aisle without taking an alternative route. (Tr. 227, 640–641: GC Exh. 3.)

At this point near the end of the march, Guard Lopez stopped his vehicle in the main transportation aisle to photograph marchers and to prevent vehicular traffic from proceeding down the transportation aisle. There was, however, no vehicular traffic stopped there as the marchers crossed over the aisle to get to the pedestrian aisle. (Tr. 227–228, 513.) Guard Lopez was also observed photographing marchers a second time while inside his vehicle at location I-12, building 40–24, approxi-

[12] Guard Lopez estimated that the December 12 march took approximately 15 minutes to complete. Tr. 540.

mately 10–12 minutes after Lopez was initially observed taking photos. (Tr. 228–229; GC Exh. 3.) Lopez testified that he took photos on December 12 "to ensure safety and to document the event." (Tr. 509.) Engineers' Member Shannon Moriarty (Moriarty) was gathering employees and leading some chants at that time before marchers were dismissed to go back to work. (Tr. 229.) As before in September, there was no material interference with any work performed at the factory. (Tr. 229, 241, 642; GC Exh. 34.) While the photos taken by Lopez were not of individual marchers, the faces of various marchers in most of the photos are clear enough to identify individual SPEAA employee marchers. (GC Exh. 34.)

(iii) December 12 Interaction between Ms. Moriarty and Mr. Lopez at Everett

Engineers' Union members observed Guard Lopez a third time sitting in his security vehicle in the main transportation aisle at the intersection closest to the Tully's in the factory building on December 12. (Tr. 230. GC Exh. 3; GC Exh. 11.) At this time, Lopez engaged in two short conversations with two employees—Moriarty and Hastings.

When Moriarty approached Lopez parked in his vehicle, she stated: "I noticed you were taking photographs of our group." (Tr. 231.) Lopez responded: "I've been directed to document all union activities." Id. Lopez admitted the same with his testimony but added that the photos were "to ensure safety." (Tr. 509.) Moriarty replied: "It makes our folks feel a bit uncomfortable." Id. Moriarty further reported that in conflict with Lopez' testimony, he did not tell her he was taking photos to ensure compliance with safety or to document traffic or safety concerns and he clearly indicated to her that he would continue to document and take photos to document in his report that 250 individuals participated in the walk. (Tr. 231, 523.) Lopez' USIR provides that 200–250 SPEEA members participated in the march. (GC Exh. 34.)

As their discussion was ending, Engineers' Union member Hastings approached Lopez and Moriarty and began to speak with Lopez as Moriarty left the group. (Tr. 232–233.) Hastings asked Lopez twice what he was doing with his camera and each time he replied that he was taking photos of non-Boeing activity. (Tr. 288.) Hastings then asked Lopez why he was taking these photos and he responded by saying: "We always do this [photo taking]." Id. No testimony was presented that during their conversation Lopez told Hastings that he was taking photos to ensure compliance with safety standards or to document safety concerns or violations. (Tr. 289.) At the end of these conversations, the march was winding down and there were approximately 15 marchers remaining leaving the pedestrian aisle and not blocking any vehicular or pedestrian traffic or interfering with plant operations. (Tr. 288–289.)

Both Moriarty and Hastings opined that neither Lopez nor any other guards directed vehicular or pedestrian traffic during the march and Lopez' report is silent with respect to engaging verbally with employees or otherwise directing traffic as it indicates that he merely observed Engineers' Union employees and photographed them. (Tr. 240, 303; GC Exh. 32.)

Lopez testified: "I was in my vehicle and I was approached, and I was questioned why we were taking photographs. And my reply to her was that I am taking photograph[s] at the request of my management. And we take those pictures to document safety and the review of safety." (Tr. 523.) Also, Lopez' version of his interaction with Hastings was that it was just a "short little hi, how you doing" with nothing related to photographs. Id.

(b.) The September 26 Engineers' Union walk at Respondent's Renton, Washington Facility

Respondent's Renton plant is located along the southern end of Lake Union near a commercial development called The Landing. (Tr. 419–420, 691; GC Exh. 12.) Respondent manufactures its 737 airplane at the Renton facility. (Tr. 420.) About 12,000 to 13,000 employees work the day shift at the Renton plant. (Tr. 697.)

On Wednesday, September 26, at 11 a.m. at the southwest corner of the 482 building, an ice cream social was held by the Engineers' Union at the Renton plant after a red-shirt walk to show union solidarity. (Tr. 318–320.) The last group of marchers arrived at approximately 11:20 a.m. to join their coworkers at the social. (Tr. 320.) Approximately 500 employees gathered at the social to listen to Engineers' union president, Tom McCarty (McCarty) provide a contract negotiation update. Id.

Respondent's security personnel had been advised prior to the social that an Engineers' Union rally was going to take place in front of the 481 and 482 factory buildings. (Tr. 685.) After approximately 5–10 minutes, McCarty led a group of about half of the attendees outside the Renton plant, through the pedestrian gate, D9, to the northwest intersection of Park and Logan Avenue. (Tr. 320–321; GC Exh. 14.) Employees stood and chanted on the intersection for about 15–20 minutes. (Tr. 324, 695.)

Soon after arriving at the intersection, employee Benjamin Braatz (Braatz) observed Respondent guard Dean Torgude (Torgude) taking photos of the workers who were gathered at the intersection. (Tr. 323–324.) Torgude was positioned inside a security vehicle, with his arm extended outside the vehicle, holding a photographic device, and parked near the Respondent's property fence about 65 feet away from the gathered workers. (Tr. 324, 694–695.)

After Braatz had been at the intersection for approximately 15–20 minutes, about 100 of his coworkers left the rally using the crosswalk button to cross Logan Avenue. (Tr. 324–325.) Braatz has used this intersection in the past and has made it across the street before the crosswalk light turns red. (Tr. 327.) After observing his co-workers cross Logan Avenue, Braatz returned back to his building. (Tr. 324.)

Security guard Torgude testified that he took photos of workers at this intersection for "[s]afety issues, safety concerns" because a lot of people were crossing the intersection and not making it across before the walk/don't walk signal changed to "don't walk." (Tr. 686, 688, 690, 692; GC Exhs. 25 and 28.) Torgude also reported this to the City of Renton after the incident. (Tr. 693.) While the photos taken by Torgude were not of individual marchers, the faces of various marchers in most of the photos are clear enough to identify individual SPEAA employee marchers. (GC Exhs. 25 and 28.)

Approximately 12,000–13,000 employees work the day shift

at the Renton plant. (Tr. 697.) When day shift employees get off work at the plant, many cross over Logan Avenue to head down to the section 11 parking area across from Renton stadium. (Tr. 696–697; GC Exh. 13.) Often, workers do not make it across Logan Avenue before the stoplight or the walk/don't walk sign changes. (Tr. 697.) Guard Torgude has notified the City of Renton several times with respect to traffic safety issues in connection with employees getting off shift. (Tr. 697–698.) Respondent's security guards have not taken photographs of employees under such common circumstances prior to the rally on September 26. (Tr. 698.)

(c) The October 3 surveillance in building 85–001 at Respondent's Portland, Oregon Facility

The first red-shirt march conducted by the Engineers' Union at Respondent's Portland, Oregon facility took place on October 3 and was organized by employee Kenneth Parcher (Parcher). (Tr. 662.) Before the October 3 march, the Portland security guards were instructed by Respondent about what to do if there were any "demonstrations" in Portland. (GC Exh. 24.) The instructions do not mention a single incident of disruption or safety violations in describing what had occurred at other Respondent facilities. Id. In addition, the instructions provide: "If there is a demonstration please let me know and have the patrol respond to the event, take photos of those involved in the event, ensure participants are acting in a safe manner and clearly document the event in USIR before the end of your shift." Id.

On October 3, approximately 45–50 employees gathered at about 11:15 a.m. at the flag pole area on the north side of the Portland facility to participate in the march. (Tr. 339.) The majority of employees were wearing red Engineers' Union shirts. (Tr. 340.) A few held poster-sized union signs which said, "Respect SPEEA to the Max." Id.

On September 5, Security Site Manager Don Collins (Collins) sent an email to Portland facility guards indicating that Engineers' Union activity was likely to increase in the coming weeks and to ensure that guards documented any Union demonstrations with USIR and photographs at the facility. (Tr. 665, 677; GC Exh. 24.) When the march began, Collins instructed guard Ed Crowe (Crowe) to be in front of the walk and to have a uniformed guard follow the walk. (Tr. 665, 677.)

After gathering at the flag pole, employees walked through the office hallways and through the production areas of the three main buildings of the Portland facility—buildings 85–120, 85–001, and 85–105.[13] Engineers' Union members did not chant nor use noisemakers and there were no derogatory signs used by the marchers during the October 3 Portland walk. (Tr. 679; GC Exh. 33.)

After Engineers' Union members marched through the Portland factory area in the 85–001 building, they went to a training area in front of the building, and Parcher observed guard Crowe filming the employees walking past him either single file or in pairs using a digital camera. (Tr. 346, 679.) Parcher was approximately 20 feet away from Crowe when he first noticed him filming the walkers. Crowe continued to film employees as they passed right by him. (Tr. 346, 668.) Employees were not chanting, blocking workers, or preventing work from being performed. (Tr. 356–347.)

The marchers continued down the front of building 85–001, went inside the cafeteria, continued along to the front of the building and re-entered the building through the main entrance and proceeded down the main hallway. (Tr. 347.) Immediately after the marchers re-entered the building through the main entrance, Crowe was right there taking photos of the marchers. (Tr. 347, 668; GC Exh. 26.) This time, Crowe was taking photos within 5 feet of the marchers despite the fact that they were not chanting, making noise, or preventing work from being completed. (Tr. 348, 675.) After exiting the 85–001 building, the marchers walked through the 85–105 building. (Tr. 349–350.)

On October 4, Crowe filed an incident report of the October 3 march that describes the march as lasting approximately 40 minutes and not being disruptive to the nonmarch work force as the march was quiet with no chants, whistles, or horns. (GC Exh. 33.) The report also indicates that photos and video were taken of the October 3 march. Id. While the photos taken by Crowe were not of individual marchers, the faces of various marchers in most of the photos are clear enough to identify individual SPEAA employee marchers. (GC Exh. 33.)

2. Rule PRO 2783

Respondent attempts to regulate camera use on its properties to protect information from disclosure to third parties. (Tr. 383–384.) The use of camera-enabled devices in classified areas at Respondent's facilities is prohibited outright and these classified areas are designated by signage, locks, and warning signs.[14] (Tr. 386, 428.) Respondent also physically designates its proprietary and less sensitive than classified areas at its Everett facility by placing it behind locked doors or with signage and either curtains, fences or theatre tape. (Tr. 428–429.)

Respondent has a working procedure/rule, PRO 2783, known by its employees, that precludes the use of personal camera-enabled devices without a valid business need and a preapproved Camera Permit from Respondent. (Tr. 183; GC Exh. 8.) This rule was last revised to its current restricted language in November 2011. Specifically, the rule provides:

> A. Possession of the following camera-enabled devices is permitted on all company property and locations except as restricted by government regulation, contract requirements or by increased local security requirements.

[13] Respondent's counsel argues in fn. 16 of its closing brief that it was error for me to disallow Respondent the opportunity to introduce additional evidence of Respondent's surveillance in the Portland Building 85–001 *factory floor* area, an area that General Counsel had no prior evidence of surveillance before hearing. This case involves, among other things, allegations of Respondent's illegal surveillance of SPEEA employees in the Portland building 85–001 *office* area. A review of the hearing transcript at pp. 659–661 shows that Respondent was given ample opportunity to present new evidence of Respondent's filming in the building 85–001 *factory floor* area in exchange for General Counsel amending the complaint to add more surveillance allegations but Respondent's counsel, instead, elected to forego adding further surveillance to this case and, therefore, waived its opportunity to add evidence of additional filming in the *factory floor* area.

[14] This case does not involve any allegation that photos were taken in Respondent's classified areas.

> However, **use** of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security: [list of devices omitted]. Id. [Emphasis in original.]

The definition of business need is:

> Business need: In relation to the use of a photographic or imaging device, a business need is a determination made by the authorizing manager that images or video are needed for a contractual requirement, training, technical manuals, advertising, technical analysis, or other purpose that provides a positive benefit to the company. Id.

PRO 2783 applies to the two main divisions of Respondent: Boeing Commercial Airplanes (BCA) and Boeing Defense Based Group (BDS). (Tr. 378.) Moriarty explained that she was given express permission by Respondent and allowed to take photos while on a VIP tour at the Everett facility with her own photo-enabled device that were not reviewed at the conclusion of the tour. (Tr. 279–282.) Respondent's director of 777 operations opined that typically no outside visitor on a VIP tour who takes photos at Respondent would have their cameras or cellphones seized for taking improper photos and he did not recall any incident where a VIP visitor had their camera or cellphone seized for taking an improper photo. (Tr. 646.) Instead, Respondent just hopes for cooperation from the VIP tour individuals in sharing photographs of the inside Everett facility they take with Respondent. Id.

Respondent's Exhibit 5 is a dvd or video it produced for public consumption showing the 18–19 days of the manufacturing process or moving final assembly line of its 777 airplanes over a lengthy period of time at the Everett facility. (Tr. 593, 598, 646.) Respondent also has a continuing policy known as PRO-3439 relating to disclosure of information outside the company. (GC Exh. 36.) This policy specifically provides, among other things:

Nothing in this procedure should be construed as preventing employees from:

> 1. Discussing or releasing information about wages, hours, working conditions, or other terms and conditions of employment to the extent privileged by Section 7 of the National Labor Relations Act or other law .... Id.

Analysis

I. CREDIBILITY

I have outlined my credibility findings in the findings of fact above and in the analysis below. As a general matter, however, in significant instances, reliable documentary evidence fails to support accounts provided by Respondent's key witnesses which weighs against such accounts being credible. Evidence contradicting the findings, particularly testimony from Madison, Smith, Harris, and Lopez, has been considered but has not been credited except to the extent it is consistent with more reliable witness testimony. For example, the general theme of Respondent's defense of the alleged Act violations here is that its questioned rules were put in place: (1) due to Respondent's "reasonable" concerns with trespassing and safety issues related to each of the four Engineers' Union marches discussed in this decision; and (2) to protect its valuable manufacturing process from competitive or terrorist outsiders with its anticamera-device rule PRO 2783.

I find that the convincing testimony from Respondent's security guards Catalini and Lopez as well as their USIR reports and the largely undisputed testimony at hearing from the eight Engineers' Union members provides strong evidence that Respondent's employees regularly veer outside Respondent's internal safety rules without discipline on a daily basis. These include frequent examples of not wearing safety glasses in the Everett factory facility or walking outside the pedestrian walkways into the transportation aisles or walking outside on the Everett factory apron through large overhead doors or walking across Logan Avenue outside the Renton facility to get to their parked cars after work before the stoplight warning light changes. No evidence was submitted that showed that any of these alleged employee infractions led to any form of discipline by Respondent before or after any of the Engineers' Union marches in 2012. Therefore I reject Respondent's alleged safety concerns to justify its questioned conduct here as it is contradicted by its actions, the documentary evidence and Engineers' Union members' testimony. Had these alleged safety infractions been real and enough to provide Respondent with solid justification for its photographing or videotaping, one would expect employee citations or some form of discipline taken to correct such unsafe conduct. In fact, there is no evidence that the security guards who escorted the marchers instructed them at any time to comply with Respondent's safety rules had they actually been in violation. I also reject Respondent's argument that individual participants cannot be identified in the photos taken of the solidarity marches.

In addition, I reject Respondent's allegation that its questioned conduct was justified due to the disruptive nature of the marches because the evidence shows that each of the four marches were not disruptive and Respondent maintained its production schedule with only its own security guards receiving Respondent's instructions to stop traffic during marches. For example, Clark, Respondent's director of manufacturing and operations of the 777 airplane, was very candid and believable when he opined that the brief pause in work from the December 12 march and even a 20-minute pause in work did not delay the delivery date of any of the aircraft. (Tr. 563, 605, 642.)

I also find the eight Engineers' Union employees' testimony particularly credible over Respondent's manager witnesses' testimony given the fact that each of the eight nonsupervisor engineer employees testified against their own interests as they were employed at Respondent at the time of trial and must continue to face Respondent's management after trial. See *S.E. Nichols, Inc.*, 284 NLRB 556 fn. 2 (1987) (Current respondent employee's testimony more reliable because it is given against his interest to remain employed by Respondent.).

As to the credibility of Moriarty, Hastings, and Lopez with respect to their conversations on December 12 when Lopez was approached while in his vehicle as the Engineers' march was ending, I credit Moriarty and Hastings versions of what Lopez said over his own blunted testimony. Moriarty and Hastings were more convincing witnesses as their demeanors were con-

fident and their versions of events having Lopez omit any reference that he was taking photos to ensure compliance with safety standards or to document safety concerns or violations were more believable and consistent with the documentary evidence in this case. This includes the USIR of Lopez which is silent with respect to engaging verbally with employees or otherwise directing traffic as it indicates that he merely observed Engineers' Union employees and photographed them. (Tr. 240, 303; GC Exh. 32.) As per the guards, the purpose of their photographing the walk was to show the scope of the crowd size for the first Engineers' Union walk at the facility. (Tr. 451, 473, 480, 538.) Even Catalini testified that before the September 19 march he and Lopez were instructed by Hess to document the scope and size of the crowd, any intimidating factors with no reference to any safety concerns. (Tr. 480, 538.)

Moreover, Respondent produced a video (R. Exh. 5), for public distribution that shows the very manufacturing process that Respondent at hearing argued needs protection from outsiders with its rule PRO 2783. While Respondent does get involved in top secret military and other highly confidential matters, those designated areas are not at issue here as Respondent argues that its manufacturing process at the Everett factory floor facility is highly confidential though as stated above, its video showing the very same process over many days' time is a public video and Respondent conducts VIP tours to foreign and local employers without the same concern for privacy it has toward its Engineers' Union member employees. I further find that any concern for plant or worker safety is noticeably absent from the security guard reports with respect to the Everett and Portland marches and only passing reference is made to a safety concern outside its facility in the Renton march report though, once again, no employees were cited for trespassing or any other safety or work rule violation. Respondent's defense here appears to have been created after the marches at issue. Therefore, I do not find that Respondent's general theme of the case credible as it is greatly outweighed by the several Engineers' Union members' testimony and its own internal reports.

II. RESPONDENT'S SURVEILLANCE RULE TO PHOTOGRAPH OR VIDEO ENGINEERS' UNION MARCHERS

The General Counsel alleges in paragraphs 7(a), 7(c), 7(d), 9, 12, and 14 of the complaint that, on September 19 and December 12 in and around Respondent's Everett factory facility, September 26 near gate D-9 at the Renton facility, and October 3 in building 85–001 at its Portland facility, Respondent, by its security guards engaged in surveillance of the Engineers' Union and/or protected, concerted activities in violation of Section 8(a)(1) of the Act.

The fundamental principles governing employer surveillance by photographing or videotaping of protected employee activity remain unchanged as set forth in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), as follows:

> . . .[A]n employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial record keeping tends to create fear among employees of future reprisals. The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct to interfere with employees' right to engage in concerted activity . . . . Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. "[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing . . . . The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case. [Citations omitted.]"

National Steel & Shipbuilding Co., 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). Therefore, Respondent must show that it had a reasonable, objective basis for anticipatory misconduct before its photography or videotape of any Engineers' Union march is allowed. Furthermore, *F. W. Woolworth Co.*, supra at 1197, held that the mere taking of photos of protected activity is inherently intimidating and that taking photos just to stick them in a file as seems to be Respondent's policy here is not solid legal justification.

Respondent argues that an employer's photography of employees engaged in a peaceful demonstration does not constitute *per se* unlawful surveillance in violation of Section 8(a)(1) of the Act and cites as authority the case *U.S. Steel Corp. v. NLRB*, 682 F.2d 98, 101 (3d Cir. 1982.) However, I am not bound by the Third Circuit Court of Appeal's decision in *U.S. Steel Corp.* I am bound to follow Board precedent that has not been reversed by the Supreme Court or the Board itself. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). As such, I find that General Counsel does not have the burden to show that Respondent's photographing or videotaping of Engineers' Union marches caused actual interference, restraint, or coercion of employees' exercise of their Section 7 rights under the Act.

Respondent further argues that its photographing and videotaping of Engineers' Union marches in late 2012 were lawful "because [Respondent's] attempts to document disruptive and unsafe SPEEA marches were based on legitimate and substantial safety and business disruption concerns." (R. Br. at 28–32.) Respondent adds that its prior history with Machinists' Union marches justified its questionable conduct here along with the Engineers' Union members' actual disruption and workplace safety violations. Id.

I reject Respondent's argument that the larger Machinists' Union marches are relevant to this case as I find that they are too remote in time and represent actions by an entirely different group of employees represented by a different union under different circumstances. While no evidence of violence or trespassing was tied to Machinists' Union marches either, Respondent's smaller professional Engineers' Union members' conduct does not provide a solid justification for Respondent's resort to anticipatory photographing and the Engineers' Union should not be held accountable for an entirely different union members' conduct that occurred more than 4 years earlier under different circumstances.

In addition, as stated above, there were no actual incidents of trespass or violence cited against any Engineers' Union em-

ployee to provide solid justification for the questioned photography or videotaping. There were no reports of unsafe behavior that Respondent had not seen before any of the four marches at issue in this case during regular workdays when no Engineers' Union marches occurred. Significantly, not any of the marchers were disciplined for any safety violations during any of the four marches. No evidence was presented showing photographs of Respondent's employees behaving in the same manner as when they marched. If photography of the same alleged unsafe conduct does not exist *before* the march (though credible evidence shows this behavior to be the same) then what is different about Respondent's employees' behavior on the questioned dates of the marches – only the fact that the Engineers' Union employees are marching. This alone is not solid justification to photograph or videotape these employees. Moreover, Respondent provided the marchers with security guard escorts in the front and back of the marchers and the guards also stopped vehicular traffic around the marchers thereby improving safety conditions during marches.

Respondent's photographing and videotaping of Engineers' Union members marching prevented employees who desired to march anonymously from doing so. Consistent with Board precedent, I find that Respondent's deviation from Respondent's regular custom and practice of *not* photographing, videotaping, or citing or disciplining its employees' very same noncitable behavior was not legitimate. This conduct that occurred before and after the late 2012 marches includes not wearing safety goggles, walking outside of pedestrian walkways and congregating at Respondent's third party-run Tully's Coffee Shop during breaks, walking onto Respondent's outside apron and under large overhead doors, and walking across crosswalks outside the facility and Respondent's property after warning lights have changed. I find that photographing and videotaping this same noncitable conduct *only* during Engineers' Union marches protected under Section 7 of the Act where no incidents of trespass or violence were recorded violates Section 8(a)(1) of the Act.

Also, Respondent's argument that the photography was justified due to the disruption of Respondent's manufacturing process caused by the marches is again false. None of the USIRs note any interference with production. Specifically, the USIR tied to the October 3 Portland Engineers' Union march expressly states that there was no interference. (GC Exh. 34.) As stated above, Respondent's director of manufacturing and operations convincingly opined that the brief pause in work caused by the Engineers' Union marches and even all of the marches combined did not delay the delivery date of any of the aircraft in Everett. (Tr. 563, 605, 642.) Furthermore, the September 26 solidarity walk was an ice cream social held *outside* the Renton facility which obviously did not cause any production disruption inside the facility where work is performed.

Respondent cites *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1217–1218 (2004), for its argument that it had a reasonable basis to suspect anticipatory misconduct on the part of the Engineers' Union members during each of the four marches to warrant its photography and videotaping of the protected concerted activities. I find that *Washington Fruit & Produce Co.* is distinguishable from the facts in this case because there the respondent's safety concerns were legitimate and the majority of 100 marchers in *Washington Fruit & Produce* included complete strangers who were not respondent's employees and at the time the decision to videotape was made the deciding official knew that the union was planning a high profile event with its own out-of-state union officials and that there had been previous trespassing on respondent's property that led respondent to contact the police for help a second time that day. The Board found respondent's videotaping lawful given these unique facts and the prior incidents of trespassing on respondent's property and further finding that taking photographs or videotaping to document trespassory activities for the purpose of making a claim of trespass is lawful. Id.

Consequently, for the reasons stated herein, I find that photographing and videotaping the four Engineers' Union marches in late 2012 was not reasonably based on solid justification and each instance violates Section 8(a)(1) of the Act.

III. SECURITY GUARD LOPEZ' DECEMBER 12 CONVERSATIONS WITH ENGINEERS' MEMBERS MORIARTY AND HASTINGS

The General Counsel alleges in paragraphs 10, 1, and 14 of the complaint that, on December 12, 2012, Respondent, by Lopez, at the Everett factory facility, created an impression among its employees that their union and/or protected, concerted activities were under surveillance in violation of Section 8(a)(1) of the Act.

The test for determining whether an employer has created an impression that its employees' protected activities have been placed under surveillance is "whether the employees would reasonably assume from the employer's statements or conduct that their protected activities had been placed under surveillance." *Greater Omaha Packing Co.*, 360 NLRB 493, 495 (2014); *Rood Industries*, 278 NLRB 160, 164 (1986). When an employer tells employees that it is aware of their protected activities, but fails to tell them the source of that information, it violates Section 8(a)(1) "because employees are left to speculate as to how the employer obtained the information, causing them reasonably to conclude the information was obtained through employer monitoring." Id.

Here, the Engineers' Union did not advise Respondent ahead of its December 12 march that a march would occur at the Everett facility that day. The march began at approximately 11a.m. at the Tully's location and security guards Hess and Lopez were dispatched to control traffic for the march after a guard reported employees wearing red Engineers' Union shirts gathering in the factory at Tully's. (Tr. 222, 283, 504.)

Engineers' Union members observed Guard Lopez sitting in his security vehicle in the main transportation aisle at the intersection closest to the Tully's in the factory building on December 12. (Tr. 230. GC Exh. 3; GC Exh. 11.) At this time, Lopez engaged in two short conversations with two employees – Moriarty and Hastings. When Moriarty approached Lopez parked in his vehicle, she stated: "I noticed you were taking photographs of our group." (Tr. 231.) Lopez responded: "I've been directed to document all union activities." Id. Lopez admitted the same with his testimony. (Tr. 509.) Moriarty replied: "It makes our folks feel a bit uncomfortable." Id. Moriarty further reported that Lopez did not tell her he was taking photos to

ensure compliance with safety or to document traffic or safety concerns and he clearly indicated to her that he would continue to document and take photos to document in his report that 250 individuals participated in the walk. (Tr. 231, 523.) Lopez' USIR provides that 200–250 SPEEA members participated in the march. (GC Exh. 34.)

As their discussion was ending, Engineers' Union member Hastings approached Lopez and Moriarty and began to speak with Lopez as Moriarty left the group. (Tr. 232–233.) Hastings asked Lopez twice what he was doing with his camera and each time he replied that he was taking photos of non-Boeing activity. (Tr. 288.) Hastings then asked Lopez why he was taking these photos and he responded by saying: "We always do this [photo taking]." Id. No testimony was presented that during their conversation Lopez told Hastings that he was taking photos to ensure compliance with safety standards or to document safety concerns or violations. (Tr. 289.) At the end of these conversations, the march was winding down and there were approximately 15 marchers remaining leaving the pedestrian aisle and not blocking any vehicular or pedestrian traffic or interfering with plant operations. (Tr. 288–289.)

Both Moriarty and Hastings opined that neither Lopez nor any other guards directed vehicular or pedestrian traffic during the march and Lopez' report is silent with respect to engaging verbally with employees as it indicates that he merely observed Engineers' Union employees and photographed them. (Tr. 240, 303; GC Exh. 32.)

In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test is whether under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005). The essential focus has always been on the *reasonableness* of the employees' assumption that the employer was monitoring their union or protected activities. Id. As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard. Id.

I find that the Lopez' activities taking photographs of the December 12 march at various times and parked in his vehicle solely to document Engineers' Union activities without any further explanation and the Respondent did not explain to the workers or put forth any credible evidence at trial that explained that why it was taking photos of the December 12 march. Therefore, Lopez' statements to Moriarty and Hastings on December 12 that he'd been directed to document all union activities and that he was taking photos of non-Boeing activity reasonably suggested to the two SPEEA employees that the Respondent was closely monitoring the degree and extent of their protected concerted march and other activities. See *Emerson Electric Co.*, 287 NLRB 1065 (1988). Stated differently, I find that Lopez' statements and conduct on December 12 before Moriarty and Hastings would reasonably cause them to assume that their protected activities had been placed under surveillance. Consequently, I find that Lopez' statements to Moriarty and Hastings on December 12 created the impression that the Engineers' Union activities were under surveillance and violated Section 8(a)(1) of the Act.

IV. RESPONDENT'S RULE PRO 2783 REGULATING EMPLOYEES' PERSONAL CAMERA PICTURE-TAKING OR VIDEO-TAKING WITHOUT A BUSINESS NEED AND PERMIT

The General Counsel alleges in paragraphs 6, 12, and 14 of the complaint that, on November 11, 2011, Respondent promulgated and since then has maintained its rule PRO 2783 to discourage its employees from forming, joining, and/or assisting the Union and/or engaging in other protected concerted activities in violation of Section 8(a)(1) of the Act.

When evaluating whether a rule violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007). Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (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." *Lutheran Heritage* at 647.

Board law is settled that ambiguous employer rules–rules that reasonably could be read to have a coercive meaning – are construed against the employer. "This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer – instead of waiting until the chill is manifest, when the Board must undertake the difficult task of dispelling it." *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012).

Respondent argues that its rule PRO 2783 is necessary to protect the valid business need of protecting its valuable manufacturing process. I find Respondent's argument non-credible based on its contrary practice of allowing free access to its manufacturing process both in the form of its dvd referenced herein which has been placed by Respondent in the public domain and its VIP tours that allow unfettered photography to the general public. I find that Respondent's manufacturing process is no more in need of protection than an automobile assembly line. See (Tr. 646; R. Exh. 5) (Respondent's airplane assembly line process in the public domain.) Respondent has adequate protection for keeping its top secret and truly confidential military and commercial information and processes protected behind closed doors with heightened security clearance. Its argument at hearing that the rule is needed to protect Respondent's competitive advantage and as a security matter is a mere smokescreen as its professed business purpose for the rule is eviscerated by its actual practice which allows public access to its Everett factory manufacturing process. As referenced above, Respondent disseminates its manufacturing process to the general public in the form of its dvd. (Tr. 646; R. Exh. 5.) In addition, Respondent admits that it allows non-Boeing outside foreign and domestic visitors to take photos of the Everett facility without showing a similar business need or permit. (Tr. 245, 269–272.)

As stated above under *Lutheran Heritage Village-Livonia*, 343 NLRB at 646, "an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." Respondent maintains its rule PRO 2783 that precludes the use of personal camera-enabled devices without a valid business need, defined to include a "purpose that provides a positive benefit to the company [Respondent] . . ." and a preapproved Camera Permit from Respondent without an exemption for activity protected by the Act. (Tr. 183; GC Exh. 8; GC Exh. 36.)

Here, Respondent is not using its rule PRO 2783 to protect the "weighty" privacy interests of hospital patients thereby distinguishing the facts in this case from those involved in *Flagstaff Medical Center*, 357 NLRB 659, 662–663 (2011). (R. Br. 39–40.) Instead, Respondent's rule is better analyzed in the context of other recent cases.

In *Hills & Dales General Hospital*, 360 NLRB 611, 611–612 (2014), the Board found as overly broad and ambiguous, a requirement that employees represent the Respondent "in the community in a positive and professional manner in every opportunity." The Board found that this requirement violated Section 8(a)(1) of the Act and could "discourage employees from engaging in protected public protests of unfair labor practices, or from making statements to third parties protesting their terms and conditions of employment –activity that may not be 'positive' towards the Respondent but is clearly protected by Section 7. [citations omitted]" Id. The same thing can be said of Respondent's rule in this case requiring a "purpose that provides a positive benefit to the company [Respondent] . . . ." as an employee could reasonably believe that photographing protected concerted activity would not be viewed by management as providing a positive benefit to Respondent. (See GC Exh. 8.) I find that Respondent's rule PRO 2783 reasonably discourages its employees from taking photos of protected concerted activities such as their solidarity marching during a lunch break during successor CBA negotiations or photographing an unsafe condition at work.

Moreover, the requirement that employees request and receive permission and a permit in order to find out if their Section 7 photo activity will be permitted is adverse to the Act. See *J. W. Marriot*, 359 NLRB 144 (21012) (Manager's absolute discretion over application of rule is unlawful because it requires management permission to engage in Section 7 activity and leads employees to reasonably conclude that they are required to disclose to management the nature of the activity for which they seek permission, a compelled disclosure that would certainly tend to chill the exercise of Sec. 7 rights.) Here, I find that Respondent's employees would reasonably construe the rule as prohibiting all photography in Respondent's factory facilities including photography performed in concert of Engineers' union solidarity marches during successor CBA negotiations or of other protected concerted activities. As such, I further find that Respondent's facially overly broad and ambiguous rule PRO 2783 would reasonably tend to chill employees in the exercise of their Section 7 rights and that an employee would reasonably construe the language to prohibit Section 7 activity. Consequently, I find that rule PRO 2783 violates Section 8(a)(1) of the Act.[15]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Security Guards Hess, Lopez, and Catalini are agents within the meaning of Section 2(13) of the Act.

4. Respondent engaged in conduct in violation of Section 8(a)(1) of the Act:

(a) By surveilling employees on September 19, 2012, at the Everett factory facility.

(b) By surveilling employees on December 12, 2012, at the Everett factory facility.

(c) By surveilling employees on September 26, 2012, near gate D-9 at Respondent's Renton facility.

(d) By surveilling employees on October 3, 2012, in building 85–001 at Respondent's Portland, Oregon facility.

(e) By creating an impression of surveillance of employees' union activities on December 12, 2012.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The above violations are unfair labor practices within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from engaging in such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act. To remedy the Respondent's violations of Section 8(a)(1) of the Act, I shall recommend that the Respondent post and abide by the attached notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, The Boeing Company, Renton and Everett, Washington, Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Photographing and videotaping employees engaged in workplace marches and rallies and/or near its property.

---

[15] Respondent could have avoided a violation by including a caveat like it has in its Rule PRO-3439, referenced above, that its rule PRO-2783 does not apply to conduct protected by the Act. See generally *Costco Wholesale Corp.*, 358 NLRB 1100 (2012) (finding unlawful the maintenance of a rule prohibiting statements posted electronically that "damage the Company . . . or damage any person's reputation"). As indicated above, Respondent uses this caveat in other rules such as its continuing policy known as PRO-3439 relating to disclosure of information outside the company. See GC Exh. 36.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Creating the impression that its employees' union and/or protected concerted activities are under surveillance.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, to the extent it has not already done so, revise or rescind rule PRO 2738 so that it does not restrict Section 7 rights and allows employees to use their personal camera enabled device in non-restricted areas.

(b) Within 14 days of the Board's Order, to the extent it has not already done so, rescind all policies and procedures requiring security and/or management personnel to photograph or videotape employees engaged in workplace marches and rallies and/or near its property.

(c) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A" at its Everett and Renton, Washington facilities and its Portland, Oregon facility.[17] Copies of the notices, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities where posting is required, the Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current employees and former employees employed at those facilities at any time since September 19, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 15, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT photograph or videotape employees engaged in workplace marches and rallies and/or near its property.

WE WILL NOT watch, photograph, or videotape you in order to find out about your union activities.

WE WILL NOT create an impression that we are watching your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, to the extent we have not already done so, revise or rescind PRO 2738 so that it does not restrict Section 7 rights and allows employees to use their personal camera enabled device in non-restricted areas.

WE WILL, within 14 days of the Board's Order, to the extent we have not already done so, rescind all policies and procedures requiring security and/or management personnel to photograph or videotape employees engaged in workplace marches and rallies and/or near its property.

THE BOEING COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-090932 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."