

No. 20-60472

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

LOWES HOME CENTERS, L.L.C.,

[Petitioner Cross-Respondent]

v.

NATIONAL LABOR RELATIONS BOARD,

[Respondent Cross-Petitioner]

Petition for Review of Decision and Order of the
National Labor Relations Board, Case No. 19-CA-191665

PETITIONER'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Lowe's Home Centers, LLC, Petitioner. Lowe's Home Centers, LLC is a manager-managed limited liability company, whose only member is Lowe's Companies, Inc. Lowe's Companies, Inc. is a publicly held corporation, and its shareholders, officers and directors have an interest in the outcome of this case. Lowe's Companies, Inc. has

no parent corporation, and no publicly held corporation owns 10% or more of its stock.

2. Peter J. Rusthoven, Peter A. Morse, Jr., David J. Pryzbylski, and Peter J. Wozniak are counsel of record in this case for Petitioner Lowe's Home Centers, LLC. All named attorneys for Petitioner are affiliated with the law firm of Barnes & Thornburg LLP.

3. As the Respondent National Labor Relations Board is a governmental entity, it is not among the parties described in the fourth sentence of Rule 28.2.1.

/s/ Peter J. Rusthoven
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PREAMBLE REQUESTING ORAL ARGUMENT

Lowe's Home Center, LLC had a workplace rule that prohibited disclosure of confidential Lowe's information "entrusted" to an employee. The National Labor Relations Board invalidated the rule on the ground that a "reasonable employee" might construe it to restrict employees' rights, under Section 7 of the National Labor Relations Act, to discuss their *own* salary information (which Lowe's contends its rule did not do).

Lowe's petition presents important questions on whether the Board properly followed its decision in *The Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017). *Boeing* altered governing standards for reviewing workplace rules, overruling the prior standard that a rule was invalid if "employees would reasonably construe the language to prohibit Section 7 activity" (*Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)). This Court has recognized *Boeing's* importance, remanding cases applying *Lutheran Heritage* for reconsideration under *Boeing*.

Lowe's believes oral argument will assist the Court in determining if the Board, in invalidating Lowe's rule based on how a "reasonable employee" might construe it, failed to follow *Boeing* and instead applied *Lutheran Heritage's* overruled "reasonably construe" standard.

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JURISDICTIONAL STATEMENT

Lowe's Home Centers, LLC has petitioned this Court to review and set aside the National Labor Relations Board's December 12, 2019 Decision and Order in *Lowe's Home Centers, LLC*, Case No. 19-CA-191665, which is reported at 368 NLRB No. 133 (Decision). The Board has cross-applied for enforcement of the Decision.

The Board had jurisdiction over the agency proceedings below under 29 U.S.C. § 160(a). This Court has jurisdiction under 29 U.S.C. § 160(f) over Lowe's petition for review, and has jurisdiction under 29 U.S.C. § 160(e) over the Board's cross-application for enforcement, because the Decision is a final order of the Board and Lowe's transacts business within this Circuit. Lowe's June 11, 2020 petition, and the Board's July 25, 2020 cross-application, were filed "within the time prescribed by law" (FED. R. APP. P. 15(a)(1)), as neither 29 U.S.C. § 160(f) nor 29 U.S.C. § 160(e) sets any post-Decision deadline for such filings.

STATEMENT OF ISSUES

The Decision invalidated a Lowe’s workplace rule (Lowe’s Rule) that prohibited disclosing confidential Lowe’s information “entrusted” to an employee. Lowe’s contends the Rule did bar disclosure by employees entrusted with access to its confidential information, which the Decision recognizes is valid. But the Board held a “reasonable employee” might construe the Rule to restrict employee rights under NLRA Section 7, 29 U.S.C. § 157, to discuss their *own* salary information (which Lowe’s contends its Rule did not do). The issues presented are:

(1) In voiding Lowe’s Rule based on its view of how a “reasonable employee” might construe it, did the Board fail to follow governing law under its 2017 *Boeing* decision, which overruled the Board’s 2004 *Lutheran Heritage* standard that rules were invalid if “employees would reasonably construe the language to prohibit Section 7 activity.”

(2) Did the Decision also fail to follow *Boeing* by disregarding the Rule’s legitimate justifications, which (a) comport with Lowe’s reasonable construction limiting the rule to employees “entrusted” with access to confidential information, and (b) refute an unreasonable construction that would prohibit an employee’s discussion of his or her *own* salary.

STATEMENT OF CASE AND RELEVANT FACTS

The Lowe's Rule

Lowe's is a leading home improvement goods retailer, with stores and facilities throughout the United States. [ROA.10]

This case involves a company compliance document titled "Lowe's Code of Business Conduct and Ethics." Its May 2013 version, pertinent here, was an 11-page, stand-alone document with an opening message from Lowe's CEO, a table of contents, an introduction, and 15 subparts. [ROA.85-95] The Code set out "certain conduct requirements for Lowe's employees and business partners who make decisions on Lowe's behalf," and "basic policies and procedures for topic areas of key legal and ethical importance." [ROA.86, 88] It applied "to all Lowe's employees," to "third party business partners that act on Lowe's behalf," and to "non-executive members of [Lowe's] Board of Directors" when acting as Board members or on other matters related to Lowe's." [ROA.88]¹

The Lowe's Rule at issue—the sole Code provision the Decision addressed—was Section E, titled "Confidential Information." It stated:

¹ Language in a prior version was similar in all material respects to the May 2013 Code. [ROA.88] It's undisputed that the Code was rescinded in August 2018.

Employees must maintain the confidentiality of information entrusted to them by Lowe's, its suppliers, its customers, or its competitors, except when disclosure is authorized by the Chief Compliance Officer or required by law. Employees must consult with the Chief Compliance Officer before disclosing any information that could be considered confidential.

Confidential information includes, but is not limited to:

- material non-public information; and
- proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records or salary information, and future plans and strategy.

[ROA.91]

Section E also included two Q&As, illustrating the Lowe's Rule's focus on confidential, competitive information:

Q: A friend of mine is a vendor in the home improvement industry. He asked me for pricing information related to a Lowe's vendor, which is one of his key competitors. He explained that the information would give him a competitive edge in competing for business with the Lowe's vendor but promised that the information would have no direct impact on Lowe's business. How should I reply to him?

A: You must decline his request. A vendor's pricing information is confidential to Lowe's and must not be disclosed. The disclosure of this information could harm our vendor and damage Lowe's reputation.

* * *

Q: My sister-in-law knows a lot about the confidential promotion strategy of one of our key competitors. I'm very curious – may I ask her?

A: No. The information is a trade secret of our competitor. Employees must respect the trade secrets of our competitors as well.

[ROA.91]

Proceedings Below

In January 2017, Charging Party Amber Frare filed an unfair labor practice charge against Lowe's, which was then twice amended. [ROA.8, 26-30] In April 2017, the Regional Director for NLRB Region 19 filed a Complaint and Notice of Hearing. [ROA.8, 31-36] The Administrative Law Judge severed several Complaint allegations after the parties settled them, and the Regional Director served an Amended Complaint in September 2017. [ROA.8, 10, 45-47, 73-79]

The parties agreed to present the case to the ALJ on a stipulated record, with the sole issue being whether Lowe's Rule (the Confidential Information section of its Code) violated NLRA Section 8(a)(1), 29 U.S.C. § 158(a)(1), by interfering with employees' exercise of their Section 7 rights to discuss salary information. [ROA.7, 14]

On April 17, 2018, the ALJ held the Lowe’s Rule “per se unlawful” under *Boeing*, with no need to consider the Rule’s legitimate justifications. The basis for this ruling was the ALJ’s view that the Rule includes “ambiguous language,” and “[a]ny ambiguities in a rule are construed against the drafter” (Lowe’s). [ROA.173]

Lowe’s filed exceptions. [ROA.126-30] After full briefing, the Board issued its December 12, 2019 Decision upholding the ALJ ruling. [ROA.174-81]

One Board member “adhere[d] to her dissent in *Boeing*.” [ROA.174 n.1] The other two panelists disagreed with the ALJ’s construing “any ambiguity in a workplace rule ... against the drafter,” a principle “*Boeing* clearly rejected.” [ROA.174 n.1] But the Decision refused to construe Lowe’s Rule as applying only to employees “entrusted” with access to confidential information. While noting employers’ “legitimate interest” in protecting such information, the Board held this inapplicable because it deemed the Rule’s language “insufficient to convey to a reasonable employee” that that the Rule “did *not* interfere” with employees’ Section 7 rights to discuss their own salaries. [ROA.174 n.1 (emphasis added)]²

² The Decision’s reasoning is further detailed *infra* in the Argument.

SUMMARY OF ARGUMENT

In 2017, *Boeing* changed the standards governing workplace rules, overruling the *Lutheran Heritage* test invalidating rules if employees could “reasonably construe” them to restrict Section 7 activity. In reviewing Lowe’s Rule—barring employees from disclosing confidential information “entrusted” to them—the Board was required to follow *Boeing*. It did not.

Boeing (as the Board held) rejected the ALJ’s construing supposed “ambiguities” against Lowe’s. But the Board upheld the ALJ result *via* the very test *Boeing* overruled. There’s no meaningful difference between *Lutheran Heritage*’s test (can employees “reasonably construe” a rule to bar Section 7 activity) and the Board’s test here (does a rule “sufficiently convey” to “reasonable employees” that it *doesn’t* bar Section 7 activity).

The Board also misread Lowe’s Rule and ignored its justifications. The Board recognized self-evident employer interests in safeguarding confidential data entrusted to employees with access to such data. But it overlooked that this was what Lowe’s Rule did. The Board instead unreasonably “construed” the Rule as treating an employee’s *own* salary as confidential data “entrusted” to the employee. This, too, was error.

The Decision failed to follow *Boeing*. The Court should reverse.

ARGUMENT

Standard of Review

The Court reviews the Board’s legal conclusions de novo. *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017) (citing *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003)).

Even on Board fact findings—which are conclusive if supported by substantial evidence—the Court’s review “is more than a mere rubber stamp of the decision.” *NLRB v. Arkema, Inc.*, 710 F.3d 308, 314 (5th Cir. 2013). But here, the Board didn’t engage in fact finding; it made a legal conclusion about the Lowe’s Rule based on a stipulated record.

That conclusion is reviewed *de novo*. *T-Mobile*, 865 F.3d at 271-73 (reviewing *de novo* and vacating Board’s conclusion that “reasonable employee” would construe workplace rule to prohibit Section 7 activity); *Dresser-Rand Co. v. NLRB*, 838 F.3d 512, 519 (5th Cir. 2016) (Board decision on whether “strike misconduct is serious enough to deny reinstatement is a legal conclusion [the Court is] free to accept or reject”) (citation omitted); *NLRB v. E-Systems, Inc.*, 642 F.2d 118, 122 (5th Cir. 1981) (rejecting Board’s “legal appraisal of the incident,” even though “substantial evidence” supported Board’s fact findings).

I. In Evaluating The Lowe’s Rule, The Board Was Required To Correctly Follow *Boeing*.

The dispositive issue on appeal is whether the Board, in invalidating the Lowe’s Rule, correctly followed the law established by its seminal decision in *The Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017).

Before *Boeing*, the Board had held that if a workplace “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.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

The Decision here didn’t find the Lowe’s Rule explicitly restricts Section 7 activity, or was promulgated in response to or has been applied to restrict such activity. The dispute centers solely on the “reasonably construe” test, which the Board reexamined in its 2017 *Boeing* decision.

In *Boeing*, the Board explicitly “overrule[d] the *Lutheran Heritage* ‘reasonably construe’ standard,” holding it “is contrary to Supreme Court precedent because it does not permit *any* consideration of legitimate

justifications that underlie many [workplace] policies, rules and handbook provisions.” 2017 WL 6403495, at *8. *Boeing* further found that “*Lutheran Heritage* has caused extensive confusion and litigation for employers, unions, employees and the Board itself,” as “[t]he ‘reasonably construe’ standard has defied all reasonable efforts to apply and explain it.” *Id.*, at *12.

Boeing also explicitly rejected prior “Board decisions applying *Lutheran Heritage*, [where] the Board has consistently misapplied an evidentiary principle that ambiguity in general work rule language must be construed against the drafter.” *Id.*, at *10 n.43; *see id.*, at *14 n.68 (reiterating repudiation of “the principle that ambiguity is construed against the employer as the drafter of the rule”).

“Henceforth,” as *Boeing* advised employers, unions and employees, the Board would “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.”

- “*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.”

Id., at *15-*16.

Boeing is governing law. As this Court and others recognize, *Boeing* can require upholding work rules that may arguably have been invalid under *Lutheran Heritage* standards. *E.g.*, *Dish Network, L.L.C. v. NLRB*, 731 Fed. Appx. 368, 369 (5th Cir. 2018) (*per curiam*) (remanding decision invalidating rule under *Lutheran Heritage* for reconsideration under *Boeing*); *Everglades Coll., Inc. v. NLRB*, 893 F.3d 1290, 1294 (11th Cir. 2018) (same); *Cowabunga, Inc. v. NLRB*, 893 F.3d 1286, 1289-90 (11th

Cir. 2018) (same); *Grill Concepts Servs., Inc., v. NLRB*, 722 Fed. Appx. 1, 3 (D.C. Cir. 2018) (*per curiam*) (same for seven Board decisions).

Hence, if the Decision didn't correctly follow *Boeing*, it must be reversed. “[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.” *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (quoted in *Everglades*, 893 F.3d at 1294, and *Cowabunga*, 893 F.3d at 1289-90).

Boeing effected a sea change in governing standards for evaluating challenged workplace rules. But as detailed *infra*, the rulings below mistakenly sailed back into *Lutheran Heritage* waters.

II. While Purporting To Follow *Boeing*, The ALJ Ruling And The Board Decision Erroneously Applied The *Lutheran Heritage* Standard That *Boeing* Overruled.

Failure to apply *Boeing* in evaluating Lowe's Rule began with the ALJ. While ostensibly following the Board's now-governing case, the ALJ's *very basis* for putting Lowe's Rule into *Boeing*'s “Category 3”—*i.e.*, a rule she could deem “per se unlawful” without considering its legitimate justifications—was that the Rule supposedly includes “ambiguous language,” and “[a]ny ambiguities in a rule are construed against the

drafter” (here, Lowe’s). [ROA.178 (citing three pre-*Boeing* decisions that applied *Lutheran Heritage* standards)]

On Board review, one panel member “adhere[d] to her dissent in *Boeing*.” [ROA.174 n.1] This is admirably candid, but doesn’t comport with governing law. The panel majority rightly held the ALJ’s reasoning couldn’t be squared with *Boeing*, rejecting her “invocation of the principle that any ambiguity in a workplace rule is construed against the drafter” as “a principle the Board in *Boeing* clearly rejected.” [ROA.174 n.1]

But the Board majority overlooked that the ALJ’s placing Lowe’s Rule in *Boeing* Category 3 was *grounded* in this discarded principle that “Boeing clearly rejected.” Further, the Board majority then grounded its *own* decision that the Rule fell in Category 3—meaning the Board wouldn’t consider the Rule’s legitimate justifications—on the following:

“In this case, however, [Lowe]’s limitation of covered information to information ‘entrusted’ to employees *was insufficient to convey to a reasonable employee* that the policy’s restriction on disclosure of salary information did not interfere with employees’ exercise of their core Sec. 7 right to engage in protected discussion or disclosure of their own salaries, particularly given that

the policy was directed to all employees, not just those given access to [Lowe]’s confidential records. Indeed, for most employees without access to confidential records, the only salary information they could reasonably view as ‘entrusted’ to them under this policy is their own salary information.”

[ROA.174 n.1 (emphasis added)]

As shown *infra* in Part III, this rationale for deeming Lowe’s Rule an unlawful, Category 3 provision fails to interpret the Rule in the light and context of its actual, legitimate justifications. But the Board’s rationale also conflicts on its face with *Boeing*.

Most important—and most obvious—the Board’s core reason for slotting Lowe’s Rule in *Boeing* Category 3 rests on the very “reasonably construe” standard that *Boeing* expressly overruled. There is no practical difference between saying (a) “employees would reasonably construe [a rule’s] language to prohibit Section 7 activity” (*Lutheran Heritage*, 343 NLRB at 647), and (b) the rule’s language “was insufficient to convey to a reasonable employee” that the rule “did not interfere with employees’ exercise of their core Sec. 7 right” (the rationale below). Under either formulation, a workplace rule is being invalidated—regardless of its

legitimate justifications—based on how it supposedly might “reasonably” be read by a “reasonable” employee.

In *Boeing*, the Board rejected such reasoning, holding that it was “contrary to Supreme Court precedent” and “has defied all reasonable efforts to apply and explain it.” 2017 WL 6403495, at *8, *12. Yet here, the Board uses essentially *identical* reasoning to conclude, supposedly under *Boeing*, that a workplace rule is categorically invalid.

This cannot be correct.

Further, the Board’s formulation here—“insufficient to convey to a reasonable employee” that a rule does “not interfere” with Section 7 rights—suggests employers may have to spell-out how workplace rules *don’t* prohibit Section 7 activity. This resuscitates two other *Lutheran Heritage* errors that *Boeing* rejected. One was “requir[ing] employers to eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity.” 2017 WL 6403495, at *10. Another *Lutheran Heritage* “false premise” was “the notion that employers drafting facially neutral policies, rules and handbooks provisions *can* anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities.” *Id.*

The reasoning below now re-invites challenges claiming that supposed “ambiguities” and “potential interpretation” of workplace rules render them “insufficient to convey to a reasonable employee” that one or another Section 7 activity is “not” prohibited. One reason *Boeing* overruled *Lutheran Heritage’s* “reasonably construe” standard was to eliminate “extensive confusion and litigation for employers, unions, employees and the Board itself.” 2017 WL 6403495, at *12. Under the Decision’s formulation, one can expect confusion and litigation to return.

In sum, the ALJ’s view that Lowe’s Rule was an invalid, Category 3 provision was based on her construing “all ambiguities” against the drafter. The Board correctly held that *Boeing* had “clearly rejected” this. But the panel majority then rationalized the same Category 3 conclusion by saying a “reasonable employee” might read the Rule as prohibiting Section 7 activity. This is indistinguishable from *Lutheran Heritage’s* “reasonably construe” standard, which *Boeing* also expressly rejected. Further, the Board’s rationale was, in effect, simply a different, indirect way of construing any alleged ambiguity in the Rule against Lowe’s.

None of this can be reconciled with *Boeing*, which the Board was required to follow.

III. The Decision Also Disregarded *Boeing* By Failing To Consider Legitimate Justifications For Lowe’s Rule.

Having erroneously slotted Lowe’s Rule in *Boeing*’s Category 3, the ALJ and Board rulings also disregarded *Boeing*—and the Supreme Court precedent on which it rests—by not considering the Rule’s legitimate justifications.

Again, *Boeing* “overrule[d] the *Lutheran Heritage* ‘reasonably construe’ standard” as “contrary to Supreme Court precedent because it does not permit *any* consideration of legitimate justifications that underlie many [workplace] policies, rules and handbook provisions.” 2017 WL 6403495, at *8. As *Boeing* correctly held, “the Supreme Court has repeatedly required the Board to take those justifications into account.” *Id.* (citing *Republic Aviation v. NLRB*, 324 U.S. 793, 797-98 (1945); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963)).

But here, both the ALJ and the Board failed to take Lowe’s justifications into account. After construing the Rule’s supposed “ambiguities” against Lowes, the ALJ explicitly refused to consider any justifications: “I read the Board’s *Boeing* holding to designate any rule prohibiting employees from discussing salary information as per se unlawful[,] thus

bypassing the need to conduct a balancing test.” [ROA.178] She then said Lowe’s failed even “to present any legitimate business justifications for precluding disclosure of salary information,” instead making only “bare assertions for its alleged business justifications.” [ROA.179]

The Board’s disregard of Lowe’s legitimate justifications took a circuitous but equally erroneous route. The majority correctly pointed out that “employers have a legitimate interest in restricting employees’ unauthorized access to, and dissemination of, information stored in their employer’s confidential records, including salary information contained in such records.” [ROA.174 n.1 (citing *Asheville Sch., Inc.*, 347 NLRB 877 (2006), and *Int’l Bus. Mach. Corp.*, 265 NLRB 638 (1982))]

But the Board said these were “circumstances not present in this case.” [ROA.174 n.1] This conclusion was grounded in its belief that Lowe’s Rule “was insufficient to convey to a reasonable employee” that Lowe’s employees discussing salary information among themselves *wasn’t* prohibited. [ROA.174 n.1] That belief was reinforced by the Board’s view that “for most employees without special access to confidential records, the only salary information they could reasonably view as ‘entrusted’ to them under this policy is their own salary

information.” [ROA.174 n.1] Based on this, the Board agreed with the ALJ’s ruling that Lowe’s Rule fell “within the scope of Boeing Category 3” [ROA.174 n.1]—*i.e.*, rules deemed unlawful because adverse impact on NLRA rights isn’t outweighed by legitimate justifications.

As shown *supra* in Part II, the Board’s “Boeing Category 3” reasoning facially conflicts with *Boeing* itself. The Board further erred, however, in saying that an employer’s “legitimate interests” in protecting confidential information were “not present in this case,” and in failing to read the Rule in the light and context of those interests.

Properly so read, Lowe’s Rule (a) legitimately prohibited disclosure of confidential salary and other information by Lowe’s employees who had access to (and thus were “entrusted with”) such information; but (b) didn’t limit discussion among Lowe’s employees of their *own* salaries.

The key points are these:

(1) To start with what the Board got right: Employers indeed have legitimate interests in protecting confidential salary and other information. One self-evident interest is preventing rivals from using such data to gain unfair competitive advantage. Another obvious interest is avoiding exposure to potential antitrust liability—*e.g.*, foreclosing the

risk that the Government (or *other* competitors) may assert that confidential information was shared among particular rivals in an effort to *restrict* competition. Lowe's pointed to both such interests below. [See ROA.135, 147-48, 174]

(2) The Board's recognizing such interests disposes of the ALJ view [ROA.179] that Lowe's "failed to present any legitimate business justifications for precluding disclosure of salary information," making only "bare assertions for its alleged business justifications." What the ALJ called "bare assertions" were treated by the Board as self-evident.

One needn't introduce "evidence" to show that companies reap advantage by acquiring a competitor's confidential salary and other data, or (conversely) that sharing such data with competitors exposes one to antitrust liability. *See, e.g., Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680 (5th Cir. 1965) ("to require testimony to show [the] self-evident"—*i.e.*, "that competition may be adversely affected" by competitor collaboration—"would greatly handicap effective [antitrust] enforcement") (quoting *FTC v. Morton Salt Co.*, 344 U.S. 37, 50 (1948)); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (Sotomayor, J.) (reaffirming viability of antitrust claim against competitors who engage in "wage-fixing")

by sharing confidential employee compensation data); *Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987) (“Courts have presumed that disclosure of [confidential data] to a competitor is more harmful than disclosure to a noncompetitor”) (collecting cases).

Such self-evident truths are judicially noticeable. *See Kampen v. Am. Isuzu Motors, Inc.*, 157 F.3d 306, 325 (5th Cir. 1998) (“tak[ing] judicial notice of the fact that a substantial number of persons who use automobile jacks will place parts of their bodies underneath cars held aloft by jacks”; “jurors do not need an expert to tell them”).

(3) The Board erred, however, in saying legitimate employer interests in protecting confidential salary and other information “were not present in this case.” To begin, it’s indisputable that such interests *are* present as to employees who were in fact “entrusted” with Lowe’s confidential information—in the Board’s words, “given access to [Lowe]’s confidential records” [ROA.174 n.1]. These are the very employees to whom Lowe’s has always contended its Rule was directed and applied. The legitimate business interests the Board treats as self-evident *make sense* as to such employees, as the Board recognized. This underscores that Lowe’s reading of its own Rule was reasonable and correct.

(4) In saying such interests “were not present in this case,” the Board was evidently referencing “employees without special access to confidential records,” for whom “the only salary information they could reasonably view as ‘entrusted’ to them under [Lowe’s Rule] is their own salary information” [ROA.174 n.1].

But this is a highly stilted, unnatural reading of “entrusted.” To “entrust” is to “put into the care or protection of someone” (WEBSTER’S ONLINE DICT.), or “give someone a thing or duty for which they are responsible” (CAMBRIDGE ENG. DICT.).³ “If you entrust something important to someone or entrust them with it, you make them responsible for looking after it or dealing with it.” COLLINS ENG. DICT.⁴

These ordinary definitions make perfect sense as applied to employees who were “entrusted” with access to Lowe’s confidential financial information. No natural, ordinary reading of the term would view it as encompassing an employee’s knowing his or her *own* salary.

³ <https://www.webster-dictionary.org/definition/Entrust> and <https://dictionary.cambridge.org/us/dictionary/english/entrust>, respectively.

⁴ <https://www.collinsdictionary.com/us/dictionary/english/entrust>.

Absent statutory or contractual definition of terms, the law looks to the natural, ordinary reading of the language used. *E.g.*, *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 634 (2012) (“it is normal usage that, in the absence of contrary indication, governs our interpretation of texts”); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (“In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning”); *Weaver v. Metro. Life Ins. Co.*, 939 F.3d 618, 626 (5th Cir. 2019) (“whether the language is contractual ... or statutory, we give words their ordinary, natural meaning”).

Courts recognize that “‘entrust’ is a commonly-used term, capable of accepted and ordinary meaning: ‘to confer a trust on,’ or ‘to commit to another with confidence.’” *KA Together, Inc. v. Aspen Specialty Ins. Co.*, 362 F. Supp. 3d 281, 288 (E.D. Pa. 2019) (quoting MERRIAM-WEBSTER COLL. DICT. (11th ed, 2005)) (other citation omitted). Courts adopt and apply that ordinary meaning in a variety of contexts, rejecting unnatural readings of “entrust.” *See, e.g.*, *United Specialty Ins. Co. v. Barry Inn Realty Inc.*, 130 F. Supp. 3d 834, 839 (S.D.N.Y. 2015) (“‘entrust’ must be given its ordinary meaning,” *i.e.*, that insured transferred possession “with confidence that the property would be used for the purpose

intended by the owner and as stated by the recipient”) (citations & other internal quotation marks omitted); *In re Mitchell*, 618 B.R. 199, 210 (Bankr. W.D. Ky. 2020) (“merely loaning or investing funds with a debtor is generally insufficient to establish that funds were ‘entrusted’ to that debtor”); *Zedella v. Gibson*, 165 Ill. 2d 181, 188, 650 N.E.2d 1000, 1003 (1995) (reversing ruling that father’s “facilitation of [adult son]’s purchase of [a] vehicle by cosigning the purchase money loan” constituted father’s “entrustment” of vehicle to his son).

There’s no good reason to take a different view here, by asserting that it’s “reasonable” for an employee (or anyone else) to embrace an awkward, non-commonsense reading of “entrust” that would render Lowe’s Rule “unlawful.”

(5) None of this is undermined by employees having ordinary Section 7 rights to discuss their own salaries with each other. Lowe’s doesn’t contend its Rule applied to such discussions. Lowe’s contends the opposite. To “construe” the Rule otherwise means reading it unnaturally as governing activities to which Lowe’s self-evident, legitimate interests *do not* apply, and instead advancing *illegitimate* interests that Lowe’s never asserted and would render the Rule unlawful. If Lowe’s had been

attempting to interfere with Section 7 rights, it chose a remarkably abstruse method to do so.

Further, the law routinely adopts readings that will render a statute or contract valid and enforceable. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012) (“every reasonable construction must be resorted to, in order to save a statute from unconstitutionality”) (citation omitted); *Walsh v. Schlect*, 429 U.S. 401, 408 (1977) (“contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable”); *In re OCA, Inc.*, 552 F.3d 413, 422 (5th Cir. 2008) (“When two constructions of a contract are possible, preference will be given to that which does not result in violation of law”) (citation omitted).

Again, there’s no good reason to take a different view here, where (to use *Walsh*’s locution) “the wording [of Lowe’s Rule] lends itself to a logically acceptable construction that renders [it] legal and enforceable” (to wit, as not restricting employees’ rights to discuss their own wages). Indeed, even assuming *arguendo* such a “construction” may theoretically be possible would make no difference. “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.’” *Boeing*, 2017 WL 6403495, at *17 (quoting *Lutheran Heritage*, 343 NLRB at 647).

(6) Finally, any concern that Lowe’s Rule could “conceivably be read to cover Section 7 activity” wouldn’t warrant deeming the Rule a *Boeing* Category 3 “unlawful” provision. *Boeing* itself shows otherwise: “[T]he 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.” 2017 WL 6403495, at *17 & n.84 (citing *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001), and *Aroostook Cty. Reg’l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996)).

This is precisely the route the Board should have taken here. Lowe’s Rule should have been upheld as to employees who had access to and were entrusted with confidential salary and other information. This

is how Lowe's construed its Rule; and the Board itself recognized an employer's "legitimate interest" in prohibiting disclosures in that context.

It was unreasonable to read the Rule as something that tried to stop Lowe's employees from exercising Section 7 rights to discuss salaries among themselves. Further, had the Rule still been in place, the Board could readily have prevented it from being unlawfully so applied. It is all the more unreasonable to invalidate a now-rescinded Rule based on an unnatural reading that (even were it theoretically conceivable) can have no future impact on any NLRA-protected activity.

CONCLUSION

The Court should grant Lowe's petition, vacate the Decision, and hold that Lowe's Rule did not improperly restrict Section 7 rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on November 13, 2020 the foregoing Petitioner's Brief has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Rules of Appellate Procedure on all registered counsel of record unless otherwise noted as follows:

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