UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STERICYCLE, INC.
Employer

and **Cases 04-CA-137660, 04 CA-145466, 04-CA-158266, and 04-CA-160621**

TEAMSTERS LOCAL 628
Petitioner

BRIEF OF *Amici Curiae*
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I. STATEMENTS OF INTEREST

HR Policy Association ("HRPA" or “Association”) is a public policy advocacy organization that represents the chief human resource officers of more than 400 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than ten million employees in the United States, nearly nine percent of the private sector workforce. Since its founding, one of HRPA's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

Significant changes in federal labor law and policy – such as what the Board contemplates in the present case – have major implications for Association member operations, and accordingly, HR Policy regularly engages with the National Labor Relations Board (“NLRB” or “Board”) on rulemakings and invitations to file amicus briefs. Association members regularly have matters pending before the Board, and HR Policy has a significant interest in ensuring that the standards articulated by the Board are consistent with the language and purposes of the National Labor Relations Act (“NLRA” or “Act”). Association members rely on the enforceability of workplace rules and policies in order to maintain operational productivity and create a diverse and inclusive workplace culture. Accordingly, Association members have a vested interest in how the Board chooses to scrutinize such rules and policies, and HR Policy submits this brief in furtherance of this interest.

The Retail Litigation Center, Inc. (“RLC”) is the only trade organization solely dedicated to representing the retail industry in judicial and quasi-judicial proceedings. The RLC’s members include many of the country’s largest and most innovative retailers. Collectively, they employ millions of workers across the United States, provide goods and services to tens of millions of

consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts and regulatory agencies with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an *amicus* in well over 150 cases. Its *amicus* briefs have been favorably cited by multiple courts, including the U.S. Supreme Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542–43 (2013).

II. SUMMARY OF ARGUMENT

Sound regulatory policy and common sense strongly suggest that the Board should not return to a role of "second-guessing" employer policies and rules and constructing hypothetical "reasonable employee's" interpretations of such policies to invalidate the same. *Amici* submit that a new four-step framework should be adopted by the Board to analyze and decide employer policy and rule challenge cases. Specifically, employer rules and policies should be invalidated if (1) the rule or policy in question, on its face, is in violation of the NLRA, or (2) the rule or policy in question was applied in a discriminatory manner, including being promulgated to interfere with union or employee organizational activity.

If the above first two steps are answered in the negative, and a party desires to continue to challenge an employer rule or policy, such party at step three would be required to establish that the policy or rule in question was actually utilized or applied by an employer to restrict or inhibit employee Section 7 rights. This third step will prevent the Board from engaging in thinly veiled speculation of how a hypothetical "reasonable employee" might construe the rule or policy in question. Indeed, this was often the flawed approach that the Obama-era Board pursued when it improperly found violations of the Act based on the legal fiction that such hypothetical reasonable

employees would have concluded that their Section 7 rights were "chilled," even if such a "reasonable employee" took no action to pursue their Section 7 rights. Additionally, this approach would instruct the Board to decide only actual cases and controversies and not to engage what has been, in essence, the issuance of advisory opinions in the pre-*Boeing* era. Stated alternatively, if an employer took no action against an employee based on the rule or policy in question, there should be no basis to find a violation of the Act.[1]

Finally, if the first three steps have not resulted in the case being resolved or dismissed, the Board should proceed to step four. At this step, and only upon a showing of actual alleged restriction of employee rights directly resulting from maintenance and/or enforcement of the employer rule or policy in question, should the Board then balance such restriction against the employer's legitimate business justifications to determine whether the rule or policy in question constituted a violation of the Act. The above analytical approach would prevent the Board from returning to being the "handbook police" and finding violations associated with employer policies and rules based on paragraph placement, comma and semicolon locations, or the failure to spell out in endless detail in their rules or policies all examples of how same could be applied.

Additionally, *amici* respectfully ask the Board to consider whether returning to the Board's pre-*Boeing* approach would result in a proper utilization of its resources. Such a policy is likely to result in unnecessary Board investigations, borderline frivolous charges going to complaint, and resulting litigation expenses in attempting to have courts enforce Board orders. *Amici* suggest that this approach is not a sound use of Board resources.

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[1] This approach would prohibit Board election results from being overturned simply by the existence of an alleged improper employer policy or rule that never had been utilized or even discussed during the election campaign. *See, e.g.*, *Jurys Boston Hotel*, 356 NLRB No. 114 (2011).

Finally, *amici* also strongly oppose any effort by the Board and its General Counsel to create a broad new investigation and enforcement philosophy towards otherwise commonly accepted (if not statutorily required) and nondiscriminatory employer workplace rules and policies to justify additional funding and staff. The Board should use its resources judiciously to focus on important matters that protect employees, employers, and unions from violations of the Act.[2]

III. ARGUMENT

A. The Pre-*Boeing* Caselaw Experience Should Not Be Repeated

The *Lutheran Heritage* standard involved a multi-step inquiry in which the Board first determined whether the rule or policy at issue, on its face, explicitly restricted activities protected by Section 7.[3] If the rule or policy was found to be violative of the Act on its face, then the rule or policy was invalid. If the rule or policy was facially neutral, the Board would nevertheless find it invalid if (1) employees would reasonably construe the language to prohibit Section 7 activity, (2) the rule was promulgated in response to union activity, or (3) the rule had been applied to restrict the exercise of Section 7 rights.[4] From its inception, most of the cases at issue under *Lutheran Heritage* involved the first prong of the second step, the contours or bounds of which were never adequately articulated, resulting in inconsistent application and enabling the Obama-era Board in particular to wage a one-sided war against employer handbooks, and related rules and policies.

The *Lutheran Heritage* standard and its progeny required employers to anticipate and detail in their workplace policies and rules virtually every specific type of prohibited misconduct to avoid Section 8(a)(1) violations. But it is virtually impossible to create rules that are 100% free of

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[2] *Amici* also endorse the brief submitted by *amici* Coalition for a Democratic Workplace et. al, specifically to the extent that an employer's voluntary use of disclaimer language as part of any workplace rule or policy stating that nothing in the workplace rule or policy is meant to interfere with employees' Section 7 rights should preclude a finding that such a rule or policy, if facially neutral, violates the Act.

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

[4] *Id*.

ambiguity, and which cannot, in some way, be interpreted by a hypothetical "reasonable employee" to restrain some hypothetical form of concerted activity. Indeed, the theoretical possibility of such an occurrence does not mean that it will or even could occur in practice.

Take, for example, a workplace rule that prohibits employees from using language in the workplace that is offensive or harassing within the meaning of Title VII of the Civil Rights Act. Hypothetically, such a rule *could* restrain an employee from complaining about terms and conditions of employment, activity that is protected under the Act, because they would be unable to do so if the complaint was accompanied by offensive language. But that does not mean that such a rule actually *does* inhibit an employee's ability to complain about terms and conditions of employment in any meaningful way. They can still do so, merely without using offensive language – hardly a significant hurdle. More to the point, an employee disciplined under such a rule would not be disciplined for the complaint itself, but merely for the offensive language accompanying it, making it clear that the complaint alone was not the reason for the discipline. To put it succinctly, the existence of such a rule or policy does not, standing alone, inhibit an employee's right to complain about terms and conditions of employment, nor is such the target of the rule. Indeed, the D.C. Circuit Court of Appeals has, for this very reason, been particularly critical of the Board's approach to employer workplace rules and policies over the years, stating in one case:

> Under the Board's reasoning, every employer in the United States that has a rule or handbook barring abusive and threatening language from one employee to another is now in violation of the NLRA, irrespective of whether there has ever been any union organizing activity at the company. This position is not "reasonably defensible." It is not even close. In the simplest terms, it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resorting to abusive or threatening language…Expecting decorous behavior from employees is apparently asking too much…America's working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and

> government employees who now condescend to them…This is a stunning misreading of the applicable precedent.[5]

Unfortunately, a majority of current Board members appear to be signaling a return to the Obama-era Board's approach of scrutinizing all employer workplace rules and policies and placing the initial burden on employers to justify same. Such an approach was not only an incorrect application of the already flawed Board's original *Lutheran Heritage* standard but also a mistaken policy approach with respect to the application of the NLRA. Such a mistaken approach can be captured succinctly through the following illustrative Board decisions of the Obama-era that inexplicably found common and well-established innocuous employer workplace rules to be in violation of the NLRA:

- *T-Mobile U.S.A., Inc*., 363 NLRB No. 171 (2016), in which the Board found that workplace policies that explained that employees should "behave in a professional manner that promotes efficiency, productivity, and cooperation" and "maintain a positive work environment" were unlawful because they could be reasonably construed by an employee to inhibit employees' rights to protected concerted activity. The Fifth Circuit Court of Appeals later denied enforcement of the majority of the Board's decision, emphasizing that the Board erred by "interpreting the rule as to how the reasonable employee *could*, rather than *would*, interpret these policies," and that "a reasonable employee would be fully capable of engaging in debate over union activity or working conditions, even vigorous or heated debate, without [violating the rule]."[6]
- *First Transit, Inc.*, 360 NLRB No. 72, (2014), in which the Board ruled that several employer policies were unlawful, including one that prohibited employees from making

[5] *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 25-26 (D.C. Cir. 2001).
[6] *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 272-74 (5th Circ. 2017).

false statements about the company and another that prohibited discourteous and inappropriate attitude or behavior toward other employees because they could be "reasonably construed" by an employee to inhibit employees' rights to protected concerted activity.

- *William Beaumont Hospital*, 363 NLRB No. 162 (2016), in which the Board ruled that a hospital's policy that advised employees to "work harmoniously" and conduct themselves "in a positive and professional manner" was unlawful because it could be "reasonably construed" by an employee to inhibit employees' rights to protected concerted activity.[7]
- *Fresh & Easy Neighborhood Market*, 361 NLRB 72 (2014), in which the Board ruled that an employer's policy that required employees to keep customer and employee information secure was unlawful because it could be reasonably construed by an employee to inhibit employees' rights to protected concerted activity.
- *Tinley Park Hotel & Convention Ctr., LLC*, 2015 LEXIS 462 (2015), in which the Board ruled that an employer's policy that prohibited false and malicious statements about the company was unlawful because it could be reasonably construed by an employee to inhibit employees' rights to protected concerted activity.

Each of the above cases involves straightforward, innocuous, and facially neutral employer workplace policies designed to promote workplace civility or to promote objectives to protect legitimate confidentiality concerns and company reputational interests; and yet, in each of the above cases, the Board found the policies to be unlawful – not because the policies *actually*

[7] It is particularly noteworthy in this case that two hospital employees were disciplined under the challenged rule for failing to adequately communicate and provide appropriate care to a patient who subsequently passed under their care.

prohibited or in any way restricted an employee from exercising their Section 7 rights, but because the policies *could be* construed by a hypothetical "reasonable employee" to do so.

The above five cases are only a small sample of dozens of pre-*Boeing* Board decisions during the Obama administration, in which the Board nullified countless facially neutral employer policies. Such an approach made it practically impossible to predict what policies and rules employers could adopt and implement. Further, such an approach often placed employers in conflict with federal anti-discrimination laws such as Title VII of the Civil Rights Act. The pre-*Boeing* caselaw experience should not be repeated.

B. Employers Adopt Workplace Rules and Policies to Support Legitimate Functions and Objectives

The Obama-era Board effectively took the position that nearly all employer workplace rules and policies were designed as unlawful inhibitors of employees' Section 7 rights, and either negated or wholly ignored the necessary and lawful functions and objectives such rules and policies are meant to serve. Employers develop workplace rules for many important purposes, such as: to promote operational efficiency, productivity, and safety; to establish standards of professionalism, particularly for customer-facing employees; and to establish inclusive workplace cultures that are free from harassment and hostility. Indeed, for decades, Democrat and Republican Boards have recognized that employers have an "undisputed right" to "maintain discipline in their establishments," among other legitimate business justifications.[8]

1. Workplace Rules Promote Diversity and Inclusion and Prevent Discrimination and Harassment in the Workplace

The importance of fostering a diverse and inclusive workplace culture in both attracting and retaining talent and to support a company's overall operation is well-established and cannot

[8] *See, e.g.*, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Republic Aviation v. NLRB* 324 U.S. 793, 797-798 (1945).

be overstated, especially in today's environment.[9] Diverse and inclusive workplaces are more productive and foster employee well-being. Conversely, workplace harassment and discrimination have been consistently linked to increased rates of employee depression, worker stress, and decreased productivity.[10] Accordingly, thoughtful employers take all available steps to foster an overall culture of inclusion in the workplace and to prevent harassment. Workplace "civility" policies that prohibit or advise employees to refrain from using harassing language and engaging in harassing activities against fellow workers are important tools in this regard. The clear objective of such policies is to prevent harassment, which, as detailed above, can lead to numerous adverse effects on employees and their employers. Such policies are clearly not an attempt, in any way, to reduce the ability of employees to engage in protected concerted activity, which they can engage in without harassing language directed against fellow employees. Accordingly, the Board should accord deference to such employer policies unless they are discriminatory on their face with respect to Section 7 employee rights or are enforced in a discriminatory manner, including being promulgated to interfere with union or employee organizational activity.

2. Workplace Rules Establish Professional Standards Necessary for Company Reputation and Productivity

Another important role of workplace rules or policies is to establish clear standards of professionalism for employees; these rules are especially helpful for employees who are in retail

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[9] *See, e.g.* Vivan Hunt et al., *Diversity Matters,* MCKINSEY & CO. *(2015),* https://assets.mckinsey.com/~/media/857F440109AA4D13A54D9C496D86ED58.ashx; Marcus Noland et al., *Is Gender Diversity Profitable? Evidence from a Global Survey,* PETERSON INST. FOR INT'L ECON. (2016), https://www.piie.com/system/files/documents/wp16-3.pdf; Juliet Bourke et al., *Diversity and Inclusion: The Reality Gap,* DELOITTE INSIGHTS (2017), https://www2.deloitte.com/us/en/insights/focus/human-capital-trends/2017/diversity-and-inclusion-at-the-workplace.html#endnote-6 ; Sophia Kerby & Corsby Burns, *A Diverse Workforce is Integral to a Strong Economy,* CENTER FOR AMERICAN PROGRESS (July 12, 2012).

[10] Carly Thelen, *Hate Speech as Protected Conduct: Reworking the Approach to Offensive Speech under the NLRA*, 104 IOWA L. REV. 985, 1002 (2019).; *see also* Kamaldeep Bhui et al., *Racial/Ethnic Discrimination and Common Mental Disorders Among Workers*, 95 AM. J. PUB. HEALTH 496, 498-500 (2005); Wizdom Powell Hammond et al., *Workplace Discrimination and Depressive Symptoms: A Study of Multi-Ethnic Hospital Employees*, 2 RACE & SOC. PROBLEMS, 19, 25-26 (2010).

customer-facing or client-facing businesses. Employees of such employers have an important role to play to deliver value to customers. Establishment and implementation of such rules or policies will color the customer or client's positive opinion of the company and thus the company's overall public image, reputation, and/or brand. It is therefore necessary for an employee to establish certain professional standards for its employees to meet in order to burnish and maintain its public reputation.

Indeed, such considerations are equally important for all employers and their employees, as the presence – or lack – of professional standards can significantly affect an employee's productivity, motivation, and satisfaction.[11] Examples of these policies include proper uniform or attire, hygiene standards, and rules for interacting with customers and clients, among others. Requiring employees to engage professionally with the public does not inherently inhibit an employee's ability to discuss grievances or conditions of employment with other employees or management or to engage in any other form of protected concerted activity.

3. Workplace Rules Ensure Occupational Health and Safety

Employer workplace rules and policies also ensure that workplaces are safe for employees and customers, and mitigate hazardous risks. Examples include uniform policies, which the Board itself has recognized in several decisions over the decades as particularly important for the maintenance of safety in industrial and manufacturing settings.[12] Indeed, workplace rules regarding onsite health and safety have become particularly paramount during the ongoing COVID-19 pandemic, which has required employers to adopt numerous infection control protocols in the workplace.

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[11] Robert J. Dignam, *There Is More to Fear Than Fear Itself: The National Labor Relations Board's Attack on Purposeful and Necessary Workplace Conduct Rules Must Be Stopped*, 52 VAL. U.L. REV. 395, 409-19 (2016).
[12] *See, e.g.*, *Albis Plastics*, 335 NLRB 923 (2001); *Andrews Wire Corp.*, 189 NLRB 108 (1971); *United Aircraft Corp.*, 134 NLRB 1632 (1961).

4. Workplace Rules Preserve Necessary Confidentiality

Confidentiality rules protect against harmful dissemination of private information that could damage employers, employees, and customers. Particularly in an increasingly digital world, companies often necessarily have customer, client, and employee data that contains confidential information. The unfettered disclosure of such data or information could harm any of these stakeholders. Employer confidentiality rules are essential for safeguarding such data and information and for preventing harmful disclosure and misuse.

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Employer workplace rules and policies serve a number of important functions. The Board should not unduly restrict an employer's ability to maintain and enforce facially neutral workplace rules and policies that are utilized to achieve essential and legitimate business functions.

C. Workplace Rules and Policies Are Often Required by Law and Regulation

Beyond the many important functions served by workplace rules and policies as outlined in Section B, many such rules and policies are driven by compliance with a number of employment laws and regulations, particularly in the areas of anti-discrimination, anti-harassment, and occupational health and safety.

1. Employers are Required by Law to Provide Workplaces Free of Discrimination and Harassment

Federal laws, such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, and similar state and local laws were enacted to protect employees generally as well as to protect those who are in statutorily protected classes. These laws require employers to avoid, to the extent possible, discrimination and harassment in their workplaces, among other obligations. Indeed, the Equal Employment Opportunity Commission ("EEOC") advises employers that clearly communicated anti-

harassment workplace policies are essential tools in preventing harassment in the workplace.[13] Further, the Supreme Court has recognized the maintenance and enforcement of anti-harassment workplace rules and policies as evidence of reasonable care taken to prevent harassment that is necessary to establish an affirmative defense against claims of harassment.[14]

Accordingly, employer workplace policies that prohibit abusive, offensive, derogatory, vulgar, and hostile language and conduct and that require employees to treat others professionally and with dignity are vital legal compliance tools for employers in order to fulfill their obligations under such laws. Consequently, the absence of, or inability to maintain and enforce such rules exposes employers to legal liability. More importantly, however, these workplace policies are important tools for providing employees the types of workplaces that federal and state legislatures have deemed essential for employee welfare.

2. Employers are Legally Required to Provide Safe Workplaces

Employers are subject to dozens of federal, state, and local occupational health and safety laws that impose a general duty[15] on employers to provide safe, healthy, and hazard-free workplaces for employees. Compliance with these laws requires workplace rules and policies designed to promote safe and healthy workplaces. For example, the Occupational Safety and Health Act alone requires employers to maintain and enforce multiple workplace rules and programs to establish workplace safety. Indeed, the Board itself has long recognized that these types of rules and policies vital for ensuring safety in industrial and manufacturing settings.[16] Employer legal obligations to provide safe and healthy workplaces have increased exponentially

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[13] *See, e.g.*, EEOC, EEOC-NVTA-2017-2, PROMISING PRACTICES FOR PREVENTING HARASSMENT (2017).
[14] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).
[15] *See, e.g.* 29 U.S.C. § 654.
[16] *See, e.g.*, *Albis Plastics*, 335 NLRB 923 (2001); *Andrews Wire Corp.*, 189 NLRB 108 (1971).

over the last two years, as federal, state, and local regulators have imposed countless new safety rules in response to the COVID-19 pandemic. The Board should not overreach its jurisdiction to interfere with facially neutral employer health and safety rules and policies.

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In sum, in addition to employers' bona fide interests in recruiting and retaining talent, and establishing a productive workplace, a web of legal and regulatory obligations drives the need for workplace rules and policies. Thus, restricting the ability of employers to maintain and enforce such rules significantly and unnecessarily increases the risk of liability under such laws and regulations.

D. The Board's Pre-*Boeing* Approach, Particularly as Applied by the Obama Board, Inhibited Employers' Ability to Comply with Anti-Discrimination Laws and Other Employment Laws

The Board's approach to workplace rules and policies during the Obama administration brought employers into direct conflict with federal, state, and local employment laws. Nowhere was this more evident than in the area of offensive speech and harassing language where the Board's jurisprudence hamstrung employers from preventing workplace harassment. Employers were forced to choose between allowing harassing and abusive language in their workplaces to the detriment of employee well-being and at the risk of legal liability, or else discipling employees for such behavior and facing unfair labor practice violations from the Board's handbook police.[17]

Indeed, several Board decisions during this period penalized employers for disciplining employees who used extremely offensive language, including racial epithets, sexual pejoratives,

[17] *See* Brief of Equal Employment Opportunity Comission as Amicus Curiae, General Motors LLC 369 NLRB No. 127 (2020) (In which the EEOC highlighted the tension between Board decisions protecting offensive and harassing language and anti-discrimination laws such as Title VII).

or violent threats.[18] Understandably, these decisions have been met with resistance by federal courts of appeal, including the D.C. Circuit, which recently refused to enforce a Board decision that penalized an employer for disciplining an employee for offensive conduct.[19] In another decision, the Court went further regarding the Board's apparent disregard for employer obligations under anti-discrimination and harassment laws, stating:

> We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here. Under both federal and state law, employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment. Abusive language can constitute verbal harassment under state or federal law. Given this legal environment, any reasonably cautious employer would consider adopting [the workplace civility rule at issue in the case].[20]

Again, as mentioned above, this is far from the only instance in which the D.C. Circuit or other federal courts of appeal have criticized the Board's pre-*Boeing* approach to employer workplace rules and policies that are intended to prevent discrimination and harassment.[21]

Further, in the more than fifty years since Title VII and other anti-discrimination laws have been enacted, there have been dramatic shifts in what is generally considered acceptable workplace behavior and language. Returning to a flawed interpretation of *Lutheran Heritage* will result in more decisions that are out of sync with evolving workplace norms and that will inhibit an employer's ability to foster diverse and inclusive workplaces.

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[18] *See, e.g.*, *Cooper Tire & Rubber Co.*, 363 NLRB No. 194 at 2 (2016) ("Go back to Africa, you f------ losers"); *Pier Sixty, LLC* 362 NLRB 505, 505 (2015) ("Bob is such a NASTY MOTHER F----- don't know how to talk to people!!!!! F--- his mother and his entire f------ family!!!!); *Airo Die Casting, Inc.*, 347 NLRB No. 75 810, 812 (2006) ("F--- you n-----"); *Detroit Newspaper Agency*, 342 NLRB No. 24 at 80 (2004) ("f------ bitch, n----- lovin' whore…your family is going to die").

[19] *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546 (D.C. Cir. 2019), denying enf. 366 NLRB No. 131 (2018).

[20] *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001).

[21] *See, e.g.*, *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 272-74 (5th Circ. 2017); *Cmty. Hosps. Of Cent. Cal. V. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003) (describing the Board's nullification of an employer's civility rule as "implausible").

A federal agency should not be in the business of making employers violate one set of workplace safety laws in order to comply with another; nor should it be in the business of making compliance with numerous anti-discrimination laws and regulations unnecessarily difficult. Beyond being unable to protect employees adequately, this is particularly problematic for employers given the skyrocketing costs of employment litigation. Even where employers are able to have meritless discrimination claims and NLRB charges dismissed at the summary judgement stage, or where claims are similarly eventually found to be without merit, such cases significantly drain a company's financial and human capital resources and create damaging media attention. Accordingly, the Board should not return to its approach pre-*Boeing*, or to any similar such standard under which employers are inhibited from compliance with anti-discrimination laws and from preventing harassment in the workplace.

Finally, if the Board does ultimately decide not to retain the *Boeing* standard, any such approach should be designed to harmonize with discrimination and harassment laws, and Title VII in particular. To that end, *amici* urge the Board to continue working with the EEOC to establish frameworks under which employers can clearly comply with obligations under both the NLRA and Title VII.

E. The Board's Pre-*Boeing* Approach under *Lutheran Heritage* Improperly Balanced Employer and Employee Interests and Nullified Legitimate Employer Rules on the Basis of Hypothetical Chilling

Under *Lutheran Heritage*, particularly as interpreted and applied by the Obama-era Board, employer rights to maintain discipline and productivity were improperly sacrificed in the name of protecting alleged concerted activity. As discussed further in Section G, the text and purpose of the NLRA require a proper balancing of employee and employer interests. As applied in practice, however, particularly by the Obama-era Board, the *Lutheran Heritage* standard involved no such

balancing, and presumed in numerous instances that employer policies unlawfully interfered with employee rights to protected concerted activity without any meaningful consideration of the employer's right to maintain and enforce such rules.

Section A provided a small sample of the many Board decisions over the last fifteen years, pre-*Boeing*, in which the Board nullified facially neutral workplace rules and policies because they could hypothetically be construed to inhibit employees' rights to protected concerted activity. Such results, as mentioned, failed to properly balance employers' and employees' rights as required under the NLRA, and have the practical effect of denying an employer's right to maintain and enforce workplace rules and policies in furtherance of productivity and discipline.

Further, such decisions were based on the Board's decision that a rule or policy *could be* "reasonably construed" by a hypothetical "reasonable employee" to inhibit employees' rights – *i.e.*, only hypothetical instances in which an employee's rights were chilled – and thus, entirely reasonable and legitimate employer policies, such as those requiring harmonious workplace relations or a certain level of professionalism, were invalidated on the basis of a hypothetical, potential inhibition of an employee's right to protected concerted activity, no matter the degree, if any, of such inhibition, and no matter whether such inhibition actually occurred.

Because the *Lutheran Heritage* standard does not properly balance employer and employee interests and does not require an actual showing that an employee's rights were chilled as a direct result of the application of a workplace rule or policy, the Board should not return to *Lutheran Heritage* or to any similar standard.

F. The Board's Approach Should Presume That Facially Neutral Rules Are Valid and Require That the Challenged Policy Has Actually Been Applied to Allegedly Violate Employees' Section 7 Rights

The Board's approach towards workplace rules and policies should presume that such rules and policies are valid unless they (1) are on their face violative of the NLRA, or (2) have been applied in a discriminatory manner, including being promulgated to interfere with union or employee organizational activity. The Board should require a high burden of proof to meet either of the above requirements. For facially neutral workplace rules and policies, the Board should then require a showing that the rule or policy in question has actually been applied or enforced in a manner that has directly resulted in an alleged restriction of an employee's rights to protected concerted activity. Finally, only where the above three steps are met without resolution or dismissal of the case, should the Board then balance such alleged restrictions against the employer's legitimate business justifications for maintaining and enforcing such rule or policy in determining whether to uphold or invalidate the rule in question. This approach will lead to predictable and reasonable results and guard against the creation of hypothetical "reasonable employees" and subsequent conjecture that the implementation of such rules could "chill" or interfere with employees' Section 7 rights.

G. A Balancing Test Should Only be Utilized Upon a Showing That Actual Infringement of Employees' Section 7 Rights Has Occurred

The text and purpose of the Act require 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."[22] This important duty of the Board that has been recognized in decades of Board decisions and by Supreme Court precedent.[23]Accordingly, any Board approach to evaluating

[22] *Boeing Co.*, 365 NLRB No. 154 (2017) (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967)); *see also* 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. 221, 229 (1963) (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").
[23] *Id*.

employer workplace rules and policies must engage in such a balancing test upon a showing of actual infringement of employees' Section 7 rights. A contrary approach, such as under *Lutheran Heritage*, unlawfully subordinates employer interests to that of employees in violation of the text and purpose of the Act as well as established Board precedent. Such subordination makes it virtually impossible for employers to maintain and enforce workplace rules and policies, as any legitimate business justification for such rules or policies could be overridden (and frequently was) by the hypothetical chilling that a rule may theoretically have on employees' rights to concerted activity.

However, as stated above, employer rules and policies should be presumed to be lawful unless they violate the Act on their face, or unless they have been discriminatorily applied. In the absence of either, only upon a showing that actual restriction or infringement of employees' Section 7 rights has occurred as a direct result of maintenance or enforcement of the rule in question should the Board then balance the extent of such infringement against the employer's legitimate business justifications for such rule in determining whether it is valid. Further, when engaging in such balancing, the Board should not begin with the presumption that employee and employer interests are on equal footing. Instead, the Board should only invalidate facially neutral employer rules or policies that serve legitimate employer interests where the alleged infringement of employees' Section 7 rights substantially outweighs such legitimate interests.

Engaging in such balancing prior to such a showing of actual application and infringement will, as under *Lutheran Heritage* and its "reasonable employee" prong, produce inconsistent Board application and results. This approach would continue the sort of wild oscillations in Board law and policy over the past fifteen years that have plagued the regulated community. Requiring a showing of actual infringement before engaging in a balancing test, and requiring such

infringement to substantially outweigh legitimate employer interests in the facially neutral rule or policy before invalidating the same, will anchor future Boards to reasonable evaluations of neutral employer workplace rules and policies and prevent Boards from using such a balancing test as a broad lens through which to unreasonably nullify the same. The above analytical approach suggested by *amici* will require the Board to engage in clear and transparent decision-making, minimize second-guessing of employer rules and policies, and provide courts with a clearly understood approach to any appeals they may be required to hear in this area.

IV. CONCLUSION

The Board should adopt a four-part test when deciding cases challenging employer rules and policies. The Board should first determine if the rule or policy in question is, on its face, violative of the Act. If it is, the rule or policy is unlawful and must be stricken. Second, if the rule or policy is neutral on its face, but the rule or policy has been applied in a discriminatory manner, the Board should find the rule or policy to be in violation of the Act. Third, if an employer rule or policy is not invalidated at steps or one two, the party continuing to challenge such rule or policy must show that the rule or policy in question has actually been applied in a manner that directly results in some level of interference with an employees' Section 7 rights – the "as-applied" test. Finally, a balancing test analysis should only be utilized in the fourth and final step if the first three steps have not resulted in the case being resolved or dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Board's "Notice and Invitation to File Briefs," the undersigned certifies that a copy of this amicus brief in Cases 04-CA-137660, 04 CA-145466, 04-CA-158266, and 04-CA-160621 was electronically filed via the NLRB E-Filing system with the National Labor Relations Board and served via electronic mail to the parties listed below on March 7, 2021.

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