16-2-AG(L)

16-346-ag(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

WHOLE FOODS MARKET GROUP, INC.,

Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

On Appeal from the National Labor Relations Board

BRIEF FOR *AMICI CURIAE* COUNCIL ON LABOR LAW EQUALITY AND COALITION FOR A DEMOCRATIC WORKFORCE IN SUPPORT OF PETITIONER-CROSS-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Council on Labor Law Equality has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Likewise, Amicus Curiae Coalition for a Democratic Workforce has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

The Council on Labor Law Equality ("COLLE") is a trade association founded more than 30 years ago for the purpose of monitoring and commenting on developments in the interpretation and enforcement of the National Labor Relations Act (NLRA). Its membership is composed of large, national employers, in virtually every business sector, all of whom are subject to the NLRA. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation of national labor policy on issues that affect a broad cross-section of American industry. COLLE is the nation's only brief-writing association devoted exclusively to issues arising under the NLRA and in recent decades has filed amicus briefs in nearly every significant labor case before the National Labor Relations Board (NLRB), the federal courts of appeals, and the U.S. Supreme Court. With respect to the present case, all of COLLE's members promulgate and maintain written personnel policies and procedures covering a

[1] Pursuant to the disclosure requirements of Local Rule 29.1 of the United States Court of Appeals for the Second Circuit, COLLE and CDW state that they are unaware of any relationship between the judge assigned to hear this proceeding and COLLE, CDW, or their counsel, that would potentially cause recusal of the judge. Furthermore, neither of the parties' counsel authored this amicus brief and no party, counsel, or other entity or person contributed money to fund the preparation or submission of the brief. Counsel for the parties have consented to the filing of this brief.

myriad of matters; and, in effect at hundreds of work locations throughout the United States.

The Coalition for a Democratic Workforce (CDW), which consists of hundreds of members representing millions of employers nationwide, was formed to give its members a meaningful voice on labor reform. The CDW has advocated for its members on several important legal questions, including the one implicated by this case. Like COLLE, many of the employers represented by CDW's members promulgate and maintain written personnel policies and procedures.

STATEMENT OF THE CASE, PROCEDURAL HISTORY AND STANDARD OF REVIEW

COLLE and CDW agree with and adopt the statements of Whole Foods Market Group, Inc. as set out in its opening brief regarding the pertinent facts, procedural history, and the appropriate standard of review applicable to this appeal.

ARGUMENT

I. The NLRB's Increased Scrutiny Of Employer Work Rules Has Yielded Inconsistent Results And Created Confusion Among Employers

The NLRB majority's finding of a violation in the present case turns almost exclusively on a determination by two of three Board Members that the work rules in question "would reasonably be construed by employees to prohibit Section 7 activity." Decision at 8. This articulated basis for the finding is drawn from what

one Board Member has referred to as the "rudimentary analysis" of *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004)*; William Beaumont Hospital,* 363 NLRB No. 162 at *8 (2016). Thus, under *Lutheran Heritage* an employer work rule or handbook provision will be found unlawful if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; [or] (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, supra,* at 647. In practice, very few cases turn on either the second or third prong of the "test", and those that do are typically not controversial in terms of the result. *See*, *NLRB General Counsel Memorandum,* GC 15-04 at 2 (March 18, 2015). By contrast, the first prong of the test has recently been used with increasing frequency to find a host of employer work rules and provisions unlawful, and these decisions have spawned considerable controversy and criticism. [2]

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2 See, U.S. Chamber of Commerce, *Theater of the Absurd: The NLRB Takes on the Employee Handbook* (available at http://www.workforcefreedom.com/sites/default/files/NLRB_Theater%20of%20the%20Absurd.pdf; Liss, *Beware That Your Social Media Policies Do Not Draw the Ire of the National Labor Relations Board,* 70 J. Mo. B. 324 (2014); Green, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity,* 27 Berkley Tech. L.J. 837 (2012); O'Brien, *The National Labor Relations Board: Perspectives on Social Media*, 8 Charleston L. Rev. 411 (2014); Hemenway, *The NLRB and Social Media: Does the NLRB "Like" Employee Interests?,* 38 J. Corp. L. 607 (2013); *Employers Beware,* 284-OCT N.J. Law. 24 (2013); 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); McNamara, *The Times are*

Nowhere has the criticism of the first prong of the *Lutheran Heritage* "test" been stronger than from the ranks of the NLRB's own Members. Thus, current Board Member Miscimarra has been repeatedly critical of the first prong of the *Lutheran Heritage* analysis. See, e.g. *Lily Transportation Corp.,* 362 NLRB No. 54 at *1, fn. 3 (2015); *Conagra Food, Inc*., 361 NLRB No. 113 at *8 (2015). Indeed, most recently in *Beaumont*, *supra,* he has expressly called upon the Board to abandon the *Lutheran Heritage* test, or, alternatively, for the reviewing federal courts to repudiate it. *Beaumont, supra,* at *11-24. He has not been alone. Other recent Board Members have repeatedly expressed similar criticism of the first prong of the *Lutheran Heritage* "test." See, e.g., *Fresh & Easy Market,* 361 NLRB No. 8 at *5 (2014). (views of former Member Johnson); *2 Sisters Food Group,* 357 NLRB No. 168 at *14 (2011), *aff'd* 359 NLRB No. 158 (2013); *Flex Frac Logistics LLC,* 358 NLRB 1131, 1133-1134 (2012), *aff'd* 360 NLRB No. 120 (2014); *The Roomstores of Phoenix,* 357 NLRB No. 143 at *fn. 3 (2011) (views of former Member Hayes). Far from expressing a consensus view of the Board, most of its recent cases resting on the first prong of *Lutheran Heritage* have one of three panel Members in dissent.

Changing: Protecting Employers in Today's Evolving Workplace, 2011 WL 601173 (2011); 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).

Not only has there been a sharp difference among Board Members regarding the general utility of *Lutheran Heritage,* virtually every Board Member that has actually applied the *Lutheran Heritage* "standard" has been "wrong" in doing so. For example, in *Beaumont, supra,* and *Flagstaff Medical Center,* 357 NLRB No. 65 at *18 (2011), current Board Member Miscimarra and current Board Chairman Pearce, respectively, determined how they believed employees would "reasonably construe" a particular rule at issue, only to find a majority of their colleagues applying the same "standard" had reached the diametrically opposite result. In a similar vein, former Members Johnson and Hayes, in *Fresh & Easy* and *Flex Frac Logistics,* respectively, applied the first prong of *Lutheran Heritage* and found employees would construe certain contested rules in a manner that would render them lawful. Their colleagues, however, applying the same test, reached the completely opposite result. In *Hyundai American Shipping Agency,* former Chairman Liebman and former Member Becker found that employees there would reasonably construe their employer's complaint procedure as interfering with their Section 7 rights. The United States Court of Appeals for the District of Columbia, however, applying the same first prong analysis, found that the language of the complaint procedure would not be reasonably construed in such a manner. *Hyundai Am. Shipping Agency, Inc. v. NLRB,* 805 F.3d 309 (D.C Cir. 2015). Finally, in *Guardsmark, LLC,* 344 NLRB 809 (2005), former Board Chairman

Battista and Member Schaumber applied the first prong of *Lutheran Heritage* to find that employees would not reasonably construe their employer's anti-fraternization policy so as to interfere with the exercise of their Section 7 rights. The United States Court of Appeals for the D.C. Circuit, however, applied the same standard, overturned their decision and found that employees would reasonably construe the anti-fraternization language to interfere with the exercise of their rights. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, (D.C. Cir. 2007). It would appear self-evident that when all of the NLRB's Chairmen, and most of its Members, who have served since the promulgation of the *Lutheran Heritage* "standard" have managed to "get it wrong", that there exists more than reasonable cause to question the utility and legal viability of such a "standard".

The confusion, uncertainty and unpredictability spawned by the standard in *Lutheran Heritage* are not insignificant matters. Virtually every employer in the United States utilizes some form of handbook, employee guide or written personnel policies. *See* XpertHR, *Employee Handbooks – How Does Yours Compare*? (available at http://www.xperthr.com/pages/employee-handbooks-research-survey-report/)(noting that 92% of 521 employers surveyed have an employee handbook).

The subject is not only one of broad importance to employers, it has proven of equally broad interest to the NLRB. Thus, since 2012, the NLRB has published

approximately 870 decisions in contested employer unfair labor practice cases. At least 129 of those cases, either in whole or in part, have involved the legality of employer handbook provisions, work rules, or employer-employee agreements.[3] By a very wide numerical margin, these handbook cases have been ***the*** predominant issue focused on by the Board in recent years.[4]

Given the degree of prosecutorial intensity that underlies this singular decisional focus, one would assume that there was a conscious effort by a recalcitrant employer community to suppress the exercise of employees' Section 7 rights through the promulgation of employment rules, or a rash of serious, negative employment consequences resulting from the enforcement of unlawful rules or policies. However, as noted by the Board's own General Counsel, and as revealed by even a cursory examination of this decisional output, such is not the case. *See* GC 15-04, *supra*. Most of the rules and policies found by the Board to violate the Act have been, like the ones in the present case, largely benign, innocently enacted, and in almost all cases, never directed at, or applied to, any employee's protected Section 7 activity. Indeed, in most instances the rule or policy has not been enforced at all. *See Cintas Corp*., 344 NLRB 943 (2005) (holding employer's

[3] *See* NLRB Board Decisions (available at https://www.nlrb.gov/cases-decisions/board-decisions).

[4] As an illustration of the Board's increased focus on this area of the law, there have been 181 cases citing *Lutheran Heritage* since it was published in 2004. Of those 181 cases, ***129*** have been decided since 2012.

confidentiality policy to be unlawful even though employer never enforced the policy); *Target Corp*., 359 NLRB No. 103 (2013) (upholding ALJ's finding that work rules were unlawful, rejecting employer's argument that overbroad rules "were not enforced, or were loosely enforced…."); *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992) (Noting that in handbook cases, "the finding of a violation is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act.").

The violation typically found by the Board majority stems only from its belief that the rule would be perceived by employees in such a way as to have a "chilling effect" on the exercise of their Section 7 rights. *See* GC 15-04, *supra*. In other words, the mere existence of the rule, not its actual enforcement, has been the singular source of the violation. Thus, rules plainly designed to foster nothing more that maintaining employee privacy or confidentiality, investigatory integrity, or workplace civility, to name but a few, have routinely been found to violate the NLRA. *See, e.g., Hyundai America Shipping Agency, Inc*., 357 NLRB 860, 862 (2011) (holding that rule prohibiting "[a]ny unauthorized disclosure of information from an employee's personnel file" was unlawful), overruled in part, 805 F.3d 309 (D.C. Cir. 2015) (partially overruling NLRB's decision on ground that "personnel file" rule invalidated by NLRB had nothing to do with charging party's discharge);

MMC, LLC, 362 NLRB No. 193 (2015) (invalidating work rule advising employees not to discuss discipline or ongoing investigations with other employees) *2 Sisters Food Group, Inc*., 357 NLRB No. 168 at *11 (holding unlawful a rule prohibiting "inability or unwillingness to work harmoniously with other employees").

In most of these cases, there existed no record evidence that any employee had been disciplined for engaging in any type of Section 7 activity in violation of the rule, or any record evidence that any employee had been, or would be, dissuaded from engaging in such protected activity by virtue of the rule's existence. *See, e.g., Hyundai America Shipping Agency*, 357 NLRB at 871 (invalidating "personnel file" rule that had nothing to do with charging party's discharge); *Mercedes-Benz U.S. International, Inc*., 361 NLRB No. 120 (2014) (invalidating overbroad solicitation rule despite evidence that employer routinely allowed employees to solicit without interference).

Beyond the absence of any seeming real-world predicate for the Agency's prosecutorial and decisional focus, its preoccupation with employer work rules has also yielded a completely anomalous result. In most instances, the more a court or other decisional body addresses a particular legal issue, the clearer the law in that particular area becomes. However, in the case of the Board's preoccupation with handbooks, the more the Board writes, the more seemingly confused the area

becomes. Not once, but on four occasions, the Board's General Counsel has taken the unusual step of issuing lengthy memoranda in an effort to bring greater clarity and predictability to this increasingly muddled province of Board law. *See* General Counsel Memos, GC 15-04, *supra*; GC 12-59, issued May 30, 2012; GC 12-31, issued January 24, 2012; GC 11-74, issued August 18, 2011. Ironically, the attempted "clarifications" have spawned nothing but additional confusion.[5] Thus, neither the Board's decisional deluge nor the General Counsel's clarifying efforts have yielded any discernible positive result. Indeed, to apprehend the continuing

[5] For example, at one point the GC's 2015 memo notes that the GC found unlawful a rule stating "You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)." Yet, in the same memo, the GC found lawful a rule stating: "No unauthorized disclosure of "business 'secrets' or other confidential information". To even the casual observer the latter rule certainly appears far broader and more readily applicable to potentially restrict Section 7 rights than the former. The memoranda are replete with similarly confusing examples and tortured rationalizations. Even the GC has been unable to adhere to a consistent position on the interpretation of certain phrases, such as "confidential information." In 2012, the General Counsel opined that the term was impermissibly vague, stating "[t]he Board has long recognized that the term 'confidential information,' without narrowing its scope so as to exclude Section 7 activity, would reasonably be interpreted to include information concerning terms and conditions of employment." GC 12-59 at 13. Three years later, the GC took the complete opposite position, opining that "broad prohibitions on disclosing 'confidential' information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information." GC 15-04 (March 18, 2015) (emphasis added).

problem one need look no farther than the present case, where the Board's own Administrative Law Judge, who heard the case, and one Member of the Board would find the rules in issue do not violate the Act, while two other Members reach the opposite conclusion. This is not an aberration. As noted above, it is a repeated pattern in the Board's handbook cases. In addition to the logistical problems this creates for the Board and reviewing courts, it is a nightmare for employers - especially small businesses - and their outside counsel to try to predict or second guess the next wording that will be parsed by the Board so as to find a theoretical violation not supported by record evidence.[6]

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[6] The Board's case law and guidance in this confusing area fail to offer employers an ascertainable path towards NLRA compliance. While the Board and the GC have suggested that employers may comply with the Act by making it clear to employees that their policies are not intended to impair Section 7 rights, the Board has consistently refused to offer any guidance regarding what constitutes an effective disclaimer (or "savings clause"). The GC has opined that the following disclaimer, which mirrors the language of Section 7 itself, does not effectively inform employees that the employer's policies are not intended to interfere with Section 7 rights:

> This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.

GC 12-59 at 14.

The Board, its stakeholders and reviewing courts have arrived at this point largely because the *Lutheran Heritage* analysis has two fundamental flaws in both its conception and its application. First, it fails to require a meaningful, fact-based analysis of *why* an employee would reasonably interpret a rule as limiting the exercise of his or her Section 7 rights. More often than not, and despite the admonition of federal courts, this critical determination boils down, at best, to an explanation of why *two Board Members could* find the rule to restrict the exercise of Section 7 rights, not an explanation of why *a reasonable employee would* find the rule impermissibly restrictive. Second, unlike the analysis of *express* restrictions, the first prong in *Lutheran Heritage* is absolute and requires no analysis of countervailing considerations. Because of the first flaw, the *Lutheran Heritage* analysis is typically untethered from the factual record and routinely ignores *context;* and, because of the second, it typically rejects the legitimacy of any employer restrictions and ignores the necessity to view rules in *balance*. Both infirmities are on full display in the present case.

II. The *Lutheran Heritage* Test Does Not Require That The Board's Conclusions Be Supported By Substantial Evidence, And There Is No Substantial Evidence To Support The Board's Determination Herein

In all cases, like the present one, that are decided under the first prong of *Lutheran Heritage*, the pivotal legal conclusion is whether or not employees would

"reasonably construe" a given rule as restricting their Section 7 rights. The Board is required under the first prong to make this determination; however, the Board is not free to reach such a conclusion without reference to the evidence in the record.[7] This is especially true where, as here, the conclusion is, by its very nature, highly subjective. Untethered from substantial record evidence, a conclusion by the Board majority that employees would "reasonably construe" language to mean one thing and not another is not an "interpretation of the statute" that is entitled to judicial deference. *Adkins v. Hampton*, 586 F.2d 1070, 1073 (5th Cir. 1978); *see also NLRB v. Arkema*, 710 F.3d 308, 318 (5th Cir. 2013) (employer did not commit an unfair labor practice when plant manager sent e-mail about company's anti-harassment policy to bargaining unit employees shortly before decertification election because "it is not enough that it merely could possibly be read that way"). Indeed, without factual grounding in the record, it is little more than the expression of personal opinion or an exercise in purported mind-reading.

Despite the obvious need for record evidence to support its central conclusion regarding employee perception, one can comb the dozens upon dozens

[7] *See*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *United Parcel Service v. NLRB*, 41 F. 3d 1068 (6th Cir. 1994) (Board's petition for enforcement denied because it failed to present substantial evidence that UPS discriminatorily enforced its appearance standards); *NLRB v. A. Duie Pyle, Inc.*, 606 F. 2d 379, 388 (3rd Cir. 1979) (Court denied Board's petition for enforcement of bargaining order where Board's order was unsupported by substantial evidence that proposed bargaining unit of truckers were "employees" as opposed to "independent contractors" exempted from coverage of the Act).

of cases decided under prong one of *Lutheran Heritage* and not find a single piece of direct evidence bearing upon how employees actually construed the rule in question. Thus, there is no testimony from employees about what they thought the rule in question meant, nor any testimony as to whether or why they did or would refrain from any particular protected activity because of the rule's existence. No such testimony or evidence exists in the present case.

While such evidence would certainly make a Board determination of what employees actually thought more substantial and credible, its absence is concededly not fatal. The Board can legitimately draw some reasonable conclusions about how an employee might construe a particular rule. However, any such conclusions cannot merely be divined, they must be rationally related to the record evidence in the case. Indeed, where the dispositive criterion on which a case turns is so highly subjective, the indispensable need for substantial evidence is even more heightened. Any determination of how someone else would reasonably construe anything is merely an exercise in personal opinion and speculation unless it is supported by objective evidence that not only supports the conclusion, but that outweighs other evidence to the opposite effect. *See, Fiesta Hotel Corp.*, 344 NLRB 1363, 1368 (2005) (characterizing it as "speculation" for the Board "to condemn as unlawful a facially neutral work rule that is not aimed at Section 7

activity and was neither adopted in response to such activity nor enforced against it.").

Recognizing that the first prong of the *Lutheran Heritage* rule does not specify the quality or quantum of evidence needed, and no doubt aware of the otherwise impermissibly subjective quality of the "standard", reviewing federal courts have often set out interpretive limitations or principles with regard to the application of *Lutheran Heritage*. While they vary in formulation, their purpose is the same. Thus, all require that any construction of the rule be tied to the record, lest the analysis under *Lutheran Heritage* become nothing more than the mere speculation of two Board Members, rather than the reasonable construction of an affected employee. Most notably, this Court has held that when the Board seeks to determine how employees would reasonably construe a rule, it is the record evidence of context which is of central importance. *International Union, UAW v. NLRB,* 520 F.3d 192 (2d Cir. 2008). Contextual evidence elevates the Board's opinion from the realm of pure speculation and it is precisely why this Court has noted that in cases analyzed under *Lutheran Heritage,* "context is everything". *UAW, supra,* at 197.

Far too often, and because the first prong of *Lutheran Heritage* does not require any reasonable anchoring in the record, the Board, despite the admonition from reviewing courts, does not even make an effort to support its conclusions

with record evidence. That it failed to do so here could not be clearer. Stripped of its rhetorical dross, the Board majority in the present case essentially finds the Respondent's rules unlawful by purportedly relying on two record facts. First, Mark Ehrnstein, the Employer's human resources vice-president, testified that he intended that the rule would be applied to all recording; and, second, the language of the ban is "broad and unqualified". Neither of these observations constitutes the substantial evidence necessary to support the Board's "conclusion" about how an employee would reasonably construe the rule.

As to the first, the Board misconstrued Ehrnstein's testimony. Ehrenstein simply testified that Whole Foods' rule restricted recording of any conversation, whether the underlying *conversation* constituted protected concerted activity or not. The Board selectively quoted Ehrnstein's testimony to make it appear that Ehrnstein admitted that *recording itself* was protected concerted activity. A review of the record reveals that Ehrnstein made no such admission.

Moreover, even if Ehrnstein had admitted that recording was protected and that Whole Foods intended for its rule to restrict such activity (which he did not), an employer's intent and the Board's rank speculation about its possible future enforcement, do nothing to illumine the question of how employees would construe the rule. Indeed, if the legality of most employer rules turned on employer intent, there would be few, if any, violations found under the first prong of

Lutheran Heritage. The Board, and its General Counsel, have made abundantly clear that employer intent is of no probative value whatsoever in determining how employees would reasonably construe a rule. *See, e.g.*, GC 15-04, at 2; *Flex Frac Logistics, LLC*, 358 NLRB at 1131-1132. Whatever the state of the record evidence, the first ground relied upon by the majority does not constitute substantial evidence upon which to rest its construction of the rule.[8]

As to the second stated basis, the mere fact that the language of the ban is "broad" or does not contain qualifications or exceptions is not substantial evidence that employees would construe the rule to impermissibly limit their Section 7 rights under the Board's own case law. In *Flagstaff,* a Board majority found lawful under the first prong of *Lutheran Heritage* rules that "prohibited the use of electronic equipment during work time" and which further provided that "[t]he use of cameras for recording images of patients **and/or hospital property, or facilities**

[8] In any event, Ehrnstein testified and counsel for General Counsel acknowledged, that the work rules at issue only apply to working time. Tr. 21:24-25; Tr. 61-62. That unrebutted fact is relevant because the Board has often deemed work time restrictions lawful. For example, the Board has long recognized that employers generally may lawfully prohibit employees from soliciting during working time. The Board has also long allowed employers to prohibit the distribution of literature during working time and in working areas. *See, e.g. Stoddard-Quirk Mfg., Co.*, 138 NLRB 615 (1962). See also, *Purple Communications, Inc.* 361 NLRB No. 126 (2014), where the Board ruled that "employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-potected communications on nonworking time." *Id.* at *14 (emphasis added).

is prohibited." *Id*. at *6 (emphasis supplied). The Board found this rule lawful because it concluded employees would interpret the rule as one designed to promote patient privacy, and not to prohibit Section 7 activity. However, the rule in *Flagstaff* is plainly as broad, if not broader, than the rule herein and it could readily be applied to a wide range of possible protected activity that would be totally unrelated to any patient privacy concern.[9] The breadth and potential application of the rules here and in *Flagstaff* are indistinguishable and should yield the same result. That they do not underlines the conclusion that the Board's purported analysis under *Lutheran Heritage* is simply arbitrary and capricious. A proper analysis of the record evidence demonstrates that the rules here are far more susceptible to a permissible construction by reasonable employees than the rule in *Flagstaff*. First, unlike *Flagstaff,* the Respondent herein specifically sets out the legitimate purpose for the restriction within the four corners of the rule and proximate to the restriction itself.[10] Second, unlike the limited possible conflicts with patient privacy law at play in *Flagstaff,* every unconsented-to recording banned by both of Whole Foods' rules is expressly illegal in a large number of

[9] For example, recording picket line activity, documenting unsafe equipment and a host of other potential prohibitions encompassed by the rule are no different at a health care facility than anywhere else, since they do not reasonably implicate issues of patient privacy. The setting of the rule is a distinction without a difference.

[10] The "recording rule" specifies that "[T]he purpose of this policy is to eliminate a chilling effect on the expression of views ....."

states in which the Respondent does business.[11] And, third, the Respondent not only makes clear the purpose of the rule, but notes there are exceptions to the rule (the presence of security cameras) where the exception serves a valid or desirable purpose and does not conflict with the stated purpose of the rule. Under such record facts it is inconceivable how an employee of Whole Foods would reasonably construe the rules at issue here to prohibit Section 7 activity, but similarly reasonable employees in *Flagstaff* would not. Inconsistency, in this instance, is not the hobgoblin of small minds, but the direct product of a means of analysis that divorces judgment from fact, and supplants reason with speculation.

A comparison of *Flagstaff* and the present case illustrates precisely the type of untenable result that obtains when the application of *Lutheran Heritage's* first prong does not rest on substantial record evidence. A contrast between this case and the decision of this Court in *UAW, supra,* illustrates how the proper consideration of record evidence can permissibly justify finding a violation under prong one of *Lutheran Heritage*. Thus, in the present case, unlike *UAW,* there is absolutely no contextual evidence in the record of any animosity toward employees' Section 7 rights. Indeed, the record here reflects only that the rules in question were expressly promulgated to *enhance and foster* the very form of employee discussion, advocacy and collective action that Section 7 protects.

[11] For a full discussion, see, *infra,* at p. 25.

Moreover, this purpose is expressly stated in the rule. Also, in the present case, unlike *UAW,* there was no evidence of any on-going organizing campaign or questionable statement contemporaneous with the promulgation of the rules, nor any other contextual fact in the record that is referenced by the Board to support its conclusion as to how a reasonable employee would construe the rules, or why a reasonable employee would do so in the manner found by the Board majority. In stark contrast, when this Court found the "harassment rule" in *UAW,* violated the Act under the first prong of *Lutheran Heritage,* it specifically noted the record evidence that: a.) the rule was promulgated approximately three weeks after a petition for a union election was filed with the NLRB and approximately three weeks before the election was to be held; b.) the promulgation of the rule coincided with a very aggressive anti-union campaign by the Employer; c.) the rule in question was promulgated on the heels of a patently unlawful "no union talk" rule; and, 4.) although generally outlawing "harassment", the rule itself made specific reference to, and only to, "union" harassment.

The central conclusion in *UAW* is rational, explicable, and objective, precisely because it is anchored in record facts. The divergent results in *Flagstaff* and the present case are irrational, inexplicable, and impermissibly subjective, because they are speculative and not rooted in fact. When the Board, as it has repeatedly done, reaches conclusions under *Lutheran Heritage* in the absence of

sufficiently supporting record facts, it is doing little more than imperiously claiming that an employer's rule "means just what I" [we] "choose it to mean—neither more nor less."[12] Humpty Dumpty's interpretive methodology, however, was not intended to, nor can it, withstand critical judicial review. Neither can the Board's. The test under *Lutheran Heritage's* first prong invites analysis that is divorced from facts and context. The Board frequently engages in such analysis that is unsupported by substantial evidence and lacks fidelity to the record, as it has done so here. For these reasons, the Board's determination in the present matter must be overturned and the "test" under prong one of *Lutheran Heritage* should be abandoned.

III. The *Lutheran Heritage* "Test" in General, and, as Applied Herein, Fails to Strike the Requisite Balance Between Legitimate Workplace Interests and the Exercise of Section 7 Rights

The first prong of *Lutheran Heritage* purports to render unlawful any employer rule that employees would reasonably construe as prohibiting the exercise of their Section 7 rights. This formulation, however, is overly simplistic and patently incorrect. Many unquestionably *lawful* work rules directly interfere with the exercise of employees' Section 7 rights, and no employee would reasonably construe such rules in any other way. For example, rules prohibiting or limiting off-duty employee access and rules prohibiting or limiting employee

[12] See, Carroll, Lewis, *Alice in Wonderland*

solicitation or distribution plainly interfere with or prevent the exercise of employees' Section 7 rights. However, it is well-settled that such rules are lawful. *See, e.g., Tri-County Medical Center,* 222 NLRB 1089 (1976); *Peyton Packing Co. Inc.,* 49 NLRB 828, 843 (1943), enf'd 142 F.2d 1099 (5th Cir. 1944), cert. denied, 323 U.S. 730 (1944).

The Section 7 rights of employees and the legitimate interests of employers are often in tension with one another. The Board, however, does not simply conclude in every case where such tension exists that the employees' Section 7 rights must preponderate. To the contrary, in such situations the Board is required to engage in an analysis which balances the two rights and interests in order to achieve a practicable resolution in the real-world workplace. *See*, R*epublic Aviation Corp. v. NLRB,* 324 U.S. 793, 797-798 (1945) (resolution of work rule issues involves "working out an adjustment" between employer interests and employee rights); *NLRB v. Erie Resistor Corp.* 373 U.S. 221, 229 (1963) (referring to the task of "weighing the interests of employees … against the interest of the employer"); *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 33-34 (1967) (noting the Board's "duty to strike the proper balance" between employer interests and employee rights). *Lutheran Heritage's* simplistic and absolutist test is antithetical to the Board's well-settled obligation to balance competing interests, and thus leads to the type of untenable result on full display in the present case.

Read together, the rules at issue here bar the recording of co-workers, customers and managers. Doing so is plainly a matter of significant employer interest. The record here demonstrates that the Employer has made open communication and employee participation an important part of its corporate culture. Whole Foods provides its employees multiple avenues to learn about the Company's strategic business plans and influence the Company's business strategy, including Town Hall Meetings (in which regional leadership discusses growth and real estate strategies, potential new products, pricing tactics, and other confidential business information, as well as any work issues Whole Foods employees wish to raise) (Tr. at 39) and All-Store Meetings (in which store leadership discusses similar confidential business information, store employees raise complaints and questions, and employees "vote" on whether to add new members to the store team) (Tr. 32-33). It has also made peer-based review of adverse employment actions (the "Fair Hearing" process) a significant feature of its personnel administration (Tr. at 36-38). Finally, Whole Foods has formed Team Member Awareness Groups that decide whether to grant fellow employees' requests for an emergency grant from Whole Foods (for example, a request for money to assist an employee who has had a medical emergency, house fire, or other personal crisis) (Tr. at 38).

Advancing these interests by not inhibiting open and honest dialogue constitutes a substantial and rational employer interest. Further, the Employer is a customer-facing enterprise in which members of the general public are routinely on its property. As a retailer, it is self-evident that the Employer has a substantial commercial interest in making its customers welcome and comfortable while on its premises. Ensuring that its customers are not subject to surreptitious recording would seemingly be a bare minimum step in achieving that legitimate end. Further still, twelve states[13] currently make recording without the consent of all parties a crime. In addition to these "two party consent" states, a host of other states outlaw surreptitious recording in which the recorder is not a participant. The prohibition in such "one-party consent" states parallels federal law which has codified the same prohibitions.[14] The Employer's rules parallel the bans in both one- and two-party consent states. It should be beyond cavil that the Employer has a clear interest in adopting policies in conformity with state and federal law, as well as ones that reflect the general public consensus regarding unauthorized recording and individual privacy. The cavalier manner in which the Board majority treats the

[13] Cal. Penal Code §632; Conn. Gen. Stat. Ann. § 52-570d(a), Fla. Stat. 934.03, 720 ILCS 5/14-2, Md. Code. Ann. §10-402(c)(3); Mass. Gen. Laws ch. 272, § 99; Mich. Comp. Laws §§ 750.539c and §750.539d; Mont. Code Ann. § 45-8-213(1)(c), N.H. Rev. Stat. Ann. §570-A:2(1-a), Or. Rev. Stat. Ann. §§165.535, 165.540; 18 Pa. Cons. Stat Ann. §5704(4); Wash. Rev. Code Ann. §9.73.030(1)(a)

[14] See, the Electronic Communications Privacy Act, 18 USC §2511(2)(d).

fact that the Employer's rules are in conformity with various state laws amply demonstrates its absolutist approach, and its failure to engage *any* of the requisite balancing.[15]

In counterpoise to these substantial and continuously present employer interests, the intrusion on employee rights resulting from the Employer's rules is largely hypothetical, and exceedingly rare. Moreover, the intrusion is minimal. Nothing in the Employer's rules prohibits the exercise of any employee's Section 7 rights. Like rules routinely found by the Board to be lawful, the rules merely limit the *manner* in which such rights can be exercised.

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[15] The Board merely notes that the policies: "are not limited to stores in those states" and "do not refer to those laws and do not specify that the recording restrictions are limited to recording that does not comply with State law." *Whole Foods,* slip op., at 4, n. 13. Beyond failing to weigh the Employer's legitimate interest in effectuating the public policy reflected in those laws, the Board's feigned consideration of such state law prohibitions is, quite obviously, only lip service. Thus, the Board's remedial order requires the Employer to notify all its employees as follows: "WILL NOT maintain rules in our General Information Guide that prohibit the recording of conversations, phone calls, images, or company meetings with any recording device without prior management approval." By its terms, the Board's order applies to all of Whole Foods' locations companywide, even in states where it is illegal to record a conversation without all parties' consent. As such, the Board's order expressly requires Whole Foods to inform employees that it will permit its employees to engage in illegal recording on company property in "two-party consent" states, and even in "one party consent" states. So superficial is the Board's treatment of this matter that it apparently assumes pre-emption, where it plainly does not exist. See, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see, also, Executive Order 13132, 64 Fed. Reg. 43,255 (August 4, 1999).

Thus, even if one were to mistakenly conclude, in the context of the present record, that an employee would reasonably construe a rule designed to promote open communication as prohibiting an employee from taking a picture of a dangerous piece of equipment, or recording picket line activity, or anticipating and memorializing a supervisor's unlawful utterance, such occurrences are unquestionably rare. More importantly, nothing in the rule prohibits or interferes with the right of employees to report such infractions, or to take other action with respect to them. At worst, in rare instances, the rule would interfere with an employee's opportunity to present the optimal evidence in support of a claimed infraction. The right to report a legal infraction or to pursue a legal claim is clearly a Section 7 right. The right to always have access to the best evidence of an infraction is, if a Section 7 right at all, one clearly at the statute's outside margins. A proper balancing of such rare and marginal "rights" against the employer's substantial and continuous interests at stake in this case should unquestionably yield the rational result that this Employer's recording rules are valid.

Finally, unrebutted testimony from Whole Foods' witness, as well as the explanatory preface to the rule itself, support the fact that the rule in question here was designed not only to advance employer interests, but to protect the interests of employees. Ironically, as the preface to the rule makes clear, the "no-recording" rule actually furthers the interests of employees engaged in Section 7 activities

rather than restricts them. As the rule makes clear in the context of its explanatory preface, the interests of employees in full, open and candid communications with one another and with their employer is advanced, rather than restricted, by the "no-recording" policy. As such, the Board's rejection of the policy ignores not only the legitimate business interests of Whole Foods and the interests of its customers, but also the interests of its employees. In fact, the Board's nit-picking speculation rejecting the policy, which is taken out of context and entirely unsupported by record evidence, actually does more harm to employees' rights to engage in protected concerted activity than it does in advancing those rights. In effect, the Board's decision herein does a disservice to the employee rights the Board and the Act are intended to protect, and, as such, must be overturned.

CONCLUSION

For all of the reasons expressed herein, the Amici COLLE and CDW support Respondent Whole Foods and urge the Court to refuse to enforce the Board's order and to reject the application of the first prong of the *Lutheran Heritage* standard on which the decision is based.

Dated: June 3, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,893 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced 14-point type using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2016, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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