UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STERICYCLE, INC., Respondent, and TEAMSTERS LOCAL 628, Charging Party.	Cases 04-CA-137660, 04-CA-145466, 04-CA-158277, and 04-CA-160621

BRIEF OF AMICI CURIAE
ASSOCIATED BUILDERS AND CONTRACTORS,
COALITION FOR A DEMOCRATIC WORKPLACE,
COUNCIL ON LABOR LAW EQUALITY,
NATIONAL ASSOCIATION OF MANUFACTURERS,
NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AND
NATIONAL RETAIL FEDERATION

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I. INTERESTS OF THE AMICI CURIAE

The Amici Curiae ("Amici") submitting this brief represent a multitude of businesses with workforces of all sizes and in virtually every industry throughout the United States. The diversity of the Amici and their members mirrors the enormous variety of workplaces subject to the National Labor Relations Act ("NLRA" or "Act"). In this vast array of work settings, millions of Americans interact with one another and perform every imaginable type of work, which benefits themselves, their families, surrounding communities, and federal, state, and local governments. More than 60 years ago, the Supreme Court emphasized that every workplace required a "means of solving the unforeseeable," including "all the problems which may arise" and the "variant needs and desires of the parties." *USWA v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960). Thus, a critical need exists for employees to have guidance regarding basic standards for many issues, some relating to their own employment (e.g., attendance, work performance, scheduling, or time off from work); some relating to how they treat each other (e.g., non-harassment, non-discrimination, standards regarding diversity, inclusion, respect, and civility); and others relating to important business issues (e.g., health and safety, operating procedures, and protecting trademarks and copyrights).

Work rules, employment policies, and employee handbooks (collectively "rules") are the primary means by which employees can be given guidance regarding all of these issues. Accordingly, the following Amici who submit this brief—and the millions of employees whose interests they represent—are vitally affected by decisions of the National Labor Relations Board ("NLRB" or "Board") addressing the right to maintain facially neutral rules:

- *Associated Builders and Contractors* ("ABC") is a national construction industry trade association representing more than 21,000 members. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

- The *Coalition for a Democratic Workplace* ("CDW") represents employers and associations and the interests of their employees, including nearly 500 member organizations and businesses of all sizes. The majority of CDW's members are covered by the NLRA or represent organizations covered by the NLRA, and therefore have a strong interest in the way that the NLRA is interpreted and applied by the NLRB.

- The *Council on Labor Law Equality* ("COLLE") is a national trade association founded over 35 years ago to monitor and comment on developments concerning the interpretation of the Act. COLLE represents employers in virtually every business sector, all of whom are subject to the Act. COLLE members have union-represented and non-union workforces, and they rely upon stability and predictability in labor relations as essential to their business success.

- The *National Association of Manufacturers* ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.5 million men and women, contributes $2.57 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation.

- The *National Association of Wholesaler-Distributors* ("NAW") is an employer and a non-profit trade association that represents the wholesale distribution industry, the link in the supply chain between manufacturers and retailers as well as other end users. NAW is comprised of member companies and associations which together include approximately 35,000 companies operating at more than 150,000 locations throughout the nation, generating about $7 trillion in annual sales volume and provides stable and well-paying jobs to more than 5.9 million workers.

- The *National Retail Federation* ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers. Retail is the nation's largest private-sector employer, supporting one in four U.S. jobs—52 million working Americans—and contributing $3.9 trillion annually to the national Gross Domestic Product.

II. SUMMARY RESPONSE TO BOARD'S QUESTIONS

The Amici respond as follows to the three questions posed by the Board in this case:

1. Should the Board continue to adhere to the standard adopted in *Boeing Co.*, 365 NLRB No. 154 (2017), and revised in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019)?

Yes, the Board should reaffirm *Boeing* and *LA Specialty Produce*. The Board in *Boeing* correctly held: "when evaluating a facially neutral policy, rule, or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights," the Board

must evaluate (1) "the nature and extent of the potential impact on NLRA rights"; and (2) the "legitimate justifications associated with the rule."[1] Thus, in *Boeing*, the Board *retained* the portion of the preexisting standard articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–47 (2004), that provided for the Board to consider whether employees "would reasonably construe the language to prohibit Section 7 activity."[2] However, *Boeing* augmented the *Lutheran Heritage* standard by stating that the Board would also consider the "*legitimate justifications* associated with the [rule's] requirement(s)."[3]

This type of dual consideration—taking into account legitimate justifications as well as a rule's potential impact on NLRA-protected rights—has been repeatedly required by the Supreme Court,[4] other courts,[5] and prior Board cases.[6] Also, in contrast with *Lutheran Heritage*'s one-size-fits-all approach, the *Boeing* standard permits the Board to engage in a "more refined evaluation" of "significant variables," including potential distinctions between different types of protected activities, different justifications, particular work settings or industries that have "unique characteristics," and "specific events" that might "reveal the importance of a particular policy, rule, or handbook provision."[7] Thus, *Boeing* properly recognized that *Lutheran Heritage*

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[1] *Boeing*, 365 NLRB No. 154, slip op. at 3, 14.
[2] As the Board did in *Boeing*, we refer to the first prong of the *Lutheran Heritage* standard as "*Lutheran Heritage*."
[3] *Id.* (emphasis added).
[4] *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963); *NLRB v. United Steelworkers*, 357 U.S. 357, 364 (1958); *Republic Aviation v. NLRB*, 324 U.S. 793, 797–98 (1945); *cf. First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 680–81 (1981). *See generally Boeing*, 365 NLRB No. 154, slip op. at 7.
[5] *See, e.g.,* cases cited in note 24 below.
[6] *See Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999) (quoting *Republic Aviation*, 324 U.S. at 797–98). *See also Caesar's Palace*, 336 NLRB 271, 272 (2001); *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015). *See generally Boeing*, 365 NLRB No. 154, slip op. at 5, 7–9.
[7] *Boeing*, 365 NLRB No. 154, slip op. at 10–11.

imposed "too many restrictions on the Board itself"[8] and that the "more refined" analysis permitted by *Boeing* advanced what the Supreme Court has recognized is the Board's "special function" of applying the Act "general provisions . . . to the complexities of industrial life."[9]

Finally, the Board in *Boeing* recognized that the *Lutheran Heritage* standard created extensive confusion and uncertainty based on numerous cases demonstrating that the "reasonably construe" standard "defied all reasonable efforts to apply and explain it."[10] Therefore, *Boeing* established a three-part framework permitting the Board to differentiate between rules and policies that would generally be considered lawful to maintain (Category 1), those that warranted individualized scrutiny (Category 2), and those that would generally be considered unlawful to maintain (Category 3). In *LA Specialty Produce*, the Board provided further explanation while refining the respective burdens of the General Counsel and other parties.[11] These decisions foster the type of "certainty beforehand" that is important to all parties when drafting, applying, and interpreting facially neutral rules, policies, and handbook provisions.[12]

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[8] *Id.* at 10.

[9] *Erie Resistor Corp.*, 373 U.S. at 236. *See also NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–67 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board."). *See generally Boeing*, 365 NLRB No. 154, slip op. at 2, 10–11, 22.

[10] *Boeing*, 365 NLRB No. 154, slip op. at 11.

[11] The Board in *LA Specialty Produce* indicated that the General Counsel's initial burden in all cases is to prove that a facially neutral rule "would in context be interpreted by a reasonable employee . . . to potentially interfere with the exercise of Section 7 rights" and, if not, "there is no need for the Board to take the next step in *Boeing* of addressing any general or specific legitimate interests justifying the rule," and if the General Counsel meets its initial burden, "the *Boeing* analysis will require a balancing of . . . potential interference [with NLRA-protected rights] against the legitimate justifications associated with the rule." *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2–3.

[12] *First Nat'l Maint. Corp.*, 452 U.S. at 678–79, 684–86 (1981).

2. In what respects, if any, should the Board modify existing law governing facially neutral rules to address (a) employee Section 7 rights and their economic dependence on employers, (b) the proper allocation of the burden of proof, and (c) the proper balancing of Section 7 rights and other justifications and business interests?

As discussed above, the Board should reaffirm *Boeing* and *LA Specialty Produce*, which provide for the Board to evaluate a rule's potential impact on employees' Section 7 rights and properly place the burden of proving any alleged violation of the Act on the Board's General Counsel. Additionally, the Board should modify existing law by holding that the following disclaimer language will preclude an interpretation that the policy or rule unlawfully interferes with Section 7 rights:

> A federal law – the National Labor Relations Act – protects the right of employees to decide whether or not to exercise their right to self-organization, to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and to refrain from any or all of such activities. Nothing in any employee handbook, employment policy, or work rules that we maintain should be interpreted to restrict, prohibit, or limit your exercise of these protected rights. If you have any questions about these protected rights, you can call any office of the National Labor Relations Board using contact information that is available here: https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices.

The Board lacks jurisdiction to *require* employers to provide such a notice to employees regarding their rights under the NLRA,[13] and the absence of such language cannot support any finding that a facially neutral work rule violates the Act.[14] Yet, the Board should hold that voluntary use of the above language will prevent any finding that that a facially neutral work rule, policy, or handbook provision unlawfully restricts NLRA-protected rights.

[13] *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152, 164–65 (4th Cir. 2013); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 954–60 (D.C. Cir. 2013).

[14] *See* NLRA Section 8(c), 29 U.S.C. § 158(c) (stating that the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice" absent a threat of reprisal or force or promise of benefit); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d at 954–60 (NLRB cannot treat an employer's failure to advise employees of NLRA rights as an unfair labor practice because it would constitute "compelled speech" in violation of Section 8(c) and, possibly, the First Amendment).

3. Should the Board continue to hold that certain categories of work rules—including investigative confidentiality rules, non-disparagement rules, and rules prohibiting outside employment (as addressed in recent cases)—are generally lawful to maintain?

Yes, the Board should reaffirm that certain categories of rules—including those identified in the Board's solicitation of briefs—are generally lawful to maintain. As noted above, *Boeing* established a three-part framework that has permitted the Board to differentiate between (1) rules and policies that would generally be considered lawful (Category 1), (2) those that warrant individualized scrutiny (Category 2), and (3) those that would be generally considered unlawful (Category 3). The Board has properly held that Category 1 includes rules protecting workplace investigation confidentiality, addressed in *Apogee Retail*, 368 NLRB No. 144 (2019); non-disparagement rules, addressed in *Motor City Pawn Brokers*, 369 NLRB No. 132 (2020); and rules prohibiting outside employment, addressed in *Nicholson Terminal & Dock Co.*, 369 NLRB No. 147 (2020), and *G&E Real Estate Management Services*, 369 NLRB No. 121 (2020).

III. ARGUMENT

A. The Board Should Reaffirm and Continue to Apply *Boeing* and *LA Specialty Produce*.

1. *Boeing* and *LA Specialty Produce* Appropriately Recognize That the Board Must Consider Both a Rule's Potential Impact on NLRA-Protected Rights and the Legitimate Justifications Associated with the Rule.

The *Boeing* standard provides that, "when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule." *Boeing*, 365 NLRB No. 154, slip op. at 3, 14. This standard appropriately considers a rule's potential impact on NLRA-protected rights, in addition to the rule's legitimate justifications. These justifications advance and protect vitally important interests in areas such as occupational safety, federal and state laws prohibiting workplace discrimination and harassment, the

prevention of workplace violence, and preserving the integrity of workplace investigations.

The Supreme Court has repeatedly held that the Board is *required* to evaluate legitimate justifications, as well as the impact on Section 7 rights, when evaluating alleged violations of the NLRA. In *NLRB. v. Great Dane Trailers, Inc.*, the Court stated that the Board had the "*duty* to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy." 388 U.S. at 33–34 (emphasis added).

In *NLRB. v. Erie Resistor Corp.*, the Supreme Court stated that the Board had the "delicate task . . . of weighing the *interests of employees in concerted activity* against the *interest of the employer in operating his business in a particular manner* and of *balancing* in the light of the Act and its policy the intended *consequences upon employee rights* against the *business ends to be served by the employer's conduct*." 373 U.S. at 228–29 (emphasis added).

In *Republic Aviation Corp. v. NLRB*, the Supreme Court referenced the need to "work[] 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"; and the Court stated: "Opportunity to organize *and* proper discipline are *both* essential elements in a balanced society." 324 U.S. at 797–98 (emphasis added).

To the same effect, the Supreme Court in *NLRB v. United Steelworkers* observed that "the responsibilities imposed by the Act primarily on the Board" involved the duty "to appraise carefully the interests of *both sides of any labor-management controversy* in the diverse circumstances of particular cases . . . ." 357 U.S. at 362–63 (emphasis added).[15]

[15] *See also Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 268–69 (1965), where the Supreme Court stated: "Naturally, certain business decisions will, to some degree, interfere with concerted activities by employees. But it is only when the interference with [Section] 7 rights outweighs the business justification for the employer's action that [Section] 8(a)(1) is violated." *Cf. First Nat'l Maint. Corp.*, 452 U.S. at 680–81 ("[T]he Act is not intended

It bears emphasis that three of the Supreme Court cases described above involved the legality of work rules. In *Republic Aviation*, the Court upheld a finding that an overly broad "no-solicitation" rule (barring solicitation during nonworking time and prohibiting the wearing of union insignia) was unlawful because it interfered with a well-established protected right *without* any legitimate justification.[16] In *United Steelworkers*, the Court overturned the Board's invalidation of an otherwise lawful no-solicitation rule, holding that the "rule of law" urged by the Board "would show *indifference* to the responsibilities imposed by the Act primarily on the Board to appraise carefully the interests of *both sides of any labor-management controversy* in the diverse circumstances of particular cases . . . ."[17] In *Erie Resistor*, the Court reviewed the employer's policy (awarding superseniority to striker replacements) based on an evaluation of the policy's impact on NLRA-protected rights[18] and the employer's asserted "business purpose."[19] The Court upheld the Board's conclusion "that the claimed business purpose would not *outweigh* the necessary harm to employee rights"[20] and, in addition to quoting its prior statement in *United Steelworkers* that the Board must carefully appraise "the interests of *both sides* of any labor-management controversy . . . ,"[21] the Court stated that the "*ultimate problem* is

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to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved.").

[16] *Republic Aviation*, 324 U.S. at 802 n.7 (quoting the Board's finding that there was a lack of evidence to show that the wearing of union steward buttons affected "normal operation" of the grievance procedure governing dispute resolution (citation omitted)). The Court quoted with approval *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir.), where the Board stated: "The Act, of course, does *not* prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. *Working time is for work*." *Republic Aviation*, 324 U.S. at 802 n.10 (emphasis added).

[17] 357 U.S. at 362–63 (emphasis added).

[18] 373 U.S. at 230–32.

[19] *Id.* at 231–32.

[20] *Id.* at 236–37 (emphasis added).

[21] *Id.* at 236 (emphasis added) (quoting *United Steelworkers*, 357 U.S. at 362–63).

the *balancing* of the *conflicting legitimate interests*."[22]

These precedents leave no doubt about what the Board in *Boeing* properly recognized: the *Lutheran Heritage* standard was "contrary to Supreme Court precedent" because it failed to permit "*any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions," which "prevent[ed] the Board from giving meaningful consideration to the real-world 'complexities' associated with many employment policies, work rules and handbook provisions." *Boeing*, 365 NLRB No. 154, slip op. at 2, 7 (citations omitted). In the instant case, the judge—though ostensibly applying *Boeing*— likewise failed to attach *any* weight to justifications underlying the rules maintained by Stericycle. *See* note 37 below.

Four additional considerations are especially compelling regarding why the Board should uphold and reaffirm the *Boeing* standard. First, regarding the validity or invalidity of a particular rule's maintenance, nothing in *Boeing* disregards, diminishes, or prevents the Board from placing significant importance on the potential adverse impact of a work rule on NLRA-protected rights. In *every* case under *Boeing*—similar to the *Lutheran Heritage* standard—the Board must consider and attach whatever weight it deems appropriate to "the nature and extent of the potential impact on NLRA rights."[23]

Second, many of the Board's prior work rule cases explicitly considered a rule's justifications in addition to its potential impact on NLRA-protected rights. *See, e.g.*, *Flagstaff Med. Ctr., Inc.*, 357 NLRB 659, 663 (2011) (finding "that employees would not reasonably interpret the [employer's] rule [prohibiting photography during working time] as restricting Section 7 activity" and emphasizing that the employer's privacy interests were "weighty" and

[22] *Id.* (emphasis added) (quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)).
[23] *Boeing*, 365 NLRB No. 154, slip op. at 14.

that the employer had "a significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography"); *Caesar's Palace*, 336 NLRB at 272 ("The issue is whether the interests of the [employer's] employees in discussing this aspect of their terms and conditions of employment outweighs the [the employer's] asserted legitimate and substantial business justifications."); *Lafayette Park Hotel*, 326 NLRB 824, 833 (1998) ("In reading these rules as we do, we are by no means precluding or restricting employers from achieving legitimate business objectives by imposing work rules governing employee conduct. Our construction is intended to safeguard the opportunity to exercise Section 7 rights as well as the ability to enforce proper workplace discipline. *Both* . . . are 'essential elements in a balanced society.'" (citation omitted)). *See generally Boeing*, 365 NLRB No. 154, slip op. at 8 (noting that "the Board *has explicitly* balanced employees' Section 7 rights against legitimate employer interests rather than narrowly examining the language of a disputed rule solely for its potential to interfere with the exercise of Section 7 rights").

Third, the courts of appeals in many different contexts have clearly held that the Board must balance the potential impact on NLRA-protected rights and other legitimate justifications associated with alleged violations of the Act.[24]

[24] *See, e.g.*, *First Student, Inc. v. NLRB*, 935 F.3d 604, 617 (D.C. Cir. 2019) ("The Board's approach, leaving the successor employer in control, has reasonably balanced employers' rights against employees' reliance interests."); *Cap. Med. Ctr. v. NLRB*, 909 F.3d 427, 430 (D.C. Cir. 2018) ("In our view, the Board's approach permissibly balances employees' rights to organize against an employer's interests in controlling its property."); *Indep. Elec. Contractors of Hous., Inc. v. NLRB*, 720 F.3d 543, 553 (5th Cir. 2013) ("[T]he Board must also allow an employer to demonstrate a legitimate and substantial business justification for its conduct. Under well settled precedent, the Board's duty is then to balance the asserted business justifications and the invasion of employees' rights in light of the Act and its policy."); *SNE Enters., Inc. v. NLRB*, 257 F. App'x 642, 647 (4th Cir. 2007) ("It is the primary responsibility of the Board and not of the courts to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." (quoting *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967)); *First Healthcare Corp. v. NLRB*, 344 F.3d 523, 531 (6th Cir. 2003)

Fourth, the Board should recognize that a multitude of extremely important justifications and interests—though unrelated to the NLRA—are associated with different kinds of work rules, employment policies, and employee handbook provisions. In this respect, the *Boeing* standard—which provides for the Board to take such justifications into account—cures a glaring deficiency in the *Lutheran Heritage* standard. In *Boeing*, this issue was aptly described in the following "loud talking in the coal mine" example:

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

("[T]he Board must balance the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonwork time with the employer's right to control the use of [its] property.") (citation omitted); *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003) (considering whether "countervailing employer interests . . . outweigh employee [S]ection 7 rights"); *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1998) (conduct violates Section 8(a)(1) where, among other things, "the employer fails to justify the action with a substantial and legitimate business reason that outweighs the employee's [Section] 7 rights."); *Huck Mfg. Co. v. N.L.R.B.*, 693 F.2d 1176, 1184 (5th Cir. 1982) ("The statute has been held to require a weighing of employer and employee interests. The employees' right to engage in activity protected by the Act 'must be balanced against the employer's right to maintain order in his business.'" (citation omitted)); *Bus. Servs. by Manpower, Inc. v. NLRB*, 784 F.2d 442, 451, 454 (2d Cir. 1986) (alleged Section 8(a)(1) violations involve "a balancing of the employer's interests against those of the employee, a balancing that must be performed on a case-by-case basis" and finding that the Board "abdicated its responsibility to balance the interests at stake and to take into account the employer's compelling business reasons for its conduct"); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (indicating it is appropriate to consider and weigh "legitimate and substantial business justifications" in addition to the impact on protected rights (citations omitted)); *McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539, 545–46 (8th Cir. 1973) (the Board "must responsibly and in a meaningful way consider the importance of the [proffered] justification and thereby determine whether the actual impact of the contested rule upon [Section] 7 rights mandates the invalidation of the rule"); *NLRB v. Hudson Transit Lines, Inc.*, 429 F.2d 1223, 1230 (3d Cir. 1970) (considering evidence of "legitimate and substantial business justifications" in addition to the impact on protected rights (citations omitted)).

> Under the standard we announce today, in this hypothetical example *the Board would appropriately consider the fact that the rule against "loud talking" has a significant justification pertaining to workplace safety*, and the rule's maintenance is also supported by the *nature of the business* (operating a coal mine) and *recent events* (past fatal mine collapses resulting from loud talking). Workplaces are not all the same, and the standard we announce today will permit the Board to discharge its "special function" of addressing "complexities" that arise from different work settings.[25]

The Board's decision in *William Beaumont Hospital*, 363 NLRB 1543 (2016), presents another example of the obvious problems associated with a standard that permits no consideration of the justifications associated with a particular employment policy. In *William Beaumont*, the employer was an acute-care hospital, where a full-term newborn infant unexpectedly died, and the hospital's investigation revealed that (1) the infant's death resulted in part from inadequate communication and failures by employees to provide requested assistance; and (2) two nurses in the hospital's labor and delivery department were found to have engaged in "intimidation," "bullying," "mean," "nasty," and "negative" behavior.[26] Nonetheless, the Board majority found that the hospital's Code of Conduct *violated* the Act by requiring that hospital employees and physicians foster "harmonious interactions and relationships" in relation to "patient care" and "Hospital operation."[27] As indicated by dissenting Member Miscimarra in *William Beaumont*, the *Lutheran Heritage* standard imposed "a form of blindness on the Board," requiring that it "ignore every important consequence associated with . . . employment policies, work rules and handbook provisions," even when the relevant justifications—as illustrated by the tragic events in *William Beaumont*—"can mean the difference between life and death."[28]

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[25] *Boeing*, 365 NLRB No. 154, slip op. at 16 n.79 (emphasis added) (citations omitted).
[26] 363 NLRB at 1543 n.2.
[27] *Id.* at 1543–44. The Code of Conduct provisions invalidated in *William Beaumont* stated, in part, as follows: "Conduct on the part of a Beaumont employee or physician that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated." *Id.* at 1543.
[28] *Id.* at 1564 (Member Miscimarra, concurring in part and dissenting in part).

In short, the Board should reaffirm *Boeing*, which adheres to the Supreme Court's mandate that the Board consider a contested rule's potential impact on NLRA-protected rights as well as the justifications associated with the rule. The Board should also reaffirm *LA Specialty Produce*, where the Board clarified the burdens of proof applicable under *Boeing*, in addition to providing further explanation regarding the three-part framework permitting the Board to differentiate between different types of rules.[29]

2. *Boeing* Provides Critically Needed Guidance and Clarity to Employees, Unions, and Employers, in Contrast to the Confusion That Existed Prior to *Boeing*.

In *First National Maintenance*, 452 U.S. at 679, 685–86, the Supreme Court emphasized that parties need "certainty beforehand" so that an employer may "reach decisions without fear of later evaluations labeling its conduct an unfair labor practice" and a union can discern "the limits of its prerogatives, whether and when it could use its economic powers . . . or whether, in doing so, it would trigger sanctions from the Board." To provide guidance to employers, employees, and unions alike, the Board in *Boeing* established a three-part framework permitting the Board to differentiate between rules and policies that would be generally considered lawful to maintain (Category 1), those that warranted individualized scrutiny (Category 2), and those that would be generally considered unlawful (Category 3).[30]

There is little question that there was "rampant confusion" throughout the period that the legality of work rules turned on the *Lutheran Heritage* "reasonably construe" standard, even though this "is an area where the Board has a special responsibility to give parties certainty and

[29] In *LA Specialty Produce*, the Board stated that "it is the *General Counsel's* initial burden in *all cases* to prove that a facially neutral rule would in context be interpreted by a reasonable employee . . . to potentially interfere with the exercise of Section 7 rights" and that only if the General Counsel meets this initial burden would the Board proceed to balance the rule's "potential interference with the exercise of Section 7 rights" and "the legitimate justifications associated with the rule." 368 NLRB No. 93, slip op. at 2–3 (emphasis added).
[30] 365 NLRB No. 154, slip op. at 4, 15.

clarity," and "the chaos that has reigned in this area has been visited most heavily on employees themselves."[31] Indeed, cursory scrutiny of relevant cases reveals that, prior to *Boeing*, there was a litany of seemingly random, irreconcilable outcomes.

For example, in *Flamingo Hilton-Laughlin*, 330 NLRB 287, 295 (1999), a Board majority found that the employer violated the Act by maintaining a rule that prohibited "using loud, abusive or foul language," which the Board majority (with Member Brame, dissenting) invalidated based on reasoning by the Administrative Law Judge ("ALJ") that the rule did "not define abusive or insulting language or conduct," which prompted the ALJ to conclude that the rule "could reasonably be interpreted as barring lawful union organizing propaganda." *Id.* However, in *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 23 (D.C. Cir. 2001), the Court of Appeals for the D.C. Circuit reached the opposite result regarding an almost identically worded rule, which prohibited employees from "[u]sing abusive or threatening language to anyone on [the employer's] premises." Although the Board in *Adtranz* held that the rule was invalid and overly broad, the court stated that the Board's position was "simply preposterous" and that "[i]t defie[d] explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace." *Id.* at 28. The court also admonished the Board for failing to consider the legitimate justifications for the rule, 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 triggering liability under state or federal law. Given this legal environment, any reasonably cautious employer would consider adopting the sort of prophylactic measure contained in the [employer's] employee handbook*. While a single, isolated

[31] *Boeing*, 365 NLRB No. 154, slip op. at 2–3, 14.

> remark will rarely be sufficient to trigger employer liability, . . . failure to maintain a workplace free of such language can place an employer at significant financial risk nonetheless. Under current law, the "only reliable protection is a zero-tolerance policy, one which prohibits any statement that, when aggregated with other statements, may lead to a hostile environment." . . . Indeed, such rules are commonplace. . . . *To bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a "catch 22*."

Id. at 27 (citations omitted).

Another example of two inconsistent, irreconcilable outcomes involves *Lafayette Park Hotel*, where the rule prohibited employees from "[m]aking false, vicious, profane or malicious statements toward or concerning the . . . Hotel or any of its employees." 326 NLRB at 828. The Board majority (with Members Hurtgen and Brame dissenting) found that maintenance of this rule violated Section 8(a)(1). However, the Board majority (with Member Liebman dissenting) reached the opposite result in *Palms Hotel & Casino*, 344 NLRB 1363, 1367–68 (2005), which upheld maintenance of a rule prohibiting "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees or patrons. *Id.*

The Board in *Boeing* properly concluded that, even within a "*single, narrow category*" (rules addressing workplace civility), the *Lutheran Heritage* "reasonably construe" standard "has led to arbitrary results."[32] In contrast, the *Boeing* standard advances the Supreme Court's requirement that the Board provide "certainty beforehand,"[33] which has particular importance "if one attempts to address the entire spectrum of issues that warrant treatment in policies, work rules or handbook provisions." *Boeing,* 365 NLRB No. 154, slip op. at 13.

B. If Existing Law Changes, the Board Must Still Consider a Rule's Justifications in Addition to NLRA-Protected Rights; the General Counsel Must Still Bear the Burden of Proof; and the Board Should Approve Appropriate Disclaimer Language.

The above considerations establish that, consistent with *Boeing* and *LA Specialty*

[32] *Boeing*, 365 NLRB No. 154, slip op. at 13 (emphasis added).
[33] *First Nat'l Maint. Corp.*, 452 U.S. at 678–79, 684–86.

Produce, any evaluation of work rules, employment policies, and employee handbook provisions should consider both a rule's potential "chilling" effect regarding NLRA-protected rights, *as well as* legitimate business justifications and the obligations imposed on employers by other laws.

It is equally clear, under any standard, that the *General Counsel* must bear the burden of proving that a work rule's maintenance violates Section 8(a)(1) of the Act. This is required by Section 10(c) of the Act, which "expressly directs that [alleged] violations [of the Act] may be adjudicated only 'upon the preponderance of the testimony' taken by the Board." *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 401 (1983) (citing 29 U.S.C. § 160(c)). The Supreme Court and other courts have indicated that the General Counsel has the burden "throughout the proceedings" of proving "the elements of an unfair labor practice." *Id.*[34] The Board cannot deviate from what the Act requires, which is the General Counsel's burden of proving alleged violations, including violations involving facially neutral work rules.

Finally, if the Board modifies existing law, it should find that the following disclaimer language—if contained in a work rule, policy, and/or employee handbook that might otherwise be considered ambiguous in relation to Section 7 rights—will avoid an interpretation that would unlawfully interfere with protected rights under the Act:

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[34] *See also DHL Express, Inc. v. NLRB*, 813 F.3d 365, 379 (D.C. Cir. 2016) ("[I]t is, of course, the General Counsel who 'carries the burden of proving the elements of an unfair labor practice.'" (citation omitted)); *O'Neil's Markets v. United Food & Com. Workers' Union, Meatcutters Loc. 88, AFL-CIO, CLC*, 95 F.3d 733, 738 (8th Cir. 1996) ("It is well settled that 'the General Counsel carries the burden of proving the elements of an unfair labor practice.' . . . Violations of [S]ection 8 may be adjudicated only 'upon the preponderance of the testimony' taken by the Board." (citations omitted)); *La. Dock Co. v. NLRB*, 909 F.2d 281, 286 (7th Cir. 1990) ("The General Counsel bears the burden of proving unfair labor practice allegations by a preponderance of the evidence."); *Allbritton Commc'ns Co. v. NLRB*, 766 F.2d 812, 817 (3d Cir. 1985) ("The General Counsel has the burden of proving an unfair labor practice allegation by a preponderance of the evidence, . . . and if he fails to meet this burden the Board is required by § 10(c) to dismiss the allegation." (citation omitted)).

> A federal law – the National Labor Relations Act – protects the right of employees to decide whether or not to exercise their right to self-organization, to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and to refrain from any or all of such activities. Nothing in any employee handbook, employment policy, or work rules that we maintain should be interpreted to restrict, prohibit, or limit your exercise of these protected rights. If you have any questions about these protected rights, you can call any office of the National Labor Relations Board using contact information that is available here: https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices.

This type of disclaimer is consistent with Chairman McFerran's (then Member McFerran's) dissenting opinion in *Boeing*, in which she advocated for the development of

> a standard disclaimer that employers – at their option – could include in employee handbooks that would mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights, by making explicit that the employer's rules will not be applied to protected concerted activity under the Act and by making clear to employees, at an appropriate level of detail, what their basic statutory rights are. Employees who read the disclaimer – in which the employer itself clearly and specifically informs them of their rights under [the] Act – would be much less likely to construe even an ambiguous work rule as bearing on their statutory right to engage in conduct that might, in theory, violate the rule. Use of such a disclaimer might establish a rebuttable presumption that any particular rule that did not explicitly restrict Section 7 activity was lawful. . . . The virtue of the disclaimer approach is clear, inasmuch as it would cover every employer work rule at once, making compliance with the Act simpler and easier.

Boeing, 365 NLRB No. 154, slip op. at 43 (Member McFerran, dissenting).

As noted above, the Board lacks jurisdiction to *require* employers to provide notice to employees regarding rights under the NLRA,[35] and the absence of such language cannot support any finding that a facially neutral work rule violates the Act.[36] Yet, the Board should hold that

[35] *Chamber of Commerce of the United States*, 721 F.3d at 164–65; *Nat'l Ass'n of Mfrs.*, 717 F.3d at 954–60 (D.C. Cir. 2013).

[36] *See* NLRA Section 8(c), 29 U.S.C. § 158(c) (stating that "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice" absent a threat of reprisal or force or promise of benefit); *Nat'l Ass'n of Mfrs.*, 717 F.3d at 954–60 (NLRB cannot treat an employer's failure to advise employees of NLRA rights as an unfair labor practice, which would constitute "compelled speech" in violation of Section 8(c) and, possibly, the First Amendment).

the above disclaimer language would render unreasonable any finding that employees would construe a facially neutral rule as restricting Section 7 rights, which would preclude any finding that the work rule violates Section 8(a)(1) of the Act.

C. The Board Should Reaffirm the Three-Category Framework Outlined in *Boeing*, and Reaffirm Existing Precedent Governing Rules Addressing Confidential Investigations, Non-Disparagement, and Outside Employment.

As discussed above, the Board should maintain *Boeing*'s three-category framework because it provides "certainty beforehand," consistent with the Supreme Court's directive, as to whether particular actions would be lawful or unlawful. *See First Nat'l Maint. Corp.*, 452 U.S. at 678–79. In past cases, the Board properly placed in Category 1 (rules that are generally lawful) policies requiring confidentiality in open workplace investigations, non-disparagement rules, and policies barring outside employment. In the instant case, contrary to the ALJ, the Board should find that Stericycle's maintenance of these types of rules did not violate the Act.[37]

It is particularly important that the Board continue to recognize, consistent with *Apogee Retail*, that employers may lawfully require employee confidentiality during ongoing (open) workplace investigations. 368 NLRB No. 144, slip op. at 1, 8. This important area does not merely implicate potential rights under the NLRA; rather, many workplace investigations address "equivalent rights – guaranteed by federal, state, and local laws and regulations – to have

[37] The ALJ's Supplemental Decision found that Stericycle violated the Act by maintaining policies stating that "[a]ll parties involved in [an] investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable," prohibiting conduct that "maliciously harms or intends to harm [Stericycle's] business reputation," and prohibiting an "activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management." Although the case was remanded so that the ALJ could apply the *Boeing* "revised framework," the ALJ invalidated these rules exclusively by reference to their potential impact on NLRA-protected activity, while attaching no weight to the justifications underlying these rules (e.g., preserving the integrity of investigations and maintaining a positive reputation with customers and the public). If these justifications receive appropriate consideration, as required by the Supreme Court, the courts of appeals, and other Board cases discussed in the text, the Board should find that mere maintenance of these rules is lawful.

protection from unlawful workplace harassment and discrimination based on sex," and employers "have an obligation to maintain work rules and policies to assure these rights." *Boeing*, 365 NLRB No. 154, slip op. at 21. As the Supreme Court held in *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942), "the Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important [c]ongressional objectives."[38] Indeed, the Equal Employment Opportunity Commission ("EEOC") has indicated that all workplace anti-harassment policies *must* include an assurance by the employer to "protect the confidentiality of harassment complaints to the extent possible,"[39] and a bipartisan EEOC Task Force—acknowledging the conflict between EEOC requirements and prior Board law regarding workplace investigations—called on the Board "to confer and consult in a good faith effort to determine what conflicts may exist" between employees' Section 7 rights and employers' need to maintain confidentiality during investigations of workplace harassment, and to "work together to harmonize the interplay of federal EEO laws and the NLRA."[40]

For similar reasons, the Board should adhere to *Motor City Pawn Brokers*, as well as *Nicholson Terminal* and *Newmark Grubb Knight Frank*, because those cases reflect the Board's reasoned assessment that either (1) in the case of the contested "no outside employment" rules,

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[38] *See also Adtranz ABB Daimler-Benz Transp., N.A., Inc.*, 253 F.3d at 27 (criticizing the Board for being "remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt" rules aimed at "maintain[ing] a workplace free of racial, sexual, and other harassment"); *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 154 (D.C. Cir. 2003) (granting petition for review because, inter alia, the Board "made no effort to engage in [a] careful balancing of conflicting policies").

[39] *See* Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, U.S. EEOC (June 18, 1999), https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors.

[40] *See* Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EEOC, at 42 (June 2016).

that a reasonable employee would not interpret the rules as prohibiting or interfering with NLRA-protected rights; or (2) in the case of the contested non-disparagement rule, that the legitimate justifications and interests associated with the contested rules outweigh the potential impact, if any, that the rules could have on NLRA-protected rights.[41]

IV. CONCLUSION

For the reasons described above, the Board should continue to adhere to the standard adopted in *Boeing* and *LA Specialty Produce*, and the Board should resolve in the manner described above the other questions raised for briefing.

Respectfully submitted,

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[41] In *Motor City Pawn Brokers*, 369 NLRB No. 132, slip op. at 7, the Board found that the employer's non-disparagement rules were "lawful because the potential adverse impact on protected rights [was] outweighed by the justifications associated with the rules" and placed the rules accordingly in *Boeing* Category 1(b). In *Newmark Grubb Knight Frank*, the Board found that the employer's rule, prohibiting employees "from participating in outside work activities that might present a conflict of interest" was lawful because such rules "are common and have no reasonable potential to interfere with Section 7 rights." 369 NLRB No. 121, slip op. at 2–3 (placing the rule in *Boeing* Category 1(a)). The Board likewise held in *Nicholson Terminal & Dock Co.* that the employer's rule prohibiting employees from obtaining other employment that "[c]ould be inconsistent with the [employer's] interests"; "[c]ould have a detrimental impact on [the employer's] image with customers or the public"; or "[c]ould require devoting such time and effort that the employee's work would be adversely affected." 369 NLRB No. 147, slip op. at 1–3 (finding that "reasonable employees" would not interpret the rule as prohibiting or interfering with NLRA-protected activity and placing the rule in *Boeing* Category 1(a)).

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the BRIEF OF AMICI CURIAE ASSOCIATED BUILDERS AND CONTRACTORS, COALITION FOR A DEMOCRATIC WORKPLACE, COUNCIL ON LABOR LAW EQUALITY, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AND NATIONAL RETAIL FEDERATION, was filed today, March 7, 2022, using the NLRB's e-Filing system and was served by email upon the following individuals:

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