"RULER" COASTER RIDE: *MODIFYING THE NLRB'S VACILLATING STANDARD FOR EVALUATING FACIALLY–NEUTRAL WORK RULES*

Founded in 1834 as the Medical College of Louisiana, Tulane University (Tulane) was originally a public institution established to serve the burgeoning city of New Orleans.[1] Since then, the school has attracted students by offering a high–quality education in a diverse and unique cultural landscape.[2] Currently, Tulane enrolls approximately 8,500 undergraduate students and nearly 6,000 graduate and professional students in prestegious programs such as law, medicine, architecture, and social work.[3] Although Tulane is known for academic excellence, ranking among the top 2% of American research universities, it is also uniquely focused on philanthropy, producing more Peace Corps volunteers than nearly all schools of similar size.[4]

Tulane is also unique in being one of very few universities that switched from the public domain to private industry.[5] This feat was only possible because of the generous, if troublesome, donation of the university's namesake, Paul Tulane, who instructed that his gifts be used to "promot[e]… education among the white young persons in the city of New Orleans."[6] While the university has consistently taken steps to be more inclusive, the rippling, although distinct, effects of Tulane's privatization continue to be felt today.

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[1] *About the University*, Tulane University (June 10, 2024, 3:00 PM), https://sse.tulane.edu/cell/academics/graduate/doctoral/about-university.
[2] *See generally id*.
[3] *Facts and Figures*, Tulane University (June 10, 2024, 3:00 PM), https://tulane.edu/about/facts-and-figures.
[4] *Peace Corps Announces 2020 Top Volunteer-Producing Schools*, Peace Corps (June 10, 2024, 3:00 PM), https://www.peacecorps.gov/news/library/peace-corps-announces-2020-top-volunteer-producing-schools/.
[5] *See* Gerald Ford, *Address at a Tulane University Convocation,* The American Presidency Project (June 10, 2024, 3:00 PM), https://www.presidency.ucsb.edu/documents/address-tulane-university-convocation.
[6] Alicia Duplessis Jasmin, *The Desegregation of a University*, TULANE MAGAZINE, Sept. 2013, at 16, https://sopa.tulane.edu/sites/default/files/The%20Desegregation%20of%20Tulane.pdf.

As a private entity, Tulane is covered under the National Labor Relations Act (NLRA) which applies to most private sector employers.[7] The NLRA—which guarantees workers the right to form, join, or assist labor organizations, bargain collectively, and engage in other concerted activities for mutual aid or protection—has protected workers' rights since 1935.[8] Additionally, the NLRA makes it unlawful for employers to infringe on these rights.[9] In the same year, Congress also created the National Labor Relations Board (NLRB), an independent federal agency vested with the authority to interpret the NLRA's provisions, promulgate rules which govern American employers, and prosecute cases against employers that violate workers' rights.[10]

While lawful work rules can be beneficial for both employers and employees, unlawful rules violate workers' NLRA–protected rights.[11] In September, 2023, Tulane published the Tulane University Staff Handbook for its 4,000 employees.[12] Among the handbook's provisions, Tulane warns that engaging in conduct that "violates any rule, regulation, policy, procedure or practice of the University" will result in disciplinary action.[13] The handbook also admonishes employees to

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[7] *Frequently Asked Questions*, National Labor Relations Board (June 10, 2024, 3:00 PM), https://www.nlrb.gov/resources/faq/nlrb.

[8] 29 United States Code § 157.

[9] *Interfering with Employee Rights*, National Labor Relations Board (June 10, 2024, 3:00 PM), https://nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1 (quoting 29 U.S.C. § 158(a)(1).

[10] *See* San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon, 359 U.S. 236, 245 (1959).

[11] Boeing Co., 365 N.L.R.B. No. 154, slip op. at 4 (2017) (defining work rules as an employer's policies, rules, and handbook provisions collectively); Christine Organ & Cassie Botorff, *Employee Handbook Best Practices In 2024*, Forbes (June 10, 2024, 3:00 PM), https://www.forbes.com/advisor/business/employee-handbook/ [hereinafter Organ & Botorff].

[12] *See generally* Tulane University Staff Handbook, Tulane University (June 10, 2024, 3:00 PM), https://tulane.app.box.com/s/r66lu4pi2egwh5y9nd2actf217mjqavd; *Facts and Figures*, *supra* note 3.

[13] Tulane University Staff Handbook, *supra* note 12, at 27.

"[n]ever threaten, harass, intimidate, coerce or fight with another member of the University community. [Do] not use profane or abusive language."[14] Tulane also forbids employees from engaging in "any inappropriate, unprofessional, unethical or illegal conduct that affects… work performance, infringes upon the rights of others or damages the reputation of the University."[15] These work rules, however, may restrict employees' rights and violate the NLRA by their very maintenance.[16] As a result, the NLRB may be asked to judge their lawfulness.[17] Unfortunately, within the last eight years, the NLRB has subjected rules like Tulane's to three different standards, resulting in inconsistent and inequitable outcomes.[18]

The changes in the NLRB's standard have led to uncertainty in the workplace. In *Martin Luther Mem'l Home, Inc.* (*Lutheran Heritage*), the NLRB adopted a standard under which the lawfulness of a work rule was largely dependent upon what an employee would reasonably construe the rule to prohibit.[19] This became known as the "reasonably construe" standard.[20] In applying it to Tulane's work rules, it is difficult to determine if an employee would interpret them to violate his or her NLRA–protected rights.[21] As a result, their lawfulness may have depended on the context provided by the university's past interactions with its employees.

Thirteen years after *Lutheran Heritage*, the NLRB promulgated a different standard which categorized a work rule by the activity it regulated.[22] In *Boeing Co.* (*Boeing*), the NLRB

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[14] *Id*.
[15] *The NLRB Process*, National Labor Relations Board (June 10, 2024, 3:00 PM), https://www.nlrb.gov/resources/nlrb-process.
[16] *See* Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113 (2023).
[17] *The NLRB Process*, *supra* note 15.
[18] *See* Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646 (2004); Boeing Co., 365 N.L.R.B. No. 154 (2017); Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113 (2023).
[19] Martin Luther, 343 N.L.R.B. at 647.
[20] *See* Boeing, 365 N.L.R.B. No. 154, slip op. at 1.
[21] *See* Martin Luther, 343 N.L.R.B. at 647.
[22] Boeing, 365 N.L.R.B. No. 154, slip op. at 4.

determined that some rules, including those which require employees to adhere to basic standards of civility, were always lawful to maintain.[23] However, other types of rules were either never lawful or sometimes lawful to maintain.[24] Under *Boeing,* and contrary to the result reached by applying the *Lutheran Heritage* standard, Tulane's work rules would be always lawful since they required employees to adhere to basic standards of civility.[25]

Recently, in *Stericycle, Inc. & Teamsters Loc. 628* (*Stericycle*), the NLRB promulgated its newest standard for evaluating a work rule's lawfulness.[26] It determined that a challenged work rule is presumptively unlawful if, from the perspective of an economically dependent employee who contemplates participating in NLRA–protected activities, there exists any reasonable interpretation that could chill an employee's NLRA–protected rights.[27] The presumption is created despite the existence of alternative interpretations and is unrebutted even if the alternative interpretations are *more* reasonable than the interpretation underlying the presumption.[28] Once the presumption arises, an employer will have great difficulty overcoming it. To do so, an employer must show that the rule protects a legitimate and substantial business interest which cannot be furthered by a more narrowly tailored rule.[29]

Here, the rule may fail on three separate grounds that resemble elements of constitutional law's rational basis, intermediate, and strict scrutiny.[30] First, the NLRB may determine that the

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[23] *Id*.
[24] *Id*.
[25] *Id*.; Tulane University Staff Handbook, *supra* note 12, at 27.
[26] Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113 (2023).
[27] *Id*., slip op. at 3.
[28] *Id*.
[29] *Id*., slip op. at 2.
[30] *See id*.; F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (applying rational basis test); Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 213–14 (1997) (applying intermediate scrutiny); McCullen v. Coakley, 573 U.S. 464, 478 (2014) (discussing the traits of strict scrutiny).

work rule is illegitimate because it lacks a lawful purpose.[31] Second, it may determine that the interest furthered by the rule is insubstantial.[32] Third, the NLRB may find that the rule is not narrowly tailored because it does not further business interests through the least restrictive means.[33] These three options virtually ensure that the employer will be unable to rebut the presumption of unlawfulness.[34]

In applying the *Stericycle* standard to Tulane's rules, a financially–dependent employee could interpret them to violate his or her NLRA–protected rights.[35] Therefore, the rules would be presumptively unlawful and Tulane would likely be unable to show that the rules protected a legitimate and substantial business interest through the least restrictive means.[36] As a result, the work rules which were always lawful under the *Boeing* standard would be unlawful under the *Stericycle* standard.[37]

To eliminate these vacillations and reduce inequitable results, the NLRB's standard for evaluating the lawfulness of work rules should accomplish the legislative goals of Congress and be: (1) neutral, (2) understandable, (3) flexible, and (4) stable.[38] In establishing the NLRA and NLRB, Congress acted to protect workers' rights.[39] While a government agency's reasonable interpretation of legislation is given deference by the courts, unreasonable interpretations receive

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[31] *Black's Law Dictionary* 513 (11th ed. 2019).
[32] *See* Stericycle, 372 N.L.R.B. No. 113, slip op. at 2.
[33] *See id*.; *infra* note 115.
[34] *See* Stericycle, 372 N.L.R.B. No. 113.
[35] *Id*.
[36] *Id*.; Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417, 2423 (1996).
[37] *See* Boeing Co., 365 N.L.R.B. No. 154 (2017); Stericycle, 372 N.L.R.B. No. 113.
[38] Office of the Federal Register, *A Guide to the Rulemaking Process*, 2, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.
[39] *See* 29 U.S.C. § 158(a)(1); *Interfering with Employee Rights (Section 7 & 8(a)(1))*, National Labor Relations Board (June 10, 2024, 3:00 PM), https://nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1.

none.[40] To maintain this deferential relationship with the judiciary, the NLRB's standard should accomplish the congressional goal of protecting workers' rights.[41] With this in mind, however, the standard should strongly favor neither employers nor employees. Further, because it provides a basis of understanding for employers, workers, union representatives, and federal judges, among others, the standard must be comprehensible. Further still, it should be malleable enough to allow for its broad application while also yielding predictable results which facilitate conflict avoidance. All things considered, a standard that accomplishes these objectives would greatly benefit both employers and employees and achieve the legislative goals of the NLRA.

In contrast to the *Boeing* and *Stericycle* standards, the *Lutheran Heritage* standard construe" standard provides a more neutral, easily understandable, and flexible approach, suitable for the NLRA's broad application.[42] It would also provide stability by allowing NLRB members, regardless of their differing political viewpoints, to accomplish their respective policy objectives without needing to implement an entirely new standard.[43] Therefore, this Comment suggests readopting the *Lutheran Heritage* standard because it would provide the most equitable results while still accomplishing the congressional goals of the NLRA.

Part I of this Comment will provide background regarding the National Labor Relations Act, the rights it protects, and the scope of its application. It will also discuss the National Labor Relations Board and the adjudication of labor disputes. Part II will review the NLRB decisions of

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[40] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (explaining that if a statute is silent or ambiguous on a particular issue, the Court would consider whether an agency's answer is based on a permissible construction of the statute). The Supreme Court may alter or eliminate this deferential obligation in its upcoming session.

[41] *See* 29 U.S.C. § 158(a)(1); *Interfering with Employee Rights (Section 7 & 8(a)(1))*, *supra* note 40.

[42] Boeing Co., 365 N.L.R.B. No. 154 (2017); Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113 (2023); Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646, 647 (2004).

[43] *See infra* Part IV(E).

Lutheran Heritage, *Boeing*, and *Stericycle*. Part III will examine the detrimental effects of vacillating legal standards and the challenges associated with the *Stericycle* decision. Part IV will suggest that the NLRB readopt the *Lutheran Heritage* standard.

I. THE NLRA, NLRB, AND ADMINISTRATIVE PROCEDURE

In 1935, Congress passed the National Labor Relations Act in response to violent confrontations between union–organizing workers and the security forces defending employers' interests.[44] To this day, Section 7 of the NLRA guarantees workers' rights to form, join, or assist labor organizations, bargain collectively, and engage in other concerted activities for mutual aid or protection.[45] These privileges, including the right to refrain from any of the aforementioned activities, are protected by Section 8(a)(1), which makes it "an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.'"[46] The NLRA's application is not limited to businesses with organized unions.[47] In actuality, the NLRA governs most private sector employers, including manufacturers, retailers, private universities, and health care facilities.[48] As a result, the NLRA protects millions of workers across the country.[49]

Congress also created the NLRB which interprets the provisions of the NLRA, protects workers' rights, and prevents and remedies unfair labor practices.[50] The NLRB is a bifurcated

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[44] National Labor Relations Act (1935), National Archives and Records Administration (June 10, 2024, 3:00 PM), https://www.archives.gov/milestone-documents/national-labor-relations-act.
[45] 29 U.S.C. § 157. *See also* National Labor Relations Act (1935), *supra* note 45.
[46] *Interfering with Employee Rights (Section 7 & 8(a)(1))*, *supra* note 40 (quoting 29 U.S.C. § 158(a)(1)).
[47] *Frequently Asked Questions*, *supra* note 7.
[48] *Id*.
[49] *News Release: Union Members 2022,* Bureau of Labor and Statistics (June 10, 2024, 3:00 PM), https://www.bls.gov/news.release/pdf/union2.pdf.
[50] *Who We Are*, National Labor Relations Board (June 10, 2024, 3:00 PM), https://www.nlrb.gov/about-nlrb/who-we-are (last visited Sep. 15, 2023).

agency comprised of a five–person board (the Board) and the General Counsel, an individual.[51] All six members of the NLRB are appointed by the President of the United States and confirmed by the United States Senate.[52] With the president initiating NLRB appointments, political power in the agency is largely dependent upon the party occupying the Oval Office.[53] As a matter of custom, the president appoints three members of his political party and two members of the opposing party to five–year terms.[54] Although NLRB members are eligible for reappointment, if a member's political party does not match that of a newly elected president, he or she may be replaced.[55]

As a federal agency, the NLRB's procedure is dictated by the Code of Federal Regulations.[56] After an unfair labor charge is filed with one of the NLRB's regional offices, the regional director investigates the charge.[57] If sufficient supporting evidence is found, the General Counsel may file a complaint, pursue the charge, and seek remedies against the employer on behalf

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[51] *Id*.
[52] *Id*.
[53] U.S. Government Accountability Office, *National Labor Relations Board-Member Service Prior to Presidential Appointment*, U.S. GAO (June 10, 2024, 3:00 PM), https://www.gao.gov/products/b-334179; General Counsel Robb, who was appointed by President Trump, was asked to resign by President Biden. When he refused, the President fired him. The courts upheld this exercise of the Presidential power over the NLRB. Daniel Wiessner, *Biden had Power to Fire U.S. Labor Board Official, Court Rules*, Reuters (Jan. 27, 2023, 4:30 PM), https://www.reuters.com/legal/government/biden-had-power-fire-us-labor-board-official-court-rules-2023-01-27/.
[54] Samantha J. Walter, *Flip Flops Should Be Limited to Footwear: An Analysis of the NLRB's Ever-Changing Interpretations of Concerted Activity Under the NLRA*, 127 Penn St. L. Rev. 539, 545–46 (2023).
[55] U.S. Government Accountability Office, *supra* note 54. With one NLRB Member's term expiring each year, the President's political party typically holds a *de facto* majority after his first few appointments. Ronald J. Krotoszynski, Jr. et. al., *Partisan Balance Requirements in the Age of New Formalism*, 90 Notre Dame L. Rev. 941, 1000 (2015).
[56] 29 Code of Federal Regulation § 101.1-101.43.
[57] *Regional Offices*, National Labor Relations Board (June 10, 2024, 3:00 PM), https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices.

of its employees.[58] If a settlement is not reached, the matter proceeds to a hearing before an Administrative Law Judge (ALJ), who will either dismiss the charge or render a decision.[59] ALJ decisions may be appealed to the NLRB.[60] After another hearing, typically before a three–member panel, the NLRB issues its own opinion.[61] Either party may seek enforcement or reversal from a federal court of appeals.[62]

As part of its duties, the NLRB is regularly called upon to evaluate the lawfulness of work rules.[63] Unlawful rules can be categorized into two groups.[64] First, *facially unlawful* work rules are direct violations of the NLRA, and no situation exists where these rules are lawful to maintain.[65] For example, a work rule which forbids employees from joining a union would never be lawful to maintain since it expressly violates Section 7 of the NLRA.[66] Second, *facially neutral* work rules are not outright violations of the NLRA.[67] However, if a rule interferes with workers' NLRA–protected rights, the work rule is unlawful as applied.[68] As a result, these rules may be

[58] *The NLRB Process*, *supra* note 15. The NLRB refuses to exercise jurisdiction over companies that do not generate a certain amount of revenue, limiting its control over these businesses.
[59] *Id.*
[60] *Id*. Conversely, if neither party appeals the NLRB's decision, the litigation ends.
[61] *Id*.; *Decide Cases*, National Labor Relations Board (June 10, 2024, 3:00 PM), https://www.nlrb.gov/about-nlrb/what-we-do/decide-cases.
[62] *The NLRB Process*, *supra* note 15. While the NLRB cannot punish wrongdoers in the traditional sense, the agency may seek make–whole remedies, such as reinstatement, backpay, and any other direct and foreseeable financial damages. Julius G. Getman, *Boeing, the IAM, and the NLRB: Why U.S. Labor Law Is Failing* 98 Minn. Law Rev. 1666 (2014); *Investigate Charges*, National Labor Relations Board (June 10, 2024, 3:00 PM), https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited Sep. 19, 2023). *See also* Thryv, Inc., 372 N.L.R.B. No. 22 (Dec. 13, 2022) (expanding the damages which the NLRB may award).
[63] *See e.g.* Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646 (2004); Boeing Co., 365 N.L.R.B. No. 154 (2017); Stericycle, 372 N.L.R.B. No. 113 (2023).
[64] T-Mobile USA, Inc. v. N.L.R.B., 865 F.3d 265, 270–71 (5th Cir. 2017).
[65] *Id*.
[66] Boeing, 365 N.L.R.B. No. 154; 29 U.S.C. § 158(a)(1).
[67] Lowes Home Centers, L.L.C. v. N.L.R.B., 850 F. App'x 886, 889 (5th Cir. 2021).
[68] T-Mobile, 865 F.3d 265, 270–71.

lawful to maintain in certain circumstances, but unlawful in others.[69] For example, a work rule that enforces a code of civility, like Tulane's, may be unlawful as applied if an employee is reprimanded for violating his employer's conduct policy while lawfully engaging in NLRA–protected, concerted activity.[70]

In short, the NLRA protects the rights of most private employees.[71] Acting in a quasi–judicial role, the NLRB has the authority to interpret and apply the NLRA.[72] Therefore, when a private employer's work rules are challenged, the NLRB may determine their lawfulness through its administrative law procedure.[73] As a result, the NLRB's standard for interpreting these rules greatly impacts their lawfulness.

II. PRIOR STANDARDS: *LUTHERAN HERITAGE*, *BOEING*, *STERICYCLE*

To contextualize the issues posed by the NLRB's current standard for evaluating work rules, understanding its recent evolution is necessary.[74] In 2004, the NLRB adopted the "reasonably construe" standard.[75] However, it was abrogated in 2017 in favor of the categorical approach articulated in *Boeing*.[76] Just six years later, however, the NLRB implemented the new and complex *Stericycle* standard.[77]

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[69] *See generally* Tesla, Inc., 371 N.L.R.B. No. 131 (2022).
[70] *See* Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113 (2023). *See e.g.* Tulane University Staff Handbook, *supra* note 12.
[71] *Frequently Asked Questions*, *supra* note 7.
[72] *Who We Are*, *supra* note 50.
[73] *The NLRB Process*, *supra* note 15.
[74] *See generally* Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646 (2004); Boeing Co., 365 N.L.R.B. No. 154 (2017); Stericycle, 372 N.L.R.B. No. 113.
[75] Martin Luther, 343 N.L.R.B. 646, 647.
[76] Boeing, 365 N.L.R.B. No. 154 slip op. at 4.
[77] *See* Stericycle, 372 N.L.R.B. No. 113 slip op. at 2.

A. Lutheran Heritage

In *Lutheran Heritage*, the NLRB considered the lawfulness of several different work rules.[78] Ultimately, it stated that the lawfulness of a *facially neutral* work rule depended on "a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule [had] been applied to restrict the exercise of Section 7 rights."[79] This became known as the "reasonably construe" standard, and its application encouraged the NLRB to consider the circumstances which surrounded the rule from the employee's perspective before examining the specific allegations.[80] In light of the diverging standards which followed, this standard represented a middle ground.[81] Although it would later be criticized, federal appellate courts consistently applied the *Lutheran Heritage* standard until it was abrogated.[82]

B. Boeing

In 2017, the NLRB determined that the *Lutheran Heritage* standard was simultaneously too simplistic and too difficult to apply, and stated that it prevented the Board from considering the "real–world 'complexities'" revealed during the adjudication of a dispute.[83] In *Boeing*, the

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[78] Martin Luther, 343 N.L.R.B. at 652-53.
[79] *Id*. at 647.
[80] Boeing, 365 N.L.R.B. No. 154, slip op. at 1; Martin Luther, 343 N.L.R.B. at 648-49.
[81] *See generally* Martin Luther 343 N.L.R.B. 646; Boeing, 365 N.L.R.B. No. 154; Stericycle, 372 N.L.R.B. No. 113.
[82] *See* Boeing, 365 N.L.R.B. No. 154, slip op. at 3 (where the NLRB noted that the *Lutheran Heritage* standard was simultaneously too simplistic and too difficult to apply). *See also* T-Mobile USA, Inc. v. NLRB., 865 F.3d 265, 272 (5th Cir. 2017); Whole Foods Mkt. Grp., Inc. v. NLRB, 691 F. App'x 49, 50–51 (2d Cir. 2017); NLRB v. Ne. Land Servs., Ltd., 645 F.3d 475, 482 (1st Cir. 2011); Cmty. Hosps. of Cent. California v. NLRB, 335 F.3d 1079, 1088 (D.C. Cir. 2003). Because federal courts are not required to apply the NLRB's interpretation of the NLRA, *Lutheran Heritage*'s consistent and comparatively long-lasting application suggests that judges approved of the standard. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
[83] Boeing, 365 N.L.R.B. No. 154, slip op. at 3.

NLRB considered the lawfulness of Boeing's no–camera rule, which forbid any and all photography on Boeing's premises without the company's permission.[84] In doing so, the NLRB abrogated *Lutheran Heritage* and implemented a balancing test for *facially neutral* work rules which weighed "the nature and impact on NLRA rights" against the "legitimate justifications associated with the rule."[85] If the impact outweighed the employer's justifications, the work rule was deemed unlawful.[86] However, if the business' legitimate justifications outweighed the nature and impact on NLRA rights, the provision was considered lawful.[87]

Although the NLRB acknowledged that the implementation of a balancing test was not a novel idea, in *Boeing*, it took a new approach by delineating three categories of rules.[88] Category 1 included rules that were always lawful to maintain because either: "(i) the rule, when reasonably interpreted, [did] not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights [was] outweighed by justifications associated with the rule."[89] The NLRB indicated that no–camera rules and rules that required employees to abide by basic standards of civility were examples of Category 1 rules.[90] Category 2 included rules that warranted individualized scrutiny through the balancing test.[91] Lastly, Category 3 rules were never lawful to maintain "because they would prohibit or limit NLRA–protected conduct, and the adverse impact

[84] *Id*., slip op. at n. 27.
[85] *Id*., slip op. at 4.
[86] *Id*.
[87] *Id*.
[88] *Id*., slip op. at 4-5 (quoting Lafayette Park Hotel v. NLRB, 203 F.3d 52 (D.C. Cir. 1999) ("the issue presented by the contested rules of conduct involves 'working out an adjustment between the undisputed right of self-organization assured to employees. . . and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society'").
[89] *Id*., slip op. at 4.
[90] *Id*.
[91] *Id*.

on NLRA rights [would] not [be] outweighed by justifications associated with the rule."[92] Rules which prohibited employees from discussing wages or benefits with one another would fall into Category 3.[93] In applying this categorical approach and drastically diverging from the previous standard, the NLRB ultimately determined that the slight adverse impact of Boeing's no–camera rule was outweighed by the company's "substantial and important justifications" for its maintenance.[94] Consequently, the NLRB placed Boeing's rule, and no–camera rules in general, into Category 1.[95]

By adopting this categorical approach, the NLRB provided additional certainty for employers.[96] In doing so, however, the NLRB lost the ability to consider the "real–world 'complexities'" presented by certain rules because their lawfulness was predetermined.[97] Ironically, *Boeing* criticized *Lutheran Heritage* for the same lack of perspective.[98] Ultimately, this more rigid procedure may have allowed employers to infringe on employee rights.

C. Stericycle

Just as the *Boeing* standard represented a drastic change in the law, the current *Stericycle* standard embodies the same.[99] In *Stericycle*, the NLRB evaluated the business' operations which included:

> [the maintenance of] a personal conduct rule in the Team Member Handbook that prohibit[ed] unit employees from engaging in conduct that maliciously harm[ed] or intend[ed] to harm [Stericycle's] business reputation, expect[ing] employees to conduct themselves and behave in a manner conducive to efficient operations, threaten[ing] employees with corrective action including termination for failing to

[92] *Id*.
[93] *Id*.
[94] *Id*., slip op. at 18.
[95] *Id*.
[96] *See id*.
[97] *Id.*, slip op. at 4.
[98] *Id.*, slip op. at 3.
[99] *See generally* Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113 (2023).

> conduct themselves in an appropriate manner or engaging in behavior that is harmful to [Stericycle's] reputation.[100]

In assessing whether Stericycle violated the NLRA by maintaining these rules, the NLRB criticized the *Boeing* standard for failing to account for the economic dependence of employees.[101] It also stated that the *Boeing* standard gave too much weight to the interests of the business because it did not require the employer to narrowly tailor work rules to avoid burdening workers' rights.[102] In doing so, the *Stericycle* Board determined that the *Boeing* standard condoned overbroad work rules and adopted yet another standard for their interpretation.[103]

The *Stericycle* standard requires the NLRB to interpret handbook provisions from the perspective of an economically dependent employee who contemplates participating in an NLRA–protected activity.[104] If a single reasonable interpretation exists which *could* be construed to chill employee rights, the rule is presumptively unlawful even if alternative, and perhaps more reasonable, interpretations of the same rule exist.[105] As a result, any work rule can easily fall to this presumption.

To overcome the presumption, an employer must show that the rule protects "a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule."[106] This seemingly requires employers to pass certain elements of constitutional law's rational basis, intermediate, and strict scrutiny.[107] First, an employer must

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[100] *Id*., slip op. at app. Order(1)(f).
[101] *Id*., slip op. at 2.
[102] *Id*.
[103] *Id*.
[104] *Id*., slip op. at 2-3.
[105] *Id*., slip op. at 3.
[106] *Id*., slip op. at 2.
[107] *Id*.; F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993); Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 213–14 (1997); McCullen v. Coakley, 573 U.S. 464, 478 (2014).

show that the rule protects "a legitimate and substantial business interest."[108] This combines the first prong of both rational basis and intermediate scrutiny which requires the government to show a legitimate or substantial interest, respectively, in the conduct being regulated.[109] Of the two, showing a substantial business interest is more difficult.[110] The NLRB's inclusion of this language would seem to indicate that the business interests advanced by a lawful work rule must reach the same level of importance as those governmental interests that pass intermediate scrutiny, such as the national defense and public health.[111] Although this is not easy to overcome, it actually represents the less stringent of *Stericycle*'s two prongs.[112] The other, like strict scrutiny, requires the work rule to be narrowly tailored to accomplish the business interest protected by the work

[108] *Compare* Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113, slip op. at 2 (2023), *with* F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 314 n. 6 (1993) (stating that the Court will confine itself to the question of whether the regulation is '"rationally related to a legitimate government purpose under the Due Process Clause'"), *and* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 213–14 (1997) (stating that under intermediate scrutiny the regulation must promote a '"substantial governmental interest'").

[109] *See* F.C.C. 508 U.S. at 315; Turner, 520 U.S. at 213–14.

[110] *See* Turner, 520 U.S. at 213–14.

[111] *See* Stericycle, 372 N.L.R.B. No. 113, slip op. at 2; Rostker v. Goldberg, 453 U.S. 57, 81-83 (1981) (holding that the governmental interest in national security which required men, but not women to register for the draft was sufficient to pass the "important government interest" test which was later recognized as intermediate scrutiny); Brokamp v. James, 66 F.4th 374, 406 (2d Cir. 2023), cert. denied, 144 S. Ct. 1095 (2024) ("New York's license requirement withstands intermediate scrutiny as a matter of law because there is no question that the law… serves an important government interest in promoting and protecting public health").

[112] *Compare* Turner, 520 U.S. at 213–14, *with* McCullen, 573 U.S. at 478.

rule.[113] Here, if any other less restrictive option exists, the rule will be deemed unlawful.[114] In this way, the NLRB guards against overbroad work rules.[115]

Stericycle and its procedure provides predictability of outcome by affording employees broad protection of their rights.[116] In doing so, however, the standard makes it difficult for employers to implement or enforce *any* work rules.[117] The ease with which a work rule may fall to the presumption, coupled with the nearly impossible task of its rebuttal, creates a "greased skid" procedure, whereby challenged work rules are quickly pushed towards unlawfulness.[118]

In summary, within a two–decade period, the NLRB has subjected work rules to three dramatically different standards.[119] While *Lutheran Heritage* took a more impartial approach, both *Boeing* and *Stericycle* created more predictable outcomes by implementing imbalanced standards

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[113] Stericycle, 372 N.L.R.B. No. 113, slip op. at 2-3; Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417, 2422 (1996) (stating that the overinclusive aspect of narrow tailoring is incorporated within the least restrictive means inquiry). By requiring work rules to be narrowly tailored, the *Stericycle* standard attempts to guard against overinclusivity. Professor Volokh notes that there are four components of narrow tailoring including: (1) overinclusivity, (2) advancement of the interest, (3) least restrictive means alternative, and (4) underinclusivity. *Id.* at 2422-23. He states that the first three components are closely related and subsumed within the least restrictive means test. *Id.* at 2423. Volokh recognizes that the only aspect of narrow tailoring that is not included within this test is underinclusivity. *Id.* However, an underinclusive rule would not infringe on NLRA-protected rights. Therefore, the NLRB is not concerned with this aspect of narrow tailoring and the least restrictive means test is an accurate portrayal of *Stericycle*'s requirement.

[114] *See* McCullen, 573 U.S. at 478.

[115] Stericycle, 372 N.L.R.B. No. 113, slip op. at 2.

[116] *See generally* Stericycle, 372 N.L.R.B. No. 113.

[117] Catherine F. Burgett, NLRB's New Standard: *Work Rules and Policies Are Unlawful if They 'Could' Be Interpreted to Have a Coercive Meaning*, Frost Brown Todd (June 10, 2024, 3:00 PM), https://frostbrowntodd.com/nlrbs-new-standard-work-rules-and-policies-are-unlawful-if-they-could-be-interpreted-to-have-a-coercive-meaning/.

[118] *See* David Beach, et al., *NLRB Decision Undercuts Work Rules and Policies*, McDermott Will & Emery (June 10, 2024, 3:00 PM), https://www.mwe.com/insights/nlrb-undercuts-work-rules-and-policies/.

[119] *Compare* Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646 (2004), *and* Boeing Co., 365 N.L.R.B. No. 154 (2017), *with* Stericycle, 372 N.L.R.B. No. 113.

that favored employers and employees, respectively.[120] In the end, the standard's repeated changes, coupled with its often imbalanced wording, has negatively impacted both employers and employees.[121]

III. CHANGING LEGAL STANDARDS AND STERICYCLE'S INEQUITABLE SOLUTION

Frequent alterations in the NLRB's standard for evaluating the lawfulness of work rules negatively impacts employers.[122] Moreover, the new *Stericycle* standard makes drafting and maintaining work rules more difficult and increases employers' exposure to litigation.[123] Furthermore, as businesses adjust to *Stericycle*, workers' NLRA–protected rights may be affected.[124]

A. Vacillating Legal Standards Negatively Impact Employers and Workers

While the NLRB serves an important role in balancing the rights of employers and employees, frequent legal shifts and imbalanced standards do not serve this purpose.[125] Recognizing the positive impact of strong businesses, the laws of the United States generally incentivize their growth and allow employers to protect their legitimate interests by making rules

[120] *See* Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646 (2004); Boeing Co., 365 N.L.R.B. No. 154 (2017); Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113 (2023).
[121] *See infra* Part III(B).
[122] *Nearly 90 Percent of U.S. Corporations Juggle Multiple Lawsuits*, Insurance Journal (June 10, 2024, 3:00 PM), https://www.insurancejournal.com/magazines/mag-features/2005/11/07/62341.htm.
[123] *See* Beach, *supra* note 118; *Nearly 90 Percent of U.S. Corporations Juggle Multiple Lawsuits*, *supra* note 122.
[124] *See infra* Part III(B).
[125] See *supra* note 90.

which govern employee behavior while at work.[126] At the same time, the government also has a strong interest in protecting workers' rights.[127]

On one hand, altering legal standards impedes legitimate business interests. First, many employers are likely unaware of the dramatic changes in the NLRB's standard or ignorant of its effects. As a result, their work rules will remain unchanged even if they are now unlawful to maintain.[128] Attentive employers who regularly update their work rules may still be unsure of how to create rules that will satisfy the new standards.[129] For example, the NLRB promulgated the new *Stericycle* standard in August, 2023.[130] One month later, Tulane updated its staff handbook.[131] Yet, it contains certain provisions that appear to be unlawful under the *Stericycle* test.[132] One can only conclude that Tulane—a university with an endowment of nearly $2 billion and a staff which includes 50 full–time attorneys—was either unaware of the new standard or willing to defend its seemingly unlawful rules before the NLRB.[133] Considering the large number of employers covered

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[126] U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Community Health and Economic Prosperity: Engaging Businesses as Stewards and Stakeholders, *Chapter 3, The Meaning, Purpose, and Opportunity of Business in 21st Century America* (Jan. 2021), https://www.ncbi.nlm.nih.gov/books/NBK568863/ (stating that businesses bring innovation, produce wealth, create value, provide jobs, and pay taxes); Gina Bento, *Ease of Doing Business in the U.S.: A Major Draw for Foreign Investor*, Research FDI (June 10, 2024, 3:00 PM), https://researchfdi.com/resources/articles/ease-of-doing-business-in-the-u-s-a-major-draw-for-foreign-investor/.

[127] *See* 29 U.S.C. § 157.

[128] *See* Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113 (2023).

[129] *See* Burgett, *supra* note 117.

[130] Stericycle, 372 N.L.R.B. No. 113.

[131] Tulane University Staff Handbook, *supra* note 12, at 1.

[132] *Id.* at 27; Stericycle, 372 N.L.R.B. No. 113. As of June 10, 2024, the Tulane work rules discussed herein are still included in the handbook.

[133] Rob Kozlowski, *Tulane University Endowment Returns 3.3% for Fiscal Year, Pensions and Investments*, Pensions and Investments (June 10, 2024, 3:00 PM), https://www.pionline.com/endowments-and-foundations/tulane-university-endowment-returns-33-fiscal-year; *Tulane People: Full Time, Tulane Law School*, Tulane University (June 10, 2024, 3:00 PM), https://law.tulane.edu/faculty/full-time.

by the NLRA, many less–wealthy and less–informed businesses are likely in a similar situation.[134] Consequently, these repeated changes leave private entities susceptible to legal challenge and potentially costly litigation.[135]

On the other hand, the United States has a strong interest in protecting workers' rights.[136] At times, employers' work rules have intruded on these rights.[137] When the NLRB follows a standard that is too favorable for employers, the government may fail to protect the statutory rights of workers.[138] Furthermore, because shifting standards place their own closely–held rights at risk, employees are most directly affected by changes in the law.[139] For example, in *Boeing*, when the NLRB determined that no–camera and civility rules were lawful *per se*, employees lost at least some ability to document unlawful work practices.[140] Employees also lost the ability to advocate for their NLRA–protected rights, such as union formation, if their discussions violated the employer's potentially ambiguous definition of "civil" behavior.[141] While these rights may seem to be fundamentally guaranteed by the NLRA, the vacillating standards adopted by the NLRB have, at times, permitted their violation.[142]

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[134] *Frequently Asked Questions*, *supra* note 7.
[135] *See* Beach, *supra* note 118; *Nearly 90 Percent of U.S. Corporations Juggle Multiple Lawsuits, supra* note 122.
[136] *See* 29 U.S.C. § 157.
[137] *See* Boeing Co., 365 N.L.R.B. No. 154, slip op. at 4 (2017).
[138] *See* Benjamin Austin and Matthew Lilley*, The Long-Run Effects of Right to Work Laws*, 65, https://scholar.harvard.edu/files/matthew-lilley/files/long-run-effects-right-to-work.pdf (2021).
[139] *See* Boeing, 365 N.L.R.B. No. 154; Catherine Cote, *5 Common Challenges of International Business You Should Consider*, Business Insights Blog (June 10, 2024, 3:00 PM), https://online.hbs.edu/blog/post/challenges-of-international-business.
[140] Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113, slip op. at n. 27 (2023).
[141] *See id*., slip op. at 10.
[142] Stericycle, 372 N.L.R.B. No. 113, slip op. at 10. *See infra* note 178.

B. Stericycle's Detrimental Effects for Businesses

Not only did the *Stericycle* decision create a dramatic change in the law, but its standard cannot achieve the proper balancing of rights.[143] In interpreting work rules from the perspective of an economically dependent employee who contemplates participating in NLRA–protected activity, the NLRB does more than slightly favor workers' rights.[144] In actuality, it takes the perspective of an employee whose daily welfare depends on the job governed by the work rules.[145] This hypothetical individual faces the inability to financially afford the life he or she has chosen.[146] Consequently, this economically–dependent employee is the least likely to contemplate any larger benefit offered by a challenged rule since he or she has the most to lose.[147] As a result, the NLRB takes the perspective of an employee that is the most likely to find an NLRA violation.[148] Yet, if this employee *could* interpret the rule to chill NLRA–protected rights, as he or she is primed to do, it will be presumptively unlawful.[149] Consequently, even though *Stericycle* insists on a reasonable interpretation of the challenged work rule, its additional considerations and procedures actually move the standard toward unreasonableness.[150]

By requiring only a single reasonable interpretation to create the presumption of unlawfulness, the NLRB limits its ability to examine the context which gave rise to the work rule. The *Stericycle* opinion made it clear that the presumption is triggered solely by an economically–dependent employee's reasonable interpretation of the challenged work rule even if other more

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[143] *See generally id*.
[144] *See id*., slip op. at 3.
[145] *See id*.
[146] *Id.,* slip op. at 13.
[147] *See* Beach, *supra* note 118.
[148] *Id*.
[149] Stericycle, 372 N.L.R.B. No. 113, slip op. at 3.
[150] *Id*., slip op. at 6; Beach, *supra* note 118.

reasonable interpretations exist.[151] However, from this perspective, nearly every work rule *could* be interpreted to violate workers' rights—creating the presumption when even a scintilla of reasonableness is present.[152] By not allowing more reasonable interpretations to prevail from the outset, the NLRB may not deny the presumption based on any amount of context.[153] As a result, *Stericycle*'s equitable application is severely limited because its "greased skid" presumption procedure ushers all challenged rules toward unlawfulness.[154]

If the presumption of unlawfulness is created, an employer may overcome it by showing that the challenged rule protects a legitimate and substantial business interest and cannot be furthered by a more narrowly tailored rule.[155] In essence, if the NLRB determines that a work rule is overly broad, it must pass a test similar to strict scrutiny to remain lawful.[156] Most, including former Supreme Court Justice Souter, recognize that "strict scrutiny leaves few survivors."[157] As a result, the creation of the presumption will likely serve as the work rule's death knell.[158] In constructing the standard in this way, the impossibility of rebutting the "greased skid" presumption expedites a finding of the work rule's unlawfulness.[159] In short, under the *Stericycle* standard, employers who may have been unaware that they were in violation of the NLRA will find it exceedingly difficult to overcome a challenge to *any* work rule.[160]

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[151] Stericycle, 372 N.L.R.B. No. 113, slip op. at 3.
[152] *Id. See* Beach, *supra* note 118.
[153] *See* Stericycle, 372 N.L.R.B. No. 113, slip op. at 6.
[154] *See* Burgett, *supra* note 117.
[155] Stericycle, 372 N.L.R.B. No. 113, slip op. at 2.
[156] *See* McCullen v. Coakley, 573 U.S. 464, 478 (2014).
[157] City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J. dissenting).
[158] *See* Burgett, *supra* note 117.
[159] Stericycle, 372 N.L.R.B. No. 113, slip op. at 2. *See* Burgett, *supra* note 117.
[160] Burgett, *supra* note 117.

Stericycle may also make it more difficult to protect worker's rights. Handbooks benefit both employers and employees by providing a concrete reference that reduces uncertainty by setting clear expectations.[161] However, the *Stericycle* standard has placed work rules under increased scrutiny.[162] Therefore, by publishing a written handbook, employers expose themselves to the possibility of additional legal challenges and the unfavorable *Stericycle* standard.[163] From their perspective, if the risks of increased litigation and expenses outweigh the benefits of maintaining written rules, employers may eliminate them.[164] The lack of written rules would cause employees to lose direct insight into their employers' expectations and may lead to supervisors imposing inconsistent disciplinary measures for the same employee actions.[165] At the same time, employers may also implement unwritten work rules that violate NLRA–protected rights. Employees would find these unwritten rules to be more difficult to successfully challenge.[166] As a result, the *Stericycle* standard may make protecting workers' rights more challenging.

In short, vacillating legal standards fail to provide stability to employers and employees alike.[167] The Board should establish a standard that does not need to be changed when the balance of political power shifts. However, the *Stericycle* standard does not present an equitable solution.[168] As a result, adopting an impartial and long–lasting rule is critical.

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[161] Organ & Botorff, *supra* note 11.
[162] *See* Beach, *supra* note 118.
[163] *Id*.; Stericycle, 372 N.L.R.B. No. 113.
[164] *See* Boeing Co., 365 N.L.R.B. No. 154, slip op. at 11 (2017).
[165] *Id*.
[166] Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 Berkeley J. Emp. & Lab. L. 345, 391 (2008).
[167] *See supra* Part III(A).
[168] *See supra* Part III(B).

IV: A RETURN TO REASON: *LUTHERAN HERITAGE*

Since the NLRA governs most of the nation's private businesses, NLRB must promulgate a standard which accomplishes the dual task of safeguarding workers' rights and allowing businesses to protect their legitimate interests.[169] A standard for testing the lawfulness of work rules should be neutral, understandable, flexible, and stable. The *Lutheran Heritage* standard—under which a work rule is deemed unlawful if (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights—would sufficiently accomplish these goals and should be readopted by the NLRB.[170]

A. Neutral

The *Lutheran Heritage* standard presents a more neutral solution than either *Boeing* or *Stericycle*.[171] In *Boeing,* the NLRB implemented a categorical approach which predetermined the lawfulness of certain work rules and permitted their implementation and enforcement even if it infringed on the NLRA–protected rights of workers.[172] The *Stericycle* Board correctly acknowledged that this wholesale approach favored employers because it failed to consider the relationship between employers and employees and the specific context from which the rule arose.[173]

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[169] *Frequently Asked Questions*, *supra* note 7. *See supra* note 88.
[170] Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646, 647 (2004).
[171] *Compare* Martin Luther, 343 N.L.R.B. 646, *and* Boeing Co., 365 N.L.R.B. No. 154 (2017), *with* Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113 (2023).
[172] Stericycle, 372 N.L.R.B. No. 113, slip op. at n. 27.
[173] *Id.*, slip op. at 10 ("[D]esignating a type of rule as always lawful to maintain improperly forgoes particularized scrutiny of a similar rule in an altogether different workplace by finding it lawful without addressing what particular Section 7 rights are at stake, what justifications an employer might actually offer for its rule, and what industry or work setting is involved.").

Just as the *Boeing* standard excessively favored employers, the *Stericycle* standard excessively favors employees.[174] A challenged work rule is subjected to a "greased skid" presumption of unlawfulness and is then faced with a nearly unpassable test to overcome it.[175] Such scrutiny makes it incredibly difficult for *any* work rule to pass muster and obstructs the objectives of employers, employees, and the NLRB.[176]

Nevertheless, the *Lutheran Heritage* standard relies on how an employee would "reasonably construe" a challenged work rule.[177] This requires case–by–case evaluation and effectively prevents the use of *Boeing*'s categorical approach.[178] Further, an average employee's reasonable interpretation, rather than the biased perspective adopted by *Stericycle*, would provide the appropriate balance for measuring the lawfulness of work rules.[179] While the *Lutheran Heritage* standard protects employee rights, it can still account for the legitimate interests of the employer. However, because a worker is more likely to protect his own interests than his employer's, *Lutheran Heritage* may slightly favor the employee.[180] From the employer's perspective, this may make the standard less appealing.[181] However, in passing the NLRA,

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[174] *See* Beach, *supra* note 118.
[175] Stericycle, 628, 372 N.L.R.B. No. 113, slip op. at 2.
[176] Burgett, *supra* note 117.
[177] Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646, 647 (2004).
[178] *Id*.
[179] Both liberal and conservative iterations of the NLRB have supported adopting the perspective of a reasonable employee while simultaneously requiring the consideration of additional factors that skewed the standard's neutrality. *See e.g.*, Stericycle, 628, 372 N.L.R.B. No. 113. By explicitly adopting the perspective of the average employee, the NLRB would strike a balance between the conservative viewpoint that "a reasonable employee does not presume a Section 7 violation lurks around every corner" and the liberal perspective that an employee "interprets work rules as a layperson rather than as a lawyer." LA Specialty Produce Co., 368 NLRB No. 93, slip op. at 9 (2019); Stericycle, 372 N.L.R.B. No. 113, slip op. at 15 (2023).
[180] *See* Wanjiru Njoya, *Job Security in A Flexible Labor Market: Challenges and Possibilities for Worker Voice*, 33 Comp. Lab. L. & Pol'y J. 459, 471 (2012).
[181] *See* Boeing Co., 365 N.L.R.B. No. 154, slip op. at 2 (2017) (criticizing the *Lutheran Heritage* standard).

Congress explicitly acted to protect workers' rights.[182] Therefore, this slight skew aligns with the NLRA's statutory purpose.[183] As a result, the *Lutheran Heritage* standard represents the most neutral solution while still maintaining a deferential relationship with the courts by accomplishing the NLRA's congressional goals.[184]

B. Understandable

Compared to both *Boeing* and *Stericycle*, the "reasonably construe" standard is far more straightforward and presents a more easily understandable solution.[185] By interpreting the rule from the perspective of a reasonable employee, the NLRB avoids placing the employer's rule into categories, creating a presumption of unlawfulness, shifting the burden to the employer, and subjecting the work rule to a test akin to strict scrutiny.[186] Furthermore, considering the 13–years of its application, the *Lutheran Heritage* standard is familiar to the NLRB, the courts, employers, and employees, making its implementation significantly easier than an entirely new standard.[187] In replacing *Boeing* and *Stericycle*'s convoluted procedures with a simple and familiar analysis, the NLRB would make analyzing the lawfulness of work rules substantially easier for all parties.[188]

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[182] *See* 29 U.S.C. § 157.
[183] *Id*.
[184] *Id.;* Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646, 647 (2004). *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
[185] *Compare* Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113 (2023) *and* Boeing Co., 365 N.L.R.B. No. 154 (2017), *with* Martin Luther, 343 N.L.R.B. at 647.
[186] 29 U.S.C. § 157; Martin Luther, 343 N.L.R.B. at 647.
[187] *See* Yoon-Ho Alex Lee, *Beyond APA Section 553: Hayek's Two Problems and Rulemaking Innovations*, 91 Geo. Wash. L. Rev. 1215, 1245 (2023) (discussing the benefit of hindsight in the readoption of previous standards).
[188] *See* Martin Luther, 343 N.L.R.B. at 647.

C. Flexible

Through its flexibility, the *Lutheran Heritage* standard would also allow the NLRB to consider the circumstances which gave rise to the challenged rule.[189] From an employee's perspective, the NLRB could gain insight into the employer. For example, if a business had a long history of unfair labor practices and was known by employees to be anti–union, an employee could reasonably find that a *facially neutral* rule was designed to infringe upon NLRA–protected rights.[190] Conversely, if the same employee worked for an employer that did not have a history of unfair labor practices, he or she would likely consider *facially neutral* work rules non–threatening.[191] As a result, the work rule would be unlawful in the first scenario, but lawful in the second.[192] This adaptable component of the *Lutheran Heritage* standard allows the NLRB to formulate decisions colored by the employer's prior conduct and facilitates the standard's application throughout the nation's many and various work environments.

D. Stable

Although different from *Boeing* and *Stericycle*, the *Lutheran Heritage* standard promotes stability. Other than the "reasonably construe" phrase, the *Lutheran Heritage* standard is essentially a restatement of the NLRA.[193] If a business implemented restrictions in response to union activities or has applied a rule to restrict the exercise of NLRA–protected rights, the company would be in direct violation of the NLRA.[194] Stated differently, the remaining phrases could read: "a workplace rule is unlawful if it explicitly restricts activity protected by Section 7 or

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[189] *Id*. at 647-48.
[190] *See id*.
[191] *See id*.
[192] *See id*.
[193] 29 U.S.C. § 158(a)(1); *Interfering with Employee Rights (Section 7 & 8(a)(1))*, *supra* note 40.
[194] *Id.*

is in violation of Section 8(a)(1)."[195] However, by formulating the standard as it did, the NLRB emphasized that employers are not permitted to create or apply *facially neutral* provisions to chill employees' rights.[196] By keeping the standard simple, succinct, and closely related to the NLRA, readoption of the "reasonably construe" standard would allow employers to refine their work rules and clarify the scope of employees' rights.

The *Lutheran Heritage* standard would also provide a different type of stability. Unlike *Boeing* and *Stericycle* which provided predictability through near certainty of outcome, *Lutheran Heritage*'s neutrality, simplicity, and flexibility would allow for the standard's non–uniform interpretation and application. At first glance, non–uniformity may seem to be the opposite of stability. However, if the standard continues to change with the NLRB's shifts in political control, even greater uncertainty will prevail.[197] Therefore, an unchanging standard which can yield differing results would provide the most stability for employers and employees alike.

E. Concerns

Although it presents an improvement over the current standard, *Lutheran Heritage* is not perfect.[198] For example, it fails to give concrete guidance when an employer's conduct has neither favored nor disfavored the NLRA.[199] In this instance, it may be argued that the *facially neutral* work rule of an employer who engages in neutral conduct should be lawful since it is unclear whether an employee would reasonably construe the rule to violate his rights. Alternatively, it may be argued that the NLRB should be protective of workers' rights when the surrounding circumstances do not clearly indicate how an employee would interpret the work rule.

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[195] Martin Luther, 343 N.L.R.B. 646; 29 U.S.C. § 157.
[196] Martin Luther, 343 N.L.R.B. 646.
[197] *See supra* Part III(A)
[198] Boeing Co., 365 N.L.R.B. No. 154, slip op. at 2 (2017).
[199] *Id.*, slip op. at 10.

The *Boeing* Board also noted that the standard's flexibility leads to differing results for similarly worded work rules.[200] Under the *Lutheran Heritage* standard, a lawful rule stated that "no 'abusive or threatening language to anyone on Company premises'" would be permitted.[201] However, an unlawful rule similarly restricted "'loud, abusive, or foul language.'"[202] This narrow difference could confuse and mislead employers.

While increasing the "reasonably construe" standard's predictability of outcome would counteract these effects, constructing a single standard that provides both optimal flexibility and predictability is exceedingly difficult.[203] An increase in the former necessarily causes a decrease in the latter and vice versa.[204] Both *Boeing* and *Stericycle* increased predictability.[205] However, neither standard was able to do so without seriously hindering the interests of either employers or employees.[206] In this way, the increased predictability actually created a net negative effect.[207] Since flexibility and predictability have an inverse relationship, the "reasonably construe" standard would create a balanced and flexible approach that would ultimately allow for more just conflict resolutions. As a result, the NLRB could equitably decide each case based on the facts rather than the strict application of a more predictable standard that could result in the same detrimental effects as seen in *Boeing* and *Stericycle*.[208]

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[200] *Id*., slip op. at 13.
[201] *Id*.
[202] *Id*.
[203] Kermit Roosevelt III, *Certainty versus Flexibility in the Conflict of Laws* (2019), Faculty Scholarship at Penn Carey Law, 18 (2019) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3031&context=faculty_scholarship#:~:text=Territoriality%20is%20considered%20to%20be,stability%20it%20is%20usually%20assigned.
[204] *See id*.
[205] *See supra* Part II(B)-(C).
[206] *See supra* Part III(A)-(B).
[207] *Id.*
[208] *See supra* Part III.

Lastly, since the "reasonably construe" standard has been abrogated once before, if readopted, its application may be limited in duration.[209] Undoubtedly, the recurring shifts in NLRB membership and the partisan decisions of the members persistently threaten NLRB precedent.[210] However, readoption of the *Lutheran Heritage* standard would provide stability in that one rule may be applied to accomplish the differing goals of the NLRB members. Considering the "reasonably construe" standard together with its predecessor, which *Lutheran Heritage* modified only slightly, this approach withstood three presidential changes.[211] Conversely, *Boeing* survived only one—a fate which *Stericycle* may share.[212] Furthermore, *Boeing* and *Stericycle*, which were adopted after *Lutheran Heritage*, increased awareness of the detrimental effects of truly imbalanced standards.[213] Consequently, NLRB members may see a greater benefit in readopting the more balanced "reasonably construe" standard. [214]

V. CONCLUSION

With over 150 million people in the American work force, employers' work rules impact the daily lives of many United States citizens.[215] When the NLRB implements an inequitable standard for evaluating work rules, both workers and employers suffer detrimental effects.[216] In comparing recent NLRB standards for evaluating the lawfulness of employee work rules, the

[209] *See* Boeing, 365 N.L.R.B. No. 154, slip op. at 8 (2017) (overturning *Lutheran Heritage*).
[210] *See supra* Part III.
[211]Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646, 647 (2004); Lafayette Park Hotel, 326 NLRB 824, 827 (1998) (stating that a work rule is unlawful if it is viewed by a reasonable employee to violate Section 7 of the NLRA).
[212] *See* Stericycle, Inc. & Teamsters Loc. 628, 372 N.L.R.B. No. 113, slip op. at 12 (2023); David Beach, *supra* note 118.
[213] *See* Stericycle, 372 N.L.R.B. No. 113, slip op. at 12; David Beach, *supra* note 118.
[214] *See supra* Part IV(A)-(D).
[215] *Economic News Release: Employment Status of the Civilian Population by Sex and Age*, (June 10, 2024, 3:00 PM), https://www.bls.gov/news.release/empsit.t01.htm.
[216] *See supra* Part III(B).

"reasonably construe" standard presents the most fair solution.[217] Its more neutral approach provides an easily understandable, flexible standard capable of even–handed application throughout the many and various American work environments.[218] Furthermore, given the challenges of the NLRB's political nature, it will also provide the most stability.[219] By reimplementing the "reasonably construe" standard, the NLRB would benefit both workers and employers by clarifying the scope of workers' rights and reducing employers' exposure to litigation.[220] In doing so, the NLRB would protect employees and enable private entities like Tulane to further its positive impact and strengthen its mission of enriching "the capacity of individuals, organizations, and communities to think, learn, act, and lead with integrity and wisdom."[221]

[217] *Compare* Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646, 647 (2004), *with* Boeing Co., 365 N.L.R.B. No. 154, slip op. at 4 (2017), *and* Stericycle, 372 N.L.R.B. No. 113, slip op. at 15.
[218] *See supra* Part IV.
[219] *See supra* Part IV(D).
[220] *Id*. *See supra* Part III.
[221] *About Tulane*, Tulane University (June 10, 2024, 3:00 PM), https://admission.tulane.edu/international/about-tulane.