No. 09-213

In the Supreme Court of the United States

NORTHEASTERN LAND SERVICES, LTD.,
DBA THE NLS GROUP, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board (Board) to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

2. Whether the Board reasonably concluded that petitioner committed an unfair labor practice by maintaining an overly-broad confidentiality rule in its employment contract that employees would reasonably interpret as prohibiting them from discussing their terms and conditions of employment with union representatives.

3. Whether the Board reasonably concluded that petitioner committed an unfair labor practice by discharging an employee for violating a rule that is itself unlawful under the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 560 F.3d 36. The decision and order of the National Labor Relations Board (Pet. App. 22-35) and the decision of the administrative law judge (Pet. App. 36-58) are reported at 352 N.L.R.B. 744.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2009. A petition for rehearing was denied on May 20, 2009 (Pet. App. 59-60). The petition for a writ of certiorari was filed on August 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In enacting the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, Congress sought through "the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939); see 29 U.S.C. 151. To that end, the NLRA provides mechanisms to resolve questions concerning union representation peacefully and expeditiously, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160.

Congress "confide[d] primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal," the National Labor Relations Board (NLRB or Board). *Garner* v. *Teamsters, Local Union No. 776*, 346 U.S. 485, 490 (1953); 29 U.S.C. 153, 154, 159, 160. As originally constituted, the Board comprised three members, and the vacancy and quorum provisions of the Act provided: "A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." National Labor Relations Act, ch. 372, § 3(b), 49 Stat. 451.[1]

[1] Pursuant to that two-member quorum provision, the original Board, from 1935 to 1947, issued 464 published decisions with only two of its three seats filled. The Board had only two members during three separate periods during that time: September 1 until September 22, 1936; August 27 until November 25, 1940; and August 28 until October 10, 1941. See *Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1937*, at 7 (1937); *Sixth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1941*, at 7 n.1 (1942); *Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942*, at 8 n.1 (1943). Those two-member Boards issued three published decisions in 1936 (reported at 2 N.L.R.B. 198-240); 237 published

In 1947, Congress enacted the Taft-Hartley Act, which enlarged the Board's unfair labor practice jurisdiction and amended Section 3(a) of the NLRA, 29 U.S.C. 153(a), to increase the Board's size from three to five members. See Labor-Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 139. Congress also amended Section 3(b) to authorize the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise," and amended the quorum requirements to provide that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [respecting delegation]." *Ibid.* Since 1947, the overwhelming majority of the Board's decisions have been issued by three-member groups constituted pursuant to the Board's Section 3(b) delegation authority.[2]

b. In 2002, the Board solicited an opinion from the Department of Justice's Office of Legal Counsel (OLC) on the question whether the Board could continue to operate with only two members if the Board had previously delegated all of its powers to a group of three members. OLC, U.S. Dep't of Justice, *Quorum Require-*

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decisions in 1940 (reported at 27 N.L.R.B. 1-1395 and 28 N.L.R.B. 1-115); and 225 published decisions in 1941 (reported at 35 N.L.R.B. 24-1360 and 36 N.L.R.B. 1-45).

[2] See *Thirteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1948*, at 7, 9 (1949); Staff of the J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Labor-Management Relations* 6 (Comm. Print 1948); *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 44-46 (1988) (*Deciding Cases at the NLRB*, an attachment to the prepared statement of the NLRB Chairman).

ments, 2003 WL 24166831 (Mar. 4, 2003). Prior to that request, the Board had not issued decisions when it had only two members since Congress expanded the size of the Board to five members in 1947. *Id.* at *1. The OLC opinion concluded that, under Section 3(b), if the Board, at a time when it had at least three members, had "delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." *Ibid.*

In late 2007, the Board had four members but anticipated losing two of those members imminently when their recess appointments expired at the end of the year. Effective December 28, 2007, the four sitting members of the Board—Members Liebman, Schaumber, Kirsanow, and Walsh—delegated all of the Board's powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow.[3] *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469, 471 (D.C. Cir. 2009), petition for cert. pending, No. 09-377 (filed Sept. 29, 2009). After the recess appointments of Members Kirsanow and Walsh expired three days later, remaining Members Liebman and Schaumber, acting as a two-member quorum, continued to exercise the powers the

[3] Also effective that day, the Board temporarily delegated to the General Counsel under Section 3(d) of the NLRA, 29 U.S.C. 153(d), full and final authority on behalf of the Board to initiate contempt proceedings for non-compliance with Board orders, to institute and conduct appeals to the Supreme Court, and to initiate and prosecute injunction proceedings, under Sections 10(e), (f) and (j) of the NLRA, 29 U.S.C. 160(e), (f) and (j). See Minute of Board Action (Dec. 20, 2007); NLRB, *Press Release No. R-2653, Labor Board Temporarily Delegates Litigation Authority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart* (Dec. 28, 2007) <http://www.nlrb.gov/shared_files/Press%20Releases/2007/R-2653.pdf>.

Board had delegated to the three-member group.[4] *Ibid.* Since January 1, 2008, that group, through its two-member quorum, has issued over 400 decisions.[5]

2. Section 7 of the NLRA, 29 U.S.C. 157, guarantees to employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 "necessarily encompasses the right [of employees] effectively to communicate with one another regarding self-organization." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 491 (1978); see *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 542-543 (1972). Section 8(a)(1) of the NLRA prohibits employers from "interfere[ing] with, restrain[ing], or coerce[ing] employees in the exercise of [their Section 7] rights." 29 U.S.C. 158(a)(1).

In enacting the NLRA, Congress "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice," but left to the Board "the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might

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[4] On July 9, 2009, the Senate received the President's nomination of Craig Becker, Mark Gaston Pearce, and Brian Hayes to be members of the National Labor Relations Board. 155 Cong. Rec. S7332 (daily ed. July 9, 2009).

[5] On May 4, 2009, it was reported that the two-member quorum of the group had issued approximately 400 decisions, published and unpublished. See Susan J. McGolrick, *Two Circuits Divide on Authority of Two-Member Board to Issue Rulings*, Daily Labor Rep. (BNA) No. 83, at AA-1. The published decisions and summary judgment rulings are reported and listed in 352 N.L.R.B. (146 decisions), 353 N.L.R.B. (132 decisions), and 354 N.L.R.B. (111 decisions as of November 27, 2009).

be charged as violative of its terms." *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798 (1945). Pursuant to that authority and its duty to protect "the right of employees to organize for mutual aid without employer interference," *ibid.*, the Board has articulated standards for assessing the legality of employer rules governing employee behavior in the workplace. Under the standards developed to implement Section 8(a)(1), an employer may not promulgate or enforce a rule of conduct that "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999); see *Cintas Corp.* v. *NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007) (employer's rule of conduct is overly broad in violation of Section 8(a)(1) when "employees would reasonably construe the [language of the rule] to prohibit Section 7 activity").

Consistent with the invalidation of overly-broad rules that would tend to deter exercise of Section 7 rights, the Board has long held that an employer violates the NLRA when it takes disciplinary action against an employee for violating such an unlawful rule. *Double Eagle Hotel & Casino*, 341 N.L.R.B. 112, 112 n.3 (2004) ("[W]here discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule."), enforced as modified, 414 F.3d 1249 (10th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

2. Petitioner is a temporary employment agency located in East Providence, Rhode Island, that supplies workers to clients in the natural gas and telecommunications industries, but pays those workers directly. Pet. App. 3. In July 2001, petitioner placed Jamison Dupuy as a right-of-way agent with El Paso Energy to assist

with the acquisition of land rights at a project in Massachusetts. *Ibid.* Before Dupuy's placement, petitioner required him to sign a temporary employment contract that included the following provision:

> Employee . . . understands that the terms of this employment, including compensation, are confidential to Employee and [petitioner]. Disclosure of these terms to other parties may constitute grounds for dismissal.

Id. at 3-4.

Subsequently, Dupuy complained to petitioner about repeated delays in receiving his paychecks from petitioner. Pet. App. 4. Dupuy expressed particular concern about the delays in payment because petitioner required him to pay up front for job expenses such as hotel bills and to seek reimbursement later. *Ibid.* An executive working for petitioner was unable to secure alternative arrangements for reimbursing Dupuy. *Ibid.*

In early October 2001, Dupuy raised additional job-related concerns directly with a project manager at El Paso Energy. Pet. App. 3-5. In the course of those conversations, Dupuy asked the project manager whether Dupuy could work for El Paso Energy through a different employment agency because petitioner was not paying him in a timely manner. *Id.* at 4. The project manager denied Dupuy's request, and gave him contact information for an agent of petitioner who might be able to resolve his pay issues. *Id.* at 4-5.

Dupuy directly involved El Paso Energy in his employment-related disputes a second time after petitioner reduced its reimbursement to Dupuy for work-related use of his personal computer. Pet. App. 5. Initially, Dupuy had been reimbursed $15 per day for com-

puter usage, which was treated as a nontaxable expense. *Ibid.* Petitioner later informed Dupuy that it was reducing the rate to $12 per day. *Ibid.* When Dupuy complained that El Paso Energy had authorized, and he had been billing, $15 per day for computer usage, petitioner's human-resources staff told him that it had reclassified the expense as taxable compensation, which increased petitioner's overhead costs and required an offsetting reduction in pay to Dupuy of $3 per day. *Ibid.* When Dupuy replied by email, he sent a copy to the project manager at El Paso Energy, asking El Paso Energy to "offset [the] surcharge and additional tax burden." *Ibid.*

On October 11, 2001, petitioner's executive vice president telephoned Dupuy and told him that, although petitioner had tried to accommodate Dupuy's requests, it was unable to do so and had decided to terminate Dupuy's employment. Pet. App. 6. When Dupuy pressed for the reason for his discharge, petitioner's executive replied that Dupuy had "not lived up to [his] end of the bargain with [petitioner]." *Ibid.* (first brackets in original). The executive later testified that he was referring to Dupuy's failure to comply with the confidentiality provision in his employment agreement. *Id.* at 7.

3. Dupuy filed an unfair labor practice charge on October 24, 2001, and an amended charge on December 17, 2001. Pet. App. 7. On January 16, 2002, the Board's general counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by maintaining an overly-broad confidentiality rule in its employment contract and by discharging Dupuy for violating that invalid rule. Pet. App. 7, 23. After holding a hearing, the administrative law judge (ALJ) issued a decision in June 2002 finding that peti-

tioner's confidentiality provision did not violate Section 8(a)(1), and dismissing the complaint. Pet. App. 27, 36-58. The ALJ found that, although petitioner's confidentiality rule restricted employees in exercising their right to discuss their terms and conditions of employment, petitioner had proffered a legitimate business justification for the rule that outweighed its burden on the exercise of employees' rights. *Id.* at 27, 50-57.

After the general counsel and charging party Dupuy filed exceptions to the ALJ's decision, the two-member Board quorum issued a decision in June 2008, reversing the ALJ's decision and finding that petitioner's confidentiality provision was unlawful. Pet. App. 22-35. The Board applied its recent decision in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004), which applied the *Lafayette Park* rule and was issued after the ALJ issued his decision in this case. Pet. App. 27-28. In *Lutheran Heritage*, the Board explained that, in assessing the validity under Section 8(a)(1) of a employer's rule, it engages in a two-step inquiry. 343 N.L.R.B. at 646-647. First, the Board stated that a rule that "*explicitly* restricts activities protected by Section 7" violates Section 8(a)(1). *Id.* at 646. Second, the Board explained that a rule that does not explicitly restrict Section 7 activity will nevertheless violate Section 8(a)(1) if any one of the following is true of the rule: "(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." *Id.* at 647. See *Guardsmark, LLC* v. *NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007). Applying the second prong of that two-step inquiry, the Board determined in this case that petitioner's employees would reasonably construe the confi-

dentiality provision as prohibiting them from discussing the terms and conditions of their employment with union representatives. Pet. App. 27-28.

Based on its finding that petitioner's confidentiality rule was unlawful, the Board concluded that petitioner's discharge of Dupuy for failing to comply with the rule violated Section 8(a)(1) because it was concededly based on the invalid rule. Pet. App. 29. The Board ordered petitioner to rescind its overly-broad rule and to notify employees of the rescission. The Board also ordered petitioner to offer reinstatement to Dupuy and to make him whole for losses suffered as a result of petitioner's unlawful conduct. *Id.* at 31-34.

4. Petitioner filed a petition for review of the Board's order in the United States Court of Appeals for the First Circuit, and the Board cross-applied for enforcement of its order. Pet. App. 1-2. Petitioner challenged the authority of the two-member quorum of the delegee group to issue the decision and order, and disputed the Board's finding that petitioner had engaged in unfair labor practices by maintaining its confidentiality provision and by firing Dupuy. *Id.* at 10-21. The court of appeals enforced the Board's order and denied petitioner's petition for review. *Id.* at 2, 21.

On the question of the Board's authority to operate with its two remaining members, the court of appeals held that Section 3(b) of the NLRA, 29 U.S.C. 153(b), allows the NLRB to continue to function when its two remaining members constitute a two-member quorum of a three-member group to which the Board had validly delegated its powers. Pet. App. 10-14. The court explained that Section 3(b) "allowed the Board to delegate all of its powers to a three-member group," and that the subsequent "vacancy, which left the two-member quo-

rum remaining, may not, under the terms of section 3(b), impair the right of the two-member quorum to exercise all powers of the Board." *Id*. at 12.

Turning to whether petitioner's confidentiality rule violated Section 8(a)(1), the court of appeals upheld the Board's application of *Lutheran Heritage* and *Lafayette Park* to find that the confidentiality provision would reasonably tend to chill employees' exercise of their Section 7 rights. Pet. App. 14-19. The court found that the Board's determination that the language of the confidentiality provision "could be fairly read to extend to disclosure of terms of employment to union representatives" was "supportable," noting that the "precise subject matter of the forbidden disclosure—terms of employment, including compensation—went to a prime area of concern under Section 7." *Id.* at 17. The court also found the Board's interpretation to be consistent with its prior cases. *Id*. at 17-18 (citing *Cintas Corp.*, 344 N.L.R.B. 943, 943 (2005), enforced, 482 F.3d 463 (D. C. Cir. 2007)).

The court of appeals rejected petitioner's contention that the Board could not find a violation of Section 8(a)(1) without evidence either that petitioner actually enforced the rule to prevent employees from discussing terms and conditions of employment among themselves or that the rule had, in fact, chilled union activity. Pet. App. 15-16. The court also rejected petitioner's argument that this Court's decision in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945), required the Board to find that petitioner's rule was justified by legitimate business reasons. Pet. App. 18.

The court of appeals also upheld the Board's finding that petitioner's discharge of Dupuy for failing to comply with the unlawful confidentiality rule was itself unlawful. Pet. App. 19-21. As the court explained, "[u]n-

der the Board's precedent, where the Board finds an employer rule is invalid, discharge for violating that rule is invalid." *Id.* at 19-20 (citing *Saia Motor Freight Line, Inc.*, 333 N.L.R.B. 784, 785 (2001); *Double Eagle Hotel & Casino*, 341 N.L.R.B. 112).

ARGUMENT

1. In its first question presented, petitioner asks this Court to decide whether Section 3(b) of the NLRA authorizes the NLRB to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that included the two remaining members. On November 2, 2009, this Court granted the petition for a writ of certiorari presenting the same question in *New Process Steel, L.P.* v. *NLRB*, No. 08-1457 (*New Process*). The Court therefore should hold the petition in this case pending its resolution of *New Process* and then dispose of the petition accordingly with respect to the first question presented.

2. In its second and third questions presented, petitioner challenges the Board's substantive unfair labor practices determinations. Because the court of appeals' decision affirming the Board's finding of unfair labor practices was correct and does not conflict with any decision of this Court or any other court of appeals, further review is not warranted. Thus, regardless of how the Court disposes of the first question presented in light of its decision in *New Process*, the Court should deny the petition as to the second and third questions presented.

a. Petitioner argues (Pet. 13-19) that, in finding that petitioner's confidentiality rule was overly broad in violation of Section 8(a)(1) of the NLRA, the Board "abandoned" the balancing test it claims this Court mandated

in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945), and departed from the governing Board precedent set forth in *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), and *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004). Further review of that argument is not available, however, because petitioner failed to raise it before the Board, and that failure deprived both the court of appeals and this Court of jurisdiction to consider it. Section 10(e) of the NLRA, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This Court has strictly construed that provision, holding that Section 10(e) is a jurisdictional bar when an issue has not been presented to the Board, and that the failure to present an issue to the Board precludes subsequent judicial consideration of the issue. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

That rule applies even where, as here, a party's first opportunity to present an argument to the Board would be in a motion for reconsideration after the Board issues its decision. *Woelke & Romero Framing, Inc.*, 456 U.S. at 665-666; *International Ladies' Garment Workers' Union*, 420 U.S. at 281 n.3. Although the ALJ applied a balancing test of the sort petitioner advocates in finding that petitioner's business justification for its confidentiality rule outweighed the rule's infringement of employee's Section 7 rights, Pet. App. 56-57, the Board reversed the ALJ under the rule articulated in *Lafayette Park* and *Lutheran Heritage*, *id.* at 14-19. After the

Board's decision issued, petitioner had the right to file a motion for reconsideration by the Board on the grounds asserted in its petition before this Court—namely, that the Board's decision constituted an impermissible departure both from the balancing test it alleges this Court required in *Republic Aviation* and from the Board's decisions in *Lafayette Park* and *Lutheran Heritage*. Petitioner has not identified any "extraordinary circumstances" that would excuse its failure to raise those issues to the Board. Accordingly, this Court is jurisdictionally barred from considering them.

It is true that the Board did not argue to the court of appeals that Section 10(e), combined with petitioner's failure to present its arguments to the Board, deprived the court of jurisdiction to consider petitioner's argument that the Board departed from this Court's decision in *Republic Aviation*. That failure does not preclude the Board from relying on Section 10(e) now, however; because Section 10(e)'s bar is jurisdictional, the Board may raise it for the first time before this Court. See *May Dep't Stores Co.* v. *NLRB*, 326 U.S. 376, 386 n.5 (1945) (Section 10(e) authorizes "[t]his Court * * *, *sua sponte*, to appraise the record to determine the power of the Circuit Court to review" issues presented to this Court); see also *Woelke & Romero Framing, Inc.*, 456 U.S. at 665-666.

b. In any event, even if this Court were not jurisdictionally barred from considering petitioner's arguments, those arguments do not merit further review because the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Petitioner asserts (Pet. 13-16) that the Board and the court of appeals abandoned the approach of this Court's

decision in *Republic Aviation*. In that case, the Court stated:

> These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

324 U.S. at 797-798.

The test articulated in *Lafayette Park* and further explicated in *Lutheran Heritage* inquires whether an employer's rule "would reasonably tend to chill" activity protected under Section 7 because employees "would reasonably construe" the language of the rule to prohibit such activity. *Lafayette Park*, 326 N.L.R.B. at 825; *Lutheran Heritage*, 343 N.L.R.B. at 647. As petitioner apparently acknowledges (Pet. 14-17), the Board's development and articulation of that test faithfully implements the role this Court envisioned for the Board in *Republic Aviation* by balancing the competing legitimate interests of employers and employees. Indeed, the Board specifically recognized in *Lafayette Park* that, consistent with *Republic Aviation*, the Board's policies concerning employer workplace rules must "work[] out an adjustment" between Section 7 rights and "the equally undisputed right of employers to maintain discipline in their establishments." *Lafayette Park*, 326

N.L.R.B. at 825 (quoting *Republic Aviation*, 324 U.S. at 797-798). Thus, the *Lafayette Park* inquiry itself integrates both the right of employees to discuss their terms of employment and the substantial and legitimate interest of employers in maintaining the confidentiality of private information.

Opting not to challenge the validity of the test articulated in *Lafayette Park* and *Lutheran Heritage*, petitioner instead asks (Pet. 16-19) this Court to review the Board's application of that test to the facts of this case, asserting that the Board was required to find that petitioner's rule actually chilled employees in the exercise of their rights under Section 7. But petitioner's argument is misplaced. As one court of appeals explained in rejecting an identical argument, "[t]he Board is merely required to determine whether 'employees *would reasonably* construe the [challenged] language to prohibit Section 7 activity,' * * * and not whether employees *have* thus construed the rule." *Cintas Corp.* v. *NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) (citations omitted). Petitioner cannot identify any decision from this Court or from any other court of appeals that would require the Board to find that an overly-broad rule that is reasonably likely to chill employees in the exercise of their Section 7 rights has actually prevented employees from exercising those rights before it may conclude that the rule violates Section 8(a)(1).[6]

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[6] Petitioner argues (Pet. 16-17) that *Lutheran Heritage* requires an evidentiary showing that an employer actually applied an overly-broad rule to conduct protected by Section 7. But petitioner misconstrues the quoted language from *Lutheran Heritage*, which discussed the validity of an employer's rule "prohibiting 'abusive or profane language.'" 343 N.L.R.B. at 647 (citation omitted). The Board determined that the rule in question did not violate Section 8(a)(1) in that case because "there

c. Further review of petitioner's argument (Pet. 20-21) that the court of appeals erred in concluding that petitioner violated the NLRA by disciplining Dupuy for violating its unlawful confidentiality rule is also not warranted. Petitioner challenges the Board's application in this case of its rule that an employer's discharge of an employee for that employee's failure to comply with a rule that itself violates Section 8(a)(1) is also unlawful. Petitioner claims that such a discharge cannot be unlawful where the activity in which the employee actually engaged was not protected by Section 7. But petitioner misunderstands the policy underlying the Board's rule. By prohibiting employers from discharging an employee for failing to comply with a rule that is itself unlawful under Section 8(a)(1), regardless of whether the employer could have validly prohibited the employee's behavior with a different rule, the Board ensures that employees are not deterred in the exercise of their rights out of fear that they might be disciplined for violating the invalid rule. See *Double Eagle Hotel & Casino* v. *NLRB*, 414 F.3d 1249, 1258 (10th Cir. 2005) (the Board's policy "reduces the chilling effect that results from imposition of overbroad rules"), cert. denied, 546 U.S. 1170 (2006); *Jeannette Corp.* v. *NLRB*, 532 F.2d 916, 920 (3d Cir. 1976) (holding that a rule that is invalid on its face under Section 8(a)(1) "cannot be enforced" and an employee's discharge for violating the rule "cannot be sustained" regardless of whether the employee was engaged in protected, concerted activity).[7]

[was] no basis for a finding that a reasonable employee would interpret a rule prohibiting such language as prohibiting Section 7 activity." *Ibid.*

[7] Petitioner's reliance (Pet. 21) on *Yesterday's Children, Inc.* v. *NLRB*, 115 F.3d 36 (1st Cir. 1997), is misplaced. That case did not involve application of an overly-broad employer rule that would reason-

Regardless of the validity of the Board's rule, its application of that rule in this case does not warrant further review because petitioner fails to identify any decision of this Court or of any other court of appeals that conflicts with the decision below.[8]

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ably tend to chill employees' protected conduct. Rather, that case involved an employer's disciplining an employee for engaging in particular conduct—making a personal call during working hours—and the court of appeals noted that the Board should have determined whether that conduct was protected activity under Section 7. That case has no application where, as here, the Board correctly found that an employer rule itself violates Section 8(a)(1).

[8] Nor is review warranted of petitioner's further argument (Pet. 21-22) that the court of appeals' enforcement of the Board's reinstatement and backpay order conflicts with Section 10(c) of the NLRA, 29 U.S.C. Section 160(c), which provides that the Board shall not require reinstatement or backpay if an individual was discharged for cause. Even if the Court were not jurisdictionally barred from considering that argument under Section 10(e), 29 U.S.C. 160(e), due to petitioner's failure to raise it before the Board, see pp. 13-14 *supra*, petitioner essentially asks this Court to make a factual finding that it discharged Dupuy for cause. But petitioner concedes (Pet. 8) that it discharged Dupuy for violating the invalid rule, and that was the only reason it gave for his discharge. Under longstanding Board precedent, an employer who disciplines an employee pursuant to an overly-broad rule can justify the discharge by demonstrating that the employee interfered with the employer's business operations, "and that this rather than violation of the rule was the reason for the discharge." *Miller's Discount Dep't Stores*, 198 N.L.R.B. 281, 281 (1972), enforced on other grounds, 496 F.2d 484 (6th Cir. 1974). Petitioner made no such demonstration.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the Court's disposition of *New Process Steel, LP* v. *NLRB*, cert. granted, No. 08-1457 (Nov. 2, 2009), and then be disposed of accordingly. With respect to the second and third questions presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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