

Nos. 15-1245, 15-1309

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BANNER HEALTH SYSTEM, d/b/a  
BANNER ESTRELLA MEDICAL CENTER**

**Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

**A. Parties and Amici**

Banner Health System, d/b/a/ Banner Estrella Medical Center (“Banner”) is the petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. Association of Corporate Counsel and American Hotel & Lodging Association, et al., are amici in support of petitioner.

## **B. Rulings Under Review**

This case is before the Court on Banner's petition to review a Board Order issued on June 26, 2015, and reported at 362 NLRB No. 137. The Board seeks enforcement of that Order against Banner.

## **C. Related Cases**

The case on review was previously before this Court in *Banner Health System v. NLRB*, Case Nos. 12-1359, 12-1377, which was dismissed and remanded upon the Board's motion. Board counsel is unaware of any related cases pending in this Court or any other court.

/s/Linda Dreeben

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Dated at Washington, DC  
this 22nd day of June, 2016

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## **GLOSSARY**

Act            National Labor Relations Act

Board        National Labor Relations Board

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Banner Health System, d/b/a Banner Estrella Medical Center (“Banner”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued on June 26, 2015, and reported at 362 NLRB No. 137. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor

Relations Act (“the Act”). 29 U.S.C. § 160(a). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides that petitions for review of final Board orders may be filed in this Court and allows the Board, in that circumstance, to cross-apply for enforcement. The petition and application were both timely, as the Act provides no time limits for such filings.

### **STATEMENT OF THE ISSUE**

Does substantial evidence support the Board’s finding that Banner violated Section 8(a)(1) of the Act by (1) including a provision in its Confidentiality Agreement that restricts employees’ discussions of terms and conditions of employment, and (2) maintaining a categorical policy of requesting confidentiality from employees in certain types of workplace investigations without an individualized determination that such confidentiality is necessary?

### **RELEVANT STATUTORY PROVISIONS**

Relevant statutory provisions appear in the Addendum to this brief.

### **STATEMENT OF THE CASE**

#### **I. PROCEDURAL HISTORY**

Acting on an unfair-labor-practice charge filed by employee James Navarro, the Board’s Acting General Counsel issued a complaint alleging that Banner violated the Act. During the course of a hearing before an administrative law

judge, the General Counsel amended the complaint to include allegations that Banner violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by maintaining an overly broad Confidentiality Agreement and workplace-investigation confidentiality policy that prohibited employees from discussing terms and conditions of employment. After the hearing, the judge issued a decision and recommended order finding a provision of the Confidentiality Agreement unlawful, and recommending dismissal of the other allegations.

On July 30, 2012, a three-member panel of the Board (Members Griffin and Block; Member Hayes, dissenting in part) affirmed the judge's rulings and conclusions in part and adopted the judge's recommended order in part, but reversed to find the workplace-investigation policy unlawful. 358 NLRB 809 (2012). Banner petitioned the Court for review of that order and the Board sought enforcement (D.C. Cir. Nos. 12-1359, 12-1377). On January 25, 2013, the Court placed the case in abeyance in light of its opinion in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). On June 26, 2014, the Supreme Court held in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), that three recess appointments to the Board in January 2012 were invalid, including the appointments of Members Griffin and Block. On August 1, 2014, this Court, granting the Board's motion, vacated the 2012 Decision and Order and remanded the case to the Board for further consideration in light of *Noel Canning*.

On June 26, 2015, a properly constituted Board panel (Members Hirozawa and McFerran; Member Miscimarra, dissenting in part) issued the Decision and Order (362 NLRB No. 137) now before the Court, adopting the judge's findings and conclusions as to the Confidentiality Agreement and also finding that Banner's workplace-investigation policy violated Section 8(a)(1) of the Act.<sup>1</sup>

## **II. THE BOARD'S FINDINGS OF FACT**

Banner operates a hospital providing inpatient and outpatient care in Phoenix, Arizona. (JA 34; JA 73, 78.)<sup>2</sup>

### **A. Banner Employees Must Sign a Confidentiality Agreement**

Upon hire, every Banner employee must sign a Confidentiality Agreement. (JA 36; JA 47.) The Confidentiality Agreement lists the following as “[e]xamples of confidential information”:

- Patient information both medical and financial
- Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee.
- Business information that belongs to Banner or those with whom we work including:
  - Copyrighted computer programs

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<sup>1</sup> The Board also affirmed the judge's dismissal of other allegations, which are not at issue in this appeal.

<sup>2</sup> “JA” citations are to the Joint Appendix. References preceding a semicolon are to the Board's findings; cites following a semicolon are to supporting evidence. “Br.” cites are to Banner's opening brief to the Court, “ACC Br.” cites to the amicus brief of the Association of Corporate Counsel, and “AHLA Br.” cites to the amicus brief of the American Hotel and Lodging Association, et al.

- Business and strategic plans
- Contract terms, financial cost data and other internal documents

(JA 36; JA 86.) The Confidentiality Agreement informs employees that “[k]eeping this kind of information private and confidential is **so important** that if I fail to do so, I understand that I could be subject to corrective action, including termination and possibly legal action.” (JA 36; JA 86.) By signing, the employee promises to “[k]eep[] this kind of information private and confidential” and to “use confidential information only as needed to do my job,” as well as not to “access patient or employee information that is not needed to do my job” or to “share confidential information in a careless manner.” (JA 36; JA 86.)

**B. Banner Requests Confidentiality From Employees During Certain Categories of Workplace Investigations**

Banner’s human-resources personnel use an Interview of Complainant form, which bears Banner’s corporate title and logo, when conducting employee interviews in the course of a workplace investigation. (JA 9; JA 49-50, 81.) The form lists six prompts for the interviewer under the heading “[i]ntroduction for all interviews,” including the following:

- This is a confidential interview and I will keep our discussion confidential except as require[d] by law, or Banner policy or as necessary to conduct this investigation. I ask you not to discuss this with your coworkers while this investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors.

(JA 9; JA 81.) Another statement advises the interviewee that “[a]ny attempt to influence the outcome of the investigation, any retaliation against anyone who participates, any provision of false information or failure to be forthcoming can be the basis for corrective action up to and including termination.” (JA 9; JA 81.)

Human Resources consultant JoAnn Odell requested confidentiality pursuant to the Interview of Complainant form in approximately six interviews during her first thirteen months at Banner. (JA 9; JA 46, 50.) She made such requests in particular types of investigations that she considered sensitive, including investigations into allegations of sexual harassment, hostile work environment, abuse, or “something like that.” (JA 9, 11; JA 65-66.)

### **III. THE BOARD’S CONCLUSIONS AND ORDER**

On June 26, 2015, the Board (Members Hirozawa and McFerran; Member Miscimarra, dissenting in part) issued a Decision and Order finding unanimously that Banner violated Section 8(a)(1) of the Act by including the “employee information” provision in its Confidentiality Agreement. The Board majority also found that Banner violated Section 8(a)(1) by maintaining and applying a policy of requesting employees not to discuss ongoing investigations of employee misconduct. The Board’s Order requires Banner to cease and desist from maintaining or enforcing both policies. Affirmatively, the Order directs Banner to rescind the Confidentiality Agreement’s “employee information” provision, advise

employees in writing of the change, and post a remedial notice at all facilities where it utilizes the Confidentiality Agreement.

### STANDARD OF REVIEW

The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Court also "applies the familiar substantial evidence test to the Board's . . . application of law to the facts" and "accords due deference to the reasonable inferences that the Board draws from the evidence." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Under that standard, "the Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Bally's Park Place*, 646 F.3d at 935 (internal quotations omitted).

The Court "defer[s] to the Board's reasonable interpretations of the [Act]," *Hyundai America Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 313 (D.C. Cir. 2015), including as to the scope of Section 7, *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984). The Court also will "defer to the Board's policy choice[s]" that are based on such reasonable interpretations. *Local 702, IBEW v. NLRB*, 215 F.3d 11, 17 (D.C. Cir. 2000). When, as here, a case involves the balancing of workplace interests, "[i]t is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and

the invasion of employee rights in light of the Act and its policy.” *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)).

The Board’s “broad discretionary power . . . to fashion remedies” is “subject to quite limited judicial review.” *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 34 (D.C. Cir. 2001). The Court “will alter [the Board’s] remedial decisions only if it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 380 (D.C. Cir. 2007) (internal quotations omitted).

### **SUMMARY OF ARGUMENT**

Banner violated the Act by maintaining two overly broad confidentiality policies that interfere with its employees’ right to discuss terms and conditions of employment. Substantial evidence supports the Board’s finding that Banner restricts Section 7 rights by prohibiting, in its Confidentiality Agreement, the discussion of “employee information.” The Confidentiality Agreement is unlawfully overbroad in that it expressly defines “confidential information” to include salaries and discipline, and conditions the discussion of such information on its disclosure by other employees.

Similarly supported in the record is the Board’s finding that Banner unlawfully interferes with its employees’ right to discuss workplace investigations.

Banner maintains a broad, categorical policy of requesting confidentiality in certain types of investigations without any individualized determination that confidentiality is necessary. Banner's subjective understanding of the scope of the policy does not render it lawful, as employees would not be aware of such purported limits. Moreover, the Board's case-by-case framework for evaluating such policies recognizes employers' interests in confidentiality while also accommodating the competing interest of employees in exercising their Section 7 rights. Banner's and amici's contrary arguments consist largely of challenges to the Board's factual findings and policy choices, as well as arguments that were not raised to the Board and thus are not properly before the Court.

Finally, the Board did not abuse its broad remedial discretion in ordering notice posting at all facilities where Banner utilizes its Confidentiality Agreement. The scope of the remedy is commensurate with the violation, and the Court has consistently enforced similar Board orders in such situations.

## ARGUMENT

### **Banner Violated Section 8(a)(1) by Maintaining Two Overbroad Workplace Confidentiality Policies That Restrict Employees' Right To Discuss Terms and Conditions of Employment**

Through two workplace confidentiality policies, Banner limits its employees' ability to communicate with each other regarding terms and conditions of employment. Because communication between employees is a foundational form of concerted activity and a cornerstone of the right to organize, Banner's policies interfere with employees' exercise of their rights under the Act. Banner's proffered justifications for its broad policies are either insufficient on the merits or not properly before the Court.

#### **A. An Employer Violates the Act By Maintaining a Work Rule That Restricts Employees' Section 7 Rights**

Section 7 of the Act guarantees employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Because of "the importance of freedom of communication to the free exercise of organization rights," *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972), Section 7 protects an employee's "right to discuss the terms and conditions of her employment with other employees," *Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007), as well as "the terms of employment of [her] fellow employees," *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, 2014 WL 3919910, at \*16 (2014).

An employer commits an unfair labor practice in violation of Section 8(a)(1) of the Act through conduct that “interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. § 158(a)(1). Accordingly, an employer violates Section 8(a)(1) by maintaining a rule or policy that “would reasonably tend to chill employees in the exercise of their statutory right[]” to communicate with fellow employees, including rules that explicitly restrict such activity, or that employees could reasonably construe as doing so. *Hyundai*, 805 F.3d at 313 (internal quotations omitted); *see also Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004). “[M]ere maintenance” of such policies violates the Act, even without evidence of enforcement. *Cintas Corp.*, 482 F.3d at 467-68 (internal quotations omitted).

Whether a rule reasonably would tend to restrict Section 7 rights is an objective standard, and does not depend on how the employer interprets the rule or whether any employee actually refrained from exercising Section 7 rights as a result of it. *Cintas Corp.*, 482 F.3d at 467; *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). The focus instead is on the text of the policy and the context in which it appears. *Cintas Corp.*, 482 F.3d at 467, 469-70. Any ambiguity is construed against the employer, *Lafayette Park Hotel*, 326 NLRB at 828, as “employees should not have to decide at their own peril what . . . is not lawfully subject to such a prohibition,” *Hyundai America*

*Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011), *enforced in relevant part*, 805 F.3d 309 (D.C. Cir. 2015).

To maintain a rule that employees reasonably could construe as restricting Section 7 rights, the employer must show a “legitimate and substantial business justification” that outweighs employees’ interest in exercising those rights. *Waco, Inc.*, 273 NLRB 746, 748 (1984). Moreover, the rule must be tailored to serve the employer’s interest; even if legitimate, that interest will not outweigh the burden on Section 7 rights if “[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient.” *Cintas Corp.*, 482 F.3d at 470; *see also Guardsmark*, 475 F.3d at 380 (explaining that an employer “ha[s] an obligation to demonstrate its inability to achieve [its] goal with a more narrowly tailored rule that would not interfere with protected activity”).

**B. Banner’s Confidentiality Agreement Unlawfully Restricts Employees’ Section 7 Right to Discuss Terms and Conditions of Employment**

Substantial evidence supports the Board’s finding (JA 37) that the “employee information” provision in Banner’s Confidentiality Agreement reasonably would tend to interfere with employees’ right to discuss terms and conditions of employment. With its overbroad definition of “confidential” and the condition it imposes on such discussions, the provision runs afoul of Section

8(a)(1)'s prohibition on work rules that restrict—or reasonably could be construed to restrict—employees' right to communicate.

An employer cannot lawfully forbid employees from discussing information otherwise protected by Section 7 simply by labeling that information “confidential.” Work rules prohibiting discussion of confidential information are unlawful if they define “confidential” so broadly as to cover terms and conditions of employment. *See, e.g., Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (unlawful rule “specifically define[d] confidential information to include wages and working conditions such as disciplinary information”), *enforced*, 414 F.3d 1249 (10th Cir. 2005); *see also Flex-Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 207, 209-10 (5th Cir. 2014) (unlawful rule defined confidential information to include “personnel information”); *cf. Bigg's Foods*, 347 NLRB 425, 436 (2006) (distinguishing invalid confidentiality rule from valid one on the grounds that the former “specifically mentions salaries”). Instead, “it is the responsibility of the [employer] to specifically define such information in a fashion that will clearly not include those matters that employees are entitled under the Act to discuss.” *Hyundai*, 357 NLRB at 871 n.12; *see also Cintas Corp.*, 482 F.3d at 469 (emphasizing that employer “made no effort in its rule to distinguish section 7 protected behavior from violations of company policy”).

The prohibition on rules that restrict discussion of terms and conditions of employment covers rules that “deny [employees] the use of information innocently obtained” about such topics, including policies that condition discussion of other employees’ employment terms on those employees’ active disclosure or express permission. *Labinal, Inc.*, 340 NLRB 203, 210 (2003). In *Labinal*, for example, the Board found invalid a prohibition on discussing fellow employees’ wages without those employees’ “knowledge or permission.” 340 NLRB at 209-10. The employer applied that rule against an employee who told fellow employees that a coworker who performed the same job received a higher salary, a fact that she learned indirectly after the coworker opened a paystub in front of her. *Id.* at 204. Such policies interfere with Section 7 activity, because employees have the right to discuss “the terms of employment of their fellow employees, even those who don’t wish to personally discuss it.” *Fresh & Easy Neighborhood Market*, 2014 WL 3919910, at \*16.

As the Board found (JA 37), Banner’s Confidentiality Agreement “could reasonably be construed to prohibit Section 7 activity,” and thus violates Section 8(a)(1). It expressly defines confidential information to include “employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee,” and prohibits employees’ use of and ability to share such information on pain of termination or legal action. (JA 86.) Such an overbroad definition of

“confidential” renders the rule unlawful. *Flex-Frac Logistics*, 746 F.3d at 209-10; *Bigg’s Foods*, 347 NLRB at 436; *Double Eagle Hotel & Casino*, 341 NLRB at 115.<sup>3</sup>

Further, the Confidentiality Agreement’s prohibition on discussing salary or discipline information “not shared by the employee” unlawfully conditions the exercise of Section 7 rights. Like the rule in *Labinal* prohibiting discussion of an employee’s wages without his “knowledge or permission,” the Confidentiality Agreement’s disclosure requirement would “deny [employees] the use of information innocently obtained” but not voluntarily disclosed. 340 NLRB at 210. As in *Labinal*, *id.* at 204, a Banner employee challenging disparate pay who learned another employee’s salary because the second employee left his paycheck in a common area would not be allowed to discuss that information. Nor could he talk to coworkers about his observation of another employee being unfairly disciplined. Indeed, the only way that a Banner employee could ensure that such

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<sup>3</sup> Because the Confidentiality Agreement specifically lists “salaries, disciplinary action, etc.” as “[e]xamples of confidential information,” Banner is simply incorrect in asserting (Br. 36) that the “Agreement does not define what ‘confidential information’ is.” Banner’s reliance (Br. 36-37, 40) on *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003), is thus misplaced, as the rule in that case referred generally to “confidential information concerning patients or employees” without further definition; under those circumstances, the Court found that employees would understand the rule to cover only information learned in confidence, and not to apply to working conditions.

information had been shared—and thus could be discussed—was if he asked the other employee for it directly. In that way, as the Board found (JA 37), the Confidentiality Agreement—like the rule in *Labinal*—“requires an employee to get permission from another employee to discuss the latter’s wages and discipline.”

Banner seeks to distinguish *Labinal* by contending (Br. 38-39) that the Confidentiality Agreement does not require permission because an employee could discuss salary or discipline information that she overhears. But that qualification is not clear from the rule itself. Whether “shared” means affirmatively provided to the employee who wishes to discuss it or simply disclosed to anyone is, at best, ambiguous, and ambiguities are construed against Banner. *Lafayette Park Hotel*, 326 NLRB at 828. Banner employees “should not have to decide at their own peril” whether they can discuss salary or discipline information not shared directly with them. *Hyundai*, 357 NLRB at 871.<sup>4</sup> In addition, Banner’s claim (Br. 38) that it harbored no hostility towards protected activity is not a relevant distinction with

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<sup>4</sup> Banner relies (Br. 38-39) on testimony from Human Resources consultant Odell about how she understood the Confidentiality Agreement, but, without any evidence that Odell shared her understanding with employees, it has no bearing on the rule’s legality; the focus is on how reasonable employees would view the Confidentiality Agreement, not what Banner subjectively thought about the scope of the rule. *Hyundai*, 805 F.3d at 313; *Lafayette Park Hotel*, 326 NLRB at 828. Moreover, Odell’s testimony on the point is inconsistent. Odell first testified that an employee who overheard a conversation about discipline would be restricted from discussing that information and would violate the Confidentiality Agreement by doing so. (JA 67.) She later stated that an employee who overheard wage information could discuss it. (JA 68-69.)

*Labinal*; a rule can violate Section 8(a)(1) regardless of the employer's motive for maintaining it. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

Banner's other arguments in defense of its rule are unmoored from the record. The Confidentiality Agreement is not, as Banner suggests (Br. 40), limited to "sensitive patient information." It specifically lists employee information as a separate category of confidential information from patient information. (JA 86.) Banner also contends (Br. 39-40, 42) that the Confidentiality Agreement prohibits employees from discussing only employee information that they "acquire in performing their jobs," but that limit is not found in the Confidentiality Agreement itself. An employee reading the document would not be aware of Banner's subjective understanding, and the record contains no evidence that Banner ever told employees of it.<sup>5</sup>

Finally, Banner contends (Br. 40-42) for the first time on appeal that the Confidentiality Agreement is justified by Banner's business interest in avoiding liability for disclosure of patient medical records, discrimination complaints,

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<sup>5</sup> Nor would Banner's narrow interpretation necessarily render the Confidentiality Agreement lawful, as it is a vague standard that reasonably could be construed to restrict discussion of any information learned in the workplace. Indeed, the Board has found rules prohibiting "[d]isclosure of confidential information gained through your employment," *Carney Hosp.*, 350 NLRB 627, 644-45 (2007), and discussion of information about employees learned "[d]uring the course of your employment," *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1015, 1018 (2001), to violate Section 8(a)(1).

financial records, and employee social-security numbers. Banner did not argue to the Board that the “employee information” provision of the Confidentiality Agreement was needed to comply with anti-disclosure laws. Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board . . . shall be considered by the court” absent “extraordinary circumstances.” 29 U.S.C. § 160(e); *see also New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011) (“[S]ection 10(e) prevents us from considering the argument raised for the first time on appeal.”).<sup>6</sup> Banner identifies no such circumstances for its failure to raise the issue to the Board.

In any event, a rule restricting discussion of salaries and discipline does not serve Banner’s proffered interest. Banner could craft a narrower rule that specifically covers information like social-security numbers without also covering terms and conditions of employment; as in *Cintas Corp.*, 482 F.3d at 470, “[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company’s presumed interest in protecting confidential information.”

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<sup>6</sup> The only argument that Banner made to the Board regarding its interest in the Confidentiality Agreement was that it “has a legitimate business interest in ensuring its employees do not disclose private and confidential information obtained solely as part of job responsibilities.” (JA 88-90.) Banner did not elaborate on the nature of that interest, and it is too late to do so now.

In sum, the Confidentiality Agreement's overbroad definition of "confidential" and restriction on the use of information innocently obtained render its prohibition on discussion of "employee information" unlawful. Banner's penchant for overbroad confidentiality policies also extends to its approach to workplace investigations.

**C. Banner's Categorical Policy of Requesting Confidentiality in Workplace Investigations Unlawfully Restricts Employee Discussion of Terms and Conditions of Employment**

Substantial evidence supports the Board's finding (JA 9-11) that Banner maintains a categorical policy of requesting confidentiality during particular types of workplace investigations, and the Board reasonably found that such a policy interferes with employees' Section 7 rights in violation of Section 8(a)(1) of the Act. Banner's arguments to the contrary consist largely of challenges to the Board's factual findings and policy choices that are insufficient to overcome the significant deference afforded the Board on such matters, as well as arguments not raised before the Board that are thus not properly before the Court.

**1. Employers Must Justify Confidentiality Requests on a Case-by-Case Basis**

A work rule "prohibiting employees from revealing information about matters under investigation . . . clearly limit[s] employees' § 7 rights to discuss their employment," and thus can violate Section 8(a)(1). *Hyundai*, 805 F.3d at 314; *see also Inova Health Sys. v. NLRB*, 795 F.3d 68, 85 (D.C. Cir. 2015)

("[E]mployees have a protected right to discuss . . . disciplinary investigations with fellow employees."); *Caesar's Palace*, 336 NLRB 271, 272 (2001) (same). As with other workplace policies that interfere with Section 7 rights, "[a]n employer may prohibit such discussion only when a substantial and legitimate business justification outweighs the infringement on employees' rights." *Inova Health Sys.*, 795 F.3d at 85 (internal quotations omitted); *see also Hyundai*, 805 F.3d at 314; *Caesar's Palace*, 336 NLRB at 272 & n.6 (citing *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976)).

To meet its burden of justifying requests for confidentiality, an employer must show that confidentiality "was[] necessary based on events peculiar to" the particular investigation. *SNE Enters., Inc.*, 347 NLRB 472, 493 (2006), *enforced*, 257 F. App'x 642 (4th Cir. 2007). Specifically, an employer must, on a case-by-case basis, "determine[] that . . . corruption of its investigation would likely occur without confidentiality." *Hyundai*, 357 NLRB at 874. A blanket policy of requesting confidentiality in every investigation is thus unlawfully overbroad. *Hyundai*, 805 F.3d at 314. Likewise, an employer's stated reason for requesting confidentiality cannot be "broad and undifferentiated," *id.*, or "applied generically," *SNE Enters.*, 347 NLRB at 493.

The Board has consistently applied those principles to determine whether an employer's confidentiality policy violated the Act. In *Caesar's Palace*, for

example, the Board found a confidentiality instruction lawful when, “in the circumstances of th[e] case,” the employer’s proffered justification for doing so “outweigh[ed] the rule’s infringement on employees’ rights.” 336 NLRB at 272. Because of “allegations of a management coverup and possible management retaliation, as well as threats of violence,” the employer had a specific interest in confidentiality during its investigation into drug dealing and theft in the workplace. *Id.* at 271-72. Based on those particular circumstances, the employer imposed a confidentiality rule in order “to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated.” *Id.* at 272.

By contrast, the Board has found unlawful generalized confidentiality policies that lack any specific or contextual rationale. For example, the employer in *Hyundai* violated Section 8(a)(1) by maintaining a policy of requiring confidentiality “without any individual review to determine whether such confidentiality is truly necessary.” 357 NLRB at 874. Enforcing the Board’s decision, the Court noted that the employer’s stated interest in conducting confidential investigations to comply with anti-discrimination statutes and guidelines did not justify a ban on “discussions of *all* investigations, including ones unlikely to present these concerns.” 805 F.3d at 314. Similarly, the employer in *Phoenix Transit System*, 337 NLRB 510, 510, 513 (2002), *enforced*, 63 F. App’x 524 (D.C. Cir. 2003), violated Section 8(a)(1) by instructing employees who

complained of sexual harassment by a supervisor not to discuss their own complaints, even among themselves. After meeting with the employees, the employer also instructed them that the meeting itself was confidential. *Id.* at 513. The employer offered no explanation for the instructions, and set no time limit as to how long they would apply. *Id.* And the employer's confidentiality directive in *Mobil Oil Exploration & Producing, U.S., Inc.*, was not warranted because the employee being investigated already knew of the investigation; in such circumstances, the employer's purported need for confidentiality was "exceedingly minimal." 325 NLRB 176, 178 (1997), *enforced*, 200 F.3d 230 (5th Cir. 1999).

The Board's case-by-case approach for evaluating confidentiality policies accommodates competing interests and furthers the Board's goal of "striking the proper balance" between those interests "in light of the Act and its policy." *Fleetwood Trailer*, 389 U.S. at 378 (internal quotations omitted). That framework permits employers the flexibility to request confidentiality when it is truly needed, while preserving employees' right to discuss workplace investigations when it is not. The Board's approach also reasonably places the burden of establishing the need for confidentiality on the employer. As the Board discussed (JA 11, 13), the employer is the party with the most information regarding the nature of the particular investigation and the character of the workplace, and is thus best positioned to articulate whether confidentiality is necessary to ensure the

investigation's integrity. *Cf. Am. Girl Place New York*, 355 NLRB 479, 480 n.5 (2010) (explaining that "placing the burden of proof on the [employer] is . . . practical" when "the [employer] has superior access to the relevant evidence" (internal quotations omitted)).

In addition, an individualized policy as to when an employer asks for confidentiality minimizes the impact on Section 7 activity. A request for confidentiality without rationale, context, or clear scope reasonably would be interpreted broadly to restrict Section 7 rights. *See Security Walls, LLC*, 356 NLRB 596, 611 (2011) (unlawful instruction contained "no caveat" that it did not cover employees' own complaints); *Phoenix Transit Sys.*, 337 NLRB at 513 (noting that employer "gave no explanation for her instruction"). But a tailored approach makes clear to employees both the nature and scope of the employer's request. If employers present "an objectively reasonable basis for seeking confidentiality during a particular investigation," then "employees will better understand not only why nondisclosure is being requested, but also what matters are and are not appropriate for conversation." (JA 13.) Unlike a blanket or categorical approach, a tailored, case-by-case policy combats the risk of confidentiality creep that would chill more protected activity than necessary to serve the employer's interest.

## **2. Banner Maintains a Broad, Categorical Confidentiality Policy for Workplace Investigations**

The Board's finding that Banner requests confidentiality on a categorical basis without any individualized determination of its necessity is supported by substantial evidence in the record. Applying established principles, the Board explained (JA 10) that Banner's policy thus violates the Act because Banner fails to "proceed on a case-by-case basis" and does not offer "objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality." Such a policy reasonably tends to interfere with the exercise of Section 7 rights, and Banner's subjective understanding of its requests as limited in nature and scope does not render the policy lawful.

### **a. Banner Requests Confidentiality in Certain Types of Investigations Without an Individualized Determination of Its Necessity**

Substantial evidence supports the Board's finding (JA 11 & n.13) that Banner maintains a policy of "requesting employees not to discuss ongoing investigations of employee misconduct" in "certain categories of investigations." Banner's official Interview of Complainant form is used for "confidential investigation[s]," including those involving "complaint[s] of inappropriate behavior." (JA 81.) The form instructs investigators to read a prompt to interviewees stating, "I ask you not to discuss this with your coworkers while this investigation is going on." (JA 81.) Human Resources consultant Odell testified

that she requests confidentiality from employees using the Interview of Complainant form in particular types of investigations that she considers sensitive, such as claims of sexual harassment, hostile work environment, abuse, and matters “like that.” (JA 65-66.)

Like the blanket ban on discussing workplace investigations in *Hyundai*, 805 F.3d at 314, Banner’s approach to confidentiality does not involve an individualized determination that confidentiality is necessary in a particular investigation. No such practice is apparent from the Interview of Complainant form, which by its terms applies to “all interviews.” (JA 81.) And Odell’s categorical approach looks to the *type* of investigation rather than the individual investigation itself. Nor has Banner shown “objectively reasonable grounds for believing” (JA 10) that every investigation that falls into one of the categories that Odell identified will be compromised without confidentiality. Further, like the rule in *Phoenix Transit System*, 337 NLRB at 513, Banner’s confidentiality request provides the interviewee with no particularized explanation as to why confidentiality is being requested for that investigation; the stated reason for the request—“when people are talking it is difficult to do a fair investigation and separate facts from rumors” (JA 81)—is generic.<sup>7</sup>

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<sup>7</sup> Banner’s suggestion (Br. 16-17) that requesting confidentiality was simply Odell’s “personal practice” rather than a company policy is belied by the record. The Interview of Complainant form bears Banner’s official corporate logo, and

Banner's policy sweeps similarly broadly as to who is asked to maintain confidentiality. The Interview of Complainant form offers alternative wordings based on whether the investigation regards "a complaint" or "your complaint." (JA 81.) The request for confidentiality thus is made to employees who—like in *Phoenix Transit System*, 337 NLRB at 510—brought the complaint that instigated the investigation, as well as to other interviewees.

The Court has no jurisdiction to review Banner's contention (Br. 18-20) that the Board's finding of an unlawful categorical confidentiality policy was not litigated and denied Banner due process. Banner did not raise that issue to the Board, and the principle embodied in Section 10(e) of the Act that a party cannot raise an issue before the court not urged before the Board extends to arguments grounded in due process. *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 419 (D.C. Cir. 1996). When an issue not addressed by the administrative law judge arises for the first time in the Board's decision, a party seeking to challenge it on appeal must first bring it to the Board's attention via a motion for reconsideration or reopening of the record. *Cobb Mech. Contractors, Inc. v.*

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includes a blank space to fill in the name of the investigator. (JA 81.) And if anything, with its reference to "all interviews" (JA 81), the form itself describes a blanket confidentiality policy broader than the approach to which Odell testified, and akin to what the Court found unlawful in *Hyundai*, 805 F.3d at 314.

*NLRB*, 295 F.3d 1370, 1377-78 (D.C. Cir. 2002); *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1101-02 (D.C. Cir. 2001); *see also* 29 C.F.R. § 102.48(d).

Under similar circumstances as here, the Supreme Court did not consider an employer's "objection that it was denied procedural due process because the Board based its order upon a theory of liability . . . allegedly not charged or litigated before the Board," as the employer "failed to file a petition for reconsideration." *Int'l Ladies' Garment Workers' Union*, 420 U.S. at 281 n.3. Banner's failure to apprise the Board of its concern likewise undermines its contention (Br. 20) that it did not have an opportunity to "prove an affirmative defense (e.g., justification)" for its confidentiality policy—Banner could have moved to reopen the record in order to present evidence of such a defense, but did not.

In any event, Banner was on notice that its confidentiality policy was alleged to be unlawful, and had an opportunity to present its case. The amended complaint alleged that Banner maintained an overbroad confidentiality policy based on the Interview of Complainant form. (JA 84.) The nature and scope of that policy was at issue during the unfair-labor-practice hearing and in the briefs to the Board, as was the issue of whether Banner had established a justification for it. (JA 64-66, 97-103.)<sup>8</sup>

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<sup>8</sup> That the complaint did not describe Banner's policy as categorical is of little moment, as "[t]he due process clause does not require a precise statement of the theory upon which the General Counsel intends to proceed." *Pergament United*

**b. Banner's Confidentiality Policy Interferes with Section 7 Rights**

The Board reasonably found (JA 13 n.16) that an overbroad confidentiality policy like Banner's "diminish[es] the opportunity" for Section 7 activity. As the Board explained (JA 12 n.16), such policies would, for example, restrict employees from acting in concert to "protect themselves either from unfairly (or even unlawfully) imposed discipline or . . . the employer's failure to impose discipline on supervisors or coworkers who adversely affect their lives at work." As in *SNE Enterprises*, 347 NLRB at 493, the target of an investigation could be prevented from "seeking information from his coworker that might be used in his defense." And as in *Phoenix Transit System*, 337 NLRB at 510, 513, a request for confidentiality could discourage employees from discussing among themselves whether Banner was conducting a fair and effective investigation of their complaints, and thus enable Banner to escape accountability if it failed to do so. In addition, Banner's policy might cause an employee with a complaint not to utilize Banner's internal procedures—because doing so would invite a confidentiality

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*Sales, Inc. v. NLRB*, 920 F.2d 130, 136 (2d Cir. 1990). Banner's references (Br. 16, 18-20) to the General Counsel's arguments to the administrative law judge are no more availing, as the Board is not limited to the General Counsel's theory of the case. See *George Banta Co. v. NLRB*, 686 F.2d 10, 22 (D.C. Cir. 1982) (noting that "the legal theories . . . of NLRB counsel are not binding on the Board"). Moreover, although Banner cites (Br. 16, 19) the General Counsel's post-hearing brief to the administrative law judge, that document is not part of the record. 29 C.F.R. § 102.45(b); *Stage Hands Referral Serv., LLC v. NLRB*, 472 F. App'x 1, 1 (D.C. Cir. 2012).

request—in order to preserve the opportunity to engage in collective action to call attention to the issue.

Banner nonetheless contends (Br. 23-28) that its confidentiality requests “would have had only minimal impact” on Section 7 rights because the nature and scope of those requests are limited. But substantial evidence supports the Board’s finding (JA 11-12) that many of those purported limits would not be clear to employees who receive such requests.

Banner claims (Br. 25-26) that its confidentiality requests are limited to just the interview itself. As the Board explained (JA 12), however, a reasonable employee would understand Banner’s requests as encompassing the entire matter under investigation. The Interview of Complainant prompt is to ask the interviewee “not to discuss this,” with no companion for the lonesome demonstrative pronoun. (JA 81.) Banner contends (Br. 25-26) that “this” refers back to the preceding sentence’s statement that “[t]his is a confidential interview,” but employees should not be forced to parse language so finely in order to know whether they can exercise their Section 7 rights. *Hyundai*, 357 NLRB at 871. Moreover, the preceding sentence also refers to “this investigation.” (JA 81.) In addition, the following sentence refers to the “[m]atter under investigation” and

“this claim,” and a later sentence again uses “this investigation.” (JA 81.)<sup>9</sup> With no obvious antecedent for “this,” employees reasonably would construe the confidentiality request to cover the entire investigation, including their own complaints. At most, the Interview of Complaint form is ambiguous as to the scope of the request, and ambiguities are construed against Banner. *Lafayette Park Hotel*, 326 NLRB at 828. Although, as Banner notes (Br. 25), Odell testified that she understood the request to be limited to the interview itself, there is no evidence that she ever expressed her subjective understanding to the employees whom she asked for confidentiality.<sup>10</sup> Under similar circumstances, the Board in *Security Walls*, 356 NLRB at 611, rejected the employer’s argument that its confidentiality policy allowed employees to discuss their own complaints, as the rule itself contained “no caveat . . . giving employees any assurances” that it was so limited.

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<sup>9</sup> Banner contends (Br. 26-27) that “there is *no* evidence” that the sentences in the other bullet-point prompts on the Interview of Complainant form were read “to *anyone* at *any* time.” But that assertion ignores the form itself. Each point is included under the same heading—“[i]ntroduction for all interviews” (JA 81)—and Odell explained that “[t]hey are prompts for the investigator to have that conversation with whoever is being interviewed.” (JA 50.)

<sup>10</sup> Banner selectively quotes (Br. 26 n.3) the amended complaint to suggest that the General Counsel understood the scope of the confidentiality request to be so limited. The full allegation is that, by maintaining its confidentiality policy, Banner “prohibit[ed] its employees from discussing their terms and conditions of employment with other employees, including the investigatory interviews.” (JA 84.)

Banner emphasizes (Br. 24-25) that its requests not to discuss investigations are limited to the time in which the investigations are ongoing, but the temporal scope of a confidentiality request does not necessarily limit its effect on Section 7 rights and is not dispositive as to its lawfulness. As the Board explained (JA 12), the time in which an employer is conducting the investigation “would seem to be the period when employees likely would be . . . most likely to benefit from[] discussion with their coworkers.” Before conclusions are reached or discipline imposed is when any Section 7 activity to ensure that the investigation is fair and legitimate would have an impact. Moreover, the Board found Section 8(a)(1) violations in *Hyundai*, 357 NLRB at 873-74, and *Mobil Oil Exploration*, 325 NLRB at 176-79, when the employers enforced their confidentiality policies against employees who had shared information with coworkers regarding matters that were currently under investigation.

Substantial evidence also supports the Board’s finding (JA 12) that a reasonable employee could understand Banner’s request for confidentiality as carrying with it a threat of discipline if the employee failed to comply. The Interview of Complainant form instructs interviewers to warn interviewees that “[a]ny attempt to influence the outcome of the investigation” can result in termination. (JA 81.) After being told that confidentiality is requested because “it is difficult to do a fair investigation” without it (JA 81), an employee reasonably

could surmise that Banner considered failing to abide by that request to be an attempt to influence the investigation. Even though the warning about termination does not expressly refer to discussing the investigation, it would tend to chill any discussion in order to guard against the possibility of such harsh discipline. *See Westside Cmty. Mental Health Ctr., Inc.*, 327 NLRB 661, 666 (1999) (finding instruction not to discuss discipline “sufficient to tend to inhibit employees from engaging in protected concerted activity” even when “there was no explicit penalty mentioned”). The scope of the warning is not clear, and, as the Board explained (JA 12), in the face of such ambiguity, a reasonable employee could decide that discussing the investigation “simply is not worth the risk.”<sup>11</sup>

Finally, Banner’s assertion (Br. 22) that the Board “arbitrarily assumed that all workplace investigations presumptively implicate Section 7 rights” mischaracterizes the Board’s decision. The Board noted that investigations will implicate Section 7 “insofar as they involve . . . terms and conditions of work,” and specifically explained that it was not holding that Section 7 activity “will always,

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<sup>11</sup> The fact that Banner requests confidentiality rather than demands it does not render Banner’s policy lawful, as “[i]t makes no difference whether the employees were ‘asked’ not to discuss” investigations “or ordered not to do so.” *Cintas Corp.*, 344 NLRB 943, 946 (2005) (internal quotations omitted), *enforced*, 482 F.3d 463 (D.C. Cir. 2007); *see also Koronis Parts, Inc.*, 324 NLRB 675, 694 (1997) (holding that overbroad policy “is not salvaged by the fact that [it] merely ‘asks,’ or ‘requests,’” confidentiality because “a ‘request’ that employees not discuss among themselves employment terms” can violate Section 8(a)(1)).

or even regularly, be a response to a workplace investigation.” (JA 12-13 n.16.)

Moreover, to the extent Banner is suggesting that the Board should have to prove that Section 7 rights are at stake in every case, its position is inconsistent with the Court’s decision in *Hyundai*, 805 F.3d at 312, 314, which found that an overbroad confidentiality policy “clearly limited § 7 rights” and was unlawful on its face, without requiring evidence that every application would implicate Section 7 rights.<sup>12</sup>

### **3. Banner’s Generalized Interests in Confidentiality Do Not Justify Its Broad Confidentiality Policy**

The Board reasonably found (JA 11) that, without an individualized determination that confidentiality was needed, Banner’s proffered interest in confidentiality was a “generalized concern” that was “insufficient to outweigh employees’ Section 7 rights.” Banner and amici contend (Br. 29-35; ACC Br. 8-21; AHLA Br. 7-9, 14-20) that Banner’s categorical policy is justified by

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<sup>12</sup> Banner’s assertion (Br. 15-16, 22) that there is no evidence that its confidentiality policy “actually . . . implicated Section 7” rights is likewise misplaced. The Court and the Board have both held that the “mere maintenance” of a policy that employees could reasonably construe as doing so is unlawful. *Hyundai*, 805 F.3d at 314 (internal quotations omitted); *Lafayette Park Hotel*, 326 NLRB at 825. For the same reason, because Banner’s “maintenance during the Sec. 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1)” regardless of when (or if) it was applied, Banner’s passing references (Br. 15-16, 21) to the six-month limitations period in Section 10(b) of the Act has no weight. *Eagle-Picher Indus., Inc.*, 331 NLRB 169, 174 n.7 (2000). Moreover, any timeliness argument is not properly before the Court, because it was not raised before the Board. 29 U.S.C. § 160(e); *Parsippany Hotel*, 99 F.3d at 417.

legitimate business interests, but their arguments ignore the fact that whether an employer has an interest in confidentiality is only part of the analysis, and that the Board's standard takes those interests into account. Moreover, Banner's broad policy is not tailored to serve its and amici's proffered interests, some of which are new arguments not properly before the Court.

As the Board explained (JA 9), an employer's interest in confidentiality, even if legitimate, does not "necessarily outweigh[] any interference with [Section 7] rights." Accordingly, although Banner and amici contend that confidentiality can aid an investigation (Br. 29-30; ACC Br. 19-21; AHLA Br. 8-9), that proposition does not end the analysis. The possibility that certain types of investigations may be more effective if conducted confidentially must be balanced against the chilling effect that requesting confidentiality places on employees' right to discuss the conditions of their employment. *Inova Health Sys.*, 795 F.3d at 85; *Hyundai*, 805 F.3d at 314; *Caesar's Palace*, 336 NLRB at 272 & n.6. By failing to conduct any individualized analysis as to whether confidentiality is necessary in a given investigation, Banner's policy leaves no room for that countervailing interest.<sup>13</sup>

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<sup>13</sup> Although Banner and amici quote (Br. 28-31; ACC Br. 20; AHLA Br. 8-10) the Board's statements in *IBM Corp.*, 341 NLRB 1288, 1293 (2004), and *Belle of Sioux City, L.P.*, 333 NLRB 98, 113-14 (2001), regarding the potential benefits of confidentiality, that language does not provide support for Banner's broad policy. The statements in *IBM Corp.* were not made in the context of balancing such

Moreover, Banner's broad policy is not tailored to serve its stated interests. Banner and amici emphasize (Br. 29-31; ACC Br. 17; AHLA Br. 10) confidentiality as a means of preventing potential witnesses from coordinating their testimony. But Banner asks interviewees not to discuss the investigation with "your coworkers" (JA 81), not just with employees who were involved in the matter or otherwise might participate in the investigation. Requesting that an interviewee not discuss the investigation with non-witnesses does little to ensure the integrity of witness testimony.<sup>14</sup> For similar reasons, Banner's and amicus

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benefits against employees' Section 7 rights; the case did not involve the issue of whether an employer could categorically request confidentiality, but instead dealt with whether an employer had to allow all employees to be accompanied by a coworker during any disciplinary interview. 341 NLRB at 1288, 1292-93. And in *Belle of Sioux City*, the employer that requested confidentiality had specific reasons to suspect that rumors would spread and evidence that the manager under investigation could be angry and vindictive when confronted. 333 NLRB at 101-02.

Nor, contrary to amicus American Hotel and Lodging Association's suggestion (AHLA Br. 20), do Board investigations involve the same broad approach to confidentiality as Banner's policy; although a witness affidavit itself is considered a "confidential law enforcement record," Board agents do not ask interviewees not to discuss the investigation or even the interview. NLRB Casehandling Manual, Part I, Unfair Labor Practice Proceedings § 10060.5, 10060.9, available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM-February%202016.pdf.pdf>.

<sup>14</sup> Banner's confidentiality policy is thus broader than the sequestration rule that Banner and amicus Association of Corporate Counsel invoke (Br. 31; ACC Br. 17-19), which prevents witnesses in court or Board proceedings from hearing the testimony of other witnesses. Fed. R. Evid. 615; *Greyhound Lines, Inc.*, 319 NLRB 554, 554 (1995). Moreover, the sequestration rule does not apply to parties,

Association of Corporate Counsel's concern (Br. 35; ACC Br. 13-14) with possible retaliation against witnesses does not justify Banner's broad policy. Banner already guards against retaliation by warning interviewees that "there is no tolerance for retaliation . . . as a result of this investigation" and that it will punish any such action, including by termination. (JA 81.) A categorical confidentiality policy thus is not separately needed to serve Banner's interest in protecting against retaliation; as to that goal, Banner's requests for confidentiality are merely duplicative. Like the unlawful rules in *Cintas Corp.*, 482 F.3d at 470, and *Guardsmark*, 475 F.3d at 380, the policy is thus overbroad.

Further, and contrary to Banner's and amici's contentions (Br. 28; ACC Br. 24; AHLA Br. 12), the Board's standard for evaluating confidentiality policies recognizes employers' interest in confidentiality. The Board acknowledged (JA 11) that employers have a "legitimate need for confidentiality in certain circumstances," including, but not limited to, the need to protect witnesses, preserve evidence, and seek truthful testimony. And its standard takes into account the interests that Banner proffers. If an employer shows, based on objectively reasonable grounds, that the circumstances of a particular investigation present, for example, a risk of not receiving accurate information or a threat of retaliation, a

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Fed. R. Evid. 615; *Greyhound Lines*, 319 NLRB at 554; by contrast, Banner requests confidentiality from complainants regarding "your complaint" (JA 81).

request for confidentiality could be justified. Indeed, the Board held such a request valid in *Caesar's Palace*. 336 NLRB at 272. Because Banner did not attempt to make such a showing, however, the Board rejected its proffered interests as overly “generalized.” (JA 11.)

Moreover, Banner takes a cramped view of integrity when it argues (Br. 35) that it has interests in confidentiality that “do not meet the Board’s test because they do not implicate the integrity of the actual investigation.” Both examples that it gives—encouraging employees to come forward with information and guarding against retaliation for those that do (Br. 35)—go to the truth-seeking function of an investigation and thus could fit within the concept of integrity. Banner also places (Br. 34) undue reliance on the Court’s dicta in *Hyundai*, 805 F.3d at 314, that the Court “need not and d[id] not” hold that an employer “must determine whether in any give[n] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up.” The Board explained (JA 11, 13) that other factors besides those four could justify a confidentiality request, and stated expressly that its decision did not “exclude the possibility that there may be other comparably serious threats to the integrity of an employer investigation that would be sufficient” to do so. The Board also repeatedly clarified (JA 10-11 & nn.8, 10) that, contrary to Banner’s

assertion (Br. 35), the situation presented in *Caesar's Palace* was not the only time an employer could lawfully request confidentiality.

Banner and amici offer several rationales for the first time on appeal, but those arguments are not properly before the Court. 29 U.S.C. § 160(e); *New York & Presbyterian Hosp.*, 649 F.3d at 733; *see also Am. Dental Ass'n v. Shalala*, 3 F.3d 445, 448 (D.C. Cir. 1993) (explaining that the Court “do[es] not address . . . contentions raised by *amicus curiae* . . . [that] are beyond the scope of the issues raised below by the appellants”). The only justification for its confidentiality policy that Banner presented to the Board was that it had an interest in “ensur[ing] a ‘pure’ and ‘fair’ investigation into sensitive matters such as harassment, discrimination and abuse allegations” and encouraging employees to come forward with information. (JA 102.) It did not argue before the Board, as it and amici do now (Br. 29-30, 33; ACC Br. 8-11; AHLA Br. 14-19), that confidentiality is needed to comply with other statutes governing the workplace. *Cf. Inova Health Sys.*, 795 F.3d at 86 (declining to address similar argument when not properly or timely raised). In any event, as the Board noted (JA 11 n.12), Banner presented no evidence that its requests for confidentiality stemmed from an interest in complying with other statutory mandates.<sup>15</sup> Moreover, the Board recognized

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<sup>15</sup> Nor was its policy tailored to serve that interest. Banner invokes (Br. 29) in particular its obligation under Title VII to investigate harassment claims. Like in *Phoenix Transit System*, however, Banner requests confidentiality from employees

(JA 11 n.12) that compliance with other laws could be a consideration in other cases.<sup>16</sup>

The Court likewise lacks jurisdiction to consider amici's new argument (ACC Br. 21-22; AHLA Br. 12-13) that an individualized determination of the need for confidentiality would be "impractical" for employers. *Am. Dental Ass'n*, 3 F.3d at 448. Their position also is inconsistent with precedent, as courts and the Board have long held that the burden of justifying a restraint on Section 7 rights is on the employer. *Hyundai*, 805 F.3d at 314; *Caesar's Palace*, 336 NLRB at 272 & n.6. And, for the reasons explained above, employers are best positioned to make such a determination. *See supra* pp. 22-23. Like Banner, amici's singular focus on

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who bring the complaints under investigation. As the Court explained in that case, because the effect of such policies is to "silence sexual harassment witnesses and victims . . . , there is no merit to [the] contention that the Board's decision conflicts with the goals of Title VII." 63 F. App'x at 525.

Further, few of the "myriad" other laws (AHLA Br. 14) that Banner and amici allege conflict with the Board's decision actually address confidential investigations. For example, the Americans with Disabilities Act, Family and Medical Leave Act, and state-law provisions that amici cite (ACC Br. 10; AHLA Br. 18-19) mandate confidentiality of employee medical information, not workplace investigations. And none of the cited authority, which deals with an *employer's* obligation, on its face requires the broad limit on *employee* activity that Banner and amici propose.

<sup>16</sup> Banner cannot point to the Board's sua sponte reference to the issue of other statutes as grounds for deeming it preserved for appeal. To satisfy Section 10(e), an issue must have been actively presented to the Board, not just discussed by it. *Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003); *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999).

the interests of employers ignores the countervailing interests of employees and the Board's task of crafting policies that accommodate both interests.<sup>17</sup> And although amici may prefer (ACC Br. 25; AHLA Br. 13) more rigid guidelines from the Board as to when employers can request confidentiality, that preference is not grounds to overturn the Board's decision to use a more flexible case-by-case approach, which is a reasonable means of serving the Act's goal of balancing competing interests. *See USW v. NLRB*, 544 F.3d 841, 859 (7th Cir. 2008) ("The Board's determination that a totality-of-the-circumstances approach is preferable to a rigid formulation is certainly worthy of . . . deference.").

In sum, the record shows that Banner maintains a categorical policy of requesting confidentiality in certain types of workplace investigations without an individualized determination that it is necessary, and the Board applied established principles in finding that policy unlawful. Ultimately, Banner and amici disagree with the Board's standard for determining whether an employer's approach to confidentiality violates Section 8(a)(1) of the Act. Such policy-based disagreements are insufficient grounds for reversal, however, as the Court will "defer to the Board's policy choice" so long as "[the Board's] interpretation of

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<sup>17</sup> Similarly inconsistent with the courts' and Board's longstanding allocation of burdens is amicus Association of Corporate Counsel's proposal (ACC Br. 24-25) that confidentiality should be presumptively allowed in certain categories of investigations, and that the harm to Section 7 rights must be proven—presumably by employees—in all such investigations before employees could discuss them.

what the Act requires is reasonable.” *Local 702, IBEW*, 215 F.3d at 15, 17 (quoting *UFCW v. NLRB*, 880 F.2d 1422, 1428 (D.C. Cir. 1989)); *see also Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171, 178 (D.D.C. 2015) (employer’s “disagreement with choices made by the agency entrusted by Congress with broad discretion to implement the provisions of the NLRA” not basis for reversal). Given the deference afforded the Board in articulating the scope of Section 7 rights, balancing competing interests, and setting national labor policy, *City Disposal Sys.*, 465 U.S. at 829; *Fleetwood Trailer*, 389 U.S. at 378, the Court will “respect [the Board’s] policy choices” on such matters. *Local 702, IBEW*, 215 F.3d at 15 (quoting *UFCW*, 880 F.2d at 1428).

**D. The Board’s Order of Multi-Facility Notice Posting Falls Within Its Broad Remedial Discretion and Is Consistent with Precedent**

Banner’s challenge (Br. 42-43) to the Board’s remedy is no more availing than its arguments on the merits. The Board has “broad discretionary power . . . to fashion remedies.” *Petrochem Insulation*, 240 F.3d at 34. In exercising that discretion, the Board long has required employers that violate the Act by maintaining unlawful work rules to post remedial notices at all facilities where the rules are in place. *See, e.g., Longs Drug Stores Cal., Inc.*, 347 NLRB 500, 501 (2006); *Kinder-Care Learning Ctrs., Inc.*, 299 NLRB 1171, 1176 (1990). Because maintenance of the rule is an unfair labor practice, *Cintas Corp.*, 482 F.3d at 467-68, the scope of the posting is commensurate with the violation. The Court

consistently has enforced such a remedy, explaining that, when an employer maintains “a company policy [that] violates the [Act]” or “distribute[s] . . . unlawful rules to all employees” at multiple facilities, “only a company-wide remedy extending as far as the company-wide violation can remedy the damage.” *Guardsmark*, 475 F.3d at 380-81; *see also Fresh & Easy Neighborhood Market, Inc. v. NLRB*, 468 F. App’x 1, 3 (D.C. Cir. 2012) (same); *U.S. Postal Serv. v. NLRB*, 969 F.2d 1064, 1072-73 (D.C. Cir. 1992) (same). In such circumstances, “[n]ationwide remedial notice . . . effectuate[s] the policies of the [Act].” *Guardsmark*, 475 F.3d at 381 (internal quotations omitted).

The Board did not abuse its discretion by ordering (JA 8 n.3, 14) notice posting at all facilities where Banner uses the Confidentiality Agreement. Banner committed an unfair labor practice wherever it maintained that unlawful rule. *Cintas Corp.*, 482 F.3d at 467-68. Accordingly, as in *Guardsmark*, 475 F.3d at 380-81, a multi-facility posting commensurate with the scope of Banner’s maintenance of the Confidentiality Agreement is warranted. In cases involving a widely disseminated work rule, the type of “hallmark” violations that Banner references (Br. 42-43) are not necessary to trigger multi-facility relief. Banner cites (Br. 42-43) *Torrington Extend-A-Care Employee Ass’n v. NLRB*, 17 F.3d 580, 585 (2d Cir. 1994), but, unlike here, the issue in that case was whether “the evidence supports an inference that the employer will commit further unlawful

acts” at other locations in the future. By contrast, maintenance of the Confidentiality Agreement is an existing violation wherever it is in place—no inference is needed.

Finally, Banner is premature in raising (Br. 43) the issue of which facilities are subject to the Order’s notice-posting requirement. The Board’s established practice, as approved by the Court, is to litigate liability first and leave the particular details of its remedial orders to the subsequent compliance stage of the case. *See, e.g., Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1330 (D.C. Cir. 2012) (“[I]t is well-established that ‘compliance proceedings provide the appropriate forum’ to consider objections to the relief ordered.” (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984))); 29 C.F.R. § 102.54. The parties will have the opportunity to address the issue of where Banner utilizes its Confidentiality Agreement in those separate proceedings.

## CONCLUSION

Because substantial evidence supports the Board's finding that Banner violated Section 8(a)(1) of the Act by maintaining two unlawful confidentiality policies, and because the Board's remedy for those violations was within the scope of its discretion, the Board respectfully requests that the Court deny Banner's petition for review and enforce the Board's Order in full.

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National Labor Relations Board

June 2016

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BANNER HEALTH SYSTEM, d/b/a	*	
BANNER ESTRELLA MEDICAL CENTER	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1245,
	*	15-1309
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	28-CA-023438
	*	
Respondent/Cross-Petitioner	*	
	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,341 words of proportionally spaced, 14-point type, the word-processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC  
this 22nd day of June, 2016

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	*
Respondent/Cross-Petitioner	*
	*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 22, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC  
this 22nd day of June, 2016



## STATUTORY ADDENDUM

### **29 U.S.C. § 157**

Employees shall have 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 . . .

### **29 U.S.C. § 158(a)(1)**

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title

### **29 U.S.C. § 160(e)**

. . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances . . .

### **29 C.F.R. § 102.45(b)**

The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, shall constitute the record in the case.

### **29 C.F.R. § 102.48(d)**

(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented

previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

**29 C.F.R. § 102.54**

(a) If it appears that controversy exists with respect to compliance with an order of the Board which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 21 days after the service of the specification.