

**Nos. 18-1125 & 18-1143**

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

**LONG BEACH MEMORIAL MEDICAL CENTER, D/B/A MEMORIALCARE  
LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER  
CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED**

**Intervenor**

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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 Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certifies the following:

### **A. Parties and Amici**

Long Beach Memorial Medical Center, d/b/a MemorialCare Long Beach Medical Center & MemorialCare Miller Children’s and Women’s Hospital Long Beach, was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. California Nurses Association/National Nurses United (“the Union”), was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

### **B. Ruling Under Review**

The ruling under review is a Decision and Order of the Board in *Long Beach Memorial Medical Center, Inc., d/b/a Long Beach Memorial Medical Center & Miller Children’s and Women’s Hospital Long Beach*, 366 NLRB No. 66 (Apr. 20, 2018.)

### **C. Related Cases**

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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## GLOSSARY

A.	The parties' joint appendix
Br.	Long Beach's opening brief
Long Beach	Long Beach Memorial Medical Center, d/b/a MemorialCare Long Beach Medical Center & MemorialCare Miller Children's and Women's Hospital Long Beach
The Act	National Labor Relations Act, 29 U.S.C. § 151, et seq.
The Board	National Labor Relations Board
The Order	<i>Long Beach Memorial Medical Center, Inc., d/b/a Long Beach Memorial Medical Center &amp; Miller Children's and Women's Hospital Long Beach, 366 NLRB No. 66 (Apr. 20, 2018.)</i>
The Union	California Nurses Association/National Nurses United

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Long Beach Memorial Medical Center, d/b/a MemorialCare Long Beach Medical Center & MemorialCare Miller Children’s and Women’s Hospital Long Beach (“Long Beach”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against Long Beach on April 20, 2018, and reported at 366 NLRB No. 66. (A. 800-12.)<sup>1</sup> California Nurses Association/National Nurses United (“the Union”), the charging party below, has intervened on behalf of the Board.

The Board had jurisdiction over the preceding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 151, 160(a). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. 29 U.S.C. § 160(e) and (f). The Board’s Order is final with respect to Long Beach. The petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

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<sup>1</sup> “A.” references are to the joint appendix. “Br.” references are to Long Beach’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board's finding that Long Beach violated Section 8(a)(1) of the Act by maintaining overbroad rules that prohibit employees from wearing union-branded pins, badges, and badge reels in non-patient care areas.

## RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the Act and Board regulations are reproduced in the Addendum to this brief.

## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY

Based on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint, subsequently amended, alleging that Long Beach violated Section 8(a)(1) of the Act by maintaining facially overbroad rules prohibiting employees from wearing union-branded pins, badges, and badge reels in non-patient care areas, and by disparately enforcing the badge reel rule. (A. 806, 809 n.12; A. 66-73, 439-43.) After a hearing, an administrative law judge found that Long Beach violated Section 8(a)(1) by maintaining the rule prohibiting union pins and badges in non-patient care areas; the judge found no other violations. (A. 806, 811.) On review, the Board affirmed the judge's rulings, findings and conclusions only to the extent consistent with its Decision and Order.

(A. 800.) Specifically, the Board agreed with the judge, for the reasons he stated, that Long Beach violated Section 8(a)(1) by maintaining the overly broad pin and badge rule, but unlike the judge, also found that Long Beach further violated the Act by maintaining the rule prohibiting union-branded badge reels in non-patient care areas. (A. 800-02 & n.7.)

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

### **A. Background: Long Beach's Operations; Employee Uniforms and Identification Badges**

Long Beach is an independent, non-profit subsidiary of Memorial Health Services ("MHS") that operates two hospitals in Long Beach, California. It employs approximately 6000 employees, including more than 2100 registered nurses represented by the Union. (A. 800, 806; A. 211-14, 233, 432.) Long Beach requires all direct care providers to wear standardized hospital uniforms color-coded by discipline, which it provides. (A. 800, 807; A. 473.) For example, registered nurses wear navy blue scrubs with their discipline and the MHS name and logo embroidered on the upper left side of the scrub top. (A. 800, 807; A. 474, 480, 486.)

Long Beach also issues identification badges to all employees, which must be visibly worn at all times while on hospital grounds. (A. 800, 806; A. 216, 225, 471, 479, 522-24.) Badges feature employees' photographs, names, job titles and, where appropriate, a color-coded strip indicating their professional discipline. (A.

800, 806; A. 226-27, 480, 485-86, 496.) They also contain electronic coding that permits employees to access authorized areas when the badge is swiped across a reader panel. (A. 800, 806; A. 76, 134-35, 225-26.)

Using a plastic sleeve or “badge holder” provided by Long Beach, direct care providers such as registered nurses affix their badges to a designated strip of cloth located at collar-level on the right side of their uniform. They may choose to affix their badges directly to the cloth, detaching the badge each time they need to present it. Alternatively, direct care providers may affix their badges via a hospital-provided “badge reel,” an easily detachable device featuring a retractable string pulley. (A. 800, 807; A. 112, 228-30, 259, 322-23, 479, 480-81, 525.)

#### **B. Long Beach’s Policy Governing Pins and Badges**

On its internal intranet under human resources, Long Beach maintains a “dress code and grooming standards” policy, formally known as Policy/Procedure # 318, which is promulgated by MHS for itself and its subsidiaries. (A. 800, 806, 807 n.3; A. 62-64, 467, 470.) Policy # 318 states that its provisions “apply to all those who work in any capacity” for Long Beach (as a subsidiary of MHS), specifically listing “employees [and] employees who work in uniforms.” (A. 470.) The policy describes “examples of minimum requirements of dress and appearance,” covering topics such as hygiene, hair style and length, and jewelry,

and at times distinguishes between clinical and administrative areas or personnel.

(A. 470-71.)

Relevant here, Policy # 318 provides without qualification that “[o]nly MHS approved pins, badges, and professional certifications may be worn.” (A. 800, 806; A. 471.) Union-branded pins and badges are not “approved” items.

Moreover, the pin rule set forth in Policy # 318 applies hospital-wide, including in non-patient care areas, and to all employees, including those working in non-patient care areas or not engaged in immediate patient care. (A. 800, 807-08; A. 242-45, 276-77, 291-92, 297-99, 302-03, 471.)

In addition, under the pin rule, Long Beach only permits registered nurses to affix certain “approved” pins to the plastic sleeves holding their identification badges. For instance, they may affix pins issued by Long Beach indicating their years of service or their donations to the hospital, or by professional associations signifying certification in a specialty. (A. 806-07; A. 89-92, 151-56, 189-90, 235-37, 291-93, 480, 487, 493-94, 496, 525.) So long as the badge remains readable, Long Beach imposes no limit on the number of “approved” pins that may be worn. (A. 808; A. 293.)

There is no evidence that the prohibition against employees wearing union pins and badges in non-patient care areas is necessary to avoid disrupting

healthcare operations or disturbing patients, or that the prohibition is justified by hospital safety and security protocol. (A. 808; A. 237, 292-93, 470-79, 497-524.)

### **C. Long Beach's Policy Governing Badge Reels**

Long Beach also maintains an “appearance, grooming and infection prevention standards” policy, formally known as PC-261.02, on its human resources intranet. (A. 800, 807; A. 64-65, 477.) PC-261.02 states that its provisions “apply to all those who work in any capacity in providing direct patient care,” including “employees who work in uniforms.” (A. 478.) In addition to establishing requirements for direct care providers’ dress and appearance in areas such as hygiene, hair style and length, and jewelry, PC-261.02 provides that “[b]adge reels may only be branded with MemorialCare approved logos or text.” (A. 800, 807; A. 479.)

Pursuant to this rule, if direct care providers elect to affix their identifications badge to their uniforms using a badge reel instead of attaching it directly to their uniform, then they must use the hospital-issued reel displaying the MHS logo. (A. 801, 807; A. 228-30, 259, 262-66, 282-83, 480-82, 525.) This requirement applies throughout the hospital, including in non-patient care areas. (A. 801; A. 479.) Thus, when direct care providers are present in public, non-patient care areas of the hospital during their workday, they must wear MHS-branded badge reels and cannot substitute reels bearing a union logo, even though

the reels are the same discrete size and shape and are readily detachable. (A. 800-02; A. 477-79, 481-84.)

There is no evidence that the prohibition against direct care providers wearing union-branded badge reels in non-care areas is necessary to avoid disrupting healthcare operations or disturbing patients, or that the prohibition is justified by the need to create a unique public image of quality patient care. (A. 801-02; A. 83.)

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

Based on the foregoing facts, the Board (Members Pearce and McFerran, Member Emanuel dissenting in part) found that Long Beach violated Section 8(a)(1) of the Act by maintaining overbroad rules prohibiting employees from wearing union-branded pins, badges, and badge reels in non-patient care areas. (A. 800, 802, 804 & n.2.) The Board's Order requires Long Beach to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. (A. 802-03.)

Affirmatively, the Order requires Long Beach to rescind the overbroad pin and badge reel rules, or to revise them to make clear that they do not prohibit employees in non-patient care areas from wearing pins, badges, or badge reels not approved by MHS and not branded with MemorialCare-approved logos or text.

The Order also requires Long Beach to notify employees that the overbroad rules have been rescinded or, if revised, to provide them a copy of the revised rules.

Finally, Long Beach must post a remedial notice. (A. 803.)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that Long Beach violated Section 8(a)(1) of the Act by maintaining its overbroad pin and badge reel rules. The pin rule prohibits all but hospital-approved pins and badges, and the badge reel rule permits only ones bearing hospital-approved logos or text. By their terms, both rules plainly restrict employees from exercising their Section 7 right to wear union-branded pins, badges, or badge reels at work, none of which are "approved." Moreover, in setting forth those blanket prohibitions, neither rule makes the legally significant distinction between immediate patient care areas, where a restriction on wearing union insignia is presumptively *valid*, and non-care areas, where a restriction is presumptively *invalid*. Although Long Beach asserts the badge reel rule applies only in immediate care areas, its claim is contrary to the rule's text. Consequently, both rules are presumptively invalid and Long Beach bore the burden of justifying them.

Substantial evidence supports the Board's further finding Long Beach failed to demonstrate that special circumstances justify prohibiting employees from wearing union-branded pins, badges, or badge reels while in non-patient care areas.

As to the pin rule, Long Beach's puzzling contention that it only prohibits pins *on* badges is contrary to the rule's plain language. Long Beach gains no more ground by asserting that the ban on wearing union pins in non-patient care areas is justified by hospital safety and security protocol. The pin rule is set forth in a policy governing dress code and personal grooming. It neither establishes safety and security measures, nor proscribes conduct that may jeopardize such measures. By contrast, Long Beach's actual safety and security policies do not address pins.

Regarding the badge reel rule, the Board found—and Long Beach does not appear to dispute—that there is no evidence the ban on union-branded reels in non-care areas is necessary to prevent disruption of care or disturbance of patients. And the Board reasonably rejected Long Beach's assertion that the ban is needed to maintain a uniform image of quality patient care. There is no evidence prohibiting union-branded badge reels in non-patient care areas is necessary to create a unique image. Likewise, Long Beach's interest in standardized uniforms does not constitute a special circumstance under established precedent. The badge reel rule, moreover, is not narrowly tailored to address Long Beach's ostensible public-image justification. Badge reels can be readily detached when direct care providers pass between immediate care and non-care areas, and easily replaced with hospital-approved ones. MHS-branded badge reels are also not required; direct care providers can simply attach their badges directly to their uniforms.

Finally, the Court lacks jurisdiction to consider Long Beach's *Boeing*-based challenges, which it failed to first raise before the Board. Those challenges are, in any event, without merit. The Court also need not address Long Beach's claims regarding exceptions briefs, which have no practical relevance here. In any event, exceptions briefs are properly excluded from the certified list.

### STANDARD OF REVIEW

This Court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). When supported by substantial evidence, the Board's findings of fact are "conclusive." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Kiewit Power Constr. Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011). The Court also applies that 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, regardless of whether the court might have reached a different conclusion *de novo*." *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Accordingly, "a decision of the NLRB will be overturned only if the Board's factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008) (internal quotation marks omitted). Moreover, the question on review is not

“whether record evidence could support the [employer’s] view of the issue, but whether it supports the [Board’s] ultimate decision.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015).

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT LONG BEACH VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING OVERBROAD RULES PROHIBITING EMPLOYEES FROM WEARING UNION-BRANDED PINS, BADGES, AND BADGE REELS IN NON-PATIENT CARE AREAS**

#### **A. Healthcare Employers Cannot Ban the Wearing of Union Insignia in All Areas of Their Facilities, Absent Demonstrated Special Circumstances**

Section 7 of the Act guarantees 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.” 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1).

The “central purpose of the Act” is to “protect and facilitate employees’ opportunity to organize unions to represent them in collective-bargaining negotiations.” *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 609 (1991). As the Supreme Court recognized long ago, “the right of employees to self-organize and

bargain collectively [under Section 7] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); accord *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). It is likewise well-established that the workplace is a “particularly appropriate” venue for employees to engage in such activity. *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1067 (D.C. Cir. 2015) (discussing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)).

At times, however, employees’ exercise of Section 7 rights in the workplace may come into conflict with their employer’s legitimate interests in controlling its property and operating its business. To aid its balancing of the conflicting interests in such cases, the Board, with Supreme Court approval, has developed certain legal presumptions, often adjusting them to account for the particularities of the industry and the activity at issue. See *Beth Israel*, 437 U.S. at 491-95 & n.10 (explaining the history of the Board’s presumptions).

Of particular relevance here, it is firmly established that employees generally have a Section 7 right to wear union-related paraphernalia while at work as a form of “other concerted action,” that is, to communicate about self-organization rights, or show support for their union. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-04 (1945); see also *HealthBridge*, 798 F.3d at 1067 (“employees have the right to wear union insignia in the workplace”). In most employment contexts, the

governing presumptions are that such paraphernalia may be worn at any time and that a restriction of that right violates Section 8(a)(1) of the Act, unless the employer demonstrates “special circumstances” to justify it. *Republic Aviation*, 324 U.S. at 803-04; *see also Beth Israel*, 437 U.S. at 492-93; *HealthBridge*, 798 F.3d at 1067; *W San Diego*, 348 NLRB 372, 373 (2006).

Although the same principles hold true in the context of healthcare facilities, the Board, with Supreme Court approval, has further refined its presumptions “to avoid disruption of patient care and disturbance of patients.” *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 778 & n.8 (1979). As the Supreme Court has stated, in the healthcare setting the “balancing of the conflicting legitimate interests . . . to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review.” *Beth Israel*, 437 U.S. at 501 (citation omitted).

In *Beth Israel*, the Supreme Court expressly approved the Board’s striking of that balance in a case involving union solicitation and distribution of union literature in a hospital setting. 437 U.S. at 507. The Board, with court approval, applies a similar analytical framework in other healthcare settings involving different types of Section 7 communications, including the wearing of union insignia. *See, e.g., HealthBridge*, 798 F.3d at 1068; *Mt. Clemens Gen. Hosp.*, 335 NLRB 48, 50 (2001), *enforced*, 328 F.3d 837 (6th Cir. 2003); *Casa San Miguel*,

*Inc.*, 320 NLRB 534, 540 (1995). Under that framework, a blanket restriction on wearing union insignia in areas not devoted to immediate patient care is presumptively *invalid*. *HealthBridge*, 798 F.3d at 1067-68; *Casa San Miguel*, 320 NLRB at 540. By contrast, a prohibition on wearing union insignia limited to direct or immediate patient care areas is presumptively *valid*.<sup>2</sup> *HealthBridge*, 798 F.3d at 1068; *Casa San Miguel*, 320 NLRB at 540.

To rebut the presumption that a restriction on wearing union insignia violates employees' Section 7 rights, an employer must establish "special circumstances." In the healthcare setting, the employer may justify a prohibition with evidence that it is "necessary to avoid disruption of health-care operations or disturbance of patients." *HealthBridge*, 798 F.3d at 1068 (quoting *Beth Israel*, 437 U.S. at 507); *see also Baptist Hosp.*, 442 U.S. at 779. To satisfy its burden, the employer must put forward specific evidence of the disruption or disturbance that the prohibition seeks to prevent, and in doing so it may not rely on mere speculation, unsubstantiated surmise, or subjective belief. *HealthBridge*, 798 F.3d at 1070-73; *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 847 (6th Cir. 2003); *Asociacion Hosp. del Maestro, Inc. v. NLRB*, 842 F.2d 575, 577 (1st Cir. 1988).

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<sup>2</sup> "Immediate patient care areas include patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas." *HealthBridge*, 798 F.3d at 1068 (quotation marks omitted).

In addition, outside of the healthcare setting, “[t]he Board has found special circumstances justifying proscription of union insignia and apparel when their display may . . . unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.” *Bell-Atl.-Pa., Inc.*, 339 NLRB 1084, 1086 (2003), *enforced sub nom., Commc’ns Workers of Am., Local 13000 v. NLRB*, 99 F. App’x 233 (D.C. Cir. 2004). *See Guard Publishing Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009) (special circumstances include “maintaining a certain employee image”). In evaluating the lawfulness of a public-image based rationale for restricting employees’ right to display union insignia at work, the Board will examine the particular circumstances of each case, assessing the asserted business objective on the one hand, and the restriction’s breadth or the affected insignia on the other. *See Bell-Atl.-Pa.*, 339 NLRB at 1086-87; *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982).

To establish special circumstances based on unreasonable interference with an asserted public image, an employer must demonstrate both its deliberate cultivation of a particular image as part of its business plan, and that the limitations it has imposed are tailored to protect that image without overly impeding its employees’ rights. *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 571 (1st Cir. 2016); *Guard Publishing*, 571 F.3d at 61-62; *Bell-Atl.-Pa.*, 339 NLRB at 1086; *W San Diego*, 348 NLRB at 373-74; *Nordstrom*, 264 NLRB at 701-02. Mere “customer

exposure to union insignia, standing alone,” is not a special circumstance, *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 35 (2007); *see also Guard Publishing*, 571 F.3d at 61; *Able Disposal*, 322 NLRB 244, 244 (1996); *Meijer, Inc.*, 318 NLRB 50, 50 (1995), *enforced*, 130 F.3d 1209 (6th Cir. 1997), and neither is a “requirement that employees wear a uniform,” *AT&T*, 362 NLRB No. 105, 2015 WL 3492100, at \*4 (June 2, 2015); *see also P.S.K. Supermarkets*, 349 NLRB at 35.

Other than the differing presumptions applied in the healthcare setting and a healthcare employer’s ability to assert a special circumstance defense based on disruption of healthcare operations or disturbance of patients, the governing principles and Board analysis remain substantively similar whether an employer selectively banned specific union insignia due to its content, *see, e.g., HealthBridge*, 798 F.3d at 1067-68, 1070-73; *Pathmark Stores, Inc.*, 342 NLRB 378, 378-80 (2004), applied an overbroad appearance or dress code to restrict the wearing of union insignia, *see, e.g., Guard Publishing*, 571 F.3d at 61-62; *George J. London Mem’l Hosp.*, 238 NLRB 704, 706-09 (1978), or simply maintained a

provision amounting to a blanket ban on all potential union insignia, *see, e.g., Boch Imports*, 826 F.3d at 570-77; *P.S.K. Supermarkets*, 349 NLRB at 34-35.<sup>3</sup>

**B. The Pin and Badge Reel Rules Are Facially Overbroad and Presumptively Unlawful, and Long Beach Failed to Establish Special Circumstances**

Substantial evidence supports the Board's finding that Long Beach violated Section 8(a)(1) of the Act by maintaining the overbroad pin and badge reel rules.

(A. 800, 802.) As shown below, by prohibiting all but hospital-approved or provided pins, badges, and badge reels, both rules plainly restrict employees' right to wear union insignia while at work. (A. 800, 808.) Moreover, in setting forth that blanket prohibition, the rules fail to distinguish between immediate patient care areas and non-care areas. Thus, both rules are overbroad and presumptively invalid. (A. 800-02, 807-08.)

Substantial evidence also supports the Board's finding that Long Beach failed to meet its burden of demonstrating that its rules are justified by special circumstances. Long Beach did not show that its blanket bans are necessary to

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<sup>3</sup> Contrary to Long Beach's argument, the Board properly cited cases where an employer banned specific union insignia based on their content. (Br. 32-33.) Those cases apply the same general principles that make a blanket ban on union insignia unlawful. Long Beach also errs in relying on *Sacred Heart Medical Center*, 347 NLRB 531 (2006). (Br. 33 n.11.) It fails to note that the Ninth Circuit denied enforcement and remanded that case for the point cited. *See Wash. State Nurses Ass'n v. NLRB*, 526 F.3d 577 (9th Cir. 2008).

avoid disruption of healthcare operations or disturbance of patients, or to prevent unreasonable interference with its public image. (A. 800-02, 808-09.)

**1. The pin rule**

**a. The rule is facially overbroad and presumptively invalid because it prohibits employees from wearing union pins or badges in non-patient care areas**

As shown, the pin rule set forth in Policy # 318 unequivocally states that “[o]nly MHS approved pins, badges, and professional certifications may be worn.” (A. 471.) Thus, as written, the rule prohibits employees from exercising their Section 7 right to wear union pins or badges at work because those insignia are not “approved” ones under the pin rule. (A. 807-08.) *See, e.g., Boch Honda*, 362 NLRB No. 83, 2015 WL 1956199, at \*2 (Apr. 30, 2015) (rule prohibiting employees from wearing pins, insignia, or message clothing not issued by employer restricted right to wear union paraphernalia), *enforced*, 826 F.3d 558 (1st Cir. 2016); *Albertsons, Inc.*, 351 NLRB 254, 256-57 (2007) (rule barring pins and badges other than name badges “[o]n its face” prohibited wearing of union pins or badges). The rule also fails to make the legally significant—and necessary—distinction between immediate patient care areas and non-care areas. (A. 807-08.) *See HealthBridge*, 798 F.3d at 1067-68; *Casa San Miguel*, 320 NLRB at 540.

Moreover, as the Board reasoned, the blanket prohibition set forth in Policy # 318 “applies to all employees, including non-direct patient care providers.” (A.

807; A. 276-77, 291-92, 297-99, 302-03, 470.) As a result, not only are direct care providers subject to the pin rule when outside of immediate patient care areas, but “all those who work in any capacity” for Long Beach, regardless of their connection to immediate care areas, are prohibited from wearing union pins or badges. (A. 470.)

Before the Court, Long Beach does not challenge (Br. 28-34) the Board’s finding that the pin rule applies in all areas and to all employees and “is not limited to direct patient care areas of the facility.” (A. 808.) Accordingly, “the rule is presumptively invalid.” (*Id.*)

**b. Long Beach failed to meet its burden of demonstrating that special circumstances justify the overbroad pin rule**

Given the pin rule’s presumptive invalidity, the Board appropriately shifted the burden to Long Beach to demonstrate that its “restriction on any employees wearing nonapproved pins in non-direct patient care areas is necessary to avoid disruption of its operations or disturbance of patients.” (A. 808.) As it did before the Board, Long Beach presents just one justification for the pin rule. (*See id.*) Specifically, it repeats the curious claim that its rule merely prevents employees (in immediate patient care *and* non-care areas) from placing union pins directly *on* identification badges, and that it can impose this restriction because badges are part

of hospital safety and security protocol. (Br. 28-29, *see also* 6-8.) As shown below, the Board reasonably rejected both contentions.

As to the pin rule's scope, substantial evidence supports the Board's finding that "the rule on its face is not limited to wearing nonapproved pins on ID badges."<sup>4</sup> (A. 808.) As discussed, the pin rule provides, without qualification, that "[o]nly MHS approved pins, badges, and professional certifications may be worn." (A. 471.) There is no limitation narrowing that broad prohibition only to placing union pins on identification badges, notwithstanding Long Beach's attempt to read that limitation into the pin rule's otherwise plain language.<sup>5</sup> (Br. 29-30.) Long Beach claims that such a limitation is evident when the pin rule is read in the "context" of Policy #318 as a whole and its other policies. (Br. 29-31, *see also* Br. 6-7.) However, as the record shows, Policy # 318, like others, contains no

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<sup>4</sup> In finding the rule unlawful as written, the Board specifically did not pass on whether the pin rule would be lawful if it were, in fact, limited to prohibiting employees from attaching union pins onto hospital-issued identification badges. (A. 800 n.2, 804 n.2.) Because, as shown, the rule is not so limited, the Board properly declined to pass on that question, contrary to Long Beach's claim. (Br. 28.)

<sup>5</sup> According to Long Beach's reading, the pin rule provides that "only MHS approved pins, badges, and professional certifications may be worn on badges." (Br. 29-30.) This misreading of the rule must be rejected because it would lead to the bizarre result that the rule prohibits non-approved badges on badges.

language “narrow[ing] the otherwise broad restriction to only badge pins.” (A. 808; A. 470-79, 497-524.)

Long Beach asserts uncontroverted evidence demonstrates that employees “understood” (Br. 29) and “knew” (Br. 30) the pin rule only prohibits pins on badges, but the employee testimony it apparently relies on does not support that claim (*see* Br. 6, 9 (citing A. 90-91, 151-52)), nor does the testimony of hospital officials (*see* A. 235, 340). In any event, several employees’ subjective understanding of the rule’s scope is not dispositive where, as here, the Board’s established analysis entails reviewing the rule’s plain text and finding that on its face, it restricts employees’ right to wear union insignia at work. *See* cases *supra* p. 19; *cf. Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (in assessing whether rule explicitly restricts Section 7 activity, “the Board focuses on the text of the challenged rule”).

The Board also reasonably rejected Long Beach’s reliance on its safety and security protocol as a basis for prohibiting union pins in non-patient care areas. As the Board found and the record shows, there was a lack of evidence that “pins are part of” the security protocol. (A. 808 (emphasis in original).) After all, as the Board noted, the rule prohibiting union pins and badges “is set forth exclusively” within Policy # 318, a dress code and personal grooming policy. (A. 808; A. 470-72.) As that policy reveals, its *raison d’etre* is establishing appearance and

grooming standards because they “play an important role in conveying an image of high quality, professional health care.” (A. 470.) Simply put, Policy # 318 does not establish safety and security measures or proscribe conduct that may jeopardize them. Conversely, the safety/security policies that Long Beach relies on (Br. 29, *see also* 6-7) do not address pins, let alone establish that affixing a union pin to a badge in non-patient care areas will adversely affect safety and security. (*See* A. 497-524, 527-29.)

Precedent supports this finding. For example, in a case where the Board rejected an employer’s safety-based defense for a ban on pins, the Board similarly found it relevant that nothing in the employer’s handbooks linked the ban—contained in a dress code provision—to safety considerations, including the section devoted to safety. *See Boch Honda*, 2015 WL 1956199, at \*3 & n.7; *see also Boch Imports*, 826 F.3d at 576 n.14 (in rejecting rationale for ban, not unreasonable for Board to rely on fact pin ban located in dress code sections of handbook, not safety section).

As the Board further found, two additional factors undermine Long Beach’s unsupported assertion that any union pin affixed to a badge, no matter its size, appearance, or message, negatively affects safety and security. First, the pin rule permits employees to place a variety of other pins directly on their badges, including “I Give” pins. (A. 808; A. 237, 292-93, 493.) There is no evidence that

such pins play a role in facilitating hospital safety and security when affixed to badges. As noted above, the pin rule's placement in the appearance and grooming policy, rather than in a policy governing safety and security, shows that nothing about pins inherently poses a safety problem. Second, Long Beach's professed concern that a union pin would create "distractions or obstructions" if placed directly on a badge (Br. 32, *see also* 8) is undermined by the admission of a hospital official that there is no limit to the number of approved pins an employee may wear directly on a badge, so long as the badge remains readable. (A. 808; A. 293.)

Thus, rather than target its ban to address a specific type, size or number of pins, or bar a specific, offensive message, Long Beach opted to implement a preemptive, blanket prohibition of *all* union pins, including in non-patient care areas. Even accepting Long Beach's claim that "I Give" and other "approved" pins assist patients in identifying caregivers when placed on badges, that justification does not warrant a blanket ban on union pins affixed to badges when employees are in non-care areas, not caring for patients. (Br. 8, 28-29.) Moreover, aside from proffering the unsubstantiated claim that it had safety reasons for banning union pins on badges, Long Beach offers no defense to the Board's finding that the pin rule imposes a blanket prohibition on all employees wearing

union pins not only on their badges but also elsewhere on their clothing, and in non-patient care areas.

Long Beach's remaining contentions are contrary to established Board law. It points out that employees may (or could) have displayed union insignia in other ways (Br. 30, *see also* 10), but the Board appropriately found that Long Beach's "burden is not satisfied simply by showing that all possible alternatives to union pins are not likewise expressly banned." (A. 808 (citing cases).) *See, e.g., Albis Plastics*, 335 NLRB 923, 923-25 (2001) (requiring employer to justify rule banning union stickers on hardhats, even though employees free to display union insignia on clothing and elsewhere), *enforced mem.*, 67 F. App'x 253 (5th Cir. 2003). As discussed, Long Beach's burden was to justify a rule that is presumptively invalid because it prohibits employees from wearing union pins (or badges) while in non-patient care areas.

For similar reasons, Long Beach misses the mark in asserting that no employees were "restrained" by the pin rule. (Br. 30-31.) The Board based its finding on Long Beach's maintenance of a rule restricting Section 7 rights, not on its application of that rule to protected activity. Therefore, it is immaterial whether any employee was "actually prohibited" from wearing a union pin or badge. (A. 808.) *Cf. Guardsmark*, 475 F.3d at 374 (maintenance of rule explicitly restricting Section 7 activity is unfair labor practice, even absent evidence of enforcement).

In sum, substantial evidence supports the Board’s finding that the pin rule is presumptively invalid, and that Long Beach failed to rebut the presumption with specific evidence that the ban on wearing union pins or badges in non-patient care areas was necessary to avoid disrupting its operations, disturbing patients, or creating safety and security problems.

## 2. The badge reel rule

### a. **The rule is facially overbroad and presumptively invalid because it prohibits employees from wearing union-branded badge reels in non-patient care areas**

As shown, the badge reel rule unequivocally states that “[b]adge reels may only be branded with MemorialCare approved logos or text.” (A. 801; A. 479.) Like the pin rule, the badge reel rule, as written, plainly prohibits employees from exercising their Section 7 right to wear union-branded badge reels at work (*i.e.* badge reels without MemorialCare-approved logos or text). (A. 800.) *See* cases *supra* p. 19. The prohibition on union-branded badge reels is similarly overbroad: “On its face,” the Board found, “this requirement applies in all areas of the hospital, including non-patient care areas.” (A. 801.) *See London Mem’l Hosp.*, 238 NLRB at 707-08 (policy prohibiting insignia other than “of a professional nature” overbroad where, on its face, ban on union insignia not restricted to patient care areas); *see also* cases *supra* p. 19.

As the Board reasoned, and the evidence shows, there are no provisions within PC-261.02, including the policy's stated purpose, limiting that otherwise blanket prohibition "to immediate patient care areas." (A. 801; A. 477-79.) By contrast, other provisions within PC-261.02 that do not govern badge reels "explicitly state they only apply in immediate patient care areas." (A. 801 & n.3; A. 477 ¶4, 478 ¶4.) Those provisions' "explicit limitation to patient care areas further suggests that the badge reel rule, which contains no similar language, is not so limited." (A. 801.) In any event, as the Board noted, because the scope of PC-261.02 is "[a]t the very least" ambiguous, the scope of its ban must be construed against Long Beach as the rule's drafter. (A. 801 (citing *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999)).)

The Board acknowledged that the badge reel rule (as part of PC-261.02) "may only apply to 'direct patient care *providers*,'" but reasonably found that fact "does not establish that it only applies in immediate patient care *areas*." (A. 801.) After all, as the Board aptly observed, direct care providers "necessarily move throughout the hospital and spend time in non-patient care areas." (*Id.*) Indeed, as the Board further noted, PC-261.02 itself recognizes that direct care providers are present at the hospital for reasons other than providing direct patient care, including for education and meetings. (A. 801; A. 478.) Thus, by its plain terms,

the badge reel rule also applies to direct care providers when they are present in the hospital but not engaged in immediate patient care.

Given the plain language of the badge reel rule and the absence of any limiting language in PC-261.02, Long Beach's assertion that the rule only applies to direct care providers "when performing patient care duties in patient care areas" is unpersuasive. (Br. 24, *see also* 28.) Contrary to its contention, nothing in the "companion" (Br. 13) policy PC-261.01 provides such a limitation. (Br. 12-14.) That policy is likewise broadly written, stating it applies "at all times" (A. 473 ¶1) and to those for whom "a standard uniform is required" (A. 474 ¶A). When the policy does mention patient care areas, it does so in connection with the "Bare below the elbows" approach to preventing hospital-acquired infections. (*See* A. 473 ¶4, 475 ¶5.) Long Beach gains no more ground by arguing—without citation to the record—that employees "understood" the badge reel rule applies only while working in patient care areas. (Br. 28, *see also* 24.) As discussed, their subjective understanding is not dispositive. *See* pp. 19, 22.

Because the badge reel rule facially applies in non-patient care areas, the Board reasonably found it presumptively invalid. (A. 801-02.) The Board therefore appropriately concluded that "[a]bsent special circumstances . . . the badge reel provision is unlawful." (A. 801.)

**b. Long Beach failed to meet its burden of demonstrating that special circumstances justify the overbroad badge reel rule**

Substantial evidence supports the Board’s further finding that Long Beach failed to meet its burden of establishing special circumstances to justify its overbroad ban on union-branded badge reels. To begin, the Board found—and Long Beach does not appear to dispute (Br. 23-28)—that Long Beach “presented no evidence” that prohibiting direct care providers from wearing union-branded badge reels in non-patient care areas was necessary to prevent disruption of patient care or disturbance of patients. (A. 801-02; A. 83.) In this regard, the Board observed that the union-branded badge reels are similar to Long Beach’s reels in size, shape, and appearance (bearing only a small, discrete logo). (A. 801-02; A. 481-84.) This fact undermines Long Beach’s contention (Br. 27-28) that union-branded reels pose a problem in non-patient care areas. *See, e.g., Nordstrom*, 264 NLRB at 701-02 (blanket ban on non-company buttons was unlawful, where banned steward button blended in with permitted jewelry).

The Board next found that Long Beach failed to establish a public-image based justification for prohibiting direct care providers from wearing union-branded badge reels in non-patient care areas. (A. 802.) Based on the evidence and relevant case law, the Board reasonably rejected Long Beach’s contention (Br. 27-28) that the restriction was justified because it sought “a standardized, easily-

identifiable, customized, consistent and professional look in accordance with its business strategy of providing quality patient[] care.” (A. 802.) As the Board aptly noted, Long Beach presented “no evidence” that prohibiting union-branded badge reels in public, non-patient care areas was “necessary to create a unique experience distinct from its competitors.” (*Id.*) *Compare W San Diego*, 348 NLRB at 372-73 (special circumstances justified blanket ban on adornments where hotel commissioned distinct uniforms for public-facing employees to foster unique “Wonderland” experience for its guests, distinct from other hotels), *with Boch Honda*, 2015 WL 1956199, at \*2 & n.6 (special circumstances did not justify blanket ban on adornments where dealership provided standard Honda uniform with “Boch” added to some public-facing employees). In addition, although Long Beach requires direct care providers to wear a standardized uniform, the Board appropriately found that fact, standing alone, did not constitute a special circumstance justifying a ban on union-branded badge reels. Simply put, under established precedent “a uniform requirement alone is not a special circumstance.” (A. 802 (citing *P.S.K. Supermarkets*, 349 NLRB at 35).)

Moreover, the Board found the badge reel rule was not “narrowly tailored” to address Long Beach’s “purported concerns of providing a uniformed image of top-quality patient care.” (A. 802.) As discussed, any rule curtailing employees’ Section 7 right to wear union paraphernalia in the workplace must be narrowly

tailored to fit the particular circumstances. *See* p. 16. The badge reel rule is not so tailored because it fails to recognize that badge reels are “readily detachable,” unlike other union paraphernalia that may be impractical to don and doff when passing between immediate care areas and non-patient care areas. (A. 802.) Thus, direct care providers can easily remove union-branded badge reels before entering immediate patient care areas, substituting the MemorialCare badge reel or simply affixing their identification badges directly to their uniform. (A. 802; A. 228-30, 259, 525.) *Compare Casa San Miguel*, 320 NLRB at 540 (special circumstances justified blanket ban on nursing assistant wearing union-branded smock in lieu of standard uniform where it was not “practical or possible” for employee to change clothes each time he entered patient care area), *with Enloe Med. Ctr.*, 345 NLRB 874, 874-76 (2005) (no special circumstances for blanket ban on employees wearing union badge where nothing prevented employees from simply removing badge when entering patient care areas).

Long Beach gains no more ground by asserting that badge reels bearing the MHS logo are an inseparable part of its uniform (Br. 14, 23, 28, 32). This claim is contradicted by the testimony of Judith Fix, its Senior Vice President of Patient Care Services and Chief Nurse Officer (A. 209), who was involved with creating the underlying policies (A. 246). Her testimony shows that so long as the *identification badge* is worn on the correct spot of direct care providers’ uniforms,

it may be affixed directly using the hospital-provided plastic sleeve (*i.e.* badge holder) or with the MHS badge reel.<sup>6</sup> (A. 228-30, 259, 525.) Consequently, the MHS badge reel is not a required accoutrement for the uniform. In sum, the Board reasonably found that the badge reel rule, which restricts employees' right to wear union-branded badge reels in non-patient care areas, is presumptively invalid, and that Long Beach failed to establish special circumstances justifying the rule.

**C. The Court Lacks Jurisdiction To Consider Long Beach's Remaining Challenges, Including Its Meritless Contention that the Board Should Have Analyzed This Case Under *Boeing***

On review, Long Beach pins its hopes almost entirely on an argument that it failed to raise below—namely, that the Board should have analyzed this case under *Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017). (Br. 24-34, *see also* 2-4, 15, 18-21.) *Boeing*, however, addresses a separate and distinct question under Board jurisprudence, whether certain facially neutral employer work rules are nonetheless unlawful because of their potential interference with

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<sup>6</sup> Long Beach does not advance its cause by citing (Br. 14) one employee's testimony that the MHS badge reel is required. (A. 186-87.) Her testimony conflicts with contrary testimony by Fix and a second employee. (*See* A. 74, 76, 103.) Long Beach gains no more ground by citing the testimony of a pediatric clinical operations director, which shows that if direct care providers wore a badge reel, then it had to be MHS-branded; her apparent belief the MHS reel is a required part of the uniform conflicts with Fix's testimony. (A. 316, 319-332.) Nor is Long Beach helped by citing certain documents pertaining to its new uniforms, bare-below-the-elbows policy, and badge reels, which do not provide that the MHS badge reel is a required part of the uniform. (A. 549-55.)

Section 7 rights.<sup>7</sup> *See id.* at \*4. Regardless, as noted, Long Beach failed to raise any of its *Boeing*-related challenges before the Board. It could have done so after *Boeing* issued on December 14, 2017, while this case was pending before the Board, or in a motion for reconsideration after the Board issued its Decision and Order on April 20, 2018. Long Beach did neither. (*See* A. 2-4.)

It is beyond cavil that a party must first raise a challenge before the Board in order to preserve it for subsequent consideration by a court of appeals. Under Section 10(e) of the Act, 29 U.S.C. § 160(e), “[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court,” absent extraordinary circumstances. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *HealthBridge*, 798 F.3d at 1069. The recognized statutory purpose underlying Section 10(e) is that a party must provide the Board with adequate notice of the basis of its objection, and thus the

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<sup>7</sup> Prior to *Boeing*, the Board used the analytical framework articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for analyzing certain employer work rules. *Boeing*, 2017 WL 6403495, at \*8, \*15-18. The Board first examined whether the rule explicitly restricted Section 7 activity; if it did, the rule was unlawful. *Lutheran Heritage*, 343 NLRB at 646. If it did not, then the Board considered whether “(1) employees would reasonably construe the [facially neutral rule’s] 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. In *Boeing*, the Board expressly overruled *Lutheran Heritage*’s “reasonably construe” prong and announced a new balancing standard. 2017 WL 6403495, at \*8, \*15-\*18. The Board left unchanged the remaining framework in *Lutheran Heritage*. *See id.* at \*1-\*17, \*2 n.4.

opportunity to respond, before the party may pursue it in court. *See Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999).

Given Long Beach's failure to raise its *Boeing* challenges before the Board, and to present any extraordinary circumstances that would excuse its failure, the Court lacks jurisdiction to consider those challenges. *See HealthBridge*, 798 F.3d at 1068-70 (where party failed to raise issue prior to Board's decision, Section 10(e) bar applied because party subsequently could have raised issue to Board on motion for reconsideration).<sup>8</sup>

In any event, Long Beach's assertion that *Boeing* controls the outcome here rests on its incorrect premise that the Board relied on *Lutheran Heritage's*

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<sup>8</sup> The Court likewise lacks jurisdiction to consider Long Beach's assertion the Board erred in relying on the established principle that an ambiguity in a rule may be construed against its drafter. (Br. 25-26.) In any event, *Boeing* merely clarifies that the Board would no longer rely on an ambiguity in a *facially neutral rule* to necessarily find that it interferes with Section 7 rights. *See Boeing*, 2017 WL 6403495, at \*2, \*8-10 & n.43. As shown, the badge reel rule is not facially neutral. Rather, on its face it plainly restricts employees' right to wear union insignia. *See* p. 26.

“reasonably construe” prong to find the violation here.<sup>9</sup> (*See, e.g.*, Br. 24-28, 30-32.) As shown, in finding the pin and badge reel rules unlawful, the Board appropriately relied on its established, court-approved precedent specifically governing employer restrictions on employees’ right to wear union insignia at work—not on the inapposite reasonably construe analysis which, as noted (pp. 32-33 & n.7) addressed the distinct issue of the validity of certain facially neutral work rules.<sup>10</sup> *See* pp. 19-32. (*See* A. 800-02, 807-09.)

Long Beach likewise errs in asserting that the administrative law judge based his analysis of the pin rule on *Lutheran Heritage*. (Br. 31-32.) Although his recommended decision occasionally refers to reasonable interpretations, it does so

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<sup>9</sup> Long Beach does not advance its cause by citing General Counsel Memorandum 18-04 (Br. 25 n.9, 30-31), *available at* <https://apps.nlr.gov/link/document.aspx/09031d45827f38f1>. General Counsel memoranda express only the General Counsel’s views and “do not constitute precedential authority and are not binding on the Board.” *Atelier Condo. & Cooper Square Realty*, 361 NLRB 966, 1002 (2014), *enforced*, 653 F. App’x 62 (2d Cir. 2016). In any event, contrary to Long Beach’s representations, the General Counsel neither stated *Boeing* applies to the type of rules at issue here (*i.e.* apparel rules), nor “called-out” the Board for finding the present rules unlawful without relying on *Boeing*. (Br. 30-31.)

<sup>10</sup> It does not matter that the judge cited *Lutheran Heritage*’s reasonably construe prong in recommending dismissal of the complaint allegation involving the badge reel rule. (A. 809.) The Board did not adopt his finding or analysis. Instead, it expressly “reverse[d]” the judge on that issue and affirmed the judge’s findings “only to the extent consistent with” its Decision and Order. (A. 800.) As the Decision and Order shows, the Board found the badge reel rule unlawful but did not rely on a reasonably construe analysis in doing so. (*See* A. 800-02.)

in the context of addressing (and rejecting) claims made by Long Beach in support of its asserted special circumstances defense; those references appear after the judge found the pin rule facially overbroad and presumptively unlawful under settled Board law. (*See* A. 807-09.) Furthermore, as the decision shows, the judge properly framed the pin rule analysis by citing apposite principles and cases such as *Healthbridge* and *Boch Honda*, including where he rejected Long Beach's claims. (*See* A. 807-08.) The Board adopted this analysis, which in no way relies on *Lutheran Heritage*. (A. 800.)

Contrary to Long Beach's further suggestion (*see, e.g.*, Br. 2, 25, 36), it is of no moment that the parties at times relied on a reasonable construction analysis in their answering or reply briefs, which was in addition to arguing their positions under settled precedent involving union insignia. (*See* A. 740-46, 748-62 and A. 682-735, 774-84.) As shown, the Board did not analyze this case under *Lutheran Heritage*. Instead, it applied the relevant Board precedent governing restrictions on wearing union insignia at work. Therefore, notwithstanding its suggestion of prejudice, Long Beach was able to defend—and defended—its rules prohibiting union insignia under the precedent relied on by the Board to find them unlawful.

Finally, Long Beach seemingly challenges the Board's findings on First Amendment grounds. (Br. 23, *see also* 15.) The Court lacks jurisdiction to consider that argument, however, because Long Beach likewise failed to raise it

before the Board.<sup>11</sup> (*See* A. 635-39, 682-736, 774-85.) Even absent this jurisdictional bar, Long Beach's passing mention of that argument in its opening brief fails to preserve the issue for appellate review. *See, e.g., United States v. Miller*, 799 F.3d 1097, 1107-08 (D.C. Cir. 2015) (arguments not preserved by mere passing references or conclusory statements).

**D. The Court Need Not Address Long Beach's Meritless Challenge to the Certified List**

Echoing claims made in its motion to supplement the record, which the Board opposed, Long Beach argues that the certified list of the contents of the agency record filed by the Board should have included the parties' briefs in support of exceptions. (Br. 35-36.) The Court, however, need not rule on this issue because it has no practical consequences here. Long Beach mistakenly believes (Br. 36) that it needs the exceptions briefs to show that the parties mentioned *Lutheran Heritage* below, but that is evident from their answering and reply briefs (*see* A. 740-46, 748-62 and A. 682-735, 774-84), which are included on the certified list (A. 2-4). The Board does not dispute that the parties relied on *Lutheran Heritage* in their pleadings below. Instead, the Board argues that Long Beach failed to timely raise below its current argument that this case should have

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<sup>11</sup> Constitutional arguments may be forfeited under Section 10(e) of the Act. *See, e.g., Ampersand Pub'g, Inc. v. NLRB*, 2017 WL 1314946, at \*2 (D.C. Cir. Mar. 3, 2017) (holding First Amendment argument forfeited under Section 10(e)).

been analyzed under *Boeing*. See pp. 32-34. Thus, the briefs in support of exceptions are of no moment, and the Court can resolve this case without relying on them.

In any event, exceptions briefs are properly excluded from the certified list because they are not part of the “record” below as defined by the applicable Board rules. Specifically, Section 102.45(b) of the Board’s Rules and Regulations, titled “Contents of record,” enumerates the documents comprising the “agency record.” The section makes it clear that exceptions briefs do not fall within the definition of that term. It provides:

The charge upon which the complaint was issued and any amendments, the complaint and any amendments, Notice of Hearing, answer and any amendments, motions, rulings, orders, the transcript 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 section 102.46, constitutes the record in the case.

29 C.F.R. § 102.45(b) (emphasis added).<sup>12</sup>

Given this plain language, it is settled that briefs in support of exceptions are not part of the “record” before the Board as that term is defined by Section 102.45(b). Consequently, such briefs also are not part of the record on appeal (or

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<sup>12</sup> Contrary to Long Beach’s bald assertion, Section 102.46—governing the content, formatting, and filing of documents, including exceptions briefs—does not make the parties’ exceptions briefs part of the agency record. (Br. 35-36.)

the certified list).<sup>13</sup> *United Parcel Serv., Inc. v. NLRB*, 706 F.2d 972, 979 n.16 (3d Cir. 1983) (“brief filed in support of exceptions not included in record of case”) (citing predecessor to Section 102.45(b)), *vacated on other grounds*, 464 U.S. 979 (1983); *A.H. Belo Corp. (WFAA-TV) v. NLRB*, 411 F.2d 959, 967 (5th Cir. 1969) (exceptions “brief is not made a part of the record on appeal”). Thus, where a party opts to file a separate brief in support of its exceptions (as permitted by Section 102.46(a)(1)(i)(D)), which all three parties did here, then consistent with Section 102.45(b) the exceptions document is part of the “agency record,” but the separate brief in support is not.<sup>14</sup>

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<sup>13</sup> *HealthBridge*, 798 F.3d at 1069, and *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1264 (D.C. Cir. 1997), cited by Long Beach (Br. 35), do not compel the inclusion of exceptions briefs in the certified list. In *HealthBridge*, the exceptions brief was not part of the certified list. Rather, the employer simply cited it in its reply brief and provided a link to access it via the Board’s public website. See *Healthbridge Mgmt., LLC v. NLRB*, Nos. 14-1101, 14-1116 (D.C. Cir.), ECF Nos. 1504296 (certified list), 1532509 (reply brief p. 8). As for *Diamond Walnut*, the decision does not reveal how the employer’s exceptions brief came before the Court. The Board’s longstanding practice would have excluded it from the certified list, and the case docket does not show that the Board was ordered to supplement the certified list with the exceptions brief. See *Diamond Walnut Growers, Inc. v. NLRB*, No. 95-1075 (D.C. Cir.). A party may have simply lodged the brief with the Court, a step Long Beach could have taken here and one that the Board would not have opposed.

<sup>14</sup> A party may be advantaged by deciding to file separate exceptions and supporting brief because any integrated document cannot exceed 50 pages. See 29 C.F.R. § 102.46(a)(1)(i)(D) (citing Section 102.46(h)).

Consistent with the foregoing, and as it has in the hundreds of cases filed in this circuit and others over the years, the Board therefore properly filed a certified list of the contents of the “agency record” listing the parties’ exceptions documents but not their separate exceptions briefs.

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

/s/ Julie Brock Broido

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National Labor Relations Board

February 2019

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**Relevant Provisions of the National Labor Relations Act,  
29 U.S.C. §§ 151-69:**

**Sec. 7 [Sec. 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

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**Sec. 8(a) [Sec. 158(a)] [Unfair labor practices by employer]** 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 7 [section 157 of this title];

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**Sec. 10 [Sec. 160]**

**(a) [Powers of Board generally]** The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. 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. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United

States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**Relevant Provisions of the National Labor Relations Board's  
Rules and Regulations  
29 C.F.R. §§ 101-103**

**§ 102.45.** Administrative Law Judge's decision; contents of record; alternative dispute resolution program.

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**(b)** [Contents of record] The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript 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, constitutes the record in the case.

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**§ 102.46.** Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements.

**(a)** [Exceptions and brief in support] Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with Section

10(c) of the Act and §§ 102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section.

**(1) [Exceptions]**

**(i) Each exception must:**

- (A)** Specify the questions of procedure, fact, law, or policy to which exception is taken;
- (B)** Identify that part of the Administrative Law Judge's decision to which exception is taken;
- (C)** Provide precise citations of the portions of the record relied on; and
- (D)** Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50-page limit for briefs set forth in paragraph (h) of this section.

**(ii)** Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

**(2) [Brief in support of exceptions]** Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

- (i)** A clear and concise statement of the case containing all that is material to the consideration of the questions presented.
- (ii)** A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

**(b)** [Answering briefs to exceptions]

(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the filing requirements of paragraph (h) of this section.

(2) The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the Administrative Law Judge and the party filing the answering brief proposes to support the Judge's finding, the answering brief must specify those pages of the record which the party contends support the Judge's finding.

(c) [Cross-exceptions and brief in support] Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the Administrative Law Judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (a) and (h) of this section.

(d) [Answering briefs to cross-exceptions] Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (b) and (h) of this section. Such answering brief must be limited to the questions raised in the cross-exceptions.

(e) [Reply briefs] Within 14 days from the last date on which an answering brief may be filed pursuant to paragraphs (b) or (d) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this paragraph (e) must be limited to matters raised in the brief to which it is replying, and must not exceed 10 pages. No extensions of time will be granted for the filing of reply briefs, nor will permission be granted to exceed the 10-page limit. The reply brief must be filed with the Board and served on the other parties. No further

briefs may be filed except by special leave of the Board. Requests for such leave must be in writing and copies must be served simultaneously on the other parties.

**(f)** [Failure to except] Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.

**(g)** [Oral argument] A party desiring oral argument before the Board must request permission from the Board in writing simultaneously with the filing of exceptions or cross-exceptions. The Board will notify the parties of the time and place of oral argument, if such permission is granted. Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

**(h)** [Filing requirements] Documents filed pursuant to this section must be filed with the Board in Washington, DC, and copies must also be served simultaneously on the other parties. Any brief filed pursuant to this section must not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (e) of this section, must not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited.

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

<b>LONG BEACH MEMORIAL MEDICAL CENTER,</b>	)	
<b>D/B/A MEMORIALCARE LONG BEACH MEDICAL</b>	)	
<b>CENTER &amp; MEMORIALCARE MILLER CHILDREN’S</b>	)	
<b>AND WOMEN’S HOSPITAL LONG BEACH</b>	)	
	)	
<b>Petitioner/Cross-Respondent</b>	)	
<b>v.</b>	)	
	)	
<b>NATIONAL LABOR RELATIONS BOARD</b>	)	<b>Nos. 18-1125,</b>
	)	<b>18-1143</b>
<b>Respondent/Cross-Petitioner</b>	)	
<b>and</b>	)	
	)	
<b>CALIFORNIA NURSES ASSOCIATION/</b>	)	
<b>NATIONAL NURSES UNITED</b>	)	
	)	
<b>Intervenor</b>	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,294 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570

Dated at Washington, DC  
this 4th day of February 2019

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

**LONG BEACH MEMORIAL MEDICAL CENTER, )  
D/B/A MEMORIALCARE LONG BEACH MEDICAL )  
CENTER & MEMORIALCARE MILLER CHILDREN’S )  
AND WOMEN’S HOSPITAL LONG BEACH )**

**Petitioner/Cross-Respondent )**

**v. )**

**NATIONAL LABOR RELATIONS BOARD )**

**Nos. 18-1125,  
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**Respondent/Cross-Petitioner )**

**and )**

**CALIFORNIA NURSES ASSOCIATION/ )  
NATIONAL NURSES UNITED )**

**Intervenor )**

**CERTIFICATE OF SERVICE**

I hereby certify that on February 4, 2019, 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 further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570

Dated at Washington, DC  
this 4th day of February 2019