

20-60472

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

LOWES HOME CENTERS, L.L.C.,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent Cross-Petitioner

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

**BRIEF FOR RESPONDENT CROSS-PETITIONER
THE NATIONAL LABOR RELATIONS BOARD**

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ORAL ARGUMENT STATEMENT

The Board believes that oral argument is unnecessary because this case involves the straightforward application of well-settled law to the facts. However, to the extent the Court believes that oral argument would be helpful or grants Lowe's Home Centers, LLC's request for oral argument, the Board requests the opportunity to participate.

TABLE OF CONTENTS

Headings	Page(s)
Oral argument statement	i
Jurisdictional statement.....	1
Issue presented	2
Statement of the case.....	2
I. The Board’s findings of fact.....	3
A. Lowe’s operations and the original and revised codes of business conduct and ethics	3
B. Consequences of violating the original and revised codes	5
II. Procedural history.....	6
III. The Board’s conclusions and order.....	8
Summary of argument.....	9
Standard of review	11
Argument.....	13
The Board’s finding that the confidentiality rules in Lowe’s Codes violate Section 8(a)(1) is reasonably grounded in the Act and supported by substantial evidence	13
A. Workplace rules that restrict employees’ right to discuss wages violate Section 8(a)(1).....	13
B. The Board reasonably determined that the Codes’ confidentiality rules restrict employees’ wage discussions.....	18
1. The Board fairly read the rules to prohibit employees from discussing their salaries	18

Headings	Page(s)
2. The Board appropriately found that no business justification warrants banning employees’ discussions of their salaries	21
C. Lowe’s has not demonstrated that the Board misapplied <i>Boeing</i> or misinterpreted the confidentiality rules.....	24
1. Lowe’s has forfeited its contention that the Board implicitly applied <i>Lutheran Heritage</i> , and, in any event, the Board properly applied <i>Boeing</i>	25
2. Lowe’s fails to show that the Board misinterpreted the word “entrusted” or otherwise misread its confidentiality rules.....	29
3. Lowe’s fails to demonstrate that <i>Boeing</i> requires the Board to consider its generalized justifications, which, in any event, do not justify its restriction of its employees’ rights.....	32
Conclusion	35
Certificate of service	36
Certificate of compliance	37

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Allentown Mack Sales & Serv., Inc. v. NLRB</i> , <u>522 U.S. 359</u> (1998).....	12
<i>Aroostook Cty. Reg. Ophthalmology Ctr.</i> , <u>317 NLRB 218</u> (1995), <i>enforced in relevant part</i> , <u>81 F.3d 209</u> (D.C. Cir. 1996)	17
<i>Bayside Enters., Inc. v. NLRB</i> , <u>429 U.S. 298</u> (1977).....	12
<i>Beth Israel Hosp. v. NLRB</i> , <u>437 U.S. 483</u> (1978).....	17
<i>Boeing Company</i> , 365 NLRB No. 154, <u>2017 WL 6403495</u> (Dec. 14, 2017).....	6-11, 13-17, 21, 24-26, 28-29, 31-33
<i>Brockton Hosp. v. NLRB</i> , <u>294 F.3d 100</u> (D.C. Cir. 2002)	24, 33
<i>Cintas Corp. v. NLRB</i> , <u>482 F.3d 463</u> (D.C. Cir. 2007)	18, 22-24
<i>Convenience Food Sys., Inc.</i> , <u>341 NLRB 345</u> (2003), <i>enforced mem.</i> , <u>129 F. App'x 57</u> (5th Cir. 2005)	18
<i>Eastex, Inc. v. NLRB</i> , <u>437 U.S. 556</u> (1978).....	17
<i>El Paso Elec. Co. v. NLRB</i> , <u>681 F.3d 651</u> (5th Cir. 2012).....	12
<i>Fall River Dyeing & Finishing Corp. v. NLRB</i> , <u>482 U.S. 27</u> (1987)	15
<i>Flex Frac Logistics, LLC v. NLRB</i> , <u>746 F.3d 205</u> (5th Cir. 2014).....	18, 20, 23, 32

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Gulf States Mfg. Inc. v. NLRB</i> , 704 F.2d 1390 (5th Cir. 1983)	26
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996)	12
<i>Hyundai Am. Shipping Agency, Inc. v. NLRB</i> , 805 F.3d 309 (D.C. Cir. 2015)	23
<i>Int’l Bus. Machines Corp.</i> , 265 NLRB 638 (1982)	22
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998), <i>enforced mem.</i> , 203 F.3d 52 (D.C. Cir. 1999)	14
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004)	6, 14, 20, 24-29
<i>NLRB v. BASF Wyandotte Corp.</i> , 798 F.2d 849 (5th Cir. 1958)	9
<i>NLRB v. Brookshire Grocery Co.</i> , 919 F.2d 359 (5th Cir. 1990)	17
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969)	12, 29
<i>NLRB v. Great Dane Trailers, Inc.</i> , 388 U.S. 26 (1967)	14
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975)	11
<i>NLRB v. Main St. Terrace Care Ctr.</i> , 218 F.3d 531 (6th Cir. 2000)	18
<i>Prime Healthcare Paradise Valley, LLC</i> , 368 NLRB No. 10, 2019 WL 2525342 (June 18, 2019)	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Sara Lee Bakery Group, Inc. v. NLRB</i> , 514 F.3d 422 (5th Cir. 2008).....	9
<i>Strand Theatre of Shreveport Corp. v. NLRB</i> , 493 F.3d 515 (5th Cir. 2007).....	12
<i>Triana Industries</i> , 245 NLRB 1258 (1979)	3
<i>United Supermarkets, Inc. v. NLRB</i> , 862 F.2d 549 (5th Cir. 1989).....	11
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	12
<i>Valmont Indus., Inc. v. NLRB</i> , 244 F.3d 454 (5th Cir. 2001).....	12
<i>Verizon Wireless</i> , 365 NLRB No. 38 (2017)	23
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	25, 33
 <u>Statutes</u>	
National Labor Relations Act, as amended (29 U.S.C. §§ 151 , et seq.)	
29 U.S.C. §157	2, 3, 6, 9-11, 13-17, 20, 21, 23, 25, 27, 28, 31, 32
29 U.S.C. § 158(a)(1)	2, 6, 7, 9, 13-15, 17, 18, 20, 25, 31, 34
29 U.S.C. § 160(a)	2
29 U.S.C. § 160(e)	2, 12, 25
29 U.S.C. § 160(f)	2

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Lowe's Home Centers, LLC to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against Lowe's on December 12, 2019, reported at

368 NLRB No. 133. ([ROA.174-81.](#))¹ The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act) ([29 U.S.C. § 160\(a\)](#)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act ([29 U.S.C. § 160\(e\)](#) and [\(f\)](#)). Venue is proper under Section 10(e) and (f) because Lowe's transacts business in Texas, Louisiana, and Alabama. Lowe's petition and the Board's cross-application were timely, as the Act places no time limit on the institution of proceedings to enforce or review Board orders.

ISSUE PRESENTED

Is the Board's finding that Lowe's violated Section 8(a)(1) of the Act by maintaining nationwide confidentiality rules in its original and revised Code of Business Conduct and Ethics that restrict employees from discussing salary information with each other reasonably grounded in the Act and supported by substantial evidence?

STATEMENT OF THE CASE

The Board has long held that Section 7 of the Act, [29 U.S.C. §157](#), protects employees' efforts to "ascertain what wages are paid by their employer, as wages

¹ Initial references are to the Board's findings; those following are to supporting evidence. References to ROA are to the page number of the record on appeal as assigned in the record's docket entry. "Br." refers to Lowe's opening brief.

are a vital term and condition of employment.” *Triana Indus.*, [245 NLRB 1258, 1258](#) (1979). This case involves the legality of Lowe’s confidentiality rules, which the Board found, when reasonably interpreted, prohibit employees from engaging in their Section 7 right to discuss salary information with each other. Under applicable precedent, no business justifications offered by the employer for such a rule can outweigh the adverse impact the rule has on employee’s Section 7 rights, rendering Lowe’s maintenance of the confidentiality rules unlawful. The Board seeks enforcement of its Order requiring Lowe’s to rescind the unlawful portions of its confidentiality rules. The Board’s findings of fact, based on a stipulated record, the relevant procedural history, and the Board’s conclusions are described below.

I. THE BOARD’S FINDINGS OF FACT

A. Lowe’s Operations and the Original and Revised Codes of Business Conduct and Ethics

Lowe’s sells home-improvement goods in retail stores throughout the United States. ([ROA.176, 10.](#)) Since at least 2013, it has maintained a Code of Business Conduct and Ethics (the Original Code) that applies to all employees. The Original Code states, in relevant part:

This Code of Business Conduct and Ethics (“Code”) applies to every Lowe’s employee (hereinafter referred to as “Employees”). [. . .] All Employees should read, review and understand these standards because, as an Employee, you must conduct yourself in accordance with this Code and help ensure that others do as well. If objections,

conflicts or possible conflicts, or disagreements with this Code arise, or if you become aware of violations or potential violations of this Code, it is important that you resolve them promptly, following the guidance provided in this Code. Employees are encouraged to talk to supervisors, managers or other appropriate personnel about observed illegal or unethical behavior and, when in doubt, about the best course of action in a particular situation.

[...]

5. Confidential Information:

Employees must maintain the confidentiality of information entrusted to them by Lowe's or its suppliers or customers, except when disclosure is authorized by Lowe's General Counsel and Chief Compliance Officer or disclosure is required by law, applicable governmental regulations or legal proceedings. Whenever feasible, Employees should consult with the company's General Counsel and Chief Compliance Officer before disclosing confidential information if they believe they have a legal obligation to do so.

Confidential information includes all non-public information that might be of use to competitors of the company, or harmful to Lowe's, its suppliers or customers, if disclosed. It includes all proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records and salary information.

(ROA.176, 11-12, 48-50.)

Since May 2013, Lowe's has also maintained a revised Code of Business Conduct and Ethics (the Revised Code), which states in its foreword and introduction that it applies to employees and all others who do business on behalf of Lowe's. (ROA.177, 86, 88.) The Revised Code contains the following "Confidential Information" rule:

Employees must maintain the confidentiality of information entrusted to them by Lowe's, its suppliers, its customers, or its competitors, except when disclosure is authorized by the Chief Compliance Officer or required by law. Employees must consult with the Chief Compliance Officer before disclosing any information that could be considered confidential.

Confidential information includes, but is not limited to:

- Material, non-public information; and
- Proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records or salary information, and future plans and strategy.

([ROA.176-77](#), [13-14](#), [91](#).)

B. Consequences of Violating the Original and Revised Codes

Lowe's also maintains a Corrective Action Procedure with different levels of violations. Under that procedure, "Class A" violations result in a final warning or immediate termination for a first offense. The procedure lists violations of the Original Code and the Revised Code (collectively, the Codes), including violations of the Confidential Information rules (collectively, the confidentiality rules) in the Codes, as an example of a Class A violation. ([ROA.176-77](#), [12-13](#), [54-58](#).) In addition, the Revised Code states that "[t]he failure of any employee to comply with this Code will result in disciplinary action which may include reprimand, probation, suspension, forfeiture of a bonus, demotion or dismissal[.]" ([ROA.177](#), [95](#).)

II. PROCEDURAL HISTORY

After the filing of unfair-labor-practice charges, the Board's General Counsel issued a complaint, then an amended complaint, alleging, in relevant part, that Lowe's violated Section 8(a)(1) of the Act by maintaining the confidentiality rules. ([ROA.8, 31-36, 73-78.](#)) The General Counsel, the Charging Party, and Lowe's moved to have an administrative law judge hear the case on an initial stipulated record, which the parties later revised. ([ROA.9, 6-25, 70.](#))

After the parties filed briefs but before the judge issued her decision, the Board issued *Boeing Company*, 365 NLRB No. 154, [2017 WL 6403495](#) (Dec. 14, 2017), which announced a new framework for evaluating when certain workplace rules violate the Act. Specifically, the Board overruled its previous test, announced in *Lutheran Heritage Village-Livonia*, [343 NLRB 646](#) (2004), under which a "facially neutral" workplace rule (one that does not expressly restrict Section 7 activity) was unlawful if employees would "reasonably construe" it as prohibiting Section 7 activity. *Boeing*, [2017 WL 6403495](#), at *2. The Board replaced the "reasonably construe" standard with a balancing test that considers both the impact of the employer's rule on employees' Section 7 rights and the employer's asserted business justifications for the rule. *Id.* at *4.

Given that new framework, which applied to Lowe's confidentiality rules, the judge requested position statements on whether to reopen the record to introduce additional evidence. ([ROA.100-01.](#)) Lowe's and the General Counsel agreed "that the record [did] not need to be reopened." ([ROA.108.](#)) The judge ordered supplemental briefing addressing *Boeing*, and both parties filed briefs. ([ROA.176, 108.](#))

On the revised stipulated record, the administrative law judge found that Lowe's violated Section 8(a)(1) of the Act by maintaining the confidentiality rules. ([ROA.175-81.](#)) Applying the *Boeing* framework, the judge reasoned that the rules, as reasonably interpreted, restricted employees from discussing wages and salaries. In doing so, the judge noted that any "ambiguities in a rule are construed against the drafter." ([ROA.178.](#)) The judge then determined that the restriction on employees' rights under the Act outweighed any possible business justification. Specifically, the judge explained that under *Boeing*, "any rule prohibiting employees from discussing salary information [is] per se unlawful thus bypassing the need to conduct a balancing test," and that even if Lowe's could present a business justification sufficient to render the rules lawful, it had not done so. ([ROA.178-79.](#))

III. THE BOARD'S CONCLUSIONS AND ORDER

After Lowe's filed exceptions to the judge's decision, the Board (Chairman Ring and Members McFerran and Kaplan) adopted the judge's decision with minor changes. The Board majority explained that although employers have a legitimate interest in preventing unauthorized access to and distribution of confidential records, "such circumstances [were] not present in this case," particularly where the rule "was directed to all employees and not just those given access to [Lowe's] confidential records." ([ROA.174](#) n.1.) The Board majority, however, did not rely on the judge's invocation of the principle that ambiguities in work rules should be construed against the drafter, noting that *Boeing* "clearly rejected" that principle.² ([ROA.174](#) n.1.)

To remedy the violation found, the Board ordered Lowe's to cease and desist from maintaining a Code that requires employees to keep salary information confidential and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act. ([ROA.174](#).) The Board also ordered Lowe's to rescind the confidentiality rules in the Codes, to furnish employees with an insert for the Codes either stating that the confidentiality rules have been rescinded or replacing those rules with lawful

² Member McFerran stated that she adhered to her dissent in *Boeing* but agreed with the violation found. ([ROA.174](#) n.1.)

provisions, and to post a remedial notice nationwide. ([ROA.174-75.](#)) The Board further noted Lowe’s claim that it had already complied with “some” of the terms of the recommended Order “by rescinding the policy at issue after the judge issued her decision[,]” and explained that “[t]he legal effect” of that alleged rescission “may be addressed in compliance.”³ ([ROA.174](#) n.2.) *See NLRB v. BASF Wyandotte Corp.*, [798 F.2d 849, 858](#) (5th Cir. 1958) (issue of whether employer had partially complied with Board order “is most appropriately left to determination by the Board during the compliance stage” rather than the merits stage of the Board’s bifurcated process).

SUMMARY OF ARGUMENT

As this Court has long recognized, workplace rules that tend to chill employees in the exercise of their rights under Section 7 of the Act violate Section 8(a)(1) of the Act, regardless of whether the employer intends the rule to interfere with employees’ rights. Applying the framework set out in *Boeing Co.*, 365 NLRB No. 154, [2017 WL 6403495](#) (Dec. 14, 2017), to determine whether a workplace rule unlawfully chills employees’ exercise of their rights, the Board reasonably concluded that Lowe’s violated Section 8(a)(1) of the Act by maintaining the

³ Before the Board, Lowe’s contended that it should not be required to post the remedial notice nationwide. It has abandoned that contention on appeal, thereby waiving any challenge to the nationwide posting. *See Sara Lee Bakery Group, Inc. v. NLRB*, [514 F.3d 422, 429](#) (5th Cir. 2008) (finding that “when an employer does not challenge a finding of the Board, the unchallenged issue is waived on appeal”).

confidentiality rules in each of the Codes. As the Board and courts have consistently held, workplace rules prohibiting employees from discussing wages and salaries with each other and with outside parties such as unions violate the Act. Here, the confidentiality rules apply broadly to all employees and prohibit the disclosure of confidential information, defined as including salary information. The confidentiality rules do not specify to whom disclosure is prohibited, and employees who violate the rules are subject to a myriad of disciplinary actions. Interpreting the confidentiality rules from a reasonable employee's perspective—as the law requires work rules to be read—the rules prevent employees from discussing salary information with each other and with nonemployees, including unions. And although the rules limited their applicability to information “entrusted” to employees, most employees without special access to confidential information, would interpret the rule as restricting wage discussions. Because the rule broadly applied to all employees and did not restrict its reach to only those with access to confidential business records, its ban on discussing salary information entrusted to employees unlawfully infringed on their Section 7 rights.

The Board also properly held that its *Boeing* decision foreclosed any business justification. That finding comports with longstanding Board and circuit law invalidating confidentiality rules that prevent employees from discussing their wages and finding that no legitimate purpose could warrant such a restriction. And

even if *Boeing* allowed consideration of Lowe’s business justifications, the Board properly found that Lowe’s had not presented any evidence that its confidentiality concerns warranted such a broad restriction on employees’ Section 7 rights.

Lowe’s primarily defends its rules by claiming that the Board actually applied the overruled “reasonably construe” test, misunderstood the word “entrusted,” and failed to consider its business justifications. It has forfeited most of its challenges by failing to raise them to the Board. In any event, Lowe’s challenges lack merit. The Board explicitly applied the *Boeing* test, declined to construe ambiguities against Lowe’s, and gave a fair reading from the employee perspective to the word “entrusted.” Its analysis therefore fully comports with *Boeing*. As such, Lowe’s confidentiality rules violate the Act.

STANDARD OF REVIEW

Based on its “cumulative experience” and “special competence” in the field of labor relations, the Board has the primary responsibility for “applying the general provisions of the Act to the complexities of industrial life,” and the balance struck by the Board in reconciling the interests of labor and management “is subject to limited judicial review.” *NLRB v. J. Weingarten, Inc.*, [420 U.S. 251, 266-67](#) (1975) (internal quotation marks omitted); see *United Supermarkets, Inc. v. NLRB*, [862 F.2d 549, 552](#) (5th Cir. 1989). Thus, for example, reviewing courts “must recognize the Board’s competence in the first instance” to judge the impact

on employees of language used in the context of the employer-employee relationship. *NLRB v. Gissel Packing Co.*, [395 U.S. 575, 620](#) (1969).

“The standard of review of the Board’s findings of fact and application of the law is deferential.” *Valmont Indus., Inc. v. NLRB*, [244 F.3d 454, 463](#) (5th Cir. 2001). Courts must “respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ . . . even if the issue ‘with nearly equal reason [might] be resolved one way rather than another.’” *Holly Farms Corp. v. NLRB*, [517 U.S. 392, 399](#) (1996) (internal citation omitted) (quoting *Bayside Enters., Inc. v. NLRB*, [429 U.S. 298, 302, 304](#) (1977)). The Court will uphold the Board’s decision if its legal conclusions are reasonably grounded in the Act and supported by substantial evidence on the record as a whole. *Strand Theatre of Shreveport Corp. v. NLRB*, [493 F.3d 515, 518](#) (5th Cir. 2007); *see* [29 U.S.C. § 160\(e\)](#); *Universal Camera Corp. v. NLRB*, [340 U.S. 474, 488](#) (1951). Substantial evidence means the degree of evidence which “*could* satisfy a reasonable factfinder.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, [522 U.S. 359, 377](#) (1998) (emphasis in original); *see* *El Paso Elec. Co. v. NLRB*, [681 F.3d 651, 656](#) (5th Cir. 2012).

ARGUMENT

THE BOARD’S FINDING THAT THE CONFIDENTIALITY RULES IN LOWE’S CODES VIOLATE SECTION 8(a)(1) IS REASONABLY GROUNDED IN THE ACT AND SUPPORTED BY SUBSTANTIAL EVIDENCE

Lowe’s contends that the Board misinterpreted its confidentiality rules to find that they unlawfully restrict employees’ discussion of their salaries and that the Board wrongly determined that its individual business justifications cannot outweigh the confidentiality rules’ harsh impact on its employees’ Section 7 rights. But as shown below, when given a reasonable construction from the employees’ perspective, as required by *Boeing*, the confidentiality rules restrict employees’ salary discussions. And under *Boeing*—consistent with decades of previous Board and court precedent—no business justification can support such an invasion of employees’ Section 7 rights. Thus, as explained below, the Board reasonably found that Lowe’s confidentiality rules violate Section 8(a)(1) of the Act.

A. Workplace Rules that Restrict Employees’ Right To Discuss Wages Violate Section 8(a)(1)

Section 7 of the Act, [29 U.S.C. § 157](#), grants employees the “right to self-organization, to form, join, or assist labor organizations, . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . to refrain from any or all of such activities” [29 U.S.C. § 157](#). An employer violates Section 8(a)(1) of the Act, [29 U.S.C. § 158\(a\)\(1\)](#), if it

“interfere[s] with, restrain[s], or coerce[s] employees in the exercise of [those] rights” Maintaining a workplace rule that tends to chill employees in the exercise of their Section 7 rights thus violates Section 8(a)(1). *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

In addition to rules that expressly restrict, are promulgated in response to, or are applied against activity protected by Section 7, some facially neutral rules that tend to chill Section 7 activity also violate the Act. *Boeing*, 2017 WL 6403495, at *1 n.4. In *Boeing*, the Board reassessed its analytical framework for determining when the mere maintenance of a facially neutral work rule violates Section 8(a)(1). Under the Board’s previous framework, set forth in *Lutheran Heritage Village-Livonia*, a facially neutral workplace rule was unlawful if “employees would reasonably construe the language to prohibit Section 7 activity.” *Lutheran Heritage*, 343 NLRB 646, 647 (2004). In *Boeing*, the Board abandoned *Lutheran Heritage*’s “reasonably construe” prong in favor of a standard that attempts to “strike the proper balance” between an employer’s “asserted business justifications” for its rule and “the invasion of employee rights in light of the Act and its policies.” *Boeing*, 2017 WL 6403495, at *15 (quoting *NLRB v. Great Dane Trailers, Inc.* 388 U.S. 26, 33-34 (1967)).

Under *Boeing*’s balancing test, the Board evaluates the lawfulness of a facially neutral policy by first asking whether that policy, “when reasonably

interpreted,” would potentially interfere with the exercise of employees’ Section 7 rights. *Boeing*, [2017 WL 6403495](#), at *4. The Board then weighs “the nature and extent of the potential impact on [Section 7] rights” against the “legitimate justifications associated with the rule.” *Id.* If the former outweighs the latter, the rule violates Section 8(a)(1). *Id.* When evaluating the rule and proffered justifications, the Board focuses “on the employees’ perspective,” which is “consistent with established Board and court case law.” *Id.* at *17 (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, [482 U.S. 27, 43](#) (1987) (“This emphasis on the employees’ perspective furthers the Act’s policy of industrial peace.”)). Using the employees’ perspective is “especially important when evaluating questions regarding alleged interference with protected rights.” *Boeing*, [2017 WL 6403495](#), at *17.

In *Boeing*, the Board further explained that, “[a]s the result of this balancing,” the Board will “delineate three categories of [work] rules” in which it would place rules “in this and in future cases” based on the nature of the Section 7 right at issue. *Id.* at *4. The Board emphasized that the categories “will represent a classification of results from the Board’s application of [*Boeing*],” and would “ultimately provide far greater clarity and certainty to employees, employers and unions regarding whether and to what extent different types of rules may lawfully be maintained.” *Id.* at *16.

Category 1 includes rules “that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.” *Id.*, at *4. Category 2 includes rules whose legality depends on their business justification in each case; that category is the only one requiring “individualized scrutiny.” *Id.*

Category 3 includes “rules that are generally unlawful because their potential interference with the exercise of protected rights outweighs *any possible* justifications.” *Id.* at *5 n.17 (emphasis added). The Board has further explained, in subsequent cases applying *Boeing*, that such rules “significantly impair employee rights, the free exercise of which is vital to the implementation of the statutory scheme established by Congress in the [Act],” and it has emphasized that “[n]o legitimate justification outweighs, or could outweigh, the adverse impact of such provisions on employee rights and the administration of the Act.” *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, [2019 WL 2525342](#), at *6 (June 18, 2019). Indeed, “as a matter of law, there is not and cannot be any legitimate justification for provisions” that the Board places in Category 3. *Id.* at *10.

At issue in this case are confidentiality rules that impact Lowe’s employees’ right to discuss salary and wages with each other. Section 7 of the Act, [29 U.S.C.](#)

§ 157, protects the rights of employees to communicate with others regarding the terms and conditions of their employment. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). Wages are “probably the most critical element” in employees’ terms and conditions of employment, and are “the grist on which concerted activity feeds.” *Aroostook Cty. Reg. Ophthalmology Ctr.*, 317 NLRB 218, 220 (1995), *enforced in relevant part*, 81 F.3d 209 (D.C. Cir. 1996). Indeed, as the Supreme Court has noted, “[f]ew topics are of such immediate concern to employees as the level of their wages.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978).

Recognizing the importance of permitting wage discussion among employees, the Board found in *Boeing* that “[a]n example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.” *Boeing*, 2017 WL 6403495, at *4.

Thus, when the Board has determined that a workplace rule, reasonably construed from the perspective of employees, restricts employees from discussing wages, *Boeing* requires that the Board find that the rule violates Section 8(a)(1) without any need to examine the business justifications offered in a particular case. *Boeing*’s determination that no justification outweighs the undeniably harsh impact that a rule prohibiting wage discussion has on employees’ Section 7 rights comports with longstanding Board and court precedent, including this court. *See NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990) (a “workplace

rule that forb[ids] the discussion of confidential wage information between employees . . . patently violate[s] [S]ection 8(a)(1)”; *see also Flex Frac Logistics, LLC*, [746 F.3d 205, 208-09](#) (5th Cir. 2014) (rule requiring confidentiality of personnel information and documents violated the Act); *Cintas Corp. v. NLRB*, [482 F.3d 463, 465](#) (D.C. Cir. 2007) (rule requiring “confidentiality of any information concerning the company,” including employees, violated the Act); *NLRB v. Main St. Terrace Care Ctr.*, [218 F.3d 531, 538](#) (6th Cir. 2000) (employer violated the Act by “promulgating a rule prohibiting employees from discussing wages with one another”); *Convenience Food Sys., Inc.*, [341 NLRB 345, 351](#) (2003) (“prohibition on employees’ discussion of salaries . . . is normally unlawful” under clear Board law), *enforced mem.*, [129 F. App’x 57, 59](#) (5th Cir. 2005).

B. The Board Reasonably Determined That the Codes’ Confidentiality Rules Restrict Employees’ Wage Discussions

1. The Board fairly read the rules to prohibit employees from discussing their salaries

As the Board found, the confidentiality rules “prohibit[] employees from unauthorized disclosure of confidential information, including salary information, without specificity as to whom disclosure is prohibited.” ([ROA.178.](#)) In the Original Code, confidential information includes “all non-public information that might be of use to competitors of the company.” ([ROA.178, 11-12, 48-50.](#)) Lest

there be any doubt, the Original Code specifically clarifies that confidential information includes “personnel” and “salary information.” ([ROA.11-12, 48-50.](#)) Similarly, in the Revised Code, confidential information includes “material, nonpublic information,” and “proprietary information” such as “personnel” and “salary information.” ([ROA.13-14, 91.](#)) Both Codes state that “[e]mployees must maintain the confidentiality of information entrusted to them by Lowe’s or its suppliers or customers.” ([ROA.11-14, 48, 91.](#)) And neither Code specifies to whom disclosure is prohibited. ([ROA.178.](#)) As such, “both versions of the Confidential Information provision may be read to preclude employees from discussing their salary information with one another, as well as nonemployees such as union representatives and Board agents[.]” ([ROA.178.](#))

Having read the rule as restricting the sharing of salary information and as applying to all employees, the Board then determined that Lowe’s “limitation of covered proprietary information to information ‘entrusted’ to employees” could not be read to restrict the rule’s reach. ([ROA.178.](#)) Such phrasing “was insufficient to convey to a reasonable employee” that the rule did not limit their right to discuss their own salaries, “particularly given that the policy was directed to all employees, not just those given access to [Lowe’s] confidential records.” ([ROA.174 n.1.](#)) As the Board further explained, “[f]or most employees, without access to confidential records, the only salary information they could reasonably view as ‘entrusted’ to

them under this policy is their own salary.” ([ROA.174](#) n.1.) Thus, “focusing on the perspective of employees,” as the precedent requires, the Board found that the Confidential Information rule “could not be read” as permitting employee discussion and sharing of salary information. ([ROA.178](#).)

The Board’s finding comports with this Court’s decision in *Flex Frac*. There, the Court examined a confidentiality rule banning employees from disclosing, among other items, “personnel information and documents” to anybody outside the employer’s organization. *Flex Frac*, [746 F.3d at 207](#) (applying *Lutheran Heritage* “reasonably construe” test). The Court found the rule unlawful, reasoning that personnel information “implicitly include[s] wage information.” *Id.* at 210. Here, Lowe’s confidentiality rules are even broader than the unlawful rule at issue in *Flex Frac*. Unlike in *Flex Frac*, Lowe’s confidentiality rules ban disclosures to all entities, not only those outside the company, and Lowe’s explicitly lists salaries as confidential information. Thus, here, Lowe’s has made explicit what the employer in *Flex Frac* only implied.

In short, when read from an employee perspective, the confidentiality rules restrict all Lowe’s employees from disclosing all salary information, including their own. ([ROA.174](#) n.1.) Nothing in the rules, including the word “entrusted,” meaningfully limits that restriction. Because employees have a Section 7 right to

discuss their salaries, as discussed below, the confidentiality rules violate Section 8(a)(1).

2. The Board appropriately found that no business justification warrants banning employees' discussions of their salaries

Because Lowe's confidentiality rules prohibit disclosure of all salary information, they are, as designated in *Boeing*, "Category 3" rules. As such, they are "per se unlawful," allowing the Board to "bypass[] any need to conduct a balancing test." ([ROA.178.](#)) As detailed in *Boeing*, once the Board places a type of rule in one of the three categories, re-designating that rule to a different category will be "relatively rare." *Boeing*, [2017 WL 6403495](#), at *16. Nothing in this case warrants reconsideration of the Board's determination that rules prohibiting wage discussions are unlawful regardless of an employer's justification.

Moreover, as the Board explained here, "[e]ven when conducting the *Boeing* balancing test," Lowe's has failed to justify its rules because "the adverse impact on employees' Section 7 rights outweighs [Lowe's] asserted business justifications." ([ROA.179.](#)) As *Boeing* makes clear, even in cases where the Board individually balances an employer's interests against employees' Section 7 rights, the employer must present evidence of "work-related justifications for the rule," allowing the Board to consider "different industries and work settings." *Boeing*, [2017 WL 6403495](#), at *16. But here, Lowe's provided nothing for the

Board to balance, as it “failed to present any legitimate business justifications precluding disclosure of salary information.” ([ROA.179.](#)) Notably, even when provided the opportunity to reopen the record to provide such evidence, Lowe’s declined, opting to rely on “bare assertions” to support its alleged business justifications. ([ROA.179.](#)) But its unsupported claims of “avoiding unethical business conduct and unfair competition” and “complying with antitrust laws” do not outweigh the adverse impact of its rule prohibiting “all employees” from discussing “personnel information,” including salaries. ([ROA.176, 179.](#)) Such a “presumed interest in protecting confidential information” does not require “interfer[ing] with protected employee activity[.]” *Cintas*, [482 F.3d at 470.](#)

In rejecting Lowe’s unsupported justifications as insufficient, the Board contrasted Lowe’s paucity of evidence with cases where other employers maintained narrower restrictions that they justified using testimony and documentary evidence—both noticeably absent from Lowe’s defense. For instance, in *International Business Machines Corporation*, the Board found that the employer justified banning employees from disclosing its aggregate wage data because it introduced testimony demonstrating the value of its closed compensation system and its rule did not “prohibit employees from discussing their own wages or attempting to determine what other employees are paid.” *IBM*, [265 NLRB 638, 638](#) (1982). In contrast to *IBM*, Lowe’s neither narrowly tailored its

confidentiality rules, which applied to “every Lowe’s employee” and all salary disclosures, nor even attempted to demonstrate any individualized circumstances warranting its confidentiality rule. ([ROA.176](#), [178](#).)

Finding that no justification could support Lowe’s prohibition of all employees’ from engaging in wage discussion comports with longstanding Board and court precedent. The Board has examined the business justifications behind employer confidentiality rules and found that they do not warrant forcing employees to keep their wages confidential. *See, e.g., Verizon Wireless*, 365 NLRB No. 38, slip op. at 1 (2017) (recognizing that “employers have a substantial and legitimate interest in maintaining the privacy of certain business information” but finding that interest does not justify broad ban on discussing wages). As courts have repeatedly recognized, employers can protect their confidentiality interests with more narrowly tailored rules that do not infringe on employees’ Section 7 rights. *See Flex Frac*, [746 F.3d at 210 n.4](#); *Cintas*, [482 F.3d at 470](#). Indeed, even the D.C. Circuit, which has required that the Board balance employers’ confidentiality interests against employees’ Section 7 rights in rules cases, *see Hyundai Am. Shipping Agency, Inc. v. NLRB*, [805 F.3d 309, 314](#) (D.C. Cir. 2015) (confidentiality rule limiting employees’ Section 7 right to discuss their employment violates the Act unless employer “present[s] a legitimate and substantial business justification for the rule, outweighing the adverse effect on the

interests of employees”), has repeatedly found that rules banning discussion of wages violate the Act without further inquiry into the specific justifications offered in particular cases. *See Cintas*, [482 F.3d at 469-70](#); *Brockton Hosp. v. NLRB*, [294 F.3d 100, 106-07](#) (D.C. Cir. 2002).

In sum, the Board recognized that employers have a “legitimate” interest in restricting employees’ “unauthorized access to, and dissemination of,” confidential documents, including salary information contained in such documents. ([ROA.174 n.1.](#)) But it properly determined, after reasonably interpreting the rule from the employees’ perspective as *Boeing* requires, that the confidentiality rules—which applied to all employees—prevented employees from discussing wages with each other, and Lowe’s could have no legitimate interest that outweighed such a broad prohibition.

C. Lowe’s Has Not Demonstrated that the Board Misapplied *Boeing* or Misinterpreted the Confidentiality Rules

In attacking the Board’s findings, Lowe’s sets forth several contentions. First, it claims that, in finding that its confidentiality rule restricts employees from discussing salaries, the Board either misapplied or implicitly abandoned *Boeing* to instead apply the overruled *Lutheran Heritage* “reasonably construe” analysis. Second, Lowe’s argues that the Board simply misread its rule as prohibiting discussion of salary information among employees. Finally, it contends that the Board has failed to consider its business justifications for the rule, as *Boeing*

requires. Lowe's failed to raise several of its arguments supporting these claims to the Board, rendering this Court without jurisdiction to consider them. Moreover, even if the Court could consider Lowe's arguments in their entirety, Lowe's has failed to undercut the Board's well-supported finding that its confidentiality rules violate Section 8(a)(1).

1. Lowe's has forfeited its contention that the Board implicitly applied *Lutheran Heritage*, and, in any event, the Board properly applied *Boeing*

Lowe's contends that the Board implicitly applied *Lutheran Heritage* in three ways: by using verbiage indistinguishable from *Lutheran Heritage*'s "reasonably construe" standard; by requiring it to anticipate any possible interpretation of the Codes that might infringe on employees' Section 7 rights; and by improperly construing ambiguities in the confidentiality rules against the drafter. The ambiguity claim is the only argument properly preserved for this Court's review, and, in any event, all three contentions lack merit.

Absent extraordinary circumstances, a reviewing court cannot consider any "objection that has not been urged before the Board[.]" [29 U.S.C. § 160\(e\)](#); *see also Woelke & Romero Framing, Inc. v. NLRB*, [456 U.S. 645, 665](#) (1982) (stating Section 10(e) of the Act precludes review of claim not raised to the Board). Before the Board, Lowe's exceptions and brief in support of exceptions failed to raise any argument that the judge applied *Lutheran Heritage* instead of *Boeing*. ([ROA.127-](#)

28; Exceptions Brief 9-16.) And it failed to otherwise claim in either document that the judge used wording indistinguishable from the “reasonably construe” test of *Lutheran Heritage* or required it to anticipate all possible interpretations of its confidentiality rules. (ROA.127-28, Exceptions Brief 9-16.) Even after the Board issued its decision, adopting most of the judge’s findings and conclusions, Lowe’s did not move for reconsideration to argue that the Board applied the wrong standard. Its failure to raise these arguments to the Board forecloses its challenges before this Court. *See, e.g., Gulf States Mfg. Inc. v. NLRB*, 704 F.2d 1390, 1396-97 (5th Cir. 1983) (failure to raise issue in briefing before the Board or in motion for reconsideration deprived court of “jurisdiction to consider the issue”).⁴

In any event, Lowe’s has failed to present any reason to doubt the Board’s application of *Boeing*. Lowe’s first contends (Br. 14-15) that the Board, regardless of what test it claimed to use, actually analyzed its confidentiality rules under *Lutheran Heritage*’s “reasonably construe” test. But its argument misreads *Boeing* and the Board’s decision in this case. In *Boeing*, the Board made clear that rules should be “reasonably interpreted” for potential “interfere[nce] with the exercise of [the Act’s] rights,” examined from employees’ perspective. *Boeing*, 2017 WL 6403495, at *17. The Board’s analysis fully comports with that governing

⁴ Because Lowe’s brief in support of exceptions is not part of the appellate record, the Board will file a motion to lodge that brief with this Court concurrently with the filing of this brief.

standard. Simply because the Board used language that is similar to *Lutheran Heritage* does not mean that the Board applied the overruled “reasonably construe” prong.

Pointing to the Board’s determination that the language in its confidentiality rules was “insufficient to convey to a reasonable employee” that the rule did not restrict their right to discuss wages, Lowe’s claims that the Board’s decision “resuscitates . . . *Lutheran Heritage* errors.” (Br. 15.) Specifically, Lowe contends that the Board required it to either “spell-out how workplace rules” do not restrict Section 7 activity or to anticipate and avoid every possible interpretation that would render a rule unlawful. (Br. 15-16.) But the language of Lowe’s rules—and not the Board’s interpretation of it—forecloses its hyperbolic claim. As the Board explained, the confidentiality rules “restrict[ed] disclosure of salary information” and were “directed to all employees,” with no language sufficient to alert employees that the rules’ applied, as Lowe’s claims, only to those “given access to confidential records.” ([ROA.174](#) n.1.) Lowe’s true complaint is that the Board did not adopt Lowe’s proffered interpretation—an interpretation that ignores the rules’ language.

Similarly unavailing is Lowe’s contention (Br. 12-14, 16) that the “very basis” for the Board’s finding the confidentiality rules unlawful is that the Board resolved all ambiguities against it in construing the confidentiality rules, a

Lutheran Heritage vestige that *Boeing* rejected. *Boeing*, [2017 WL 6403495](#), at *10 n.43, 14 n.68. The Board, however, explicitly disavowed the judge’s reliance on that principle. ([ROA.174](#) n.1.) To counter the Board’s straightforward disavowal, Lowe’s misrepresents the judge’s decision as relying solely on ambiguities to find its confidentiality rules unlawful. But the “sole basis” for the judge’s invalidation of the rules was not that they are ambiguous. As discussed above, the judge explained that both rules “*could not be read*” to reach only some kinds of confidential information and not employees’ discussions of their salaries. ([ROA.178](#).) As the Board found, far from being “*grounded* in this discarded principle” (Br. 13), the judge’s reasoning remains equally valid regardless of its treatment of ambiguities. ([ROA.174](#) n.1.)

Thus, Lowe’s incorrectly characterizes the Board’s decision as “sail[ing] back into *Lutheran Heritage* waters.” (Br. 12.) The Board strictly adhered to *Boeing*’s analysis—reasonably interpreting the rule to determine whether there was any potential interference with Section 7 rights and then considering whether the rule could be justified by a legitimate business purpose. Notably, it is Lowe’s that ignores *Boeing*; its brief fails to mention *Boeing*’s finding that Lowe’s promulgated the exact type of rule that the Board used as an example of a Category 3 rule.

Lowe's accusation that the Board ignored *Boeing* turns a blind eye to its convenient disregard of *Boeing*'s most closely applicable teaching.⁵

2. Lowe's fails to show that the Board misinterpreted the word "entrusted" or otherwise misread its confidentiality rules

Lowe's contends that the Board misinterpreted its confidentiality rules. As explained below, Lowe's failure to raise some of its arguments criticizing that interpretation to the Board prevents the Court from considering them here. On the merits, Lowe's contentions ignore that the Board must interpret the rules by "focus[ing] rightfully on the employees' perspective." *Boeing*, [2017 WL 6403495](#), at *17. In doing so, the Board heeds the Supreme Court's instruction that when balancing employees' rights against an employers' justifications, the Board "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel*, [395 U.S. at 617](#). And it is "the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *Id.* at 620.

⁵ Whether *Boeing* can "require" finding work rules lawful that would have been deemed invalid under *Lutheran Heritage* is not, as Lowe's contends, a principle that the Board or the courts have recognized. (Br. 11.) The precedent that Lowe's relies on (Br. 11) simply reflects the Board's routine and uncontroversial request to remand Board decisions that applied *Lutheran Heritage* back to the Board for it to reconsider a work rule under the *Boeing* standard.

Lowe's argues that the Board wrongly read the word "entrusted," which it insists limits its rules' application solely to employees whom it "entrusted" with access to its confidential records. But as the Board noted, the rules stated that they applied to "all employees." The use of "entrusted" did not limit their reach only to employees who had access to any particular records, and does not require the interpretation that Lowe's proffers. ([ROA.174](#) n.1, 178.)

Lowe's points to dictionary definitions (Br. 22) and various commercial-law cases (Br. 23-24) that it contends support a far narrower reading of the word "entrusted" than that given by the Board. It has forfeited that contention, however, by failing to raise before the Board the various definitions proffered in such dictionaries or precedent; it did not even advocate a particular definition of the word "entrusted" before the Board. ([ROA.127-29](#), Exceptions Brief 10-16.) *See* pp.25-26, above. In any event, the Board reads workplace rules from the employee perspective—not the perspective of a dictionary or a court evaluating the merits of a commercial case. Lowe's has also failed to cite any Board precedent addressing the validity of a work rule prohibiting wage discussion—or indeed, any work rule case—that would support its reading.

Lowe's other critiques of the Board's interpretation are equally unconvincing. Lowe's claims (Br. 24-25) that if it intended its rules to apply to employees' discussions among themselves and unions of their salaries, it would

have done so more directly, and that the Board should have treated its confidentiality rules like a court would treat a statute or contract and interpret them in such a way as to render them lawful. Again, it failed to raise either contention to the Board and, therefore, this Court is barred from addressing it. ([ROA.127-29](#), Exceptions Brief 10-16.) Regardless, Lowe's intent in drafting its rules is irrelevant. Lowe's has not pointed to any case under Section 8(a)(1) stating that employees must interpret workplace rules in light of the employer's subjective intent or in the light most favorable to the employer.

Lowe's further criticizes the Board for failing to interpret its rules "in the light and context of [their] actual, legitimate justifications." (Br. 14.) But that emphasis on its justifications turns a blind eye to the requirement that the Board examines the rule from the viewpoint of the employees, who do not read the rule with an ear attuned to the employer's interests. Given that the confidentiality rules, when read from that perspective, foreclosed wage discussion among all employees, Lowe's justifications for those rules had no role to play in determining their legality. *See Boeing*, [2017 WL 6403495](#), at *17.

Finally, Lowe's points out (Br. 26-27) that the Board, without interpreting the rule as unlawful in this case, could still find that applying it against Section 7 activity violates the Act. But that is true of every workplace rule. *See Boeing*, [2017 WL 6403495](#), at *17 (noting that even a rule the Board finds lawful to

maintain “cannot lawfully be applied against employees who engage in . . . protected conduct”). And as this Court has pointed out, “the employer’s enforcement of the rule [is not] determinative.” *Flex Frac*, [746 F.3d at 209](#). Indeed, the Board’s entire *Boeing* analysis applies to situations where an employer restricts employees’ Section 7 rights without actually enforcing the workplace rule at issue. The Board properly applied that analysis here, finding that Lowe’s promulgated the exact type of rule that the Board used as an example of a Category 3 rule in *Boeing*.

3. Lowe’s fails to demonstrate that *Boeing* requires the Board to consider its generalized justifications, which, in any event, do not justify its restriction of its employees’ rights

Lowe’s asserts (Br. 17-18) that *Boeing* required the Board to consider and weigh its justifications. Its reasoning, however, misreads *Boeing*. The Board in *Boeing* already balanced employees’ Section 7 right to discuss their wages against any possible employer justification for infringing on that right, and found that the Section 7 rights prevailed. *Boeing*, [2017 WL 6403495](#), at *4. Nothing in *Boeing*, or this case, required the Board to conduct that analysis again.

Even considering Lowe’s justifications for its rule (Br. 19-27), none of them warrants infringing on employees’ right to communicate about their salaries with each other. First, Lowe’s claims (Br. 19-20) that it has a “self-evident interest” in keeping salaries private in order to stop rivals from using that data to gain a

competitive advantage or to accuse it of antitrust violations. But Lowe's has presented no record evidence supporting its justification nor cited precedent supporting its claim that a "self-evident" interest in preventing any competitive disadvantage outweighs the indisputably adverse impact of a rule that prohibits employees from discussing wages—the "very stuff of collective bargaining." *Brockton Hosp.*, [294 F.3d at 107](#). The Board therefore reasonably rejected Lowe's claim that its antitrust and competitive-advantage concerns justified such a broad confidentiality rule, and such a finding is consistent with precedent.

Second, Lowe's argues (Br. 20-21) that it did not have to introduce evidence supporting its claims, citing antitrust cases where courts did not require testimony to establish that competitor collaboration hurts competition. Lowe's contends that the Court should take judicial notice of "[s]uch self-evident truths." (Br. 21.) But it failed to cite any such precedent to the Board or request that the Board take judicial notice of any truths, self-evident or otherwise. ([ROA.127-29](#), Exceptions Brief 13-14.) That failure deprives this Court of jurisdiction to consider its belated argument. *Woelke*, [456 U.S. at 665](#); *see also* pp.25-26, above. In any event, Lowe's has not explained why its antitrust concerns would be so unique to Lowe's, as opposed to any other employer, that the Board would need to balance them individually rather than follow *Boeing's* approach of adopting a general rule against prohibiting employees from discussing their salaries. As such, the record

and governing law support the Board’s finding that Lowe’s confidentiality rules cannot be supported by any individualized justification, and the confidentiality rules therefore violate Section 8(a)(1).⁶

⁶ Lowe’s suggests (Br. 3 n.1) that there is no issue as to whether it has already rescinded the confidentiality rules, and relatedly asserts (Br. 27) that it is “unreasonable to invalidate a now-rescinded rule.” Any claim of alleged rescission is irrelevant. As the Board explained, “the legal effect” of any rescission will be addressed in a later compliance proceeding. ([ROA.174](#) n.2.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enforce the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
December 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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LOWES HOME CENTERS, L.L.C.,)
)
	Petitioner Cross-Respondent) No. 20-60472
	v.)
) Board Case No.
NATIONAL LABOR RELATIONS BOARD) 19-CA-191665
)
	Respondent Cross-Petitioner)
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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC this
17th day of December 2020

UNITED STATES COURT OF APPEALS
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)	
	Respondent Cross-Petitioner)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Nos. 32(a)(5), 32(a)(6) and 32(a)(7)(B), the Board certifies that its brief contains 7553 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Office 365.

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