ORAL ARGUMENT NOT YET SCHEDULED
NOS. 15-1245, 15-1309

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BANNER HEALTH SYSTEM D/B/A BANNER ESTRELLA MEDICAL CENTER,
Petitioner/Cross-Respondent, vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON CROSS-PETITIONS FROM AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

JOINT *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER BY AMERICAN HOTEL & LODGING ASSOC., ASSOCIATED BUILDERS AND CONTRACTORS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, COLLEGE AND UNIVERSITY PROFESSIONAL ASSOC. FOR HUMAN RESOURCES, COUNCIL ON LABOR LAW EQUALITY, HR POLICY ASSOCIATION, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Circuit Rules 26.1 and 29, the Joint *Amici Curiae* hereby certify that they are trade associations, each of their general purposes include the objective of preserving and protecting the rights of employers under the National Labor Relations Act. The specific purposes of each of the *Amici* are set forth below in the section of this brief entitled, "Identity and Interests of the *Amici*."

The Joint *Amici* hereby certify that none of them have any outstanding shares or debt securities in the hands of the public. They further certify that none of them has any parent companies, nor does any publicly held company have a 10% or greater ownership interest in any of the *Amici*.

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IDENTITY AND INTERESTS OF THE *AMICI*

The following Joint *Amici*, collectively representing millions of employers and virtually every industry covered by the National Labor Relations Act (NLRA), have received the consent of both parties to file this *amicus* brief in support of the Petitioner, Banner Health Systems.[1]

The American Hotel & Lodging Association is the sole national association representing all sectors and stake holders in the lodging industry, including more than 11,000 individual hotel property members, hotel companies, student and faculty members, and industry suppliers. AHLA seeks to protect its members' interests in legislative and regulatory matters, including the NLRA.

Associated Builders and Contractors (ABC) is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry.

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and

[1] No party, party's counsel, or person other than the *Amici*, their members, and their counsel, has: (1) authored this brief in whole or in part or (2) contributed money that was intended to fund preparing or submitting the brief.

indirectly represents the interests of more than three million companies and professional organizations of every size, in every business sector and from every region of the country, many of whom are covered by the NLRA. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases involving issues of concern to the nation's business community.

The Coalition for a Democratic Workplace consists of over 600 member organizations and employers, who in turn represent millions of additional employers, the vast majority of whom are covered by the NLRA or represent organizations covered by the NLRA.

The College and University Professional Association for Human Resources represents more than 19,000 HR professionals and campus leaders at over 1,900 member organizations in higher education. Higher education employs over 3.7 million workers nationwide, with colleges and universities in all 50 states.

The Council on Labor Law Equality is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the NLRA. COLLE's single purpose is to monitor and comment on the activities of the National Labor Relations Board and the courts as they relate to the Act.

HR Policy Association is the lead public policy organization of chief human resource officers from large employers, consisting of over 365 of the largest corporations doing business in the United States and globally. Collectively HR Policy member companies employ more than 10 million people in the United States. One of HR Policy's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

The International Foodservice Distributors Association is the trade organization representing 156 companies in the foodservice distribution industry, who operate more than 800 distribution facilities across North America and represent annual sales of more than $125 billion. IFDA provides the important perspective of leading foodservice distributors on legislative and regulatory matters.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American

living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

National Association of Wholesaler-Distributors advocates the interests of direct member companies in the wholesale distribution industry, together with a federation of national, regional, state, and local associations and their member firms which collectively total approximately 40,000 companies with locations in every state in the United States.

National Federation of Independent Business is the nation's leading small business association representing 325,000 small and independent businesses and advocating the views of its members in Washington and all 50 state capitals. NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

The Society For Human Resource Management is the world's largest association devoted to human resource management, representing more than 250,000 members in over 140 countries. Among other purposes, SHRM seeks to promote the use of sound and ethical human resources management practices in the profession of human resource management.

All of the above referenced organizations have joined together in this brief to make the Court aware of the burdensome and arbitrary nature of the standard adopted by the Board in this case, which unduly restricts the right of employers to

request employees to maintain confidentiality of workplace investigatory interviews in appropriate business circumstances. The Court should deny enforcement of the Board's Order because the Board has failed to accommodate employers' legitimate business needs and has failed to harmonize its ruling with other federal laws.

ARGUMENT

I. THE BOARD'S DECISION IMPOSES A NOVEL AND IMPRACTICAL BURDEN ON EMPLOYERS TO JUSTIFY THE CONFIDENTIALITY OF ONGOING WORKPLACE INVESTIGATIONS

In its recent decision in *Hyundai American Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015), this Court declared that the confidentiality requirements of antidiscrimination statutes and guidelines "may often constitute a legitimate business justification for requiring confidentiality in the context of a particular investigation or particular types of investigations." The Court declined to endorse the Board's "novel view" that in order to demonstrate a legitimate and substantial justification for confidentiality, an employer must "determine whether in any give[n] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up." *Id*.

The present appeal again raises the question whether the Board is entitled to require employers in every case to determine and somehow prove that corruption

of a workplace investigation will likely occur without confidentiality. Though it may not be necessary for the Court to reach this question due to significant gaps in the evidence relied on by the Board,[2] should the Court find that the General Counsel otherwise met his burden of proving a violation of the Act in this case, then the Joint *Amici* are writing to urge the Court to reject the Board's novel and impractical standard narrowing the business reasons for requesting confidentiality in workplace investigations.

As further explained below, the Board's decision here impermissibly creates a far-reaching presumption that any investigatory confidentiality rule is per se unlawful unless the employer can meet a virtually insurmountable standard of proof on a case-by-case basis. The Board's decision has direct and immediate complications for the millions of employers that the NLRA covers, many of which are collectively represented by the Joint *Amici.*

According to the Board, employers may not seek to maintain the confidentiality of ongoing investigatory interviews based on a "generalized" concern with protecting the integrity of their investigations. As noted above, the

[2] For the reasons explained in the Petitioner's Brief, which will not be repeated here, the Court should deny enforcement of the Board's order without reaching the broader policy issues because the Board's findings were not supported by substantial (or any) evidence. *See also Hyundai America Shipping, Inc.,* 805 F.3d at 313, citing *Drug Plastics & Glass Co v. N.L.R.B.,* 44 F.3d 1017, 1021 (D.C. Cir. 1995) (denying enforcement of Board findings that were not "closely related" to the original charge against the employer).

Board now contends that employers must "first determine whether in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up." (Dec. at 2). Only if the employer determines that such a corruption of its investigation would likely occur without confidentiality is the employer then free to prohibit its employees from discussing these matters among themselves. *Id.,* citing *Hyundai American Shipping Agency,* 357 NLRB No. 80, slip op. at 15, *enf. den. in part*, 805 F.3d 309. The Board will no longer allow employers to take a "categorical" approach requiring confidentiality even in investigations involving sensitive issues such as alleged sexual harassment, hostile work environment, illegal drugs, or physical abuse. (Dec. at 4). The employer bears the impractical burden of establishing that confidentiality is necessary in each case.

The Board's holding in this regard ignores the reality of workplace investigations, contravenes the Board's own precedent without justification, and fails to accommodate the policies of the NLRA to other federal statutes governing the workplace. In particular, the Board's opinion gives insufficient weight to the many legitimate and substantial business justifications for keeping workplace investigations confidential. The prohibition on confidentiality ignores the practical challenges imposed on employers by the new standard.

The Board claims that its decision is based on "well-established" Board precedent. (Dec. at 3). In fact, until quite recently, Board precedent had long acknowledged "the need for employers to conduct all kinds of investigations of matters occurring in the workplace to ensure compliance with . . . legal requirements." *IBM Corp.*, 341 NLRB 1288, 1293 (2004).[3] As the Board further held in *IBM*:

> Employer investigations into these matters require discretion and confidentiality. The guarantee of confidentiality helps an employer resolve challenging issues of credibility involving these sensitive, often personal, subjects . . . . If information obtained during an interview is later divulged, even inadvertently, the employee involved could suffer serious embarrassment and damage to his reputation and/or personal relationships and the employer's investigation could be compromised by inability to get the truth about workplace incidents . . .

The Board thus recognized that the possibility that information will not be kept confidential greatly reduces the chance that the employer will get the whole truth about a workplace event. It also increases the likelihood that employees with information about sensitive subjects will not come forward.

The Board in *IBM* recognized the panoply of business justifications for maintaining confidentiality of ongoing workplace investigations and clearly gave great weight to the need for confidentiality to preserve the integrity of

[3] Among the types of investigations referenced by the Board in *IBM* were those intended to address sexual and racial harassment, use of drugs, employee health matters, improper computer and internet usage, and allegations of theft, violence, sabotage, and embezzlement. This did not purport to be an exclusive list. *Id.*

investigations generally. Certainly, the Board recognized the importance of confidentiality to the resolution of credibility disputes, avoiding embarrassment to employee witnesses, victims, or accused workers, and damage to reputations or personal relationships. Perhaps most importantly, the Board acknowledged in *IBM* that lack of confidentiality "greatly reduces the chance that the employer will get the whole truth about a workplace event" and "increases the likelihood that employees with information about sensitive subjects will not come forward." *IBM Corp*., 341 NLRB at 1293.

The Board cites *Caesar's Palace, Inc.* for the broad proposition that the Board upholds confidentiality rules only in investigations where the employer justifies its action in those particular circumstances. The Board asserts that it approved Caesar's confidentiality rule only because the employer provided a legitimate and substantial justification for this application of the rule involving the alleged illegal drug and drug related activity in the workplace by employees and managers. That substantial justification outweighed the employees' Section 7 rights in those circumstances. (Dec. at 3 citing *Caesar's Palace, Inc*., 336 NLRB 271, 272 (2001)).

However, as the Board dissent in the present case points out, *Caesar's Palace* simply happened to involve a strict confidentiality requirement imposed on employees relating to a management cover up and possible management

retaliation, as well as threats of violence, which the Board found were legitimate business justifications for maintaining confidentiality in that case. (Dec. at 19, Member Miscimarra Dissent). Nothing in prior Board precedent, or *Caesar's Palace,* requires every employer to limit their justifications of confidentiality to the narrow circumstances that were present in that case. Prior to the present decision, the Board also recognized other broad justifications for confidentiality, including the importance of ensuring that witnesses did not "tailor accounts" to other witnesses' statements. *See Belle of Sioux City, LP*, 333 NLRB 98, 113-114 (2001).[4]

Taken as a whole, these cases stand for the proposition that employer efforts to maintain the confidentiality of ongoing workplace investigations into sensitive matters are generally justified, as long as the grounds set forth in *IBM* and subsequent cases are present. Until the recent, unexplained shift in Board policy evidenced by the present case, the Board struck a necessary and proper balance between the business need for confidentiality and employee rights, resulting in the

[4] *See also Charles Schwab & Co., Inc*., Case No. 28-CA-19445, 2004 NLRB LEXIS 739 (2004), in which the Administrative Law Judge noted that a confidentiality requirement served the legitimate business purpose to "protect [witnesses] against retaliation, protect the integrity of the investigation, and encourage witnesses to come forward." *Id.* at *61. The decision in *Inova Health System*, 360 NLRB No. 135 (2014), *enf'd* 795 F.3d 68 (D.C. Cir. 2015) is not to the contrary, because there the Board made explicit findings that a supervisor directed an employee to keep confidential an investigation into her own protected concerted activity, and this Court did not address the broader policy issues.

confidentiality of ongoing investigations being upheld in all but the most extreme cases.

The Board's new standard is inconsistent with its long established standard for evaluating whether employer work rules violate Section 7's guarantee of employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. When an employer's workplace rule or policy does not explicitly violate the Act, the NLRB's test for validity of the rule is supposed to be whether: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict Section 7 activity. *Lutheran Heritage Village- Livonia*, 343 NLRB 646, 647 (2004). The Board has long distinguished between workplace rules that have been actually applied to restrict the exercise of Section 7 rights, and those which have not. *Id.*

Here, as the Petitioner and the dissenting Board opinion have pointed out, no record evidence exists establishing that the alleged policy regarding instructions during investigations implicated any employee section 7 rights. (Dec. at 16, Member Miscimarra Dissent). Instead, the Board has again shifted the balance against employers by requiring an individualized determination at the outset of every investigation before deciding whether confidentiality is justified, even where

the desire for confidentiality is framed as a "request," and in the absence of any discipline.

The Board's opinion also fails to acknowledge the full range of previously recognized grounds for justifying confidentiality of an ongoing investigatory interview process, but instead references only the narrow grounds of protecting witnesses and evidence and the dangers of fabrication or cover up of testimony. The Board's holding does not address the impact of loss of confidentiality as a disincentive to future reporting of infractions and to future participation in investigations, both of which have again been long accepted as significant justifications for confidentiality policies.

The Board's new holding also fails to explain how employers can meet the newly imposed burden of justifying confidentiality at the *outset* of an investigation, when the employer's management representatives may not yet know enough about the subject matter (since they have not actually conducted the interviews) to make an informed determination. Until employer representatives conduct their interviews in a particular workplace investigation, most employers will have no way of knowing whether witnesses "need protection" or whether "evidence is in danger of being destroyed," whether testimony is "in danger of being fabricated," or whether there is "need to prevent a cover up." (Dec. at 2).

The *Amici* submit, based upon their extensive collective experience in the day-to-day administration of workplace investigations, that the Board's case- by-case burden imposed on employers is impossible to administer in practice. The need for workplace investigations may arise with little advance notice, and the management staff of many employers often does not have immediate access to legal counsel whose advice may be required to apply the Board's "balancing" test. The Board's test as articulated in this case requires such nuanced judgment calls that even experienced attorneys would be unable to opine with any certainty as to whether any particular investigation can be kept confidential. In any event, the typical management representatives who conduct workplace investigations cannot possibly have sufficient expertise to make the determinations now being required of them by the Board before every investigatory interview, and the lack of guidance from the Board would frustrate even the most highly trained team of managers.

This Court has previously denied enforcement of Board decisions that show "indifference to the concerns and sensitivity which prompt employers to adopt workplace rules." *Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. N.L.R.B.*, 253 F. 3d 19, 27 (D.C. Cir. 2001). The Board failed to adequately take employers' justifiable business needs into account when imposing such an impractical standard by which workplace confidentiality policies now will be

reviewed in the context of workplace investigations. For this reason, the Board's Order is arbitrary and capricious and should be denied enforcement.

II. THE BOARD'S STANDARD FAILS TO ACCOMMODATE THE NLRA TO OTHER FEDERAL EMPLOYMENT LAWS THAT REQUIRE EMPLOYERS TO CONDUCT EFFECTIVE WORKPLACE INVESTIGATIONS

In addition to the inherently impractical nature of the Board's case-by-case standard, the Board's standard fails to accommodate the requirements of the myriad employment laws that employers confront daily in the workplace. Since the passage of the original Wagner Act in 1935, Congress has enacted many other statutes regulating the workplace, including Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 627; the Occupational Safety & Health Act ("OSHA"), 29 U.S.C. § 651; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101; the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601; and the Uniformed Service Employment & Reemployment Rights Act ("USSERA"), 38 U.S.C. § 4334.

There is no inherent conflict between these laws and the NLRA. No provision of the NLRA prohibits employers from requiring employees to maintain the confidentiality of investigations regarding workplace misconduct, including alleged violations of other employment laws. The Board's interpretation of the NLRA, however, creates an unnecessary conflict with employer obligations under

the other laws referenced above. Employee rights under the NLRA are not so absolute or dominant as to presumptively override employer efforts to comply with other employment laws, many of which directly or indirectly require employers to conduct an effective, and confidential, investigation when an employee alleges a violation.

It is well settled that the NLRA must be interpreted in a way that is consistent with these other federal employment laws. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 251 (1970) (referring to "the task of the courts to accommodate [and] reconcile the older statutes with the more recent ones."). *See also Hoffman Plastic Compounds v. N.L.R.B.*, 535 U.S. 137, 144 (2002) ("[W]here the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."); *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives").

Consistent with this well-established Supreme Court precedent, this Court has likewise required the Board to interpret the NLRA in a way that accommodates other federal laws. For instance, in *Yukon-Kuskokwim Health Corp. v. N.L.R.B.*, 234 F.3d 714 (D.C. Cir. 2000), the Court remanded the question of whether a non-

profit health corporation controlled by Alaska Native tribes was covered by the NLRA to the Board. The non-profit corporation argued that the Indian Self-Determination Act ("ISDA") required that the NLRA be read to exclude the corporation from the Act's coverage. The Court agreed that an accommodation was necessary:

> An agency, faced with alternative methods of effectuating the policies of the statute its administers, (1) must engage in a careful analysis of the possible effects those alternative courses of action may have on the functioning and policies of other statutory regimes, with which a conflict is claimed; and (2) must explain why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime.

Id. at 718 citing *New York Shipping v. Fed. Maritime Comm'n*, 854 F.2d 1338, 1370 (D.C. Cir. 1988). *See also Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015); *Adtranz ABB Daimler-Benz Transportation, N.A., Inc.,* 253 F.3d at 27 (denying enforcement of a Board order that failed to accommodate employers' needs to maintain "commonplace" workplace rules to protect themselves against civil liability "should they fail to maintain a workplace free of racial, sexual, and other harassment.").

Furthermore, employers have an obligation under Title VII to investigate allegations of sexual and other forms of harassment in the workplace. The U.S. Equal Employment Opportunity Commission ("EEOC") has determined that confidentiality is essential to conducting an effective investigation: "[A]n anti-

harassment policy and complaint procedure should contain, at a minimum, the following elements: . . . Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible."[5] Indeed, in cases of supervisor harassment, the EEOC states that "[a]n employer should make clear to employees that it will protect the confidentiality of allegations to the extent possible."[6]

Confidentiality also may affect whether an employer is found vicariously liable for unlawful workplace harassment. For example, in *Roby v. CWI, Inc.*, 579 F.3d 779 (7th Cir. 2009), an employee complained of sexual harassment by a supervisor and filed a claim against her former employer under Title VII. The Seventh Circuit held that the employer was not liable for the supervisor's harassment under the Supreme Court's *Faragher/Ellerth* vicarious liability standard, because the employer exercised "reasonable care to prevent and correct [this manager's] conduct." *Id.* at 786.[7] The Seventh Circuit explained that the employer had exercised reasonable care after it "performed an investigation, *instructed interviewees that the information was confidential*, *fired Gartzke, [another supervisor], when he breached confidentiality*, and disciplined [the

[5] *See* http://www.eeoc.gov/policy/docs/harassment.html.

[6] *Id.*

[7] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998).

manager] by issuing a written reprimand and ordering him to attend education and retraining classes." *Id.* (emphases added).

The employee had complained to the company that confidentiality was important to her, and that other employees had breached that confidentiality "by speaking to her about her allegations." *Id.* at 783. The company's actions in trying to maintain confidentiality, and terminating a supervisor who breached that confidentiality, helped to demonstrate that the company exercised "reasonable care" to prevent and correct the harassment.[8]

There are other laws that impose similar confidentiality requirements. Employers have an obligation under the ADA to maintain the confidentiality of medical information that is obtained from employees for purposes such as whether the employee is able to perform the functions of the job or is entitled to a reasonable accommodation under the ADA. *See* 42 U.S.C. §12112(d)(3)(B). FMLA regulations issued by the U.S. Department of Labor also specifically provide that medical information obtained in order to determine whether the

[8] In a decision issued prior to the Board's decision in this case, a Board majority recognized that employers have a legitimate interest in protecting the confidentiality of investigations concerning workplace harassment or discrimination. *See Piedmont Gardens*, 359 NLRB No. 46 (2012). In determining whether an employer is privileged to withhold witness statements from a union in the context of a collectively bargained grievance procedure, the Board majority noted that the statutory duty to provide information to the union may be overridden by "legitimate" concerns such as "compliance with EEOC guidelines." *Id.*, slip op. at 4, n.14. Again, however, the Board improperly placed the burden on the employer of proving the legitimacy of that concern on a case-by-case basis.

employee is entitled to take leave under the FMLA must be kept as separate confidential medical records. *See* 29 C.F.R. § 825.500(g). If an employer fails to ensure that such information is kept confidential – *i.e.*, not disclosed to the employee's co-workers – the employer may be liable for injuries suffered by the employee as a result of the disclosure, including emotional distress. *See EEOC v. Ford Motor Credit Co.*, 531 F. Supp. 2d 930 (M.D.Tenn. 2008) (denying employer's motion for summary judgment when supervisor disclosed employee's medical information to co-workers; employer conducted internal investigation and fired supervisor for violating confidentiality rule).

Yet another example of the conflict between the Board's *Banner Health* standard and other federal regulatory regimes can be found in the Sarbanes-Oxley Act, which mandates that employers with designated "audit committees" establish procedures for "(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) *the confidential, anonymous submission by employees* of the issuer of concerns regarding questionable accounting or auditing matters." 15 U.S.C. § 78j-1(m)(4)(B) (emphasis added). A presumption that confidentiality is unlawful under the NLRA, according to the *Banner Health*, conflicts with this affirmative requirement under Sarbanes-Oxley.

The NLRB itself recognizes the importance of confidentiality to its own investigations of alleged unfair labor practices under the NLRA. Indeed, the NLRB has vigorously defended the confidentiality of affidavits taken from employee witnesses and has argued, successfully, that they are exempt from disclosure under the Freedom of Information Act ("FOIA"). *See NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978). In *Robbins Tire*, the Board pointedly argued to the Supreme Court that "a particularized, case-by-case showing is neither required nor practical, and that witness statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure while a hearing is pending." *Id.* at 222.

The NLRB continues to require confidentiality with regard to witness statements taken during investigations of alleged unfair labor practices. *See* Case Handling Manual, Section 10060.9 ("In order to enhance the confidentiality of the affidavit, instruct the witness not to share the affidavit with anyone other than his/her attorney or designated representative."). Thus, burdening employers with proving the need for confidentiality on a case-by-case basis, pursuant to *Banner Health*, is inconsistent with the Board's longstanding position with respect to its own investigations.

The Joint *Amici* submit that the *Banner Health* standard should be modified to reflect employers' obligations to ensure confidentiality in many types of

workplace investigations governed by other federal employment laws consistent with this Court's decision in *Hyundai American Shipping*. As this Court has suggested, employers should be able to create lawful NLRA policies requiring confidentiality for particular types of investigations in light of other statutes and guidelines. *Hyundai America Shipping Agency,* 805 F.3d at 314.

A case-by-case approach is simply not practical, as the Board itself argued in *Robbins Tire*, and fails to accommodate the NLRA to the many other federal regimes that regulate the modern workplace. In addition to any other legitimate business justification that may exist, compliance with other federal laws and regulations should be recognized as a legitimate business justification that outweighs employees' Section 7 rights.

CONCLUSION

For each of the reasons stated above and in Petitioner's Brief, the Petition for Review should be granted and the Board's Order should be denied enforcement.[9]

Respectfully submitted,

January 21, 2016

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[9] The Joint *Amici* fully support the additional grounds in support of the Petition set forth in the Petitioner's brief.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify pursuant to FRAP 32(a)(7) that the foregoing brief contains 4,235 words of proportionally-spaced 14-point type, and the word processing system used was Microsoft Word 2010.

January 21, 2016 /s/ *Maurice Baskin*

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2016, I electronically filed a true and correct copy of the foregoing brief using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/ Maurice Baskin