ORAL ARGUMENT NOT YET SCHEDULED

NOS. 15-1245, 15-1309

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

BANNER HEALTH SYSTEM, DOING BUSINESS AS BANNER ESTRELLA MEDICAL CENTER,

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

***AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER BY ASSOCIATION OF CORPORATE COUNSEL**

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *Amicus Curiae* Association of Corporate Counsel certifies that:

(A) Parties and Amici

Except for *Amicus Curiae* Association of Corporate Counsel, all parties, intervenors, and amici appearing in the proceedings before the National Labor Relations Board and in this Court are listed in the Brief for Petitioner. *Amicus Curiae* is not aware of other amici intending to file.

(B) Rulings under Review

Reference to the ruling at issue appears in the Brief for Petitioner.

(C) Related Cases

As stated in the Brief for Petitioner, this case was not previously before this court and *Amicus Curiae* is aware of no related cases currently pending in this Court or in any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *Amicus Curiae* Association of Corporate Counsel certifies the following: Association of Corporate Counsel has no outstanding shares or debt securities in the hands of the public, and does not have a parent company. Therefore, no publicly held company has a 10% or greater ownership interest in *amicus curiae*.

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STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The Association of Corporate Counsel is a nonprofit association whose members include more than 30,000 "in-house" attorneys employed by more than 10,000 businesses and nonprofits worldwide. The Association has a strong interest in this case because its members are responsible for advising their respective organizations on how to comply with both labor regulations and antidiscrimination statutes, including how to investigate violations of these state and federal laws.

Responsible organizations respond to nearly every allegation with an investigation. These investigations often involve—and often uncover—sensitive information that can expose employees to reprisal. Accordingly, many firms keep pending investigations confidential, for both the welfare of employees and the integrity of the investigation. The Board's decision below imperils this common protection—to the detriment of workers and businesses alike. The Association respectfully submits this brief to assist the Court in appreciating the serious ramifications of the Board's novel regime regarding confidentiality in internal investigations.

All parties consent to the filing of this *amicus* brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Counsel for *amicus* authored this brief, and no party or counsel for a party authored any part of this brief. No person other than *amicus* contributed money to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The prompt, fair, and tactful resolution of employee problems is one of the most important ways that an organization can promote a harmonious relationship with its employees. A firm's in-house counsel, in cooperation with management and human resources personnel, strives to establish procedures within organizations that can address employee complaints ranging from racial discrimination to harassment to worker insubordination. These procedures must sort the spurious from the serious both to protect employees' rights and to shield companies from liability under numerous state and federal laws. Most organizations by default keep these investigations confidential: confidentiality protects innocent employees from embarrassment or reprisal, inhibits retaliation against witnesses, and encourages employee participation in investigations.

Confidentiality is especially critical because internal investigations are employees' first—and often only—redress for workplace wrongs. The overwhelming majority of employees first turn to internal compliance procedures when they know or suspect a violation of their rights in the workplace. Most employees *only* rely on internal investigations. In-house investigations therefore not only shield firms from liability, but are also the primary means for vindicating employers' rights and preventing further harm to workers. Confidentiality encourages employees to participate freely in these investigations, enabling firms

to better comply with federal antidiscrimination, whistleblower, and worker safety laws. By inhibiting employers' ability to keep investigations confidential, the Board's order threatens to block this vital avenue for worker redress.

Like most companies, Banner Health employs a limited confidentiality policy.[1] In sensitive investigations—those that implicate sexual harassment, retaliation, workplace abuse, and the like—Banner Health attempts to keep the contents of internal investigations confidential. Banner Health makes this individualized determination in the light of the type of employee complaint lodged, the employees involved, and its experience with past complaints.

This case arises from Banner Health's attempts to keep an investigation into employee insubordination confidential. A Banner Health employee approached a human resources officer to alert the company regarding a potential problem with its sterilization practices. When the employee informed the officer that he was concerned about his job, the officer asked for the employee's discretion pending her investigation. The protocols were later determined to be safe. The officer issued the employee a coaching, and no further action was taken against either the employee or his supervisor.

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[1] Though Banner Health kept the investigation at issue confidential through a request, *amicus* suggests that in many circumstances, a confidentiality requirement will be appropriate. *Amicus* submits that similar considerations as those discussed herein would apply in a case involving a rule imposing confidentiality.

The Administrative Law Judge found the confidentiality request unproblematic, analogizing it to a sequestration rule at trial. But a divided Board disagreed, upending tens of thousands of organizations' internal procedures surrounding investigations in the process. It imposed a novel obligation on firms seeking confidentiality in pending investigations. *First*, the Board required firms to determine whether confidentiality is appropriate on a case-by-case basis, without relying on experience with past investigations or categorical rules informed by that experience. *Second*, the Board allowed confidentiality only where the firm could demonstrate on "objectively reasonable grounds" that an investigation was likely to be compromised without it.

The Board's dual requirements place organizations in an untenable dilemma. The Board's regime compels employers—at least for a time—to keep open matters that other sources of federal law demand be closed. Several statutes explicitly direct organizations to conduct confidential investigations under specified circumstances. Other agencies—such as the Equal Employment Opportunity Commission—advise businesses to assure their employees that complaints will be investigated confidentially. These requirements are not just in tension with the Board's decision below. They are impossible to reconcile. Yet the Board's regime fails to provide a clear safe harbor for compliance with other State or federal laws

obligating employers to confidentiality. As a result, the Board forces in-house counsel to recommend violating one law to comply with another.

At the root of this dilemma is the fact that confidentiality protects employees and workplace investigations. It is a given that the Board's decision will reduce how often (and for how long) firms may keep workplace investigations confidential. The Board's decision therefore threatens the numerous benefits arising from employers' ability to credibly promise discretion.

First among the benefits that the Board's decision imperils is workers' protection from retaliation. Internal reporting remains the near-exclusive method for reporting workplace wrongdoing. Confidentiality is one of the only ways that employers can prevent retaliation. Workplace retaliation directly threatens the most reliable way that employers learn of—and stop—many violations of federal law. Employers will find it significantly more challenging to encourage employees to come forward and participate in internal investigations without confidentiality.

And when employees nonetheless participate, the Board's decision reduces the likelihood of an accurate result. Confidentiality fosters accurate investigations by inhibiting deceit and encouraging candor. Federal courts, many States' courts, and private dispute resolution forums each recognize the value of confidentiality in preventing witnesses from altering their accounts in response to one another. Each

of these systems therefore provides a hard rule—and *not* a case-by-case analysis—supporting confidentiality for witness testimony.

Finally, the Board's regime is manifestly impractical, misunderstanding how confidentiality in the workplace actually functions. The Board's case-by-case analysis will foster redundant preliminary investigations into complaints, as the Board's "objectively reasonable grounds" requirement will surely map onto the subsequent merits investigation. The Board's regime also forces complicated and delicate legal analyses on human resources officers who, because of limited legal resources, will not always have recourse to in-house counsel, adding not just burden but also cost to workplace investigations. And it precludes firms from engaging in a more sensible balancing framework: one that would consider the type of complaint and the likelihood that employee rights would be impeded by confidentiality in a type of case.

The Board's order upsets the settled organizational practices and expectations of employers and employees alike. It subjects employers to contradictory legal obligations, exposes employees to reprisal, inhibits accurate investigations, and imposes an unwieldy burden on employers. The petition for review should be granted.

ARGUMENT

I. The Board's Restrictions On Confidentiality Place Employers In An Impossible Legal Dilemma.

The Board's order tightly constrains the circumstances under which an organization may keep an internal investigation confidential. But numerous federal laws—no doubt recognizing the benefits of confidentiality to employees—obligate employers to keep confidential certain categories of investigations. The Board's decision therefore places in-house counsel in an impossible dilemma: advise the firm to violate the Board's order, or advise it to violate other applicable laws.

This is a strong clue that the Board's order is both novel and wrong, as the National Labor Relations Act must be interpreted consistently with other federal laws. *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250-51 (1970); *see also Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002) ("[W]here the Board's chosen remedy trenches upon a federal statute or policy . . . the Board's remedy may be required to yield."); *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (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.").

For example, Title VII obligates employers must investigate harassment in the workplace—sexual or otherwise. In investigating these complaints, the Equal

Employment Opportunity Commission directs employers to "[a]ssure[s employees] that the employer will protect the confidentiality of harassment complaints" as much as possible. EEOC, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS § (V)(C)(1) (1999), http://www.eeoc.gov/policy/docs/harassment.html. Records of employee complaints also must be kept confidential. *Id*. The Commission even recommends "for the employer to set up an informational phone line which employees can use to discuss questions or concerns about harassment on an anonymous basis." *Id*. In-house counsel at firms nationwide therefore ensure that harassment allegations are categorically kept confidential—to comply with the Commission's directive, to encourage victims to step forward, to protect victims from retaliation for speaking up, and to protect the good names of those who are accused but innocent.

Sarbanes-Oxley presents an even sharper conflict. Sarbanes-Oxley requires covered firms to form audit committees to ensure compliance. These committees must establish procedures for "the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters," and "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)(A)-(B). Sarbanes-Oxley flatly contradicts the Board's requirements; a firm's in-house counsel must decide which law to disregard.

These examples are hardly unique. The Americans with Disabilities Act requires employer confidentiality with employee medical information for numerous purposes, such as determining whether an employee is capable of performing essential job functions. *See* 42 U.S.C. § 12112(d)(3)(B). Family and Medical Leave Act regulations promulgated by the Department of Labor require information gathered in resolving a claim for leave under the Act to be kept as confidential records. *See* 29 C.F.R. § 825.500(g). Many States have laws obligating employers to keep confidential any information gained about certain workplace topics. *See, e.g.*, 410 ILL. COMP. STAT. 513/25 (Illinois law obligating employers to keep genetic information about employees confidential); MO. STAT. ANN. § 191.656 (Missouri law obligating all individuals to keep HIV status confidential on pain of damages, injunction, and attorneys' fees).

The Board's order requires in-house counsel to instruct their firms—at least under some, and arguably most, circumstances—to disregard these laws: the only justification for confidentiality the order allows is the risk that an investigation's integrity might be imperiled. Yet none of the above statutes contain exceptions for disclosing otherwise confidential information to comply with another regulatory requirement. The Board's order thus places firms and their in-house counsel in an irreconcilable dilemma.

The most the Board will assure employers caught in these conflicts is that when "confidentiality [is] necessary to satisfy another statutory mandate," it "may be a consideration in other cases." *Banner Health Sys.*, 362 NLRB No. 137, slip op. at 4 n.12 (2015). Employers would be justified in feeling less than reassured, however, as the Board has indicated that it will require employers to justify this need on a case-by-case basis. *See generally Piedmont Gardens*, 359 NLRB No. 46 (2012), *set aside on other grounds*, 2014 WL 2929761 (June 27, 2014). In the meantime, if in-house counsel errs toward adhering to the Board's standards in lieu of complying with other legal obligations, the firm may face heavy penalties for violating other statutes or regulations. *See, e.g.*, *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 261, 263 (5th Cir. 2014) (employer held liable under Sarbanes-Oxley anti-retaliation provision for "wrongful motive" because of disclosure of identity of complaining employee without need).

These confidentiality requirements were intended to benefit employees: they typically impose obligations upon employers and vest employees with enforceable rights, and they are intended to protect employees from the perceived risks of speaking up. The Board's unnecessary conflict with these other federal and state workplace laws places it at odds with these worker protections.

II. Restricting Confidentiality Harms Employees.

In-house counsel design their firms' internal compliance regimes to: (1) encourage wronged workers to come forward, and (2) lead to the correct resolution of workplace grievances. Confidentiality in investigations serves each of these goals. The Board's regime impedes both. Indeed, while the Board's order places in-employers and their counsel in an untenable legal position, its practical damage will fall primarily on employees.

A. The Board's Rule Will Facilitate Retaliation, Thereby Discouraging Workers From Raising Complaints.

The Board's order fails to account for the most important function that confidentiality serves: encouraging victimized employees and witnesses to step forward by deterring (and ideally precluding) workplace retaliation. In short, the assurance of confidentiality is a natural prerequisite for employee participation in sensitive investigations.

This is no small point for employers. Internal compliance procedures are not just the most common method for employees to report wrongdoing or unsafe conditions—they are virtually the only method. Even when internal grievance procedures are relatively weak, 81 percent of employees who report wrongdoing begin by reporting internally. ETHICS & COMPLIANCE INITIATIVE, INCREASING EMPLOYEE REPORTING FREE FROM RETALIATION 12 (2015). For firms with strong internal compliance procedures, 97 percent of employees first report wrongdoing

internally. *Id*. And 94 percent report *only* to internal authorities—even in firms with effective internal procedures in place. *Id*. By one estimate, only three percent of employees who report wrongdoing ever turn to the media or a government agency to expose wrongdoing. ETHICS & COMPLIANCE INITIATIVE, RETALIATION AGAINST EMPLOYEES WHO REPORT WRONGDOING: INSIGHTS FROM RESEARCH CONDUCTED BY THE ETHICS RESEARCH CENTER 4 (2015).

Fear of retaliation is the most common reason that employees stay silent in the face of wrongdoing. *Id*. at 4. Retaliation can come from any level of an organization—senior management, a direct supervisor, or coworkers—but its effect is to inhibit employees from speaking up, thereby inhibiting organizations from both detecting wrongdoing and complying with state and federal law. In large part because of fear of retaliation, "in 2013, 37 percent of observed misconduct—where employees had first-hand knowledge of a violation taking place—went unreported." *Id*. A reporting system that credibly promises to keep complaints confidential (and, where appropriate, anonymous) is integral not only to preventing unlawful retaliation, but to ensuring that many employee grievances receive a hearing in the first place. *Id*. at 9-10.

Recent data from the Equal Employment Opportunity Commission suggests that employees' fear of retaliation is reasonable. In 2014, retaliation claims were the most common type of claim filed with the Commission (37,955), exceeding

race-discrimination claims (31,073), sex-discrimination claims, including pregnancy-discrimination claims (26,027), disability-discrimination claims (25,369), and age-discrimination claims (20,588). *See* EEOC, EEOC RELEASES FISCAL YEAR 2014 ENFORCEMENT AND LITIGATION DATA (2015).[2] This pattern recurs year after year. While many of these claims may have lacked merit, the data still reflect that, for employees, retaliation is a real phenomenon in the workplace.

The Board failed to consider the threat of retaliation against employees in its order. The Board declined even to acknowledge that preventing retaliation is a legitimate goal for a firm's confidentiality policy. *Banner Health Sys.*, slip op. at 4. It forbade employers from approaching investigations likely to cause retaliation with a presumption in favor of confidentiality. *Id.* at 6 n.17. And, without so much as acknowledging the far-flung effects of its shift, the Board's order appears to permit confidentiality only for *ongoing* investigations—not completed ones. Hardly any change would more likely chill employee participation in grievances. Under the Board's order, no firm may now credibly promise to keep a complaint confidential indefinitely, even in the face of *certain* retaliation. Surely this failure to protect employee interests—and the concomitant failure to protect the integrity of workplace investigations—demonstrates that the Board is fundamentally (and impermissibly) "indifferent to the concerns and sensitivit[ies] which prompt many

[2] *Available at* http://www1.eeoc.gov/eeoc/newsroom/release/2-4-15.cfm.

employers to adopt" workplace investigation confidentiality rules. *Adtranz ABB Damiler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001).

This failure is of recent vintage. Until recently, the Board's decisions reflected the understanding that enforcing laws governing the workplace requires confidentiality. In *Caesar's Palace, Inc*., 336 NLRB 271 (2001), the Board approved an employer's confidentiality requirement on the grounds that an employee's complaint alleged possible management retaliation. "The . . . investigating officials sought to impose a confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated." *Id*. at 272.

Significantly, the Board in *Caesar's Palace* did not require the employer to demonstrate a particularized basis for requiring confidentiality. The employer in *Caesar's Palace* required confidentiality *at the outset*—which the Board approved—because of the nature of the allegations. *Id*. at 271, 272. The employer, with the Board's approval, applied its investigative confidentiality requirement categorically. Sensibly so. But the Board now rejects that sensible rule: now, the nature of the allegations alone—the type of employee complaint—cannot justify a confidentiality request. *Banner Health Sys*., slip op. at 3. The consequences are clear and dire: whistleblowing employees will suffer—as will well-intentioned employers who wish to encourage internal reporting—while

co-workers and others bent on retaliation will benefit from knowing exactly who raised a complaint, who spoke up as a witness, and what was said. These are the essential ingredients for intimidation, collusion and retaliation.

At least one can credit the government with practicing better than it preaches. Federal agencies use confidentiality to limit their employees' exposure to potential retaliation. For example, federal employees with potential complaints about unlawful discrimination must contact an Equal Employment Opportunity Counselor first to attempt to "informally resolve the matter." 29 C.F.R. § 1614.105(a). Counselors advise employees of their rights and responsibilities under federal law, *id.* § (b)(1), offer alternative dispute resolution services, *id.* § (b)(2), and extensively discuss the employee's potential complaint. But the counselor "shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by" the employee. *Id.* § (g). Indeed, a Counselor may not even inform the agency of the allegations until the employee files a complaint (thereby making his grievance public). *Id.* §§ (c), (g).

This is a patently sensible policy. And it is a policy that, until recently, employers could have emulated to encourage the more than one-in-three employees who fail to report wrongdoing to step forward.

B. The Board's Regime Decreases The Accuracy Of Investigations.

The Board's regime also undercuts the one goal that the Board acknowledges can justify confidentiality: "the integrity of the investigation." *Banner Health Sys.*, slip op. at 3. This is a familiar problem in any dispute resolution system that depends on witnesses to ascertain information, as it is axiomatic that witness collusion, and even inadvertent witness influencing, can compromise an investigation. But other fact-finding regimes do not take a "case-by-case" approach that presumes *against* requiring confidentiality in sequestering witnesses; they either categorically require confidentiality or they begin with a strong presumption in favor of confidentiality. The divided Board stands alone in its approach.

The federal judiciary squarely rejects the Board's approach. "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." FED. R. EVID. 615 advisory committee's notes to 1972 proposed rules (quoting 6 WIGMORE ON EVID. §§ 1837-38). In federal courts, a party may request the court to order witnesses out of the courtroom so that they may not hear other witnesses' testimony. FED. R. EVID. 615. The potential for dishonesty, collusion, and mischief need not be proven; it is presumed. A trial court therefore is obligated to

sequester virtually all witnesses on request. *See, e.g., United States v. Collins*, 340 F.3d 672, 680-81 (8th Cir. 2003).

Numerous States follow these principles as well, viewing confidentiality as either a matter of right held by all parties to the litigation or nearly so. In Texas, the analogous rule of evidence—Texas Rule 614—is simply referred to as "The Rule," and the Rule prohibits witnesses from hearing one another's testimony, from speaking with one another, or from discussing the ongoing case with anyone. *See Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 115 (Tex. 1999) ("the Rule"); TEX. R. EVID. 614 (the Rule); TEX. R. CIV. P. 267(d).

In California, judges have slightly more discretion—one commentator describes judicial practice as "liberal about granting a party's motion for an exclusion order"—but the sanctions for violation are more severe. A witness who violates an exclusion order may be prohibited from testifying at all. *People v. Valdez*, 223 Cal. Rptr. 149, 151-58 (Ct. App. 1986).

In New York, no codified rule has been necessary, as courts of that State have considered "the practice of such exclusion . . . a time-honored one [that] should not be abandoned." *People v. Felder*, 334 N.Y.S.2d 992, 999 (App. Div. 1972) (citation omitted); *see also People v. Greene*, 5 Hill 647 (N.Y. Sup. Ct. 1845).

And, of course, many States simply adopt the federal rule near-verbatim. *E.g. State v. Guild*, 44 A.3d 545, 547 (N.H. 2012); *State v. Betts*, 139 Wash. App. 1073, at *7 n.6 (Ct. App. 2007) (unpublished); *Fourthman v. State*, 658 N.E.2d 88, 91 n.2 (Ind. Ct. App. 1995); *Stone v. State*, 745 P.2d 1344, 1350 (Wyo. 1987); *Bloudell v. Wailuku Sugar Co.*, 669 P.2d 163, 168-69 (Haw. Ct. App. 1983).

Presumptive confidentiality requirements are standard outside of courts, too. "Confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator." American Arbitration Association, Commercial Mediation Procedures, Rule M-10 (2013). Mediators must keep confidential "all information obtained in the mediation," including testimony and reports. *Id*. Mediation confidentiality extends even to subsequent proceedings, including "admissions made by a party *or other participant* in the course of mediation proceedings." *Id.* (emphasis added).

It is not so much noteworthy that these tribunals reject the Board's approach as that they reject it for the same reason—keeping potential witnesses from sharing information encourages candor, prevents confusion, and thwarts deceit. And these concerns are nowhere stronger than in the workplace, where coworkers generally will know one another and see one another significantly more than will two witnesses in a given case. Coworkers' repeated interactions with one another

surely amplify the pressures—both internal and external—to accommodate stories to match one another. And it is precisely this pressure that confidentiality inhibits.

Even the Board has acknowledged that confidentiality in investigations leads to more accurate outcomes. In *IBM Corp*., 341 NLRB 1288, 1293 (2004), the Board concurred that "[e]mployer investigations into [sensitive] matters require discretion and confidentiality. The guarantee of confidentiality helps an employer resolve challenging issues of credibility involving these sensitive, often personal, subjects . . . . 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." *Id.*; *see also Belle of Sioux City, L.P.*, 333 NLRB 98, 113-14 (2001) (recognizing that confidentiality prevents witnesses from "tailor[ing] accounts" to one another's statements).

The Board's recent break from almost every other tribunal's understanding of the importance of confidentiality—including the understanding articulated by the 2004 Board—is drastic. In short, the Board now requires employers to demonstrate objectively reasonable evidence of what virtually everywhere else is simply and wisely assumed: that without confidentiality, witnesses can just get their proverbial stories straight. And because witness collusion is difficult to detect and impossible to cure, the best mitigation is prevention at the outset.

Unreliable witnesses—either those intentionally trying to deceive or those unwittingly influenced by workplace discussion—are of particular concern for in-house counsel. In many organizations, in-house counsel oversee internal investigations, and in some cases conduct them. In-house counsel rely on these investigations to identify compliance risks and recommend remedial actions. Under the Board's new rule, in-house counsel will have to advise firms with less information of worse quality, and employees bearing witness to legitimate grievances will suffer.

III. The Board's Requirements For Confidentiality Are Impractical.

The Board's decision requires employers to (1) make individualized confidentiality determinations, without the benefit of categorical presumptions, while (2) maintaining confidentiality only where an employer can demonstrate, in advance, objectively reasonable grounds that an investigation will be compromised without confidentiality. Each requirement creates problems.

The Board's first requirement—that confidentiality may be invoked only case-by-case—imposes tremendous administrative costs. It allows employers the ability to learn neither from past allegations nor from past experiences with types of allegations. The Board anticipates as much in a footnote, where it rebuffs Member Miscimarra's suggestion that certain categories of allegations predictably raise confidentiality concerns. *Banner Health Sys.*, slip op. at 6 n.17. This means

that each potentially sensitive investigation may itself require a preliminary investigation into the "relevant circumstances" in a "particular case" that can justify confidentiality.

But this preliminary investigation will largely overlap in employees interviewed, documents examined, and issues raised, proving largely redundant. And at the outset of this investigation, the firm will confront a disconcertingly familiar question: may it request confidentiality in the preliminary investigation? A Scylla and Charybdis of redundancy and infinite regression do not suggest a policy calibrated "to the complexities of industrial life." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

Navigating this legal minefield will require expert counsel, even if the investigation should not otherwise require nuanced legal analysis. Especially in smaller firms—where management may not have prompt access to legal counsel to apply the Board's case-by-case approach to each preliminary investigation—employers will face new legal costs before the first witness is interviewed. Some employers may well decide not to pursue the investigation, lest they trip into an unfair labor practice. Even in sophisticated settings, in-house counsel—or a lay employee—will need to make a judgment call on profoundly limited information and hope that the Board, several years later, agrees.

But where the Board's first requirement of case-by-case analysis requires an excessively specific examination of each need for confidentiality, its second requirement proves excessively generalized. The Board requires that employers show—in all circumstances, in all investigations—on the same basis (objectively reasonable grounds), to the same evidentiary standard (likely), toward the same threatened harm (the integrity of the investigation), to protect the same rights of employees (Section 7 organizing). The Board's second requirement assumes profound uniformity in employer and employee interests across internal investigations.

This is simply not the case. The Board's order presupposes that every investigation is equally likely to impinge on employees' Section 7 rights by virtue of the fact that every investigation carries "potential discipline." *Banner Health Sys.*, slip op. at 3-4. This premise is wrong as an initial matter: many investigations are undertaken without an eye to employee discipline, at least initially. But the Board's conclusion does not even follow from its premise, as many investigations (e.g., investigations of workplace embezzlement or fraud) are inherently unlikely to prompt employee conversations in ways that implicate Section 7 rights.

Nor, for that matter, is every investigation equally likely to require confidentiality. Though the circumstances of each type of employee complaint

vary, again, some types of investigations will more likely require confidentiality than others. Investigations that touch on more sensitive matters will, as a category, more often require confidentiality than those that do not. But again, the Board's one-size-fits-all solution imposes the same burdensome standard for employers to show: that an investigation *likely* will suffer one specific ill effect without confidentiality.

Nor is confidentiality required in every investigation to serve the same end. Confidentiality may be required for myriad reasons—to ensure an investigation's integrity, to prevent retaliation, to protect the firm from tort liability, to determine whether a pattern of conduct can be corroborated, to retain trade secrets, or to recover lost or stolen property. But the Board's order allows for one—and only one—legitimate reason for confidentiality.

In short, the Board's test is too individualized and yet too general; too flexible and yet too rigid. *Amicus* submits that the Board's order is simply too blunt an instrument to obtain its desired results. Rather than attaching a completely tailored inquiry (the case-by-case analysis) to a completely fixed standard (the objectively reasonable grounds of likely harm), the Board should have embraced a presumption-shifting system. For categories of investigations in which employees are likely to suffer retaliation, embarrassment, or harm, the Board should presume that confidentiality is appropriate, subject to a particularized

showing that confidentiality actually will inhibit protected Section 7 activity. But for categories of investigations likely to implicate Section 7 activity—such as those concerning workplace and employment conditions—the Board's case-by-case approach is appropriate, and employers should be permitted to show a particularized need for confidentiality.

A scheme employing presumptions subject to burden-shifting is both administrable and familiar. Employment discrimination cases use a similar regime consistently. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Board could establish which categories are entitled to which presumptions individually; *amicus* acknowledges that these would be difficult, and, in part, policy-driven questions on which reasonable individuals could disagree. But it is indisputable that some investigations implicate both Section 7 rights and important confidentiality concerns to greater—or lesser—extents than others. A presumption-driven system could give employers and employees alike greater predictability in knowing the circumstances under which confidentiality would be protected—and when it would be suspect.

But as currently conceived, the Board's regime does none of these things. It pincers employers between contradictory legal mandates. It fails to acknowledge one of the best reasons for confidentiality—protecting employees from retaliation—and thereby proves "remarkably indifferent to the concerns and

sensitivit[ies] which prompt many employers to adopt the sort of rule at issue here." *Adtranz ABB*, 253 F.3d at 27. And it is tremendously impractical, providing neither guidance in its application nor meaningful flexibility to the broad swath of in-house investigations. The Board's regime "place[s employers] in a 'catch 22'" time and again, *id*., and this Court should therefore grant the petition for review.

CONCLUSION

The petition for review should be granted.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 5,077 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 21, 2016, I caused this Amicus Curiae Brief in Support of Petitioner by Association of Corporate Counsel to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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