ORAL ARGUMENT NOT YET SCHEDULED
NOS. 12-1359, 12-1377

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 ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION 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.

Charles I. Cohen
Jonathan C. Fritts
David R. Broderdorf
MORGAN LEWIS & BOCKIUS, LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Ph: (202) 739-3000
Fax: (202) 739-3001
ccohen@morganlewis.com
jfritts@morganlewis.com
dbroderdorf@morganlewis.com
Attorneys for Amicus Curiae Council on Labor Law Equality

Maurice Baskin
VENABLE LLP
575 7th St., N.W.
Washington, D.C. 20004
Ph: (202) 344-4823
Fax: (202) 344-8300
mbaskin@venable.com

Attorneys for the Joint Amici

(Additional counsel listed on inside cover)

(Additional counsel)

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Counsel for Amicus
Chamber of Commerce of the
United States of America

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 whose general purposes include the objective of preserving and protecting the rights of employers under the National Labor Relations Act.[1] 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*.

[1] The term "Joint Amici" refers to all *amici curiae* identified herein, including *amicus curiae* Council on Labor Law Equality (COLLE), which is separately represented and filed a separate notice of intent to file an *amicus* brief in support of the Petitioner. COLLE joins in this brief pursuant to Circuit Rule 29(d), which provides that "[a]mici curiae on the same side must join in a single brief to the extent practicable."

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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, as indicated in their written representations of such consent filed with this Court:

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 is a trade association representing more than 22,000 construction contractors and related employers who employ more than two million workers in the construction industry. ABC regularly files *amicus* briefs to assist the courts in analyzing issues affecting the construction industry under the NLRA.

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and an underlying membership of more than three million businesses and

organizations of every size, in every business sector and from every region of the country, many of whom are covered by the NLRA. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital 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 15,500 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 330 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 more than 135 companies in the foodservice distribution industry, who operate more than 700 distribution facilities across North America and represent annual sales of more than $110 billion. IFDA provides the important perspective of leading foodservice distributors on legislative and regulatory matters.

National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding of the vital role of manufacturing to America's economic future and living standards.

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 350,000 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.

STATEMENT ON PARTY COUNSEL AND FUNDING

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.

ARGUMENT

I. THE BOARD'S DECISION IMPOSES A BURDEN ON EMPLOYERS TO JUSTIFY THE CONFIDENTIALITY OF ONGOING WORKPLACE INVESTIGATIONS THAT IS IMPRACTICAL, UNJUSTIFIED, AND CONTRARY TO LAW.

The Board's decision in this case has direct and immediate implications for the millions of employers who are covered by the NLRA, many of whom are collectively represented by the Joint *Amici*. In what appears to be part of a broader campaign by the Board to expand the Section 7 rights of employees outside the context of union organizing, at the expense of commonly accepted business policies,[2] the Board has held that employers may not seek to maintain the confidentiality of ongoing investigatory interviews based upon a "generalized" concern with protecting the integrity of their investigations. Instead, the Board found that the petitioning employer in this case was required to "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). While it is unclear from the Board's opinion whether these were the only business justifications that the Board would accept as

[2] *See* Law360, *NLRB Precedential Changes On The Horizon* (Oct. 17, 2012), available at http://www.law360.com (citing recent NLRB challenges to "employment at will" policies, social media policies, and required posting of employee rights notices in non-union workplaces).

sufficient to outweigh employees' rights under the NLRA, no other permissible justifications are referenced in the decision. The Board concluded by declaring that a "blanket approach clearly failed to meet those requirements." (*Id*.)[3]

As is further explained below, the Board's holding ignores the reality of workplace investigations, contravenes the Board's own precedent, and fails to accommodate the policies of the NLRA to other federal statutes governing the workplace. In particular, the Board's opinion gives insufficient attention to the practical challenges imposed on employers by the new standard and ignores numerous additional justifications for keeping ongoing workplace investigations confidential, which the Board itself has previously recognized.

In *IBM Corp*., 341 NLRB 1288, 1293 (2004), the Board acknowledged "the need for employers to conduct all kinds of investigations of matters occurring in the workplace to ensure compliance with … legal requirements."[4] As the Board further held:

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[3] The Petitioner has convincingly argued that the record contradicts the Board's claim that the employer here adopted a "blanket approach" at all. (Pet. Br. at 21-23). In either event, the Joint *Amici* submit that the burden imposed on employers by the Board in this case should be denied enforcement, for the reasons set forth below and in the Petitioner's brief.

[4] 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*.

> 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 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.

Thus, the Board in IBM recognized a 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 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." *Id*. at 1293.

In *Caesar's Palace, Inc*., 336 NLRB 271 (2001), the Board expressly found no unfair labor practice in connection with an employer's requirement of

confidentiality during an investigation of alleged illegal drug activity in the work place. In that case, the employer's investigation happened to involve allegations of 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. The Board certainly did not limit the justification of confidentiality to those narrow circumstances, however. *See Belle of Sioux City, LP*, 333 NLRB 98, 113-114 (2001) (recognizing the importance of confidentiality to ensure that witnesses did not "tailor accounts" to other witnesses' statements).[5]

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, so 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 confidentiality of ongoing investigations being upheld in all but the most extreme

[5] *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 of "protecting [witnesses] against retaliation, protect the integrity of the investigation, and encourage witnesses to come forward." 2004 NLRB LEXIS 739, at *61.

cases, particularly in the absence of disciplinary enforcement interfering with any exercise of Section 7 employee rights.[6]

In the present case, the Board has without explanation 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 was framed as a "request" and even in the absence of any discipline.[7] 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. Again, it is unclear from the Board's opinion whether this is an exclusive list of the justifications that the Board would accept. For instance, the Board's holding does not address the impact of loss of confidentiality as a

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[6] By way of contrast, in *Phoenix Transit Systems*, 337 NLRB 510 (2002), the Board found no business justification for a confidentiality rule that prohibited employees from discussing a workplace investigation that had long since been completed and was not therefore "ongoing." Also distinguishable is the Board's decision in *Hyundai America Shipping Agency, Inc*., 357 NLRB No. 80 (2011), *petition for review pending*, No. 12-1359 (D.C. Cir.), in which employees were allegedly discharged for violating a confidentiality policy.

[7] 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. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board's opinion ignores that distinction in this case, where there were no findings of disciplinary action against any employee for disclosing the details of an ongoing workplace investigation.

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 (when 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* further 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 will be 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 upon 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. NLRB*, 253 F. 3d 19, 27 (D.C. Cir. 2001). For the same reason, this Court should deny enforcement of the Board's order in the present case, in that it fails to recognize the many legitimate employer concerns regarding the protection of the integrity of ongoing workplace investigations, particularly in the absence of any adverse action taken against any employee in derogation of Section 7 rights.

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 et seq.; 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 standard articulated in *Banner Health* is premised on a sweeping interpretation of employee rights under NLRA. The Board broadly interprets the NLRA to guarantee employees the right to discuss with their co-workers any and all matters affecting terms and conditions of

employment, including matters that are the subject of an internal investigation by their employer. But 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. NLRB*, 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. NLRB*, 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. NLRB*, 234

F.3d 714 (D.C. Cir. 2000), the Court remanded to the Board the question of whether a non-profit health corporation controlled by Alaska Native tribes was covered by the NLRA. 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 Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB, supra*, 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.").

Thus, it is clear that the Board cannot ignore the impact of its decisions on the many other federal regulatory regimes that govern the workplace. Otherwise, regulated employers will be pulled irreconcilably in different directions, with one

agency requiring them to take action that another agency may deem to be unlawful. This is the fundamental problem with the Board's *Banner Health* standard.

By presuming that an employer's requirement of confidentiality during an internal investigation is unlawful, unless the employer affirmatively proves at the outset of an investigation that confidentiality is justified in that particular case, the NLRB has failed to reconcile the NLRA with private-sector employers' obligations under the other federal employment laws cited above. For instance, 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."[8] 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."[9]

The requirement of confidentiality under Title VII is inherent in the legal standard for holding an employer liable for unlawful workplace harassment. For

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

[9] *Id.*

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,[10] because the employer exercised "reasonable care to prevent and correct [this manager's] conduct." *Id.* at 786. 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 manager] by issuing a written reprimand and ordering him to attend education and retraining classes." *Id.* (emphases added). Notably, 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 ensuring confidentiality, and terminating a supervisor who breached that confidentiality, demonstrated that the company exercised "reasonable care" to prevent and correct the harassment.[11]

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

[11] In a decision issued subsequent to *Banner Health*, a Board majority recognized that employers have a legitimate interest in protecting the confidentiality of

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 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 E.E.O.C. 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).

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investigations concerning workplace harassment or discrimination. *See Piedmont Gardens*, 359 NLRB No. 46 (Dec. 15, 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.* at slip op. 4, n. 14. Again, however, the Board places the burden on the employer of proving the legitimacy of that concern on a case-by-case basis.

Yet another example of the conflict between the *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.").[12] 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' obligation to ensure confidentiality in many types of workplace investigations governed by other federal employment laws. A case-by-

[12] While FOIA does not apply to private-sector employers, the case law reflects a determination that employees have privacy and confidentiality interests with respect to testimony provided in an investigations. For example, in *Halloran v. Veterans Admin.*, 874 F.2d 315, 321 (5th Cir. 1989), a party to a civil lawsuit submitted a FOIA request to the Veterans Administration seeking transcripts of secretly taped conversations occurring during a fraud investigation. The VA released the transcripts, but redacted names and indentifying information of 42 individuals. *Id.* at 317. The court ruled that this information fell under the personal privacy exemption under 5 U.S.C. § 552 (b)(7)(C). *Id.* at 321. The court stated "many of the non-suspects who are identified or referred to in the transcripts have discernible privacy interests in not having their thoughts, comments, and views regarding their work, their job performance, and their co-workers, clients, and friends released to the public. " *Id.* Moreover, "courts have recognized that persons who are not the subjects of the investigation may nonetheless have their privacy invaded by having their identities and information about them revealed in connection with the investigation." *Id.* at 320-21 (citing *McCorstin v. Dep't of Labor*, 630 F.2d 242, 245 (5th Cir. 1980) ("Exemption 7(C) is intended to protect the privacy of any person mentioned in the requested files, not only the person who is the object of the investigation.")).

case approach is simply not practical, as the Board argued in *Robbins Tire*, and fails to accommodate the NLRA to the many other federal regimes that regulate the modern workplace. A proper accommodation should include a categorical recognition that an employer's requirement of confidentiality does not violate the NLRA when the investigation concerns an allegation of misconduct covered by another federal law or regulation. 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 decision should be denied enforcement.[13]

Respectfully submitted,

/s/ Maurice Baskin
Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
Ph: (202) 344-4823
Fax: (202) 344-8300
mbaskin@venable.com

Attorneys for the Joint Amici

Charles I. Cohen
Jonathan C. Fritts
David R. Broderdorf
MORGAN LEWIS & BOCKIUS, LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Ph: (202) 739-3000
Fax: (202) 739-3001
ccohen@morganlewis.com
jfritts@morganlewis.com
dbroderdorf@morganlewis.com
Attorneys for Amicus Curiae Council on Labor Law Equality

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Chamber of Commerce of the United States of America

[13] 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 5207 words of proportionally-spaced 14-point type, and the word processing system used was Microsoft Word 2010.

January 14, 2013 /s/ *Maurice Baskin*

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2013, a copy of the foregoing Brief of *Amici Curiae* was served through the Court's e-filing system on the following counsel of record:

Linda Dreeben
Usha Dheenan
Joel Abraham Heller
National Labor Relations Board
1099 14th St., N.W., Suite 8100
Washington, D.C. 20570
appellatecourt@nlrb.gov
usha.dheenan@nlrb.gov
joel.heller@nlrb.gov

Mark G. Kisicki
Elizabeth M. Townsend
Ogletree, Deakins, Nash, Smoak & Steward, P.C.
2415 East Camelback Road, Suite 800
Phoenix, AZ 85016
Mark.kisicki@odnss.com
Elizabeth.townsend@odnss.com

/s/ *Maurice Baskin*